This opinion is nonprecedential except as provided by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
A22-1263

Dean Robert Hoversten, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 24, 2023
Affirmed
Bjorkman, Judge

Anoka County District Court
File No. 02-CR-19-4855

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

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

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

Considered and decided by Bjorkman, Presiding Judge; Larkin, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges the denial of his petition for postconviction relief from the sentence imposed following his guilty plea to first-degree criminal sexual conduct. He

argues that the district court abused its discretion by (1) denying relief from the agreed-upon upward durational sentencing departure because the departure is based on improper factors that duplicate elements of the offense; and (2) denying relief from the presumptive prison sentence because he is particularly amenable to probation. We affirm.

FACTS

In July 2019, appellant Dean Hoversten was charged with four counts of first-degree criminal sexual conduct based on allegations that he engaged in sexual contact and penetration with his daughter. In exchange for the state's agreement to dismiss three of the charges, he pleaded guilty to one count, agreed to an aggravated sentence of 216 months with the option to move for a downward dispositional departure, and waived his right to a sentencing jury. Regarding the offense, Hoversten admitted that he began touching his daughter's bare genitals with his bare penis in 2012, when she was six years old. After a few years, he began having anal or vaginal sex with her once or twice a week. This pattern continued until 2019, when she reported the abuse. Regarding sentencing factors, Hoversten admitted that the abuse took place in his daughter's bedroom, on her bed, and that this invaded her "zone of privacy." He admitted that his daughter was particularly vulnerable in part because he was significantly larger than her and had authority over her. And he acknowledged that the multiple forms of penetration he committed are "an aggravating factor in this case as well."

Hoversten moved for a downward dispositional departure. He argued that a probationary sentence is best for his family and that he is particularly amenable to treatment, pointing to the psychosexual-evaluation report that described him as "a good

candidate" for outpatient treatment. The district court denied the motion, instead imposing the agreed-upon 216-month sentence based on findings that Hoversten's daughter was particularly vulnerable, the abuse continued for a long time, there were multiple forms of penetration, and he committed the offense in her zone of privacy.

In March 2022, Hoversten petitioned for postconviction relief,[1] arguing that his aggravated sentence was based on improper factors, contrary to his understanding when pleading guilty. In the alternative, he asked the district court to reconsider his motion for a downward dispositional departure. The district court denied the petition. Regarding Hoversten's aggravated sentence, the court reasoned that continuation of the abuse over a long time and the victim's particular vulnerability were improper grounds for departure but the invasion of her zone of privacy and multiple forms of penetration are valid grounds that justify the departure. And the court reiterated its rationale for denying a downward dispositional departure. Hoversten appeals.

DECISION

We review the denial of postconviction relief for an abuse of discretion. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). A district court abuses its discretion when it bases its decision on "an erroneous view of the law" or makes clearly erroneous factual findings. *Rhodes v. State*, 875 N.W.2d 779, 786 (Minn. 2016) (quotation omitted).

[1] The same judge presided over Hoversten's guilty-plea, sentencing, and postconviction proceedings.

I. The district court did not abuse its discretion by denying Hoversten relief from the agreed-upon upward durational sentencing departure.

A district court must impose a sentence within the Minnesota Sentencing Guidelines' presumptive range unless it finds substantial and compelling circumstances to depart. *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017). A durational departure must be based on factors that reflect the seriousness of the offense. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). It cannot be based on factors already accounted for as elements of the current offense, *State v. Thompson*, 720 N.W.2d 820, 829-30 (Minn. 2006), or "unfairly exaggerate the criminality of the defendant's conduct," *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). We will affirm an upward durational departure if the district court's reasons for the departure are legally permissible and factually supported. *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015). A single aggravating factor may justify an upward durational departure. *State v. Bell*, 971 N.W.2d 92, 109 (Minn. App. 2022), *rev. denied* (Minn. Apr. 27, 2022).

Hoversten argues that his aggravated sentence is improper and he is therefore entitled to relief either in the form of plea withdrawal or sentence correction.[2] He claims the aggravated sentence improperly relies on factors that are elements of the offense and this exaggerates the criminality of his conduct. This argument is unavailing.

[2] Hoversten also argues for plea withdrawal on the ground that his guilty plea was unintelligent because it was based on the mistaken understanding that the agreed-upon aggravated sentence had a proper basis. *See State v. Raleigh*, 778 N.W.2d 90, 96-97 (Minn. 2010) (stating that guilty plea is "intelligent" if defendant understands "the consequences of his plea," including maximum sentence). This argument essentially duplicates his challenge to his aggravated sentence and fails for the same reason: The sentence is valid.

Hoversten pleaded guilty to first-degree criminal sexual conduct and admitted to all elements of the offense: (1) sexual penetration, (2) a victim under 16 years of age at the time of the offense, (3) a "significant relationship" between himself and the victim, and (4) "multiple acts committed over an extended period of time." Minn. Stat. § 609.342, subd. 1(h)(iii) (2010). As the district court acknowledged, two of the sentencing factors it originally identified—the victim's particular vulnerability and the continuation of the offense over a long time—are invalid because they duplicate elements of the offense. But the other two sentencing factors—invasion of the victim's zone of privacy and multiple forms of penetration—do not duplicate elements of the offense. And while either may independently justify Hoversten's sentence, *see Bell*, 971 N.W.2d at 109 (permitting aggravated sentence based on one factor), both are valid aggravating factors amply supported by Hoversten's admissions.

The sentencing guidelines recognize that invasion of an area where the victim "had an expectation of privacy" is a valid aggravating factor. Minn. Sent'g Guidelines 2.D.2.b.(14) (2011). When the victim lives with the defendant, this zone of privacy is limited to the victim's bedroom. *See State v. Mohamed*, 779 N.W.2d 93, 100 (Minn. App. 2010). Part of what makes a sexual assault in a victim's own bedroom particularly egregious is that it turns an "island of security" into a place of harm that the victim must return to daily. *State v. Vanengen*, 983 N.W.2d 479, 488 (Minn. App. 2022) (quoting *State v. Coley*, 468 N.W.2d 552, 555 (Minn. App. 1991)), *rev. granted* (Minn. Mar. 14, 2023). Hoversten admitted that he invaded his daughter's "zone of privacy" by sexually abusing her in her own bedroom, on her own bed, where she "should have felt safe."

Likewise, subjecting a victim to multiple forms of penetration is a valid aggravating factor, particularly when the case involves "intrusive and numerous acts of penetration." *State v. Yaritz*, 791 N.W.2d 138, 146 (Minn. App. 2010), *rev. denied* (Minn. Feb. 23, 2011). This factor can apply even in cases of criminal sexual conduct involving multiple acts committed over an extended period of time because that element is distinct from inflicting multiple forms of penetration. *State v. Adell*, 755 N.W.2d 767, 774 (Minn. App. 2008), *rev. denied* (Minn. Nov. 25, 2008). Hoversten admitted to this factor as well, testifying that he repeatedly forced anal and vaginal sex upon his daughter.

In sum, Hoversten has not demonstrated that the district court abused its discretion by determining that the upward durational departure was justified based on Hoversten's admission to facts establishing two valid aggravating factors.

II. The district court did not abuse its discretion by denying Hoversten relief from the presumptive prison sentence.

A district court may grant a downward dispositional departure based on a defendant's "particular amenability to individualized treatment in a probationary setting." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). The defendant must be "particularly" amenable, not "merely . . . amenable to probation," to establish the substantial and compelling circumstances that distinguish him from others and justify a departure. *State v. Soto*, 855 N.W.2d 303, 308-09 (Minn. 2014). When determining whether the defendant reaches this high bar, a district court should consider "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family." *Trog*, 323 N.W.2d at 31. We will affirm a

presumptive sentence if 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).

Hoversten asserts that the district court "failed to fully consider" the *Trog* factors. He contends that he is particularly amenable to probation, as demonstrated by his remorsefulness, his cooperative behavior, his openness to treatment, and the statement in the psychosexual-evaluation report that—as he characterizes it—he is "well suited for sex-offender treatment in an outpatient setting." We are not persuaded.

A district court is not required to "discuss" all of the *Trog* factors so long as the record "demonstrates that [it] deliberately considered circumstances for and against departure and exercised its discretion." *State v. Pegel*, 795 N.W.2d 251, 254 (Minn. App. 2011). The record confirms that the district court did so here.

At sentencing, the district court explained that it considered all of the materials offered in support of the departure motion, including a victim impact statement from Hoversten's daughter and the psychosexual-evaluation report. The court also considered arguments from counsel and heard from Hoversten. The court noted various positive factors, such as Hoversten's gainful employment, lack of any significant criminal history, and apparent remorse. But it also found that a probationary sentence would not be in the best interests of Hoversten's daughter or the family unit, for which the court saw no "hope of reconciliation." Ultimately, it reasoned that substantial and compelling reasons do not exist to justify departing from the presumptive prison sentence.

The district court reaffirmed this reasoning in denying postconviction relief. In doing so, the court emphasized that the psychosexual-evaluation report stated only that Hoversten would be "a good candidate for outpatient treatment," not that he was *particularly* amenable to treatment in a probationary setting. *See Soto*, 855 N.W.2d at 310 (emphasizing the "large and crucial step missing" between these two determinations). Indeed, even if the report had stated that Hoversten was particularly amenable to probation, "the mere fact that the person who prepared a report for the district court reached a certain conclusion does not necessarily justify departing from the presumptive disposition under the guidelines." *Id.* at 309 (quotations omitted).

On this record, we are satisfied that the district court carefully considered factors for and against probation and acted within its discretion by determining that those factors do not establish the requisite substantial and compelling circumstances to depart from the presumptive prison sentence. Accordingly, we see no abuse of discretion in the denial of postconviction relief.

Affirmed.