

*This opinion is nonprecedential except as provided by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
A20-1141**

State of Minnesota,
Respondent,

vs.

Tony Xiong,
Appellant.

**Filed August 2, 2021
Affirmed
Hooten, Judge**

Ramsey County District Court
File No. 62-CR-19-4405

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

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

Considered and decided by Hooten, Presiding Judge; Connolly, Judge; and
Bratvold, Judge.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

In this direct appeal from a judgment of conviction for first-degree arson, appellant argues that the district court abused its discretion in denying his motion for a durational or dispositional departure. We affirm.

FACTS

On June 13, 2019, appellant Tony Xiong went to a friend's girlfriend's home in Saint Paul and poured a "bottle of gasoline" on a "shed." He lit the shed on fire, intending to destroy it. The next day, respondent State of Minnesota charged Xiong with first-degree arson, Minn. Stat. § 609.561, subd. 3(a) (2018). Xiong and the state reached an agreement where Xiong would plead guilty as charged, and the state would dismiss an unrelated case. The parties also agreed that Xiong's sentence would be "capped at [the] low end of the box," but he could argue for a departure. After waiving his trial rights, Xiong pleaded guilty and admitted a factual basis for his plea. The district court accepted Xiong's plea, ordered a presentence investigation (PSI), and continued the case for sentencing.

Xiong moved for a downward dispositional departure or, alternatively, for a downward durational departure. Along with his motion, Xiong included an interoffice memorandum prepared by a dispositional advisor with the Office of the Public Defender explaining the basis for Xiong's departure request and his personal history. The PSI recounted some of this personal history and recommended a sentence of 95 months in prison, which is the bottom of the presumptive sentencing guidelines range of 95 to 132 months.¹

At the sentencing hearing, the state requested that Xiong receive an executed sentence of 95 months. Xiong requested a dispositional departure or, alternatively, a

¹ The guideline range is based on first-degree arson's severity level of 8 and Xiong's 8 criminal history points, plus three more months based on Xiong's custody status point and higher-than-maximum criminal history score. See Minn. Sent. Guidelines 4.A., 2.B.2.c. (2018).

durational departure. In support of his request, Xiong addressed the district court, indicating that he took “full responsibility” for his “stupidity” and “actions.” He asked the district court to give him the opportunity to go to a community treatment facility, rather than prison, where he would be “given the tools” that he needed to resolve his drug and alcohol addiction. The district court denied Xiong’s motion for departures and imposed a 95-month executed prison sentence, explaining:

I don’t think, based on the record that I have, that I can find that you’re particularly amenable to probation, because you’ve been on probation so many times before, as you said. And . . . the offense isn’t any less severe or significant than a typical arson in the first degree.

This appeal follows.

DECISION

Xiong argues that the district court abused its discretion when it imposed a 95-month prison commitment. He submits that he is particularly amenable to probation, thereby entitling him to a dispositional departure, and that his conviction was for conduct that was less serious than the typical arson offense, warranting a durational departure. The state disagrees and argues that the district court did not clearly abuse its discretion.

I. The district court did not abuse its discretion by imposing a guideline sentence.

“The sentences provided in the [Minnesota Sentencing Guidelines] Grids are presumed to be appropriate for the crimes to which they apply.” Minn. Sent. Guidelines 2.D.1 (2018). But the district court “may depart from the presumptive disposition or duration” if “there exist identifiable, substantial, and compelling circumstances to support

a departure.”² *Id.* 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) (quotation omitted). And appellate courts “give great deference to a district court’s findings of fact and will not set them aside unless clearly erroneous.” *State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008).

As a threshold matter, the state argues that “this Court need not address [Xiong’s] arguments why the facts of his case entitle him to a departure.” The state directs us to *State v. Van Ruler*, 378 N.W.2d 77, 80-81 (Minn. App. 1985), where we stated that “[t]he reviewing court may not interfere with the sentencing court’s exercise of discretion, as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination.” However, appellate courts “have the power, if the circumstances warrant, to modify a sentence given by the [district] court, even if the sentence is within the presumptive sentence range.” *State v. Kraft*, 326 N.W.2d 840, 842 (Minn. 1982). The supreme court has repeatedly stated that “we do not ‘intend entirely to close the door on appeals from refusals to depart.’” *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) (quoting *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981)). We may not abandon our duty to review each sentencing appeal for abuse of the district court’s

² “A ‘dispositional departure’ occurs when the court orders a disposition other than that recommended in the Guidelines.” Minn. Sent. Guidelines 1.B.5.a. (2018). “A ‘durational departure’ occurs when the court orders a sentence with a duration other than the presumptive fixed duration or range in the appropriate cell on the applicable Grid.” Minn. Sent. Guidelines 1.B.5.b. (2018).

discretion, even when the district court imposes a presumptively-appropriate sentence. See *Kindem*, 313 N.W.2d at 7. We therefore address both of Xiong’s arguments.

Dispositional departure

The guidelines provide a “nonexclusive list of factors that may be used as reasons for departure,” including when “[t]he offender is particularly amenable to probation.” Minn. Sent. Guidelines 2.D.3.a.7 (2018). “A dispositional departure typically focuses on characteristics of the defendant that show whether the defendant is particularly suitable for individualized treatment in a probationary setting.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (quotation omitted). To determine if an offender is particularly amenable to probation, the district court may consider “[n]umerous factors, including 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). Xiong’s argument turns on these *Trog* factors.

First, Xiong argues that “giving due consideration to the instability and trauma he suffered as a youth, his young age [of 39] would weigh in favor of an opportunity for rehabilitation without incarceration.” But Xiong does not explain why his age of 39 years, which is closer to middle age, would necessarily weigh in favor of his request for a dispositional departure.

The record does support that Xiong’s life has been traumatic and unstable. The record indicates that Xiong’s father abandoned the family and his mother was murdered in front of him purportedly by a gang member. After his mother’s murder, he lived with one of his brothers. At the age of thirteen, he began using drugs and eventually became

chemically dependent. Because of his involvement with drugs and gangs, his brother moved with him from California to Utah. Xiong continued to have “many problems” even in Utah and was placed in foster care for a short period of time. After being returned to the custody of his brother, he was able to leave the gang lifestyle, finish high school, get married, and have a child. Xiong argues that after his child died at two weeks of age and he divorced his wife, he began using drugs again and engaging in criminal activity as a coping mechanism.

But, Xiong has a significant criminal history. While in Utah, Xiong had two non-felony convictions for theft from a motor vehicle and criminal mischief. Since moving to Minnesota with his wife in 2009, he has been convicted of eight felonies in Minnesota and Wisconsin—five separate motor-vehicle theft convictions, two separate fleeing a police officer in a motor vehicle convictions, and a drug possession with intent to sell conviction. In addition, he had a domestic assault and an interference with a 911 call conviction for two separate incidents. Xiong’s lengthy criminal record as an adult, covering a span of time from 2009 to the present, and his life-long involvement with drugs weigh against his motion for a dispositional departure.

Second, Xiong argues that despite his long criminal history, he “had arranged community-based treatment, as well as a treatment back-up plan.” Still, the PSI indicates that during this offense, which resulted in his ninth felony conviction, Xiong was on supervised release and was awaiting sentencing in three other felony cases. He committed this offense just four days after an early release from prison and nine days before his sentencing in the three felony cases. The record demonstrates that despite having been on

multiple probations and supervised-releases, Xiong continued to commit crimes. These prior unsuccessful probations and supervised releases support the district court's conclusion that he would not be successful in community-based probation.

Third, Xiong points out that he "cooperated with the legal process and took responsibility for his actions." But while Xiong ultimately cooperated with law enforcement, he initially denied his involvement with the arson when confronted by police. And fourth, "Xiong expressed both remorse and a motivation to change" through a letter and personal statements to the district court. But the district court, which "is properly tasked with deciding whether a defendant's actions express genuine remorse and how much weight to give to that remorse," did not make a finding of remorse. *Solberg*, 882 N.W.2d at 626. On this record, we cannot conclude that the district court's refusal to find that Xiong was remorseful was clearly erroneous.

Fifth, Xiong argues that despite his criminal history and recent 18-month prison sentence, his "treatment needs were never addressed either during incarceration or while on probation." Before sentencing, Xiong had secured a 60-day in-patient placement at Lakeshore Treatment Center, and, as a backup, also secured a placement at the Salvation Army Adult Rehabilitation Center. But Xiong's past failures on probation and recent criminal activity while on supervised release support the district court's rejection of his argument that his treatment needs would be met by a less restricted community-based treatment rather than in a chemical dependency treatment program while in prison.

Finally, even if a mitigating factor was "clearly present," it would "not obligate the [district] court to place [the] defendant on probation or impose a shorter term than the

presumptive term.” *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984). Given this record, where there was a lack of substantial and compelling reasons supporting a departure and the evidence was that Xiong was not particularly amendable to probation, the district court did not abuse its discretion in denying Xiong’s motion for a dispositional departure.

Durational departure

Generally, a durational departure is appropriate when a “defendant’s conduct was significantly more or less serious than that typically involved in the commission of the crime in question.” *State v. Cox*, 343 N.W.2d 641, 643 (Minn. 1984). Xiong contends that his offense was less serious than a typical first-degree arson because he only “set the shed on fire because he wanted to ruin the victim’s stuff,” and “didn’t want to risk hurting anyone.” He also points to information included in his dispositional memorandum, which indicates that “of the 38 first-degree arson cases from 2014-2018 . . . only one case involved a non-dwelling.” The state argues that Xiong’s “argument minimiz[es] the seriousness of his conduct [and] ignores the fact that if he had used gasoline to start a fire in a building he knew was occupied, he could have been charged with attempted murder.”

We reject Xiong’s argument that his offense was less serious than typical. A fire department captain reported that Xiong’s offense was “brazen” because it was committed during the day and in front of a camera. And Xiong used “a large amount of gasoline” to set fire to two sheds, which then spread to a garage. The captain reported that people were living illegally in the sheds, though no one was in the sheds at the time of the fires. Thus, the district court did not err when it determined that Xiong’s offense was serious.

Xiong argues that “but for the use of an accelerant, [Xiong’s offense] would not have been classified as first-degree arson; it would be more akin to a second- or third-degree offense.” First-degree arson has three subdivisions: subdivision 1 prohibits the intentional burning of a dwelling, subdivision 2 prohibits the intentional burning of an occupied building, and subdivision 3—the subdivision underlying Xiong’s conviction—prohibits the intentional burning of a building when “a flammable material is used to start or accelerate the fire.” Minn. Stat. § 609.561. It is true that second- and third-degree arson prohibit the burning of a building “not covered by” the first-degree arson statute, based on the value of the building. Minn. Stat. § 609.562 (2018) (second degree: over \$1000); Minn. Stat § 609.563 (2018) (third degree: \$300 to \$1000). But that is irrelevant. Here, Xiong used an accelerant: a “large amount of gasoline.” That he does not meet the other statutory grounds for a first-degree-arson conviction does not make his offense less serious than a typical first-degree-arson conviction for use of an accelerant.

The district court, therefore, did not abuse its discretion when it determined that Xiong’s “offense isn’t any less severe or significant than a typical arson in the first degree” and imposed a guideline sentence.

Affirmed.