

*This opinion is nonprecedential except as provided by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
A20-0159**

State of Minnesota,
Respondent,

vs.

Joseph Earl Robinson,
Appellant.

**Filed February 8, 2021
Affirmed
Smith, Tracy M., Judge**

St. Louis County District Court
File No. 69DU-CR-19-191

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

Mark S. Rubin, St. Louis County Attorney, Victoria D. Wanta, Assistant County Attorney,
Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill,
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NONPRECEDENTIAL OPINION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

In this direct appeal from final judgment of conviction, appellant Joseph Earl Robinson argues that his conviction for first-degree criminal sexual conduct must be reversed because respondent State of Minnesota failed to prove beyond a reasonable doubt

that he sexually penetrated his then-girlfriend's daughter. In the alternative, Robinson argues that the district court abused its discretion by denying his motion for a downward dispositional departure at sentencing. We conclude that the direct evidence is sufficient to prove Robinson's guilt beyond a reasonable doubt and that the district court acted within its discretion at sentencing. Therefore, we affirm.

FACTS

The evidence at Robinson's bench trial established the following facts. In January 2019, Robinson lived in Duluth with his girlfriend of three years and her children, including her 12-year-old daughter, A.L. One evening, Robinson called A.L. into the living room of their apartment just after A.L. finished showering. Robinson was sitting in a chair, and A.L. came into the room next to him. A.L. was wearing a t-shirt and a new pair of underwear that Robinson had recently bought for her. A.L. found that the underwear was too small for her. Robinson told A.L. to turn around so he could stretch the underwear. He first pulled the waist of the underwear from behind and then told A.L. to turn around so he could stretch them from the front. After he pulled at the waist of the underwear from the front, he moved his hands down to the leg openings and put his hands inside A.L.'s underwear. This made A.L. uncomfortable, and she "froze." A.L. felt Robinson's finger go inside her. Robinson had longer fingernails, and A.L. felt a scratch inside her vagina. A.L. testified at trial that Robinson had his index finger inside her for around 15 to 20 minutes.

Right after the incident, A.L. went to the bathroom. She testified that "the inside of [her] smelled like cigarette ashes" and that the toilet paper she used was gray like cigarette

ashes. Robinson had just finished smoking a cigarette when he called A.L. into the living room.

The next morning, A.L. told her middle-school counselor what had happened, and the counselor informed child protective services. A.L. then met with a social worker and an investigator from the Duluth Police Department. A.L. confirmed that Robinson put his hand “down there,” that it was “inside” her for 15 to 20 minutes, and that she smelled like cigarette smoke afterwards. A.L. also said that Robinson made her hurt “inside [her] body.” In a second interview, A.L. clarified that “down there” meant her vagina and that she thought Robinson’s conduct was an accident. A.L. underwent a sexual-assault examination two days after the incident, which did not exclude or include the possibility that A.L. suffered an injury during the incident.

After the examination, two investigators interviewed Robinson. Robinson said that he pulled on A.L.’s underwear to stretch them and he “guess[ed] [his] hand poked her.” He described putting his hands “inside her thighs” and said his “finger probably went in a little bit” but not “far enough to do anything.” He denied penetrating A.L.’s vagina. He did ask A.L. if he had hurt her because of “[his] nails.”

The state charged Robinson with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2018). At the bench trial, the state presented testimony from A.L., the counselor, two investigators from the Duluth Police Department, and the nurse who conducted the sexual-assault examination. The district court found Robinson guilty.

Before sentencing, Robinson moved for a downward dispositional departure, arguing that he was particularly amenable to probation. The district court denied the motion, finding that there were not substantial and compelling reasons to depart from the sentencing guidelines. The district court sentenced Robinson to a presumptive sentence of 144 months in prison.

Robinson appeals.

DECISION

Robinson raises two arguments. He contends that the evidence was insufficient to prove beyond a reasonable doubt that he sexually penetrated A.L., as required to sustain his first-degree conviction. In the alternative, he argues that the district court abused its discretion at sentencing by denying his motion for a downward dispositional departure.

I. The evidence is sufficient to convict Robinson of first-degree criminal sexual conduct.

The state presented direct evidence to prove that Robinson sexually penetrated A.L. We review challenges to the sufficiency of direct evidence by determining whether the evidence—when viewed in the light most favorable to the conviction—allows the factfinder to have reached a guilty verdict. *See State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We will not disturb a verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement for proof beyond a reasonable doubt, could have reasonably concluded that the defendant was guilty. *See State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988). We “use the same standard of review in bench trials and in jury

trials in evaluating the sufficiency of the evidence.” *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011).

For the district court to find Robinson guilty of first-degree criminal sexual conduct, the state had to prove four elements beyond a reasonable doubt: (1) that Robinson sexually penetrated A.L., (2) that A.L. was under 13 years old at the time of the penetration, (3) that Robinson was more than 36 months older than A.L., and (4) that the act took place in St. Louis County. *See* Minn. Stat. § 609.342, subd. 1(a). Robinson argues only that the evidence was insufficient to prove that he sexually penetrated A.L.

Robinson’s argument centers on the statutory definition of “sexual penetration.” *See* Minn. Stat. § 609.341, subd. 12(2)(i) (2018). “Sexual penetration” is defined by statute as “any intrusion however slight into the genital or anal openings . . . of the complainant’s body by any part of the actor’s body or any object used by the actor for this purpose.” *Id.* Robinson observes that the legislature has not defined “genital or anal openings.” To arrive at a definition of “genital opening,” Robinson notes that the legislature has distinguished “sexual penetration” from “sexual contact”; that “sexual contact” is statutorily defined as touching a person’s “intimate parts”; and that “intimate parts” by statute includes a person’s “primary genital area.” *See id.*, subds. 5, 11(a)(i) (2018). Robinson then turns to dictionary and other definitions to conclude that a female’s primary genital area must mean the area around the vaginal opening and the “genital opening” must mean only the vaginal opening. Robinson argues that the state “never reviewed with A.L. her understanding of female genitalia” and that A.L.’s use of terms such as her “private area” and “down there” failed to distinguish between her vaginal opening and the parts of her genitalia immediately

surrounding it. Because of this, Robinson argues, the evidence did not exclude the reasonable possibility that Robinson only touched A.L.’s external genitalia and did not sexually penetrate her. *Id.*, subd. 11(a)(i).

Robinson’s argument is unpersuasive. In *State v. Shamp*, we addressed the sufficiency of the evidence to prove “sexual penetration.” 422 N.W.2d 520, 524-25 (Minn. App. 1988), *review denied* (Minn. June 10, 1988).¹ We concluded that the child-victim’s testimony proved “sexual penetration” when the testimony indicated that the defendant “would rub his fingers between the folds of skin over [the victim’s] vagina, but not insert his fingers ‘all the way.’” *Id.* at 526. We did not demand the specific anatomical language that Robinson argues for here. Similarly, in *State v. Mosby*, we relied on *Shamp* in holding that the evidence was sufficient to prove sexual penetration when the child-victim testified that the defendant “took his hand and stuck it in [her] private,” which she described as her “middle” or the part she uses “to go the bathroom.” 450 N.W.2d 629, 632 (Minn. App. 1990).

Consistent with *Shamp*, we conclude that the state presented sufficient evidence for the district court to find beyond a reasonable doubt that Robinson sexually penetrated A.L. A.L. testified multiple times that Robinson put his finger or hand “inside” her. First, she stated that, as Robinson was stretching her underwear, “he put his finger inside of [her].” She later clarified that Robinson put his index finger inside her “private area,” which she

¹ Although *Shamp* analyzes the definition of “sexual penetration” as then codified in Minn. Stat. § 609.341, subd. 12 (1986), *Shamp*, 422 N.W.2d at 526, the relevant statutory language mirrors the current version of the statute. *See* Minn. Stat. § 609.341, subd. 12(2)(i).

agreed meant her “vagina,” and that Robinson scratched the inside her vagina with his fingernails. A.L. also testified that, when she was in the bathroom just after the incident, “the inside of [her] smelled like cigarette ashes, ‘cause that’s—he just got done smoking a cigarette” and that the toilet paper she used was gray from the ashes.

The state did not need to corroborate A.L.’s testimony in this case. *See* Minn. Stat. § 609.347, subd. 1 (2018) (providing that “the testimony of a victim need not be corroborated” in a prosecution for criminal sexual conduct). Even still, witness testimony regarding A.L.’s prior statements supported A.L.’s trial testimony. A.L.’s school counselor testified that A.L. told her that A.L. smelled like cigarettes from Robinson’s hands. The nurse who conducted the sexual assault examination testified that A.L. told her:

His hand was down there . . . and he asked me, Are you uncomfortable? And I said, no. . . . He has long fingernails and they were kind of scratching me . . . And then I was in the bathroom. It smelled like cigarettes, and it was hurting. . . . It hurt for about 15 minutes.

And an investigating officer from the Duluth Police Office testified that A.L. said Robinson’s hand was “inside” her body for 15 to 20 minutes. A.L. later told investigators that this hurt her “inside [her] body.”

Construing the evidence in the light most favorable to the verdict, we conclude that the evidence was sufficient for the district court to find Robinson guilty of first-degree criminal sexual conduct.

II. The district court did not abuse its discretion by denying Robinson’s motion for a downward dispositional departure.

Robinson alternatively argues that the district court abused its discretion by denying his motion for a downward dispositional departure from the sentencing guidelines.

District courts have broad discretion in sentencing. *State v. Soto*, 855 N.W.2d 303, 305 (Minn. 2014). We review a district court’s sentencing decision for an abuse of discretion. *See id.* at 307-08. 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 district court’s sentencing discretion is limited by the Minnesota Sentencing Guidelines, which prescribe a sentence that is “presumed to be appropriate.” Minn. Sent. Guidelines 2.D.1 (2018). *See Soto*, 855 N.W.2d at 308 (citing this provision of the Minnesota Sentencing Guidelines). A district court may depart from the presumptive sentence only if “identifiable, substantial, and compelling circumstances” warrant departure. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (quoting Minn. Sent. Guidelines 2.D.1). To maintain uniformity and proportionality in sentencing, departures from the guidelines sentence are discouraged. *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017) (quotation omitted).

If a defendant requests a downward dispositional departure, a district court must determine whether “mitigating circumstances are present” and, if so, whether “those circumstances provide a substantial and compelling reason not to impose a guidelines sentence.” *Soto*, 855 N.W.2d at 308 (quotations omitted). A district court may consider

“both offender- and offense-related factors” for a downward dispositional departure. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018). But “the mere fact that a mitigating factor is present in a particular case does not obligate the court to place [a] defendant on probation.” *State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011) (quotation omitted). The district court is not required to explain its decision to impose a presumptive sentence if it considers reasons for departure but elects not to depart. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). We will reverse a district court’s refusal to depart only in a “rare” case. *Walker*, 913 N.W.2d at 468.

The guidelines provide a nonexclusive list of mitigating factors that can justify a downward dispositional departure. One mitigating factor is that “[t]he offender is particularly amenable to probation.” Minn. Sent. Guidelines 2.D.3.a.(7) (2018). The qualifier “particularly” limits the number of departures, promoting the guidelines’ purpose of fostering uniformity in sentencing. *See Soto*, 855 N.W.2d at 308-09. In determining whether a defendant is particularly amenable to probation, district courts consider “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). That said, the district court is not required to cite each *Trog* factor in its decision but need only consider the circumstances both for and against departure before exercising its discretion. *See, e.g., Pegel*, 795 N.W.2d at 254 (concluding that the district court did not abuse its discretion because it considered the circumstances for and against departure).

The district court here sentenced Robinson to a presumptive prison sentence of 144 months. Robinson argues this was an abuse of discretion as he is particularly amenable to

probation. While the district court did not explicitly analyze all of the *Trog* factors during sentencing, it reviewed the presentence investigation report (PSI), the psychosexual evaluation report, the sentencing worksheet, a victim-impact statement, and a statement from Robinson, and heard arguments on the motion for a downward dispositional departure.

The district court determined there was no substantial and compelling reason to depart from the presumptive sentence. It addressed several of the *Trog* factors. It spoke to Robinson’s cooperation and attitude in court when it observed that Robinson had shown up for court during pretrial release and had been “very polite, very pleasant.” But the district court also observed that Robinson was still maintaining that he did not do anything wrong—in other words, he was not showing remorse. And, although the district court did not expressly discuss the other *Trog* factors, the briefing from both parties on the dispositional departure motion addressed the remaining *Trog* factors (*e.g.*, Robinson’s age of 36 years and his lack of a serious criminal history). The district court therefore considered the circumstances for and against departure in exercising its discretion and ultimately determined that there were not substantial and compelling reasons to depart from the presumptive sentence. The district court therefore did not abuse its discretion in declining to depart from the guidelines.

Robinson also argues that the district court mistakenly applied the standard for durational rather than dispositional departures, as evidenced by the district court’s statement at sentencing that it “can’t get past the fact that the Sentencing Guidelines are basically what . . . the state has said, which is you don’t get a free pass. You—you sexually

assault somebody, you go to prison.” This statement, Robinson argues, shows that the district court did not understand that it had the discretion to dispositionally depart. The argument is unpersuasive. The sentencing transcript shows that the district court recognized that substantial and compelling reasons could justify a dispositional departure; indeed, the district court explained that the issue was “whether or not [Robinson] go[es] to prison” and that it had been reviewing the case for the “last couple of days trying to figure out what” to do. In the end, it concluded that, despite some favorable considerations for Robinson, there were not substantial and compelling reasons justifying departure. The district court thus exercised its discretion, and this is not the rare case warranting reversal of the imposition of a presumptive sentence.

Affirmed.