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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1282**

State of Minnesota,
Respondent,

vs.

Deandre Marquey Birgans,
Appellant.

**Filed April 20, 2020
Affirmed
Connolly, Judge**

St. Louis County District Court
File No. 69DU-CR-18-998

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Nathaniel T. Stumme, Assistant County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Lauermann, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Connolly, Judge; and
Jesson, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

In this sentencing appeal, appellant argues that the district court abused its discretion by denying his motion for a downward durational departure. Because appellant presented no mitigating factors to support a departure, we affirm.

FACTS

In March 2018, Duluth police officers responded to a report of sexual contact involving 12- and 15-year-old victims. The victims explained that they were with a male acquaintance when appellant Deandre Birgans picked them up in his vehicle. The four individuals went to appellant's residence and drank alcohol. Eventually both adult males engaged in sexual intercourse with the minor victims.

Following this report, respondent State of Minnesota charged appellant with one count of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a) (2016), and one count of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(b) (2016). In February 2019, appellant pleaded guilty to first-degree criminal sexual conduct, admitting that he engaged in sexual penetration with the 12-year-old victim. In exchange for this plea, the state dismissed the other charge and recommended a sentence at the bottom of the presumptive range of the sentencing guidelines.

Based on his criminal-history score and the plea agreement, appellant faced a 153-month prison sentence. See Minn. Sent. Guidelines 4.A (2016). Before sentencing, appellant moved for a downward durational departure, seeking a 120-month sentence. As mitigating factors, appellant cited (1) the less serious nature of his offense, (2) the

“consensual” nature of his encounter with the victim, (3) his intoxication on the offense date, and (4) his codefendant’s receipt of a downward dispositional departure.¹ Finding no substantial and compelling reasons to depart, the district court denied the motion and imposed a 153-month prison sentence. This appeal follows.

D E C I S I O N

An appellate court reviews a district court’s sentencing decision for an abuse of discretion. *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). Under the Minnesota Sentencing Guidelines, a district court must impose a sentence within the presumptive range unless substantial and compelling circumstances exist to support a departure. Minn. Sent. Guidelines 2.D.1 (2016). In the durational departure context, “substantial and compelling circumstances” show “that the defendant’s conduct was significantly more or less serious than that typically involved in the commission of the crime in question.” *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017) (quotation omitted).

Minnesota statutes and the sentencing guidelines contain a nonexclusive list of aggravating and mitigating factors that may support a sentencing departure. Minn. Stat. § 244.10, subd. 5(a) (2016); Minn. Sent. Guidelines 2.D.3 (2016). But because the sentencing guidelines seek to maintain uniformity and proportionality, departures from the presumptive sentence are discouraged. *State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008).

¹ The other adult male involved in the offense entered a plea agreement with the state.

Here, the presumptive sentence range for appellant was between 153 and 216 months. Minn. Sent. Guidelines 4.A. Appellant sought a downward durational departure, which is a sentence that is shorter than the presumptive guidelines range. Minn. Sent. Guidelines 1.B.5.b (2016). Only offense-related reasons may justify a durational departure. *Rund*, 896 N.W.2d at 533. The requisite mitigating factors to support a downward durational departure must relate to the seriousness of the offense rather than to the defendant's characteristics. *State v. Solberg*, 882 N.W.2d 618, 624 (Minn. 2016).

Appellant first argues that his offense was less serious than the typical first-degree criminal-sexual-conduct offense. He contends that his offense did not involve force, physical assault, traumatization of the victim, or careful planning. Instead, appellant characterizes his offense as a spontaneous encounter with a person he believed was 18 years old.

The record shows that appellant engaged in sexual penetration with an intoxicated 12-year-old girl. This conduct falls within the type of behavior that the first-degree criminal-sexual-conduct statute prohibits. See Minn. Stat. § 609.342, subd. 1(a). And appellant's attempt to classify the encounter as "consensual" lacks legal support. "The preclusion of consent as a defense to statutory rape 'reflects the feeling of society in general that sexual contact by adults with children under 16 is reprehensible whether or not the child consents, because at that age, *the child should be deemed incapable of consenting.*'" *Bjerke v. Johnson*, 727 N.W.2d 183, 193 (Minn. App. 2007) (quoting *State v. Steinbrink*, 297 N.W.2d 291, 293 (Minn. 1980)), *aff'd*, 742 N.W.2d 660 (Minn. 2007). For this reason, appellant's argument advances a legal fiction: his victim was unable to consent to his act.

The same analysis applies to appellant's claimed lack of knowledge about the victim's age. Appellant's mistake about a sexual assault victim's age does not make his offense less serious than the typical first-degree criminal-sexual-conduct offense. Again, appellant's conduct fell under the statute's prohibition on sexual contact with minors. For these reasons, appellant's arguments on the "consensual" nature of the encounter and his lack of knowledge about the victim's age did not present the district court with mitigating factors warranting a durational departure.

Second, appellant highlights that his codefendant received a downward dispositional departure. He argues that his codefendant, who allegedly knew the age of both victims before the offense, was more culpable. In appellant's view, his more culpable codefendant's receipt of a lesser sentence represents a mitigating factor warranting a downward duration departure.

Established precedent belies this argument. For example, in *State v. Vazquez*, the supreme court rejected a similar codefendant-comparison argument and observed that fairness and equity in sentencing involve more than just comparing an offender's sentence with an accomplice's sentence. 330 N.W.2d 110, 112 (Minn. 1983). It also involves comparing the defendant's sentence to the sentences that other offenders have received for the same offense. *Id.* Here, appellant's receipt of the bottom-of-the-box presumptive sentence reveals that he was not treated harshly compared to other offenders. The fact that appellant's codefendant received a dispositional departure did not present the district court with a mitigating factor. See *State v. Lonergan*, 381 N.W.2d 51, 53 (Minn. App. 1986)

(“The sentence chosen for a co-defendant does not mandate a more lenient sentence for appellant.”).

Finally, appellant asserts that his expressed remorse warrants a durational departure. A defendant’s remorse can justify a durational departure only when it relates to the criminal conduct and makes that conduct less serious than the conduct underlying the typical commission of the offense. *Solberg*, 882 N.W.2d at 626. Appellant did express remorse at sentencing. But his remorse conflicts with his effort to excuse his behavior by claiming that everyone told him the victim “w[as] over the age to drink and consent” and that he was “highly under the influence.” And when appellant first spoke to police, he denied having sex with the 12-year-old victim, an offense he later pleaded guilty to. As a result, appellant’s expressed remorse did not make his conduct less serious than the conduct underlying the typical violation of Minn. Stat. § 609.342, subd. 1(a).

In sum, appellant presented no mitigating factors to the district court that warranted a downward durational departure. Thus, the district court did not abuse its discretion when it denied appellant’s departure motion. *See Spain*, 590 N.W.2d at 88 (“In fact, a sentencing court has no discretion to depart from the sentencing guidelines unless aggravating or mitigating factors are present.”).

Affirmed.