

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0054**

State of Minnesota,
Respondent,

vs.

Damon Moore,
Appellant.

**Filed January 19, 2021
Affirmed
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-18-24157

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

Michael O. Freeman, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica M. Surges, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Hooten, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

On direct appeal from final judgment of conviction for second-degree murder, appellant Damon Moore challenges the district court's decision to deny his motion for a downward durational sentencing departure and to impose a presumptive sentence. Because

the district court did not abuse its discretion by finding that there was no substantial or compelling reason to depart from the sentencing guidelines, we affirm.

FACTS

The facts underlying Moore's conviction are drawn from the record supporting his guilty plea. Moore was shopping at a grocery store in South Minneapolis when he was accosted by J.M. Moore and J.M. began physically fighting. When the fight ended, Moore stayed in the store while J.M. exited to the parking lot. Moore then followed J.M. into the parking lot and reignited the fight. During this fight, Moore pulled out a pocketknife and stabbed J.M. in the side of his head. Moore then fled the scene. J.M. later died of his injury.

A grand jury indicted Moore for first-degree premeditated murder and second-degree intentional murder. Pursuant to a plea deal, Moore pleaded guilty to second-degree murder and the state dismissed the first-degree charge. Sentencing was to be determined by the district court.

The presumptive sentence was an executed sentence of 312 to 439 months. *See* Minn. Sent. Guidelines 4.A (2018). A presentence investigation report (PSI) recommended a presumptive sentence of 402 months' imprisonment. Moore, through his attorney, argued for a downward durational departure. At sentencing, the district court heard victim-impact statements from five individuals. It also heard arguments from the state and Moore's attorney and reviewed the PSI, the sentencing worksheet, and video footage of the fight captured by the grocery store's security cameras. The district court then sentenced Moore to a presumptive sentence of 366 months in prison.

This appeal follows.

DECISION

Appellate courts “afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion.” *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (footnote and quotation omitted). A district court “abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011).

The range of sentences prescribed under the sentencing guidelines “is presumed to be appropriate.” *Soto*, 855 N.W.2d at 308 (quotation omitted). Departures from the sentencing guidelines are discouraged. *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017). A district court may depart from the presumptive sentence only if “identifiable, substantial, and compelling circumstances” warrant doing so. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (quotation omitted). For durational departures, substantial and compelling circumstances “are those which demonstrate that the defendant’s conduct was significantly more or less serious than that typically involved in the commission of the crime in question.” *Rund*, 896 N.W.2d at 532 (quotations omitted). “Durational departures may be justified by offense-related reasons only.” *Id.* at 533.

Even if grounds justify departure, the district court need not depart from the guidelines. *See State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). “Although the [district] court is required to give reasons for departure, an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence.” *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). When the district court imposes

a presumptive sentence, appellate courts will not interfere “as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination.” *Id.* at 80-81. Appellate courts will reverse a district court’s refusal to depart from a presumptive sentence only in a “rare” case. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018).

The district court here found that there were no substantial and compelling circumstances warranting a downward departure. Moore argues that the finding was an abuse of discretion because two mitigating factors from the Minnesota Sentencing Guidelines apply. We address each in turn.

First, Moore argues that J.M. was the aggressor in the incident, thereby mitigating his culpability. *See* Minn. Sent. Guidelines 2.D.3.a.(1) (2018) (identifying as a mitigating factor that the victim was the aggressor). The district court addressed this argument during the sentencing hearing, saying:

In this case, I saw the victim exit the store. The confrontation was over. And you re-engaged while the victim—with the victim while holding a previously opened knife which you concealed until you hit him in the head with it as he was backing away.

So the fight was over until it was restarted by you, so victim as the aggressor does not apply here. The chain was broken.

The district court’s finding is supported by the record. The record establishes that the district court reviewed the surveillance footage of the fight before pronouncing Moore’s sentence. The district court not only considered Moore’s argument, but it also explained why it found it unpersuasive—specifically, because the confrontation was over and Moore

restarted it. The district court therefore did not abuse its discretion by rejecting the argument that J.M. was the aggressor in the fight.

Second, Moore argues that his culpability was mitigated by the impairment of his capacity for reason due to intoxication at the time of the offense, his long-term alcoholism, his 2013 traumatic brain injury (TBI), and other hardships and traumas that Moore has suffered in his life. *See* Minn. Sent. Guidelines 2.D.3.a.(5) (2018) (identifying as a mitigating factor “[o]ther substantial grounds . . . that tend to excuse or mitigate the offender’s culpability, although not amounting to a defense”). The district court also rejected this argument at the sentencing hearing, saying:

Now, there is nothing in the PSI with respect to any sort of TBI or brain injury. As to drinking, I think the witnesses indicated that you had, in fact, been drinking . . .

But on this day, as far as I could see, you were functioning, talking, walking and making decisions, albeit poor ones, at the time of the offense.

So I don’t see any evidence that there’s any impairment this [sic] was so extreme such that it deprived you of control over your actions. And, in fact, per the presentence investigation . . . , you were able to recount the events of the evening to the police shortly after the incident and to the PSI writer . . . one year later.

The district court’s finding is supported by the record. The record reflects that the district court reviewed the surveillance video of the fight, which showed Moore’s ability to physically function at the time of the offense. The district court also reviewed the PSI, which contained Moore’s recitation of events, demonstrating his ability to recall what happened, and which contained a list of Moore’s prior convictions stretching back to

1989—24 years prior to Moore’s TBI—which tended to undercut the argument that the TBI was a significant factor in Moore’s criminal behavior here. Thus, the district court did not abuse its discretion by finding that Moore did not establish an impairment mitigating his culpability for his crime.

While presenting his challenge to the sentence within the framework of substantial and compelling circumstances, Moore also suggests that the presumptive sentence is unreasonable for other reasons: because his offense was more akin to a heat-of-passion crime; because, he says, the district court judge, at some point before sentencing, had told counsel that 240 months was “enough” of a punishment; and because, given Moore’s age at sentencing of 57 years, a 366-month sentence is more like a life sentence. But Moore pleaded guilty to and was convicted of second-degree intentional murder, there was no agreement as to sentencing, and the presumptive sentence is 312 to 439 months. *See* Minn. Sent. Guidelines 4.A. Moore relies on *Neal v. State*, 658 N.W.2d 536 (Minn. 2003), as authority for reversing an unreasonable sentence. But, in *Neal*, the defendant was sentenced to four times the presumptive sentence, making that case unlike this one. *See Neal*, 658 N.W.2d at 547. Here, in the absence of a substantial and compelling reason to depart, the district court did not abuse its discretion by imposing a presumptive sentence. *See Solberg*, 882 N.W.2d at 623 (explaining requirement of substantial and compelling circumstances to depart from presumptive sentence).

Even if the district court could have found that the sentencing guidelines factors favor a downward departure, it was still not required to depart from the presumptive

sentence. *See Bertsch*, 707 N.W.2d at 668. In sum, the district court acted well within its ambit of discretion when it imposed a presumptive sentence.

Affirmed.