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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1671**

State of Minnesota,
Respondent,

vs.

Stephen Jeroy Mister,
Appellant.

**Filed September 4, 2018
Affirmed
Halbrooks, Judge**

Ramsey County District Court
File No. 62-CR-15-3566

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Rodenberg, Judge; and
Smith, John, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges his sentence for first-degree assault, arguing that the district court abused its discretion by denying his motion for a downward dispositional or durational departure. We affirm.

FACTS

One night in 2015, appellant Stephen Mister returned to the apartment he shared with S.S. When he arrived, he found S.S., K.R., D.M., and D.M.'s girlfriend drinking alcohol and smoking marijuana. Mister and D.M. started arguing, and the altercation turned physical. The two began wrestling and, as a result, broke a television and some furniture. D.M. then left the apartment and went into the hallway. Mister followed. While in the hallway, Mister shot D.M. with a handgun. S.S. called 911 after hearing shots, but Mister struck her arm, causing her to drop the phone. D.M. was transported to a hospital, and surgeons removed 13 inches of his lower intestine.

The state charged Mister with first-degree assault under Minn. Stat. § 609.221, subd. 1 (2014), and domestic assault under Minn. Stat. § 609.2242, subd. 4 (2014). The parties entered into a plea agreement contemplating a bottom-of-the-box guidelines sentence. In exchange, Mister would plead guilty to first-degree assault, the domestic-assault charge would be dismissed, and Mister could bring a motion for a dispositional or durational departure. Mister also waived his right to argue self-defense.

Mister pleaded guilty to first-degree assault. Probation prepared a presentence investigation (PSI) report that indicated that Mister had at least four traffic-related

convictions, six misdemeanor or gross misdemeanor convictions, and four felony convictions. The PSI indicated that Mister took “minimal responsibility for his actions” and “did not seem remorseful.” The PSI recommended that the district court impose the presumptive sentence.

Before sentencing, Mister moved for a downward dispositional or durational departure, arguing that he is particularly amenable to probation and that, because D.M. was also an aggressor, his first-degree-assault offense was less serious than other first-degree assaults. The state opposed the motion. The district court denied Mister’s motion for a downward dispositional or durational departure and imposed a 125-month sentence. This appeal follows.

D E C I S I O N

I.

We note at the outset that Mister received a guidelines sentence. “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). We will not interfere with “the sentencing court’s exercise of discretion, as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination.” *Id.* at 81.

Mister argues that he is particularly amenable to probation, and, therefore, the district court abused its discretion by denying him a downward dispositional departure. A district court may depart from the presumptive sentencing guidelines only if substantial

and compelling circumstances warrant doing so. *State v. Cameron*, 370 N.W.2d 486, 487 (Minn. App. 1985), *review denied* (Minn. Aug. 29, 1985). “Substantial and compelling circumstances are those that make a case atypical.” *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018). Even if substantial and compelling circumstances are present, a district court is not required to depart. *Id.* “For a downward dispositional departure, a district court may consider both offender- and offense-related factors.” *Id.* We will reverse a district court’s refusal to depart only in a “rare” case. *Id.*

A district court may impose a dispositional departure if the defendant is particularly amenable to treatment in a probationary setting. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). Factors relevant in determining if a defendant is particularly amenable to treatment in a probationary setting include “the defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family.” *Id.* A defendant’s amenability to individualized treatment in a probationary setting may by itself support a downward dispositional departure. *State v. Hickman*, 666 N.W.2d 729, 731-32 (Minn. App. 2003).

At Mister’s sentencing hearing, the district court stated its reasons supporting its decision to deny Mister’s motion for a downward dispositional departure. The district court denied the downward dispositional departure “based on [Mister’s] history of not being in compliance with probation, based on the very serious nature of this offense, and based on some of [his] own words and work through some of [his] treatment.”

Mister acknowledges that not all the *Trog* factors favor a conclusion that he is particularly amenable to probation. He concedes that his criminal-history score—five—

and his age—42—weigh against finding that he is particularly amenable to probation. But he contends that he has “demonstrated his particular amenability to individualized treatment in a probationary setting” because he has completed two rule 25 chemical-health assessments, enrolled in anger-management therapy services, and sought therapy services from CREATE, Inc. Mister also maintains that he is remorseful.

The record indicates that Mister did complete two rule 25 chemical-health assessments. He enrolled in anger-management therapy services at Cornerstone Therapy and Recovery Center. He also attended multiple therapy sessions at CREATE, the goals of which included maintaining positive mental health, addressing impulse control, and developing coping skills.

But the district court expressed particular concern over a CREATE group therapy session in which Mister made statements indicating that he was not accepting responsibility for the crime. The district court stated that it was concerned with how Mister portrayed himself in and out of court because the statements made during the CREATE group therapy session came *after* (1) Mister’s public defender prepared his motion for a downward departure, (2) his depositions advisor prepared a more “thorough memo,” and (3) he had allegedly taken responsibility for the crime.

Further, Mister’s prior probation record supports the district court’s conclusion that he is not particularly amenable to individualized treatment in a probationary setting. According to the PSI, Mister violated probation terms at least five times in the past.¹ Mister

¹ Mister violated probation once in 2008, 2011, and 2014, and twice in 2015. He does not dispute these violations.

contends that the district court “may have overstated the situation” surrounding these violations because “they spanned a nine-year period” and “the pre-sentence investigation provided no information about the nature of the violations.” But amenability to probation turns on a defendant’s ability “to comply with the conditions of probation and benefit from the opportunity for rehabilitation that probation affords.” *Hickman*, 666 N.W.2d at 732. Mister’s history of noncompliance with probation orders demonstrates that he is not particularly amenable to probation.

Mister also contends that his remorse weighs in favor of a downward dispositional departure. The Minnesota Supreme Court has “consistently treated remorse as a factor that may support a downward dispositional departure.” *State v. Solberg*, 882 N.W.2d 618, 625 (Minn. 2016) (“A primary justification for considering remorse in sentencing is that a defendant’s remorse bears on his or her ability to be rehabilitated.”).

Mister did apologize on the record, both at his plea hearing and during his sentencing. During the guilty-plea hearing, Mister admitted that he shot D.M. with a handgun, that he intended to pull the trigger, and that D.M. lost 13 inches of his intestines as a result of his injuries. But remorse is “just one of several ‘[f]actors a court *can* consider’ when determining whether the defendant is particularly amenable to probation.” *State v. Soto*, 855 N.W.2d 303, 311 (Minn. 2014) (quoting *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006)). Based on the record in its entirety, the district court’s decision not to focus on Mister’s apology “suggests that, appropriately, it did not give the apology much, if any, weight in concluding that [Mister] was [not] amenable to probation.” *Cf. id.*

The district court, after considering the testimony and thoroughly reviewing the record, determined that there are no substantial or compelling circumstances to warrant a downward dispositional departure and that Mister is not particularly amenable to probation. We conclude that the district court acted within its discretion by denying Mister's motion for a downward dispositional departure.

II.

Mister contends that the district court abused its discretion by denying him a downward durational departure because his conduct in committing the first-degree assault was significantly less serious than that typically involved in the commission of first-degree assault and because the district court relied on the same grounds for denying the durational departure as it did for denying the dispositional departure.

When deciding whether to depart durationally, a district court must determine if “the defendant's conduct was significantly more or less serious than that typically involved in the commission of the crime in question.” *State v. Herrmann*, 479 N.W.2d 724, 728 (Minn. App. 1992) (quotation omitted), *review denied* (Minn. Mar. 19, 1992).

Mister was convicted of first-degree assault. Minn. Stat. § 609.221, subd. 1. “Whoever assaults another and inflicts great bodily harm . . .” is guilty of first-degree assault. *Id.* “Great bodily harm” is defined as “bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.” Minn. Stat. § 609.02, subd. 8 (2014). The first-degree-assault statute therefore prohibits a person from assaulting another and inflicting bodily

injury that causes a permanent loss of an organ. Minn. Stat. §§ 609.02, subd. 8, .221, subd. 1.

The supreme court has affirmed a conviction for first-degree assault when the defendant pushed another person into a bonfire. *State v. Dorn*, 887 N.W.2d 826, 833 (Minn. 2016). Here, Mister used a firearm, which the Minnesota legislature has defined as a “dangerous weapon.” Minn. Stat. § 609.02, subd. 6 (2014). If the first-degree assault statute prohibits the conduct of one person pushing another into a bonfire, using her hands, and inflicting great bodily harm, *Dorn*, 887 N.W.2d at 833, then committing first-degree assault by using a dangerous weapon is more serious “as compared with other acts constituting the same offense.” *Herrmann*, 479 N.W.2d at 728.

Mister also argues that the district court should have granted a durational departure because the following mitigating factors exist: (1) the victim was an aggressor and (2) other substantial grounds exist that excuse or mitigate his culpability. Under the Minnesota Sentencing Guidelines, a district court can consider as mitigating factors whether “[t]he victim was an aggressor in the incident” and whether “[o]ther substantial grounds exist that tend to excuse or mitigate the offender’s culpability, although not amounting to a defense.” Minn. Sent. Guidelines 2D.3.a (2014).

Mister claims that both mitigating factors are present here, reasoning that D.M. introduced the handgun into the fight and that he grabbed it from D.M. during a struggle. Mister relies on *State v. Hennum*, in which the supreme court reduced a defendant’s sentence because substantial grounds existed that tended to reduce her culpability in murdering her husband. 441 N.W.2d 793, 801 (Minn. 1989). The husband “physically

abused [Hennum] on the night of the incident . . . [and] there was substantial evidence that [he] had subjected [her] to severe physical and mental abuse throughout their relationship.”

Id. On the night of the murder, the husband threw firewood and car parts at Hennum, pulled her hair, and ripped off her shirt. *Id.* at 795-96. The supreme court determined that those facts constituted a “rare” case that merited reversal of the district court’s discretionary refusal to depart. *Id.* at 801.

Hennum is distinguishable. Hennum murdered her husband, who had physically and emotionally abused her and her children for years. *Id.* Unlike in *Hennum*, there is no evidence here that D.M. had a history of physically or emotionally abusing Mister. Moreover, while Mister contends that D.M. introduced the handgun into the fight, the PSI and the probable-cause statement underlying the complaint suggest that Mister, not D.M., retrieved the handgun from somewhere within the apartment and brought it into the fight in the hallway.

Mister maintains that the district court “denied the motion for a downward durational departure for improper reasons and failed to consider valid reasons for departure.” We disagree. The district court denied Mister’s motion based “on the very serious nature of [the] offense,” which is a legally valid reason for denying a durational departure. *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017). We conclude that the district court acted within its discretion by denying Mister’s motion for a downward durational departure.

Affirmed.