

*This opinion is nonprecedential except as provided by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
A20-0607**

State of Minnesota,
Respondent,

vs.

Dustin Eugene Bilges,
Appellant.

**Filed March 15, 2021
Affirmed
Florey, Judge**

Hennepin County District Court
File No. 27-CR-19-14366

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, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Reilly, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

In this direct appeal from the district court's judgment of conviction for second-degree criminal sexual conduct, appellant argues that the district court abused its discretion

by denying his motion for a downward durational departure. Because the district court acted within its discretion by imposing the presumptive sentence, we affirm.

FACTS

The state charged appellant Dustin Eugene Bilges with one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. The first-degree count alleged that Bilges engaged in acts of sexual penetration against his daughter between December 2016 and February 2019, when the victim was between 13 and 15 years old. The second-degree count alleged that Bilges engaged in sexual contact against his daughter in the same time frame.

Bilges pleaded guilty to the second-degree count pursuant to an agreement with the state. The agreement called for the first-degree count to be dismissed and allowed the parties to argue for a sentence between 36 and 108 months in prison. In establishing a factual basis for his plea, Bilges admitted that he touched the victim's breasts with sexual intent on two occasions. He said that he was pleading guilty because he was guilty, but also "so they don't have to come up there and tell everybody things that happened."

According to both the psychosexual evaluation and the presentence investigation report (PSI) that were filed before sentencing, Bilges expressed remorse about his offense. The psychosexual evaluation indicated that Bilges "expressed considerable remorse and emotion." The PSI noted that Bilges "expressed shame for his actions and meaningful remorse for the victim. He took responsibility for his behavior and wrong-doing, even going so far as to acknowledge that his actions were the reason the victim felt violated." Bilges also reported that he had a traumatic childhood. According to the PSI, Bilges

“experienced a chaotic and dysfunctional childhood, fraught with abandonment, loss, and abuse.”

The victim made a statement at the sentencing hearing. She explained that Bilges’s offense had a significant impact on her happiness, her childhood, and her belief that she was safe in her home. She did not believe that Bilges was genuine when he said that he pleaded guilty to prevent her from having to testify.

Bilges argued that substantial and compelling circumstances supported a downward durational departure—namely, the facts that he took responsibility for his offense and showed remorse. He also referenced his initial lack of understanding of the impact that his offense had on the victim. He asked the district court to sentence him to 36 months in prison.

The state argued that there was no basis to support a durational departure in this case. It asserted that Bilges’s remorse was not related to the offense and does not lessen the impact on the victim. The state asked the district court to sentence Bilges to 108 months in prison.

The district court sentenced Bilges to the presumptive sentence under the sentencing guidelines—90 months in prison. The district court acknowledged that Bilges took responsibility for his offense and commended Bilges for making it so that the victim did not need to testify. The district court also acknowledged that Bilges did not intend to harm the victim to the extent that he did. But the district court ultimately determined that it was “comfortable concluding that [Bilges] hurt [the victim] badly enough that sentencing within those guidelines is an appropriate way to sentence.” Considering “all the

circumstances of this case,” the district court was not willing to depart from the guidelines. Bilges appeals.

DECISION

We review the district court’s sentencing decision for an abuse of discretion. *See State v. Law*, 620 N.W.2d 562, 564-65 (Minn. App. 2000), *review denied* (Minn. Dec. 20, 2000). The district court is afforded “great discretion” in sentencing and “we cannot simply substitute our judgment for that of the [district] court.” *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). But, “[a]ppellate courts may vacate or modify a sentence on many grounds, including that the sentence is unreasonable or inappropriate, or that such a result is in the interest of fairness and uniformity.” *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) (citation and quotation omitted).

The sentences provided by the Minnesota Sentencing Guidelines are presumed to be appropriate. *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001). The guidelines provide that the district court may depart when substantial and compelling circumstances are present, and it is only in “rare” cases that an appellate court will reverse the district court’s refusal to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). If a defendant requests a downward departure, the district court must consider the factors that the defendant asserts support the departure. *See State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002).

A district court may only depart if it finds that there are “identifiable, substantial, and compelling circumstances to support a departure.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (quotation omitted). There are two types of departures—dispositional

and durational departures. *Id.* To determine whether a dispositional departure is appropriate, the district court should consider whether the defendant is particularly amenable to probation, analyzing factors relating to the defendant as a person, such as “his 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); *see also Solberg*, 882 N.W.2d at 623. A durational departure, on the other hand, is appropriate if there are substantial and compelling circumstances relating to “the seriousness of the offense, not the characteristics of the offender.” *Solberg*, 882 N.W.2d at 623 (emphasis in original). Thus, a downward durational departure is justified if “defendant’s conduct was significantly less serious than that typically involved in the commission of the offense.” *Id.* at 624 (quotation omitted).

Here, Bilges argues that the district court abused its discretion by refusing to depart because two offense-related mitigating circumstances existed—his remorse and his lack of capacity to understand the consequences of his actions. The state maintains that these circumstances are offender-related factors that could arguably support a dispositional departure, but do not support a durational departure.

Generally, remorse is relevant to a dispositional departure, not a durational departure, because it speaks to the defendant’s ability to be rehabilitated and not the offense itself. *Solberg*, 882 N.W.2d at 625; *see also Trog*, 323 N.W.2d at 31 (noting that remorse may support a dispositional departure). In rare cases, however, a defendant’s remorse may “relate back [to the offense] and be considered as evidence of remediation that makes the conduct significantly less serious than the typical conduct underlying the offense of

conviction.” *Solberg*, 882 N.W.2d at 625-26. Showing that remorse is relevant to a durational departure “will not be an easy task.” *Id.* at 626.

Bilges argues that his remorse was relevant to a durational departure because it motivated him to plead guilty to prevent the victim from having to testify, thus mitigating the impact of the offense on the victim. But the victim stated at the sentencing hearing that she did not believe that Bilges’s sentiment was genuine and explained the significant impact that Bilges’s offense had on her. Although there was evidence that Bilges was genuinely remorseful, we conclude that the district court did not abuse its discretion by denying Bilges’s durational-departure motion on this ground. The district court observed that Bilges “hurt the victim badly enough” that the presumptive sentence was appropriate. The record supports the conclusion that Bilges’s decision to plead guilty, even assuming that Bilges had good intentions, did not remediate the conduct underlying his conviction.

Bilges also argues that his lack of capacity to understand the consequences of his actions and his purportedly non-malicious intent render his offense less serious than a typical second-degree criminal-sexual-conduct offense. Again, the parties disagree over whether Bilges’s lack of capacity may support a durational departure.

A defendant’s lack of capacity is generally considered an offender-related circumstance. *See State v. Rund*, 896 N.W.2d 527, 533 (Minn. 2017) (noting that defendant’s “lack of substantial capacity for judgment” was an offender-related reason to depart). But in some cases, Minnesota appellate courts have discussed durational departures based on a defendant’s lack of capacity. *See, e.g., State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984) (concluding that upward durational departure was inappropriate where

the defendant had a lack of substantial capacity due to schizophrenia); *State v. Barsness*, 473 N.W.2d 325, 329 (Minn. App. 1991), *review denied* (Minn. Aug. 29, 1991).

In any event, Minnesota law provides that a defendant's lack of capacity, to support a departure, must be based on a physical or mental impairment and be "extreme." See Minn. Sent. Guidelines 2.D.3.a(3) (2016) (listing, as a mitigating factor, that the "offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed"); see also *State v. McLaughlin*, 725 N.W.2d 703, 716 (Minn. 2007); *Wall*, 343 N.W.2d at 25 (indicating that lack of capacity, caused by paranoia and schizophrenia, is a mitigating factor). Considering the evidence in the record, the district court was well within its discretion to reject Bilges's assertion that his lack of capacity supported a durational departure.

But the primary flaw in Bilges's arguments on appeal runs deeper than whether his remorse or lack of capacity supports a durational departure. We would affirm the district court's sentence even if these factors otherwise supported a durational departure. The district court expressly acknowledged Bilges's remorse, the fact that his guilty plea made it so that the victim did not have to testify, his initial lack of capacity to understand the impact of his offense on the victim, and the fact that Bilges did not intend to harm the victim to the extent that he did. Thus, the district court fulfilled its duty to consider the factors that Bilges relied upon to support his motion. *Mendoza*, 638 N.W.2d at 483. Even if substantial and compelling circumstances to depart exist, the district court may impose

the presumptive sentence. *Kindem*, 313 N.W.2d at 7. This is not the “rare” case where we are compelled to reverse the district court’s imposition of the presumptive sentence. *Id.*

Affirmed.