

*This opinion is nonprecedential except as provided by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
A20-0193**

State of Minnesota,
Respondent,

vs.

David Scott Bothe,
Appellant.

**Filed January 11, 2021
Affirmed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CR-19-10831

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges his sentence for first-degree criminal sexual conduct, arguing that the district court abused its discretion by denying his motion for a downward dispositional departure. We affirm.

FACTS

Appellant David Bothe and his husband are the adoptive parents of four children. The afternoon of May 8, 2019, the men went to the hospital with the oldest, 15-year-old M.B., to report that Bothe had sexually abused the boy during the previous month. M.B. disclosed that the abuse began with Bothe coming to his bedroom and initiating oral sex with him. M.B. also indicated that he was made to masturbate Bothe. And Bothe engaged in anal sex with M.B. three times, which was sometimes painful for M.B. Once, Bothe masturbated M.B. in the car in a parking lot. M.B. stated that, after these interactions, Bothe gave him gift cards and told him not to tell anyone. Bothe agreed to speak with police and admitted engaging in these sex acts with M.B.

Respondent State of Minnesota charged Bothe with two counts of first-degree criminal sexual conduct and indicated its intention to seek an aggravated sentence based on multiple forms of penetration and the infliction of pain and emotional distress. M.B. was placed in foster care, along with his three siblings.

On June 20, Bothe began outpatient sex-offender treatment at Alpha Human Services. In late August, he pleaded guilty to one count of first-degree criminal sexual conduct in exchange for the state's agreement to dismiss the other count and not pursue an

aggravated sentence. Bothe moved for a downward dispositional departure,¹ relying on a psychosexual assessment, a progress report from Alpha, and letters of support from his aunt and husband. Bothe emphasized his own history of childhood sexual abuse and argued that he is particularly amenable to probation because he (1) began sex-offender therapy, (2) has no criminal record, (3) cooperated by reporting the offense and pleading guilty, and (4) is remorseful. A presentence investigation report (PSI) recommended against a downward departure. The district court considered all of these documents and denied Bothe's motion, imposing a presumptive sentence of 172 months' imprisonment. Bothe appeals.

DECISION

A district court must impose the presumptive sentence unless “identifiable, substantial, and compelling circumstances” warrant a departure. Minn. Sent. Guidelines 2.D.1 (2018). Departures “are discouraged and are intended to apply to a small number of cases.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). The decision whether to depart from the sentencing guidelines rests within the district court's discretion. *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011). Even when a mitigating factor is present, the district court is not obligated to grant a downward departure. *Id.* at 253-54. We will reverse the denial of a downward departure only in a “rare” case. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018) (quotation omitted).

¹ Bothe also sought a downward durational departure, but his argument to the district court focused solely on disposition, and he does not challenge the denial of a durational departure in this appeal.

A defendant's particular amenability to probation is a mitigating factor that may warrant a downward dispositional departure. Minn. Sent. Guidelines 2.D.3.a(7) (2018). Factors that may indicate a defendant's particular amenability to probation include his age, prior record, remorse, cooperation, attitude while in court, and support of friends or family. *State v. Soto*, 855 N.W.2d 303, 310 (Minn. 2014) (reciting factors articulated in *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)). A district court need not expressly address all of the *Trog* factors or explain its decision to impose a presumptive sentence. *Pegel*, 795 N.W.2d at 254. It need only consider "circumstances for and against departure and deliberately exercise[] its discretion." *Id.* at 255.

Bothe contends the district court abused its discretion by denying a downward departure because it did not thoroughly consider whether he is particularly amenable to probation and sentenced him based on improper factors. His argument is unavailing in both respects.

First, the record demonstrates that the district court duly considered Bothe's argument that he is particularly amenable to probation. At the beginning of the sentencing hearing, the district court stated that it had reviewed the PSI and all of the documents Bothe submitted in support of his motion. The court then heard arguments from counsel, and statements from M.B.'s foster parent and Bothe. After weighing the competing arguments and evidence, the court articulated several reasons why it found probation inappropriate. Although Bothe claimed remorse, he minimized and blamed M.B. for his conduct, as indicated in the PSI, the psychosexual assessment, and the Alpha progress report. Bothe asserted that he cooperated and took responsibility for his conduct by reporting it, but M.B.

indicated that Bothe acknowledged the abuse only after M.B. came forward to report it. And certain aspects of the offense could have warranted an aggravated sentence. In short, the record convinces us that the district court considered whether a departure was appropriate and deliberately exercised its discretion.

Second, we are not persuaded that the district court's sentencing decision was affected by improper considerations. Bothe contends that the court should not have considered possible aggravating factors. We disagree. A district court should consider the severity of the offender's conduct in determining whether to grant a downward dispositional departure, *Soto*, 855 N.W.2d at 313, so long as it distinguishes between acts that are elements of the offense and those that make the offense more severe than usual, *State v. Meyers*, 869 N.W.2d 893, 897 (Minn. 2015). The factors the district court assessed—the multiple forms of penetration, M.B.'s particular vulnerability based on the neglect and instability he experienced before his adoption, and Bothe's grooming conduct—are not elements of first-degree criminal sexual conduct. Because these factors make the offense more severe, the district court properly considered them.

Bothe also cites two statements the district court made at sentencing: that Bothe likely would not have been permitted to adopt M.B. and his siblings if he had disclosed his own history of childhood sexual abuse and that Bothe's conduct may spur negative sentiment toward other same-sex couples trying to adopt children. We are not persuaded that these comments warrant reversal. When a district court considers improper factors in denying a downward dispositional departure, reversal is warranted only if the court did so *instead of* considering circumstances that would support departure. See *State v. Mendoza*,

638 N.W.2d 480, 484 (Minn. App. 2002) (stating that consideration of improper factors in denying a downward dispositional departure does not require reversal “unless circumstances exist that would support a departure” and the district court failed to consider those circumstances), *review denied* (Minn. Apr. 16, 2002). If the district court considered “circumstances for and against departure,” we will affirm. *Pegel*, 795 N.W.2d at 254. As discussed above, the record shows that the district court carefully considered arguments for and against a downward dispositional departure based on Bothe’s particular amenability to probation. And the court determined that the evidence does not warrant a departure. On this record, we discern no abuse of discretion by the district court in imposing the presumptive sentence.

Affirmed.