

*This opinion is nonprecedential except as provided by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
A22-0836**

State of Minnesota,
Respondent,

vs.

Mark Allen Lacek,
Appellant.

**Filed July 3, 2023
Affirmed
Johnson, Judge**

Anoka County District Court
File No. 02-CR-20-5545

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

Brad Johnson, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney,
Anoka, Minnesota (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Gaïtas, Judge; and Larson,
Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

Mark Allen Lacek entered an *Alford* plea to attempted first-degree felony murder.
We conclude that the plea is valid because it is supported by a strong factual basis. We

also conclude that the district court did not err by denying Lacek's request for a downward departure from the presumptive guidelines sentence. Therefore, we affirm.

FACTS

In September 2020, the state charged Lacek with six offenses: one count of attempted first-degree premeditated murder, in violation of Minn. Stat. §§ 609.17, .185(a)(1) (2020); one count of attempted first-degree felony murder, in violation of Minn. Stat. §§ 609.17, .185(a)(3) (2020); three counts of first-degree arson, in violation of Minn. Stat. § 609.561, subds. 1, 2(a), 3(a) (2020); and one count of fleeing a peace officer in a motor vehicle, in violation of Minn. Stat. § 609.487, subd. 3 (2020).

The state alleged in the complaint that, on September 16, 2020, Lacek started a fire at a residence in the city of Coon Rapids by breaking windows, pouring a significant amount of gasoline through the windows, and igniting the gasoline. The residence belonged to a woman, K.A.C., who recently had ended a relationship with Lacek. K.A.C. told investigators that, since their break-up, Lacek had become hostile toward her and had indicated that he would kill her by burning down her home. The state also alleged that, immediately before the fire, Lacek had confronted another resident of the home at the front door and demanded to be admitted but was turned away.

In October 2020, Lacek requested rule 20.01 and rule 20.02 evaluations to assess his mental competency to participate in the criminal case and to investigate the availability of a mental-illness or cognitive-impairment defense. *See* Minn. R. Crim. P. 20.01, 20.02. After the evaluation was completed, the district court found Lacek competent to proceed.

In November 2021, the state and Lacek entered into a plea agreement. Lacek agreed to enter an *Alford* plea to count 2, which alleged attempted first-degree felony murder. *See North Carolina v. Alford*, 400 U.S. 25 (1970); *State v. Goulette*, 258 N.W.2d 758 (Minn. 1977). The state agreed that Lacek's prison sentence would be no longer than 180 months, that Lacek was free to request a downward departure at sentencing, and that the remaining counts would be dismissed.

At a plea hearing in December 2021, the prosecutor made an offer of proof that, if the case were to go to trial, the state would present the following evidence:

An adult female, K.A.C., would have testified that she had had a relationship with the defendant just prior to that time frame. That relationship had ended, and at the culmination of that relationship, the defendant had sent her several text messages, very unhappy about the nature of the relationship, and some of them very specifically stating that he intended to burn her house down. That was just prior to the offense behavior on September 16th of 2020.

Then on September 16, 2020, there would be additional witnesses; one adult male with the initials S.J.G., who was a roommate with K.A.C., was at home when the defendant came to the residence, which was on Zion Street in the city of Coon Rapids here in Anoka County, demanded to be let in, but was turned away.

S.J.G. would have testified, then, that a short time later, he was upstairs, heard some windows breaking, and came downstairs to discover that significant portions of the lower level, specifically the kitchen, were on fire.

A neighbor would have come and testified that there was some cell phone video depicting the moment when the fire occurred and then provided some illumination, which would have shown a male fleeing the area and the clothing that male was wearing.

Additional witnesses would have testified . . . that a white Honda passenger vehicle left the scene at a high rate of speed, and all these things had occurred that evening right around the time of the fire beginning.

Finally, there would have been significant evidence from detectives and crime scene personnel that they eventually located the defendant who had that white Honda passenger vehicle in the garage. The defendant appeared to match the description of the person who had fled from that scene of the fire.

In addition, there would have been significant testimony about the nature of the scientific evidence discovered at the defendant's home; that there were gasoline cans right adjacent to the car, and when the defendant was taken into custody, he smelled strongly of gasoline.

In addition, finally, . . . there was scientific testing of the clothing that was recovered at the defendant's residence, which, again, matched that cell phone video, and that testing revealed that the clothing was positive for the presence of gasoline.

The district court found that Lacek's plea was "voluntary and intelligent and rational" and that there was "a strong probability that [Lacek] will be convicted of the charged offense."

At sentencing, Lacek requested a downward dispositional or durational departure. The district court considered the presentence investigation report (PSI), the victim-impact statements of K.A.C. and S.J.G., and letters of support for Lacek. The district court denied Lacek's request and imposed a presumptive guidelines sentence of 180 months of imprisonment. Lacek appeals.

DECISION

I. Validity of Plea

Lacek's primary argument is that his guilty plea is invalid on the ground that it lacks a strong factual basis. A criminal offender may challenge the validity of a guilty plea on direct appeal even if he did not file a motion to withdraw the plea in the district court. *State v. Iverson*, 664 N.W.2d 346, 350 (Minn. 2003); *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989).

"To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent." *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). If a guilty plea does not meet all three of these requirements, it is invalid. *State v. Theis*, 742 N.W.2d 643, 650 (Minn. 2007). "A defendant bears the burden of showing his plea was invalid." *Raleigh*, 778 N.W.2d at 94. In determining whether a guilty plea is invalid, this court applies a *de novo* standard of review. *State v. Mikulak*, 903 N.W.2d 600, 603 (Minn. 2017).

Lacek contends that his guilty plea is invalid because it does not satisfy the accuracy requirement. "The main purpose of the accuracy requirement is to protect a defendant from pleading guilty to a more serious offense than he could be convicted of were he to insist on his right to trial." *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). To satisfy the accuracy requirement, a guilty plea "must be established on a proper factual basis." *Raleigh*, 778 N.W.2d at 94. A proper factual basis exists if there are "sufficient facts on the record to support a conclusion that defendant's conduct falls within the charge to which he desires to plead guilty." *Iverson*, 664 N.W.2d at 349 (quoting *Kelsey v. State*, 214 N.W.2d 236, 237 (Minn. 1974)). Stated somewhat differently, a proper factual basis exists

if “the record contains a showing that there is credible evidence available which would support a jury verdict that defendant is guilty of at least as great a crime as that to which he pled guilty.” *Nelson v. State*, 880 N.W.2d 852, 859 (Minn. 2016) (quoting *State v. Genereux*, 272 N.W.2d 33, 34 (Minn. 1978)).

In a conventional guilty plea, the defendant’s admissions provide the factual basis of the defendant’s guilt. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). But an *Alford* plea is different; it allows a defendant to maintain his innocence but plead guilty based on his belief that the state has sufficient evidence of guilt and likely would obtain a conviction if the case were to go to trial. *Goulette*, 258 N.W.2d at 761. Because an *Alford* plea is “not supported by the defendant’s admission of guilt, and is actually contradicted by [a defendant’s] claim of innocence,” a “strong factual basis” is required. *Theis*, 742 N.W.2d at 649. Accordingly, a defendant submitting an *Alford* plea must “agree[] that evidence the State is likely to offer at trial is sufficient to convict.” *Id.* A defendant should “specifically acknowledge on the record at the plea hearing that the evidence the State would likely offer against him is sufficient for a jury, applying a reasonable doubt standard, to find the defendant guilty.” *Id.* This agreement and a strong factual basis “provide the court with a basis to independently conclude that there is a *strong* probability that the defendant would be found guilty of the charge to which he pleaded guilty, notwithstanding his claims of innocence.” *Id.*; see also *Ecker*, 524 N.W.2d at 716-17; *State v. Johnson*, 867 N.W.2d 210, 214-17 (Minn. App. 2015), *rev. denied* (Minn. Sept. 29, 2015).

Lacek contends that a strong factual basis does not exist because the state’s evidence “does not establish that [he] intended to kill K.A.C.” He asserts that K.A.C. was not at

home at the time of the fire and that “there is no evidence in the plea record that [he] believed she was home.” He further asserts that “the only person who was present was S.J.G.” but that he “did not enter an *Alford* plea for attempting to kill S.J.G.” because “the named victim in the offense was K.A.C.”

This part of Lacek’s argument is based on mistaken premises. The state did *not* allege in count 2 that Lacek intended to kill K.A.C. Rather, the state alleged that Lacek “attempt[ed] to cause the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit arson in the first or second degree.” That allegation is broad enough to include both the scenario in which Lacek intended to kill K.A.C. and the scenario in which he intended to kill S.J.G. In addition, the prosecutor’s proffer at the plea hearing was *not* specifically limited to K.A.C. The evidence described by the prosecutor could be used to prove that Lacek intended to kill either K.A.C. or S.J.G. Furthermore, the prosecutor’s proffer does not indicate whether Lacek had any knowledge when he set the fire as to whether K.A.C. was at home or not at home. Thus, Lacek’s *Alford* plea is valid if there is a strong factual basis that he intended to kill either K.A.C. or S.J.G.

Lacek also contends that, in determining whether there is a strong factual basis for his *Alford* plea, we should apply the standard of review that we apply to circumstantial evidence supporting a guilty verdict after a contested trial. *See State v. Harris*, 895 N.W.2d 592, 598 (Minn. 2017). We are unaware of any caselaw for the proposition that a guilty plea is invalid if, in light of the circumstances proved, there are alternative hypotheses that are consistent with innocence. At oral argument, Lacek’s appellate attorney agreed that

there is no caselaw requiring the application of the circumstantial-evidence standard of review to the factual basis of an *Alford* plea. In the absence of such caselaw, we apply the caselaw concerning whether there is a sufficient factual basis for a guilty plea, which asks whether “facts exist from which the defendant’s guilt of the crime charged can be reasonably inferred,” *Nelson*, 880 N.W.2d at 861 (quotation omitted), keeping in mind that the factual basis of an *Alford* plea must be “strong,” *Theis*, 742 N.W.2d at 649. Thus, Lacek’s *Alford* plea is valid if there is a strong factual basis that he had the “intent to effect the death” of either K.A.C. or S.J.G., *see* Minn. Stat. § 609.185(a)(3), which would be true if he “either ha[d] a purpose to do the thing or cause the result specified or believe[d] that the act, if successful, will cause that result,” *see* Minn. Stat. § 609.02, subd. 9(4) (2020).

Lacek’s intent to kill either K.A.C. or S.J.G. can be reasonably inferred from the evidence recited by the prosecutor at the plea hearing. The state was prepared to introduce evidence at trial that Lacek was very unhappy with K.A.C. because she had broken up with him. Prior to the fire at K.A.C.’s home, Lacek had sent K.A.C. text messages stating that he intended to burn her house down. Before starting the fire, Lacek knocked on K.A.C.’s front door, was greeted by S.J.G., demanded to be let inside, and was refused entry. A short time later, S.J.G. heard windows breaking and discovered a fire that had quickly spread to significant portions of the lower level of the home. Lacek fled the scene in his vehicle at a high rate of speed. When law-enforcement officers apprehended Lacek at his home, they found gasoline cans next to his vehicle, and he smelled strongly of gasoline. This evidence is sufficient to allow a jury to infer a hostile motive toward either K.A.C. or S.J.G. and an intent to use an accelerant to create a fast-moving fire that would spread

quickly before S.J.G. or K.A.C. could escape. *See Nelson*, 880 N.W.2d at 861. Accordingly, the state’s evidence is a strong factual basis for the inference that Lacek intended to cause the death of either K.A.C. or S.J.G.

Thus, Lacek’s *Alford* plea is valid.

II. Sentencing

Lacek’s secondary argument is that the district court erred by denying his request for a downward durational or dispositional departure from the presumptive guidelines sentence.

The Minnesota Sentencing Guidelines generally prescribe presumptive sentences for felony offenses. Minn. Sent’g Guidelines 2.C (2020). For any particular offense, the guidelines sentence is “presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics.” Minn. Sent’g Guidelines 1.B.13 (2020). Accordingly, a district court “must pronounce a sentence . . . within the applicable [presumptive] range . . . unless there exist identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent’g Guidelines 2.D.1 (2020). The sentencing guidelines provide non-exclusive lists of mitigating and aggravating factors that may justify a departure from the applicable presumptive range. *See* Minn. Sent’g Guidelines 2.D.3 (2020).

If a defendant requests a downward departure, a district court first must determine whether “‘mitigating circumstances are present’” and, if so, whether “‘those circumstances provide a ‘substantial[] and compelling’ reason not to impose a guidelines sentence.” *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quoting *State v. Best*, 449 N.W.2d 426, 427

(Minn. 1989), and Minn. Sent’g Guidelines 2.D.1 (2012)). If substantial and compelling reasons exist, the district court has discretion to order a downward departure. *Id.*; *Best*, 449 N.W.2d at 427. This court generally applies an abuse-of-discretion standard of review to a district court’s denial of a motion for a downward departure. *Soto*, 855 N.W.2d at 307-08. But a district court has discretion to depart from the presumptive range “only if aggravating or mitigating circumstances are present; if aggravating or mitigating circumstances are not present, the trial court has no discretion to depart.” *Best*, 449 N.W.2d at 427 (emphasis omitted). A district court abuses its discretion if “its decision is based on an erroneous view of the law.” *Soto*, 855 N.W.2d at 308 n.1 (quoting *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011)).

There are two types of sentencing departures: dispositional and durational. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). Lacek requested both types in the district court. The district court denied Lacek’s request at the sentencing hearing by stating, “Counsel made good arguments, but the court can’t find on these facts that there are substantial and compelling reasons to depart.” On appeal, Lacek renews his arguments for both types of departures. We will analyze each type separately.

A. Durational Departure

Lacek first argues that the district court erred by reasoning that there are no substantial and compelling reasons for a downward durational departure.

A durational departure must be based on factors related to the “seriousness of the offense, not the characteristics of the offender.” *Id.* (emphasis omitted). 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 (quoting *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985)).

Lacek argues that a durational departure is required in this case for two reasons. First, he contends that his offense was less serious than the typical offense of attempted first-degree felony murder. He notes that, after starting the fire, he did not prevent S.J.G. from leaving the home. The state contends in response that Lacek has not identified a typical case of attempted first-degree felony murder. An appellate court may identify a typical case by relying on its “collective experience” in reviewing numerous criminal appeals, *see, e.g., State v. Rourke*, 773 N.W.2d 913, 922 (Minn. 2009), or by making comparisons to similar cases, *see, e.g., Tucker v. State*, 799 N.W.2d 583, 587 (Minn. 2011). We are aware of only one comparable case in which a person was convicted of attempted first-degree felony murder for setting fire to an occupied home. *See State v. Johnson*, No. A05-0826, 2006 WL 1460600, at *1 (Minn. App. May 30, 2006), *rev. denied* (Minn. July 19, 2006). In that case, we rejected the appellant’s argument that the district court erred by denying his motion for a downward durational departure. *Id.* at *3-4. The state also contends that Lacek’s offense was not less serious because he did not warn or help S.J.G. but, rather, fled the scene. “Fleeing the scene of the offense and abandoning the victim is typical behavior for those defendants convicted of second-degree unintentional felony murder.” *Tucker*, 799 N.W.2d at 587 (emphasis omitted). Because the facts of this case resemble the facts of *Johnson* and *Tucker*, there are not substantial and compelling reasons to believe that Lacek’s offense is significantly less serious than a typical case of attempted first-degree felony murder.

Second, Lacek contends that he lacked substantial capacity for judgment due to a mental illness. A downward durational departure may be appropriate 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 mental-health impairment must be extreme ‘to the point that it deprives the defendant of control over his action.’” *State v. Musse*, 981 N.W.2d 216, 222 (Minn. App. 2022) (quoting *State v. McLaughlin*, 725 N.W.2d 703, 716 (Minn. 2007)), *rev. denied* (Minn. Dec. 28, 2022). Lacek asserts that his diminished capacity arose from a combination of his mental illness and his substance-abuse disorder, which included “the actual use of prescribed and unprescribed substances.” But the mitigating-factor guideline on which Lacek relies states, “The voluntary use of intoxicants (drugs or alcohol) does not fall within the purview of this factor.” Minn. Sent’g Guidelines 2.D.3.a.(3) (2020). It appears that Lacek’s diminished-capacity argument is not based solely on his mental-health condition. Accordingly, there are not substantial and compelling reasons to believe that Lacek lacked substantial capacity for judgment because of a mental impairment.

Thus, the district court did not err by denying Lacek’s request for a downward durational departure.

B. Dispositional Departure

Lacek also argues that the district court erred by reasoning that there are not substantial and compelling reasons for a downward dispositional departure.

Lacek’s sole argument to the district court for a downward dispositional departure was that he is particularly amenable to probation. Particular amenability to probation is a

mitigating factor recognized in the sentencing guidelines. Minn. Sent'g Guidelines 2.D.3.a.(7) (2020). In determining whether a defendant is particularly amenable to probation so as to justify a downward dispositional departure, a district court may consider, among other things, “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). Particular amenability to probation is not established if the defendant is only somewhat amenable to probation. *Soto*, 855 N.W.2d at 308-09. Rather, the defendant must be “*particularly* amenable” to probation in a way that “distinguishes the defendant from most others and truly presents the substantial and compelling circumstances that are necessary to justify a departure.” *Id.* at 309 (alteration omitted) (quotation omitted). A district court need not discuss all of the *Trog* factors if the district court denies a motion for a downward dispositional departure. *State v. Pegel*, 795 N.W.2d 251, 254 (Minn. App. 2011).

Lacek contends that the district court erred on the ground that “all the *Trog* factors weigh in Lacek’s favor.” The state challenges Lacek’s contention with respect to several factors. For example, the state contends that Lacek has no caselaw for the proposition that his age, 28 years old, makes him particularly amenable to probation. In *Soto*, the supreme court rejected the notion that the age of 37 makes an offender particularly amenable to probation. 855 N.W.2d at 310. The state is correct that Lacek does not have any legal authority for his age-based argument. In addition, the state disputes Lacek’s assertion that his prior record makes him particularly amenable to probation. The state asserts that Lacek has four prior misdemeanor convictions and was charged with multiple violations of orders

for protections, which were dismissed. The remaining factors identified by Lacek—remorse, attitude in court, and letters of support—are not so weighty in themselves that they constitute substantial and compelling reasons for a downward dispositional departure. *See id.* at 311-12. Finally, we note that the probation officer who performed the PSI concluded that Lacek is not amenable to probation. Accordingly, there are not substantial and compelling reasons to believe that Lacek is particularly amenable to probation.

Thus, the district court did not err by denying Lacek's request for a downward dispositional departure.

Affirmed.