

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0121**

State of Minnesota,
Respondent,

vs.

Mubarak Osman Musse,
Appellant.

**Filed October 17, 2022
Affirmed
Larkin, Judge**

Hennepin County District Court
File No. 27-CR-21-5325

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, Max B. Kittel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Larkin, Judge; and Reilly, Judge.

SYLLABUS

Denial of a defendant's request for a downward durational sentencing departure for second-degree intentional murder was not an abuse of discretion where the defendant fired approximately 15 shots at the victim with a handgun, striking the victim approximately six times, in a confrontation that arose at a public mall after the victim cut in line in front of the defendant at a tea-shop.

OPINION

LARKIN, Judge

Appellant challenges his sentence for second-degree intentional murder, arguing that the district court abused its discretion by denying his motion for a downward durational departure. We affirm.

FACTS

The state charged appellant Mubarak Osman Musse with second-degree intentional murder, alleging that he shot and killed a man after an argument and physical confrontation at a local mall. Musse pleaded guilty to the charge, without an agreement on the sentence to be imposed.

In the factual basis for his guilty plea, Musse stated that he had a verbal dispute with the victim, the victim kicked him in the back, the two fought, the victim punched Musse while he was on the ground, Musse drew his licensed firearm while he was on the ground, and Musse shot at the victim approximately 15 times, hitting him numerous times. Musse admitted that he used “too much force.” He also admitted that he shot the victim several times, walked away from the victim, returned, and shot the victim again to ensure that he died. In conjunction with his guilty plea, Musse waived any claim that his actions were justified by self-defense.

The presumptive sentence for Musse’s offense was a prison term of 261 to 367 months. The presentence-investigation report recommended a 306-month sentence. The state requested the maximum presumptive sentence of 367 months. Musse moved for a downward durational departure and requested prison sentence of only 86 months.

The district court held an evidentiary hearing on the issue of sentencing. The court received video evidence of the murder, which depicted the following events. Musse walked toward the mall exit while pursued by a group of men, some of whom held the victim back as he lunged at Musse. Musse exited the mall, reentered, and was kicked out of the mall door. People gathered outside the mall exit as Musse and the victim scuffled outside of the mall door. People ran away as shots were fired. Musse walked away from the victim while continuing to fire at the victim. Musse then returned to fire more shots at the victim, after he had walked approximately four car lengths away from the victim.

The district court received two reports regarding Musse's mental health. One was from a psychologist who opined that Musse was competent to participate in the criminal proceedings. The other was from a second psychologist who diagnosed Musse with a major mental illness exhibited by anxiety and panic. The district court heard statements from the victim's family, Musse's family, and Musse, and it received written submissions from counsel supporting and opposing the departure motion.

The district court denied Musse's request for a downward durational departure, noting that his actions "went well beyond any self-defense that may have been originally authorized," particularly because Musse "went back to continue to shoot the victim." For that reason, the district court declined to find that the offense was less "onerous" than typical. The court, however, found it "extremely significant" that Musse turned himself in to law enforcement soon after the murder, which showed Musse's respect for the law and remorse. The district court therefore sentenced Musse to a prison term at the low end of the guidelines range, imposing a 261-month prison sentence. Musse appeals his sentence.

ISSUE

Did the district court abuse its discretion by denying Musse’s request for a downward durational sentencing departure?

ANALYSIS

The Minnesota Sentencing Guidelines establish presumptive sentences for felony offenses. Minn. Stat. § 244.09, subd. 5 (2020). The guidelines seek to “maintain uniformity, proportionality, rationality, and predictability in sentencing.” *Id.* “Consequently, departures from the guidelines are discouraged and are intended to apply to a small number of cases.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016).

A district court may depart from the presumptive sentence only if there are “identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent’g Guidelines 2.D.1 (2020). A durational departure must be based on factors that reflect the seriousness of the offense. *Solberg*, 882 N.W.2d at 623. “A downward durational departure is justified only if the defendant’s conduct was significantly less serious than that typically involved in the commission of the offense.” *Id.* at 624 (quotation omitted).

A district court has broad discretion to depart from a presumptive sentence so long as substantial and compelling circumstances are present, and we generally will not interfere with an exercise of that discretion. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). An appellate court will reverse the district court’s refusal to depart from a presumptive sentence only in a “rare” case. *Id.* When exercising sentencing discretion, the district court “must consider circumstances supporting a downward durational departure from the

presumptive sentence” and errs if it fails to consider “[l]egitimate” and “significant” reasons for a departure. *State v. Curtiss*, 353 N.W.2d 262, 262-64 (Minn. App. 1984). “Although the [district] court is required to give reasons for departure, an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence.” *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

Musse contends that the district court abused its discretion in denying his motion for a downward durational departure. He argues that his crime was significantly less serious than typical because the victim was the aggressor, that his actions were consistent with a heat-of-passion killing, and that his mental-health issues mitigated the severity of the offense. He asserts that the district court “failed to consider these valid reasons to depart” and instead weighed “only a lack of a valid self-defense claim against a genuine display of remorse.” He also asserts that the district court abused its discretion by basing its decision on a “misunderstanding of the law” and by refusing “to weigh factors in support of a departure.”

In his written arguments to the district court, Musse raised the same grounds for departure that he now claims the district court failed to consider. And at the sentencing hearing, the district court stated that it had reviewed and considered the written arguments submitted by the parties. Thus, we are satisfied that the district court considered all of Musse’s proffered reasons for a departure. We nonetheless address Musse’s specific challenges.

Victim an Aggressor

Musse contends that his crime was significantly less serious than typical because the victim was an aggressor. The fact that the victim was an “aggressor in the incident” is among the list of nonexclusive factors that may justify a departure. Minn. Sent’g Guidelines 2.D.3.a.(1) (2020). At sentencing, the district court declined to make a finding identifying the “original aggressor,” but it noted that the victim “got the upper hand in the physical arguments.” The district court ultimately concluded, however, that Musse’s offense was not significantly less serious than typical because Musse’s actions “went well beyond any self-defense.” In sum, the district court considered the victim’s aggression in determining whether to grant a durational departure, but reasonably concluded that it did not justify a departure because of the severity of Musse’s response.

We do not view the district court’s reference to Musse’s self-defense claim or its refusal to make a finding on the initial aggressor as an indication that the district court failed to consider the victim’s status as an aggressor. The district court merely stated what is obvious to this court: Even if the victim was the initial aggressor, that fact would not excuse the severity of Musse’s response, which was not significantly less serious than that typically involved in the commission of second-degree murder.

Heat-of-Passion Killing

Musse contends that his offense was significantly less serious than typical because it was “very similar” to first-degree manslaughter, also known as heat-of-passion manslaughter. *See State v. Stewart*, 624 N.W.2d 585, 588-89 (Minn. 2001) (discussing heat-of-passion manslaughter). Musse therefore argues that “[o]ther substantial grounds

exist that tend to excuse or mitigate the offender's culpability, although not amounting to a defense," which is a circumstance that can support a departure. Minn. Sent'g Guidelines 2.D.3.a.(5) (2020).

A heat-of-passion manslaughter occurs when one "intentionally causes the death of another person in the heat of passion provoked by such words or acts of another as would provoke a person of ordinary self-control under like circumstances." Minn. Stat. § 609.20(1) (2020). A heat-of-passion manslaughter requires (1) that the killing be "committed in the heat of passion" and (2) that the passion be "provoked by such words or acts of another as would provoke a person of ordinary self-control under the circumstances." *Stewart*, 624 N.W.2d at 590. "The first element is subjective and the second element is objective." *Id.*

Although Musse acknowledges the objective component of heat-of-passion manslaughter in his brief to this court, he does not meaningfully argue that the objective standard was satisfied. That is, he fails to address his prolonged and disproportionate response to the initial physical confrontation. Instead, he primarily relies on his personal circumstances and his state of mind at the time of the crime, which address only the subjective component of heat-of-passion manslaughter. For example, he argues that he suffered significant trauma while he was a child in Somalia, that he has been diagnosed with anxiety and panic disorder, and that he was in a highly emotional state at the time of the offense. But under the objective element, "[t]he adequacy of the provocation is judged from the perspective of a *person of ordinary self-control* under like circumstances." *State v. Nystrom*, 596 N.W.2d 256, 262 (Minn. 1999) (emphasis added). And Musse's assertion

that he took too much of his prescribed Xanax on the day of the murder does not support his argument because “a person of ordinary self-control does not include a person under the influence of intoxicants or a controlled substance.” *State v. Hannon*, 703 N.W.2d 498, 510 (Minn. 2010) (quotation omitted).

In sum, we fail to see how Musse’s act of shooting the victim several times, walking away, and then returning to execute the victim was reasonably and objectively provoked under these facts. *See Nystrom*, 596 N.W.2d at 262 (holding that a victim’s physical gesture challenging the defendant to fight as the defendant rode away on his bike was insufficient to provoke a person of ordinary self-control). Because Musse’s claimed departure ground is based on his erroneous assertion that “the fact pattern more closely fit a heat of passion killing,” it is not a valid departure ground. *See Minn. Sent’g Guidelines 2.D.3.a.(5)* (2020) (requiring substantial, mitigating grounds).

Mental Impairment

Musse contends that his “mental impairment” made the offense less serious. A departure may be granted if the offender “because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed.” *Minn. Sent’g Guidelines 2.D.3.a.(3)* (2020). The offender must lack “substantial capacity for judgment when the offense was committed,” and “[t]he voluntary use of intoxicants (drugs or alcohol) does not fall within the purview of this factor.” *Id.* The mental-health impairment must be extreme “to the point that it deprives the defendant of control over his actions.” *State v. McLaughlin*, 725 N.W.2d 703, 716 (Minn. 2007).

At sentencing, the district court received a report from a psychologist regarding Musse's mental health. The psychologist believed that Musse's "recklessness and insightful actions" were the result of his "unstable state of mind." But the psychologist's conclusion appears to have been rooted in Musse's "entrenched drug addiction," including his overuse of prescribed Xanax on the day of the offense. Musse's voluntary overuse of Xanax "does not fall within the purview" of the departure factor. Minn. Sent'g Guidelines 2.D.3.a.(3) (2020). Further, it is not clear that, at the time of the offense, Musse suffered from the type of extreme mental impairment necessary to satisfy the departure factor. *See McLaughlin*, 725 N.W.2d at 716 (upholding district court's imposition of consecutive sentences based on its finding that the defendant's schizophrenia was not an extreme mental illness).

Musse argues that the district court abused its discretion because it "wholly ignored" his mental-health argument. But his argument was presented in his written submission to the district court in support of departure, and his mental health was the subject of a report received by the district court at sentencing. In fact, the district court urged Musse "to get help for [his] mental health struggles" while serving his sentence. This record does not support Musse's assertion that the district court failed to consider his mental health. And we do not fault the district court for failing to specifically address this issue because "an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence." *Van Ruler*, 378 N.W.2d at 80. Finally, even if Musse's mental-health issues had constituted a mitigating factor, the district court was not required to depart. *See State v. Olson*, 459 N.W.2d 711, 716 (Minn. App. 1990) (stating that a

district court “is not necessarily obligated to depart” if departure grounds exist), *rev. denied* (Minn. Oct. 25, 1990).

Remorse

“[U]nless 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.” *Solberg*, 882 N.W.2d at 626. Musse acknowledges that the district court considered his remorse, noting that the district court referred to his remorse as “an extremely significant factor.” But he contends that his remorse was the *only* factor the district court weighed in support of a durational departure and that the district court “abused its discretion by not following the law and giving due consideration to and weighing the other valid reasons advanced.” Musse’s contention is unavailing because as described above, the district court addressed the victim’s aggression at sentencing, there is no reason to believe that the district court did not consider Musse’s mental-health issues given the record and the court’s statement encouraging Musse to get help with his mental-health issues, and Musse’s heat-of-passion argument does not set forth a valid departure ground.

Conclusion

We are satisfied that the district court did not engage in an impermissible “mechanical or callous” sentencing. *Curtiss*, 353 N.W.2d at 264. Instead, the district court considered the relevant circumstances and determined that they justified a sentence at the low-end of the presumptive range, but not a sentencing departure.

We take this opportunity to reiterate that sentencing departures are not the norm, and that presumptive sentences are intended to be imposed “with a high degree of regularity.” *Id.* at 263 (quotation omitted). Sentencing departures are intended to be rare. *See State v. Soto*, 855 N.W.2d 303, 309 (Minn. 2014) (stating that limiting the number of sentencing departures “fosters uniformity in sentencing, which is a primary purpose of the Sentencing Guidelines”); Minn. Sent’g Guidelines cmt. 2.D.301 (2020) (stating that the factors justifying departures “are intended to describe specific situations involving a small number of cases” and that the commission “rejects factors that are general in nature, and that could apply to large numbers of cases”). “The purposes of the sentencing guidelines will not be served if the [district] courts generally fail to apply the presumptive sentences found in the guidelines.” *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999).

In this case, violation of a societal norm—cutting ahead in a line at a beverage counter—led to a verbal confrontation and a physical attack. Musse understandably defended himself, but not in a manner allowed under the law. Musse fired approximately 15 shots at the victim, including while the victim was on the ground and injured. By his own admission, Musse did so to ensure that he killed the victim. Video evidence shows people running from the mall in response to the gunfire.

On this record, the district court reasonably rejected Musse’s claim that his conduct was significantly less serious than that typically involved in the commission of second-degree murder. In fact, given the multiple gunshots, which struck the victim multiple times, and the risk to bystanders, it was arguably more serious. “The manner of use of a single deadly weapon, or two similar instruments, has been held sufficient to establish

particular cruelty and to justify a double or less-than-double departure.” *State v. Dircks*, 412 N.W.2d 765, 768 (Minn. App. 1987), *rev. denied* (Minn. Nov. 24, 1987); *see State v. Edwards*, 774 N.W.2d 596, 600, 607 (Minn. 2009) (upholding upward departure where defendant fired seven times at or toward a group of nine people); *State v. Campbell*, 367 N.W.2d 454, 456-57, 460-61 (Minn. 1985) (upholding upward departure where victim was maced, her throat was cut ear-to-ear, and she was stabbed 17 times); *State v. Kisch*, 346 N.W.2d 130, 133 (Minn. 1984) (upholding upward departure because murder was “not just an unintentional killing resulting from a single blow but was one resulting from multiple brutal blows”); *State v. Rathbun*, 347 N.W.2d 548, 548 (Minn. App. 1984) (upholding upward departure where victim was stabbed 23 times); *State v. Vogelpohl*, 326 N.W.2d 635, 636 (Minn. 1982) (upholding upward departure where victim was hit on the head eight times with two different hammers).

We are not unsympathetic to Musse’s childhood circumstances. But this is not a “rare” case warranting reversal of a presumptive sentence. *See Kindem*, 313 N.W.2d at 7. The district court appropriately adhered to the presumptive sentencing range in this case.

DECISION

The district court did not abuse its discretion by imposing a sentence within the presumptive range under the Minnesota Sentencing Guidelines.

Affirmed.