

*This opinion is nonprecedential except as provided by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
A21-1049**

State of Minnesota,
Respondent,

vs.

Thomas Jacob Nohner,
Appellant.

**Filed June 6, 2022
Affirmed
Wheelock, Judge**

Scott County District Court
File No. 70-CR-19-2508

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

Ronald Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney (for respondent)

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

Considered and decided by Wheelock, Presiding Judge; Jesson, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Appellant argues that the district court abused its discretion by refusing to grant downward dispositional and downward durational departures from the presumptive guidelines sentence based on evidence that he was amenable to probation and that his

conduct was less serious than that typically involved in the commission of the crime for which he was convicted. Because the district court did not abuse its discretion by sentencing appellant to the presumptive sentence, we affirm.

FACTS

Appellant Thomas Jacob Nohner was charged with first-degree and second-degree criminal sexual conduct after Nohner's then-fiancée reported to police that Nohner had sexually assaulted her nine-year-old daughter. The child's mother told police that she had a "weird gut feeling" about how Nohner and the child would lie on the couch at home together when the mother went to work in the evening over the course of three to four months. On questioning, first by the mother and then by police, the child stated that while they were cuddling on the couch under a blanket, Nohner touched her under her clothing on the outside and inside of her vagina, on her buttocks, on her chest, and on her stomach. The child indicated that it happened more than once and that while Nohner would touch her, he would use his other hand to masturbate.

Nohner entered a straight plea of guilty to first-degree criminal sexual conduct without a sentencing agreement. When the district court questioned him about the factual basis for the plea, Nohner admitted to some of the alleged conduct but indicated that other of the contact was incidental. He eventually admitted that his conduct was done on purpose and with sexual intent. The district court accepted Nohner's plea and found him guilty of first-degree criminal sexual conduct, ordered a presentence investigation (PSI), and scheduled a sentencing hearing.

Nohner participated in interviews for the PSI, during which he persisted in denying some of the allegations but ultimately deferred to the child's perception of what occurred after viewing her recorded statement. The PSI included two attached reports. The first report was from Nohner's psychosexual evaluation and deemed him to be at below-average risk for reoffending and a good candidate for community supervision. The second report was a progress report from Nohner's sex-offender treatment program and identified him as an appropriate candidate for treatment in a community setting. The PSI recommended a sentence of 144 months in alignment with the presumptive guidelines sentence.

Nohner moved for a downward dispositional sentencing departure based on his particular amenability to probation, focusing on his lack of prior criminal history, participation in treatment, low recidivism risk, remorse, and acceptance of responsibility. He highlighted his network of social and family support and provided letters of support for his motion from his mother, his sister, his brother, and the child's mother. Nohner also moved for a downward durational departure, arguing that his conduct was less serious than the typical first-degree criminal-sexual-conduct offense.

At the sentencing hearing, Nohner's attorney argued for downward sentencing departures, the state argued for imposition of the presumptive guidelines sentence, and Nohner made a statement to the court on his own behalf. The district court confirmed that it had reviewed the following information and documents: a PSI report with the attached clinician reports; a sentencing memorandum that the public defender's dispositional advisor had prepared; a Minnesota Sentencing Guidelines Commission report on departures for first-degree criminal sexual conduct that the defense submitted; and the

letters in Nohner’s support. The district court determined that Nohner did not meet the criteria to establish that he was particularly amenable to probation and that the offense was not less serious than the typical first-degree criminal-sexual-conduct crime. The district court declined to depart from the guidelines, sentencing Nohner to the presumptive sentence of 144 months in prison.

Nohner appeals.

DECISION

We review a district court’s sentencing decision for an abuse of discretion. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). The Minnesota Sentencing Guidelines determine presumptive sentences for felony offenses. Minn. Sent. Guidelines 2 (2018). District courts “must pronounce a sentence of the applicable disposition and within the applicable prison range unless there exist identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent. Guidelines 2.D.1. The decision to depart is “an exercise of judicial discretion constrained by statute or case law.” *Id.* “Substantial and compelling circumstances are those that make a case atypical.” *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018). We will reverse a sentencing court’s refusal to depart only in a “rare” case. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). “We will affirm the imposition of a presumptive guidelines sentence when the record shows that the sentencing court carefully evaluated all the testimony and information presented before making a determination.” *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (quotation omitted), *rev. denied* (Minn. Sept. 17, 2013).

I. The district court did not abuse its discretion in denying a downward dispositional departure.

The Minnesota Sentencing Guidelines provide a nonexclusive list of factors that may serve as reasons for a sentencing departure, of which the offender's particular amenability to probation is one factor. Minn. Sent. Guidelines 2.D.3.a(7). Particular amenability to probation "distinguishes the defendant from most others and truly presents the substantial and compelling circumstances necessary to justify a departure." Minn. Sent. Guidelines cmt. 2.D.303 (citing *State v. Soto*, 855 N.W.2d 303, 309 (Minn. 2014)). Characteristics of the offender determine whether the offender is "particularly suitable for individualized treatment in a probationary setting." *Solberg*, 882 N.W.2d at 623 (quotation omitted).

The "*Trog* factors" aid the district court in determining particular amenability to probation and include the defendant's "age, prior record, remorse, cooperation, attitude while in court, and support of friends or family." *State v. Gebeck*, 635 N.W.2d 385, 389 (Minn. App. 2001) (citing *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)). We have held that for downward dispositional departures, a district court may consider both offender- and offense-related factors. *Walker*, 913 N.W.2d at 468; accord *State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995). Even if a defendant would be particularly amenable to probation, however, a district court is not required to grant a downward dispositional departure. *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009).

Nohner argues that substantial and compelling circumstances warranted a downward dispositional departure and that the district court abused its discretion by failing

to grant such a departure. Nohner relies on the reports from his psychosexual evaluation and his sex-offender treatment program deeming him to be a good and appropriate candidate for community-based treatment and supervision to demonstrate his amenability to probation. He further asserts that his statements of remorse at sentencing are indicative of his amenability to probation. The district court concluded that, while Nohner may have been amenable to probation, he was not particularly amenable such that a downward dispositional departure was warranted. *See Soto*, 855 N.W.2d at 309 (noting that the requirement of “particular amenability” is meant to ensure that the defendant’s amenability to probation “distinguishes the defendant from most others and truly presents the substantial and compelling circumstances that are necessary to justify a departure” (quotation omitted)).

Nohner further contends that the district court failed to fully consider all of the offender-related reasons for a dispositional departure, but the record does not support his argument. At sentencing, Nohner argued that in addition to the evaluators’ reports and his remorse, other offender-related factors supporting departure included his cooperation throughout the proceeding, his family support, and his concern for the victim. The state argued that Nohner’s inability to take responsibility and be truthful about his conduct indicated that his remorse was not genuine and that he did not demonstrate a sufficiently low risk of reoffending to warrant a departure. In pronouncing its sentence, the district court reflected on the testimony received and stated that it had reviewed the PSI report along with the letters of support and the dispositional memorandum with supplemental documents.

Along with the provider evaluations, the district court considered Nohner's expressions of remorse at sentencing and his statements as recounted in the PSI report downplaying his culpability. The district court, which sits with a unique perspective on all stages of a case, is properly tasked with evaluating the genuineness of a defendant's remorse and how much weight to give that remorse. *Solberg*, 882 N.W.2d at 626. And even if the district court had found Nohner particularly amenable to probation, the grant of a downward dispositional departure is discretionary. *Olson*, 765 N.W.2d at 664-65. The district court did not abuse its discretion by finding that there was insufficient support to demonstrate Nohner's particular amenability to probation based on his remorse and suitability for community-based supervision, or any of the other factors Nohner raises here.

Nohner also suggests that the district court improperly focused on offense-related factors in denying a downward dispositional departure rather than solely focusing on offender-related factors. Nohner asserts that statements the district court made at sentencing deemphasize the role of rehabilitation in imprisonment, arguing that the statements were reactive to and erroneously focused on the offense. He also points to a recommendation in the PSI report that seems to conflate offender- and offense-related factors by indicating that the repeated acts and the victim's vulnerability favor imprisonment. In fact, the district court may consider both offender- and offense-related factors when evaluating a dispositional departure's appropriateness. *Walker*, 913 N.W.2d at 468. We conclude that, here, the district court considered all relevant offender- and offense-related factors before it and thus did not abuse its discretion by denying Nohner's motion for a downward dispositional departure.

II. The district court did not abuse its discretion in denying a downward durational departure.

The district court also declined to grant Nohner a downward durational departure. In contrast with dispositional departures, a district court can only consider offense-related factors when deciding whether to grant a durational-departure request. *Compare Solberg*, 882 N.W.2d at 623 (“A durational departure must be based on factors that reflect the seriousness of the *offense*, not the characteristics of the offender.”), *with Walker*, 913 N.W.2d at 468 (“For a downward dispositional departure, a district court may consider both offender- and offense-related factors.”). “Substantial and compelling circumstances for a durational departure are ‘those which demonstrate that the defendant’s conduct was significantly more or less serious than that typically involved in the commission of the crime in question.’” *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017) (quoting *State v. Leja*, 684 N.W.2d 442, 450 (Minn. 2004)).

Nohner argues that the district court abused its discretion, asserting that his offense was significantly less serious than typical first-degree criminal-sexual-conduct crimes because his conduct did not involve force, coercion, or injuries and was not prolonged, being alleged to have occurred over the course of three or four months. Nohner supports this argument with examples of other first-degree criminal-sexual-conduct cases that involved a high level of violence against adult victims and cases where child victims were subjected to multiple types of conduct and acts persisting over a longer duration of time. Because Nohner’s conduct shares some circumstances with the examples he provided of criminal-sexual-conduct cases involving child victims, such as conduct involving children

around the victim's age, children who trusted the offenders, and abuse that occurred in the child's home, these examples do not support Nohner's contention. To the contrary, these circumstances could be aggravating factors, not mitigating ones, under the guidelines. Minn. Sent. Guidelines 2.D.3.b(1), (14).

The defendant's remorse, as an offender-related factor, generally does not bear on a court's decision regarding a durational departure. *Solberg*, 882 N.W.2d at 625. Remorse that bears on the seriousness of the conduct may be considered, but "unless a defendant can show that his demonstrated remorse is directly related to the criminal conduct at issue and made that conduct significantly less serious than the typical conduct underlying the offense of conviction, remorse cannot justify a downward *durational* departure." *Id.* at 626. Accordingly, "showing the relevance of remorse to a durational departure will not be an easy task." *Id.* Nohner argues that by engaging in sex-offender treatment during the pendency of the proceeding and pleading guilty to prevent additional trauma to the child victim, he has demonstrated remorse-driven conduct relating directly to the criminal conduct at issue, thereby making it significantly less serious than the typical first-degree criminal-sexual-conduct offense, as in *Solberg*.

We reject this argument, as Nohner has not shown how his guilty plea or participation in treatment are driven by remorse or serve to make his conduct significantly less serious than the typical offense. Any remorse expressed by Nohner is not of the sort that relates back to the original conduct and therefore does not bear on the seriousness of the offense. *See id.* at 625-26. We therefore conclude that the district court acted within its discretion in finding that Nohner's conduct was not significantly less serious than the

typical offense and that no substantial or compelling circumstances exist that warrant a downward durational departure.

Affirmed.