STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0833

State of Minnesota,
Respondent,

vs.

Ramon Cantu,
Appellant.

Filed May 8, 2023
Affirmed
Bryan, Judge

Dakota County District Court
File No. 19HA-CR-19-1691

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

Kathryn Marie Keena, Dakota County Attorney, Jessica A. Bierwerth, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Gina D. Schulz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Johnson, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this direct appeal, appellant challenges his sentence for the following two reasons: (1) the district court abused its discretion in denying appellant's motion for a downward dispositional departure; and (2) appellant received ineffective assistance of counsel at his

sentencing hearing. Because we conclude that the district court did not abuse its discretion in sentencing appellant and because appellant does not establish that the alleged ineffective assistance of counsel resulted in prejudice, we affirm.

FACTS

On July 5, 2019, respondent State of Minnesota charged appellant Ramon Cantu with one count of second-degree criminal sexual conduct. The complaint alleged that on two occasions Cantu engaged in sexual contact with a person who was approximately ten years old when he was over forty-five years old. According to the complaint, this conduct occurred between March 2013 and March 2014. The complaint states that Cantu lived with the victim and her mother at that time, and that Cantu had "played the role of [the victim's] father figure during that time period." The victim told her mother about Cantu's conduct in April 2016, and law enforcement was informed in December 2018.

Cantu entered a *Norgaard* plea to the charged offense pursuant to a plea agreement.[1] Under the plea agreement, the state agreed not to charge a second count of second-degree criminal sexual conduct and agreed to seek a maximum prison sentence of 60 months. The parties anticipated that Cantu would move for a downward dispositional departure. The district court accepted Cantu's *Norgaard* plea and ordered a pre-sentence investigation (PSI).[2] The PSI identified the presence of three aggravating factors (the offenses were

[1] A defendant who cannot admit facts due to memory loss may nevertheless plead guilty by entering a *Norgaard* plea if the defendant agrees there is sufficient evidence to convict. *State v. Ecker*, 524 N.W.2d 712, 716-17 (Minn. 1994) (citing *State ex rel. Norgaard v. Tahash*, 110 N.W.2d 867, 871 (1961)).

[2] The PSI was an updated version of an earlier pre-plea investigation from February 2021. Both documents were submitted to the district court and are part of the appellate record.

committed in the victim's home, there were multiple instances at issue, and there was an abuse of trust since Mr. Cantu was acting as a role model and caregiver) and identified no substantial or compelling mitigating factors. The PSI described Cantu's criminal history, which included a third-degree murder conviction in 1995 (for which Cantu received a 278-month executed prison sentence) and two gross misdemeanor driving-while-impaired (DWI) convictions in 2013 and 2015. Cantu committed all three of those offenses while under the influence of alcohol. In addition, Cantu committed the present offense and both DWI offenses while on supervised release for the third-degree murder offense. The PSI noted that Cantu had undergone a psychosexual evaluation, a chemical use assessment, and had been diagnosed in both with, among other things, severe alcohol use disorder. The PSI summarized the evaluation, which connected Cantu's history of alcohol dependency and past convictions to unresolved trauma from his youth, concluded that Cantu posed a moderate level of risk of sexual reoffense, and opined that Cantu's "current amenability for treatment appears to be moderately-low." The PSI also noted that Cantu last used alcohol in October 2021, started treatment in December 2021, and was also attending additional programming for substance abuse. Based on the psychosexual evaluation, the severity of the offense, the presence of multiple aggravating factors, and the observation that Cantu "still demonstrates what appears to be little to no insight into his offending behaviors," the PSI recommended an executed prison sentence.

Cantu moved for a downward dispositional departure and argued that the following factors supported a sentencing departure: (1) "his entire 3 points of criminal history comes from his 1995 murder"; (2) he had been cooperative during the legal process, was doing

well in treatment, and was willing to participate in further programming; (3) he had the support of his family and friends; and (4) he did not pose a public safety concern and would be amenable to supervision and programming. On appeal, the parties agree that the downward departure motion contained two errors. First, the motion incorrectly asserted that Cantu "successfully completed an extensive probationary period," even though Cantu received an executed prison sentence for the third-degree murder conviction. Second, while case law permits departures when a defendant is "*particularly* amenable to probation," *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014), the memorandum argued that Cantu need only be "amenable to probation" to receive a departure.[3]

The district court held a sentencing hearing on March 18, 2022, at which the parties presented further argument regarding Cantu's motion. Cantu's counsel argued that an executed sentence would be less effective because the offense occurred several years ago, that Cantu was "doing very well" in chemical dependency treatment, and that Cantu was able to comply with conditions of probation. During this argument, Cantu's counsel repeatedly asserted that Cantu was sentenced to probation following his 1995 third-degree murder conviction and that this successful period of probation demonstrated Cantu's amenability to probation. Additionally, Cantu's counsel again argued that Cantu was "amenable to probation," instead of "particularly amenable." Cantu's counsel made two

[3] Counsel also cited the wrong standard at the plea hearing. While questioning Cantu, counsel stated: "if everything goes well . . . the judge can also decide that you are what's called 'amenable to probation.' I mean, that's the standard we're looking at." However, Cantu does not argue that his plea was invalid.

additional arguments at the sentencing hearing that are relevant on appeal. First, he commented on the fact that the victim in this case took multiple years to report the offense:

> The alleged incident here, Judge, took place back in 2014. We're talking about almost nine years ago, and they're not even sure about that, but that's allegedly when it happened. It was reported about four or five years later, which we see quite a bit. But when there's such a late report, number one, as a defense attorney, that's something we like to explore. Number two, we just got to question what's going on that it took so long to report. In this day and age, kids at whatever age—three, five, or ten—are instructed anything improper, don't be afraid to go to your parents, go to your school, go to your priest, go to anybody and report. Even though it's difficult, I see a lot of cases where it's reported right away. This was a late report, Judge, and we can't deny that.

Second, Cantu's counsel analogized revocation to the delayed punishment of a dog:

> You know, punishment is what we're after here, and when you have an incident that's so old, it's hard to see how a jail sentence or prison is going to punish the offender. And this might sound like a weird analogy, Judge, but I just think of it 'cause I've got a dog who's lately been having a lot of accidents—I don't know why—in the house. And if you catch the offender shortly afterwards and the appropriate discipline—I'm not saying beat the dog, but, you know, a correction or whatever—they're going to get the message. But if you see the accident and you see the dog hours later and you try to have a corrective whatever, it's not going to sink in because they don't know what happened, they don't know why. A weird analogy, Judge, but really the same thing applies here. I'm not saying do not punish Mr. Cantu, but I don't know if prison is the best answer for the punishment at this point when we have a conduct that was at least eight or nine years ago on that, Judge.

The state argued in favor of an executed sentence, asserting that it had "serious safety concerns in going forward," because of the recommendations in the PSI, Cantu's history of alcohol abuse, and the fact that Cantu committed multiple offenses while on

supervised release. Cantu also spoke at the hearing. He expressed remorse for his conduct, stated that he had been working hard at his job, expressed willingness to participate in treatment and therapy, and asked the court "to please allow [him] to do what [he] need[s] to do to try to be part of society and get some treatment."

The district court addressed the parties' arguments, first noting that Cantu's argument regarding the delayed report "[made] absolutely no difference to [the court]," and that Cantu's offense "was life-altering for the victim in this case." The district court further observed that Cantu's criminal history suggests "a person who has really struggled over a lifetime of taking responsibility." The district court expressed particular concern over Cantu's history of alcohol abuse, noting that Cantu committed the present offense and two DWIs while on supervised release from a conviction that involved alcohol and that Cantu had continued to use alcohol after being arrested for the present offense. The district court told Cantu that "'issue' doesn't even describe what alcohol is for you," and stated: "You are not particularly amenable to probation. You are a public safety risk. You don't know how to stop drinking."

The district court further stated: "I appreciate that you're in treatment right now . . . [b]ut Mr. Cantu, reality has got to hit you, and you need to accept the fact of your life-long struggle with alcohol and you need to accept the fact that you are a child sex offender." And the district court noted that "there was no effort to seek any kind of sex offender treatment in advance of this matter," and that Cantu was "really late to the game with treatment for . . . chemical dependency." The district court denied Cantu's motion for a downward dispositional departure and imposed a 60-month prison sentence with a 10-year

conditional release period, consistent with the maximum sentence in the plea agreement. This appeal follows.

DECISION

I. Downward Dispositional Departure

Cantu argues that the district court erred in denying his motion for a downward dispositional departure because the record contains evidence that he is particularly amenable to probation. We conclude that the district court did not abuse its discretion.

The Minnesota Sentencing Guidelines establish presumptive sentences for felony offenses. Minn. Stat. § 244.09, subd. 5 (2012). "[A] district court may depart from the presumptive guidelines sentencing range only if there exist identifiable, substantial, and compelling circumstances to support a sentence outside the range on the grids." *Tucker v. State*, 799 N.W.2d 583, 586 (Minn. 2011) (quotation omitted). "Substantial and compelling circumstances are those circumstances that make the facts of a particular case different from a typical case." *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). The sentencing guidelines provide "a nonexclusive list of factors that may be used as reasons for departure." *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (quotation omitted). Even when grounds for downward departure exist, the presence of such grounds "does not obligate the court to place defendant on probation or impose a shorter term than the presumptive term." *State v. Pegel*, 795 N.W.2d 251, 253-54 (quotation omitted).

Cantu argues that his particular amenability to probation justified a downward dispositional departure. *See Soto*, 855 N.W.2d at 308-09 (recognizing "particular amenability to probation" as a permissible basis for downward departure). A downward

departure on this basis requires 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." *Id.* at 309 (quotation omitted); *see also State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (listing factors relevant to particular amenability, including age, criminal history, remorse, cooperation, attitude while in court, and the support of friends and/or family). The supreme court has noted that only "a rare case . . . would warrant reversal of the refusal to depart" from a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). We review a district court's denial of a dispositional departure request for an abuse of discretion. *Soto*, 855 N.W.2d at 307-08.

Cantu asserts that the *Trog* factors weigh in favor of a departure. He contends that "his treatment compliance and motivation to get better weigh heavily in favor of departure." Cantu also argues that the statement in the psychosexual evaluation that his behavior stems from unprocessed childhood trauma indicates that he is amenable to treatment and unamenable to correction by imprisonment. And he asserts that he expressed remorse at sentencing, cooperated with the legal process by entering a *Norgaard* plea, was participating in treatment, and has the support of his family and friends.

While the record does contain some evidence to support these arguments, it also includes uncontested evidence on several other *Trog* factors, which strongly weigh against a departure. For instance, Cantu's prior record involves multiple serious offenses, all of which involved alcohol and three of which—including the present one—occurred while on supervised release. The psychosexual evaluation noted Cantu's childhood trauma, but it also discussed Cantu's extensive history of alcohol dependency and concluded that his

amenability to treatment was "moderately-low." Although Cantu expressed remorse at the sentencing hearing, the PSI stated that Cantu "still demonstrates what appears to be little to no insight into his offending behaviors." Ultimately, the district court weighed the evidence and arguments, including Cantu's criminal history, alcohol dependency, and failure to seek sex offender treatment, before it concluded that Cantu was not particularly amenable to probation. Based on this record, we discern no abuse of discretion in the district court's denial of Cantu's departure request.

II. Ineffective Assistance of Counsel

Cantu also argues that he received ineffective assistance of counsel.[4] We conclude that Cantu did not establish to a reasonable probability that the outcome would have been different but for the asserted ineffective assistance.

"The United States and Minnesota Constitutions guarantee a criminal defendant the right to effective assistance of counsel." *Crow v. State*, 923 N.W.2d 2, 14 (Minn. 2019). *See also* U.S. Const. amend. VI; Minn. Const. art. I, § 6. Appellate courts examine an ineffective assistance of counsel claim under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). Under the *Strickland* test, an appellant "must demonstrate that (1) [their] counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable

[4] Generally, claims of ineffective assistance should be raised in a postconviction petition, "[b]ut, when a claim of ineffective assistance of trial counsel can be determined on the basis of the trial record, the claim must be brought on direct appeal," and appellate courts apply the *Strickland* test. *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017) (quotation omitted). Because Cantu bases each of his arguments solely on the record, no additional evidentiary hearing was required.

probability exists that the outcome would have been different but for counsel's errors." *Id.* Regarding the second prong, a "reasonable probability" that the outcome would have been different is "a probability sufficient to undermine confidence in the outcome." *Ellis-Strong*, 899 N.W.2d at 540 (quotation omitted). "If a claim fails to satisfy one of the *Strickland* prongs, we need not consider both prongs in determining that the claim fails." *Swaney v. State*, 882 N.W.2d 207, 217 (Minn. 2016). A defendant bears the burden of proving ineffective assistance of counsel. *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007); *see also Davis v. State*, 784 N.W.2d 387, 391 (Minn. 2010) (stating that ineffective assistance of counsel claims must contain more than "conclusory, argumentative assertions without factual support"). Appellate courts review claims of ineffective assistance de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

Cantu argues sentencing counsel was ineffective for three reasons. First, Cantu asserts that counsel failed to investigate his 1995 third-degree murder conviction. Second, Cantu asserts that counsel misstated the relevant legal standard by arguing that Cantu was merely "amenable to probation," instead of that he was "particularly amenable to probation." Third, Cantu argues that counsel's representation fell below the constitutional standard because counsel was critical of how much time had passed before the victim reported Cantu's conduct and compared executing his sentence to punishing a dog.

Assuming without deciding that counsel's performance was constitutionally deficient, we are not persuaded that any of these errors prejudiced Cantu under the second *Strickland* prong. Cantu points to nothing in the record to show that these errors affected the district court's sentencing decision. *See Davis*, 784 N.W.2d at 391. Cantu asserts that

counsel failed to investigate his background to uncover mitigating evidence, but Cantu does not explain what mitigating factors or evidence might exist. In addition, although counsel incorrectly stated that Cantu completed probation following his murder conviction, there is no indication that counsel's error affected the district court's decision, especially where the district court referenced the correct information from the PSI, noting that Cantu committed the current offense and two DWIs while on supervised release following a prison term. Similarly, even though Cantu's counsel argued that Cantu was merely amenable to probation instead of particularly amendable, the district properly applied the correct standard.[5] Finally, the district court explicitly stated that Cantu's argument regarding the victim's delayed report "[made] absolutely no difference to [the court]." On this record, we cannot conclude that the outcome would have been different but for counsel's errors. *See Andersen*, 830 N.W.2d at 10.

Affirmed.

[5] We also note that counsel's reference to a previous term of probation instead of prison and refence to general amenability portrayed Cantu more favorably than he would have been under a correct statement of fact and law. There is no indication that the district court held his counsel's inaccurate statements against Cantu or denied his departure request on the grounds that counsel was incorrect or misleading.