

*This opinion is nonprecedential except as provided by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
A20-0082**

State of Minnesota,
Respondent,

vs.

Nicole Antoinette Miller,
Appellant.

**Filed January 4, 2021
Affirmed
Johnson, Judge**

Hennepin County District Court
File No. 27-CR-18-22967

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Larkin, Judge; and Bjorkman, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

A Hennepin County jury found Nicole Antoinette Miller guilty of first-degree aggravated robbery. Before the sentencing hearing, she moved for a downward dispositional departure on the grounds that she is particularly amenable to probation and

that the offense was significantly less serious than a typical first-degree robbery offense. The district court denied the motion and imposed a sentence within the presumptive range prescribed by the sentencing guidelines. We conclude that the district court did not err by denying Miller's motion and, therefore, affirm.

FACTS

On September 5, 2018, Miller went to the Mystic Lake Casino with her sister and a male friend, R.C. When Miller's group arrived, they met C.S., who was playing blackjack. When he finished playing blackjack, C.S. cashed in his chips for more than \$5,000. R.C. told C.S. that there was a girl at a nearby gas station who wanted to meet C.S., and he was persuaded to leave the casino for that purpose. He left the casino with R.C., Miller, and her sister, in a vehicle driven by Miller's sister.

After Miller's sister drove past several gas stations, C.S. sensed that something was wrong. Miller and her sister asked C.S. for money. C.S. asked Miller's sister to drop him off somewhere, but she did not stop. As the car slowed down on a highway exit ramp, C.S. tried to jump out of the moving car, but R.C. grabbed him by the neck, held him in the car, and choked him. Miller reached over the front passenger seat and hit and grabbed C.S.'s legs to help keep him in the car. R.C. told C.S. that he had a gun and demanded his money. Miller took money and a phone from C.S.'s pocket. R.C. asked Miller, "Are we clear?"; she responded, "We're clear." Miller's sister stopped the car in Eden Prairie, where C.S. was let out of the car before it drove away. After the incident, C.S. had marks and bruises on his head, neck, and legs.

The state charged Miller with aiding and abetting first-degree aggravated robbery, in violation of Minn. Stat. §§ 609.245, subd. 1; 609.05, subds. 1, 2 (2018). The case was tried to a jury on two days in September 2019. The jury found Miller guilty.

Before the sentencing hearing, Miller moved for a downward dispositional departure. At the outset of the hearing, the district court stated that it had reviewed the memorandum in support of the departure motion and letters of support from Miller’s family members. The state opposed the motion and urged the district court to impose a sentence of 41 months of imprisonment, which is the shortest sentence in the presumptive range. The district court also received Miller’s statement of allocution. The district court denied Miller’s motion and imposed an executed sentence of 41 months of imprisonment. Miller appeals.

DECISION

Miller argues that the district court erred by denying her motion for a downward dispositional departure from the presumptive sentencing range.

The Minnesota Sentencing Guidelines generally provide for presumptive sentences for felony offenses. Minn. Sent. Guidelines 2.C (2018). For any particular offense, the presumptive sentence is “presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics.” Minn. Sent. Guidelines 1.B.13 (2018). A district court “must pronounce a sentence of the applicable disposition and within the applicable [presumptive] range, . . . unless there exist identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent. Guidelines 2.D.1 (2018). “Substantial and compelling circumstances are those demonstrating that the defendant’s

conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question.” *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (quotations omitted).

In reviewing a departure from the applicable sentencing range, this court applies an abuse-of-discretion standard of review. *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014). A district court “has broad discretion to depart” from the sentencing guidelines “only if aggravating or mitigating circumstances are present.” *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989) (emphasis omitted). But “if aggravating or mitigating circumstances are not present, the trial court has no discretion to depart.” *Id.* One way in which a district court may abuse its discretion is by basing its decision “on an erroneous view of the law.” *Soto*, 855 N.W.2d at 308 n.1 (quotations omitted). Whether an aggravating or mitigating circumstance is present is, in essence, a question of law. *See Best*, 449 N.W.2d at 427. “[T]o the extent a decision to depart turns on a question of law, reviewing the decision for an abuse of discretion . . . calls for resolving the legal question de novo.” *Soto*, 855 N.W.2d at 308 n.1; *accord State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008); *State v. Dentz*, 919 N.W.2d 97, 101 (Minn. App. 2018); *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010); *State v. Grampre*, 766 N.W.2d 347, 350 (Minn. App. 2009), *review denied* (Minn. Aug. 26, 2009). If an aggravating or mitigating circumstance is present, an appellate court applies an abuse-of-discretion standard of review to the district court’s departure decision. *State v. Robideau*, 796 N.W.2d 147, 150 (Minn. 2011); *Best*, 449 N.W.2d at 427.

Miller’s argument for reversal has two parts. First, she argues the district court should have granted her motion on the ground that she is “particularly amenable to probation.” Minn. Sent. Guidelines 2.D.3.a.7 (2018). In determining whether a defendant is particularly amenable to probation so as to justify a downward dispositional departure, a district court may consider, among other things, “the defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family.” *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). A district court need not discuss all of the *Trog* factors if the district court denies a motion for a downward dispositional departure. *State v. Pegel*, 795 N.W.2d 251, 254 (Minn. App. 2011). Particular amenability to probation is not established if the defendant is only somewhat amenable to probation. *Soto*, 855 N.W.2d at 308-09. Rather, the defendant must be “particularly” amenable to probation in a way that “distinguishes the defendant from most others and truly presents the ‘substantial[] and compelling circumstances’ that are necessary to justify a departure.” *Id.* at 309 (quoting Minn. Sent. Guidelines 2.D.1) (alteration in original). Only a “rare case” will warrant reversal of a district court’s decision to not depart from the sentencing guidelines on the ground of particular amenability to probation. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006); *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

In this case, the district court determined that Miller was *not* particularly amenable to probation. The district court stated that it was “very happy” that Miller had plans for the future but reasoned that Miller consistently had denied any participation in the offense, had shown little remorse for her conduct, and had prior experience in the criminal justice system. Miller contends that she established her particular amenability to probation

because she has support from those close to her, she has a good probationary record, and she has a commitment to her future business plans. But the district court's reasons for denying this part of Miller's departure motion—her lack of remorse and her prior criminal record—are legally valid reasons. *See Trog*, 323 N.W.2d at 31. In addition, the district court's reasons are supported by the record. Thus, the district court did not err by determining that Miller is not particularly amenable to probation.

Second, Miller argues that the district court should have granted her motion on the ground that the offense is significantly less serious than the typical first-degree aggravated robbery. A downward departure may be justified if “the defendant's conduct was significantly less serious than that typically involved in the commission of the offense.” *State v. Solberg*, 882 N.W.2d 618, 624 (Minn. 2016) (quotation omitted); *see also State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985) (affirming district court's downward durational departure). A district court may consider offense-related factors in determining whether either a durational or a dispositional departure is appropriate. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018) (citing *State v Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995)).

In this case, the district court found that the offense was *not* significantly less serious than the typical offense of first-degree aggravated robbery. The district court stated that the victim was taken against his will and confined in a vehicle, was terrified, and was injured. The district court described the offense as “serious.” Miller contends that her offense is a lower-level offense because the victim suffered only “minimal bodily harm,” which she asserts is atypical for the offense of first-degree aggravated robbery. In response,

the state contends that the offense was very serious because the victim was strangled, thought that he might die that night, and chose to jump out of a moving vehicle to get away. Again, the district court's reasons for denying this part of Miller's departure motion—the violent, threatening, and terrifying conduct of Miller and her cohorts and the impact of the crime on the victim—are legally valid reasons. *See Solberg*, 882 N.W.2d at 624; *Mattson*, 376 N.W.2d at 415; *Walker*, 913 N.W.2d at 468. In addition, the district court's reasons are supported by the record. Thus, the district court did not err by determining that Miller's offense is not significantly less serious than the typical offense of first-degree aggravated robbery.

In sum, the district court did not err by denying Miller's motion for a downward dispositional departure.

Affirmed.