STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1569
A18-1579

State of Minnesota,
Appellant (A18-1579),
Respondent (A18-1569),

vs.

William Cornell Walker,
Appellant (A18-1569),
Respondent (A18-1579).

Filed August 5, 2019
Affirmed
Cochran, Judge

Nobles County District Court
File No. 53-CR-17-1174

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

Kathleen A. Kusz, Nobles County Attorney, Worthington, Minnesota; and

Travis J. Smith, Special Assistant County Attorney, Slayton, Minnesota (for State of Minnesota)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for William Cornell Walker)

Considered and decided by Florey, Presiding Judge; Worke, Judge; and Cochran, Judge.

U N P U B L I S H E D O P I N I O N

COCHRAN, Judge

In these consolidated appeals, William Cornell Walker challenges his conviction for third-degree criminal sexual conduct (CSC), and the state appeals from Walker's sentence. Walker argues that the prosecutor committed misconduct constituting plain error by eliciting testimony about Walker's post-*Miranda* failure to tell officers that the sexual contact was consensual. Walker also submitted a pro se supplemental brief claiming that the state improperly introduced testimony and that the jury was not a jury of his peers. The state argues that the district court abused its discretion by granting Walker's motion for a downward dispositional departure. Because we conclude that the prosecutor's conduct did not constitute plain error, that the district court did not abuse its discretion in granting the departure, and that Walker's pro se arguments are meritless, we affirm.

FACTS

The following evidence was presented at Walker's jury trial on charges of third-degree CSC. Walker is a semi-professional basketball player. In 2017, while Walker was playing for a semi-professional team in Iowa, he met P.C. The two met through an online dating app and became friends. In September 2017, Walker moved into P.C.'s apartment in Iowa. P.C. testified that they developed a "friends with benefits" relationship during this time period. P.C. further testified that around Thanksgiving 2017, she decided that they would be strictly friends, and their relationship would no longer be sexual.

In December 2017, Walker and P.C. traveled to Minnesota to celebrate Christmas with P.C.'s family. They stayed with P.C.'s adult daughter. Walker and P.C. shared an air

mattress in the living room. P.C. testified that while they were lying on the air mattress, Walker made sexual advances towards her. P.C. then got up and went to sleep on a love seat. After Walker promised that he would leave her alone, P.C. agreed to come back to the air mattress. P.C. testified that Walker then pinned her, pulled her sweatpants down, and penetrated her anus with his penis. P.C. testified that she tried to get away, asked Walker to stop, and told him that he was hurting her, to which Walker responded, "I don't give a f--k." P.C. then threatened to scream, and Walker released her.

P.C. did not initially go to police or mention the incident to her family because she did not want to ruin Christmas for her family. On December 25, P.C. and Walker returned to Iowa. The next day, P.C. went to work and sent Walker a message telling him to leave her apartment. Walker emailed P.C. in response. He asked her to forgive him and wrote that he did not remember much from the night of the incident because he had been drinking. He also wrote:

> "I do remember hearing you say no. I am not a rapist and I do not hurt the people i have love for . . . . Theres no excuse for my actions I did what i did and I feel horrible about it bc i betray and hurt (physically,mentally) you."

Walker went on to write that he valued their friendship and stated that "[w]hat [he] did will never happen again." Walker then asked whether he could stay at P.C.'s apartment for another day or two.

P.C. went to the police station to ask an officer to go to her apartment to ensure that Walker had left. A police officer asked P.C. about what was going on, and P.C. told him that Walker had sexually assaulted her in Minnesota just before Christmas. P.C. also told

the police officer about a previous incident in Iowa involving Walker earlier in December, which she described as Walker forcing her to have sex. P.C. later described the incident as Walker pestering or badgering her for sex to which she eventually consented.

The police officer then went to P.C.'s apartment, where he encountered Walker. The police officer told Walker that P.C. claimed he had sexually assaulted her, informed him of his right to remain silent, and asked whether Walker would speak with him. Walker agreed to speak to the police officer and confirmed that he sent the email to P.C. The police officer then arrested Walker for the previous incident in Iowa. A few days later, Walker was charged in Minnesota with third-degree CSC for the incident that occurred in Minnesota.

During Walker's trial, the police officer testified in the state's case-in-chief and as a rebuttal witness after Walker testified. The police officer testified that on the drive to the police station, after he arrested Walker, Walker told him that things got out of hand in Minnesota and that he took things too far. The police officer also testified that Walker told him that the incident earlier in December in Iowa was consensual but did not indicate that the Minnesota incident was either consensual or a misunderstanding. Walker did not object to this testimony at trial.

The jury found Walker guilty. Following the trial, the district court ordered a presentence investigation (PSI) report. The PSI report showed that Walker, who was born in 1984, was fined in connection with five different misdemeanor charges, including shoplifting in 2016 and public intoxication in 2017, but had a criminal history score of zero. The PSI report also noted that Walker has a good relationship with his parents and

siblings and wanted to move back to Ohio to live with his brother. The PSI report recommended that Walker receive the presumptive 48-month executed sentence. Walker also completed a psychosexual assessment.

Walker moved for a downward dispositional departure from the presumptive sentence on the grounds that he is particularly amenable to probation. In addition to the PSI report and the psychosexual assessment, the district court received letters of support from Walker's parents, his brother, and a registered nurse who knows Walker personally. The district court granted the motion for a downward dispositional departure. The district court stated that its reasons for departing included information contained in the psychosexual report, Walker's family support system, Walker's age, Walker's criminal history score, Walker's attitude in court, and Walker's cooperation with the court proceeding, including returning from a trip that the court allowed him to take to Ohio. The district court imposed a 48-month sentence, stayed for ten years.

Following the sentencing hearing, Walker appealed his conviction, and the state appealed the district court's decision to grant Walker's departure motion.

D E C I S I O N

I. The prosecutor's conduct did not constitute plain error.

Walker argues that the prosecutor committed misconduct constituting plain error by eliciting testimony of his post-*Miranda* silence for substantive and impeachment purposes. The state counters that, because Walker spoke to police about the incident after the *Miranda* warning, the prosecutor was entitled to present evidence of what Walker did and did not say while speaking with police.

Because Walker did not object to the evidence at trial, his claim of prosecutorial misconduct is reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under the modified plain-error standard, the appellant bears the burden to show that there was (1) an error; (2) that is plain. *Id.* An error that is plain is one that is "clear or obvious at the time of appeal." *State v. Sanchez-Sanchez*, 879 N.W.2d 324, 330 (Minn. 2016) (quotation omitted). "Typically, a 'plain' error contravenes case law, a rule, or a standard of conduct." *State v. Peltier*, 874 N.W.2d 792, 799 (Minn. 2016).

If an appellant establishes that the prosecutorial misconduct is error that is plain, the burden shifts to the state to show that the misconduct did not affect the appellant's substantial rights. *Ramey*, 721 N.W.2d at 302. If the state fails to show that the misconduct did not affect the appellant's substantial rights, "the court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.*

A. Use of post-*Miranda* silence for impeachment purposes.

Walker argues that the prosecutor violated the United States and Minnesota Constitutions by impeaching Walker's testimony with evidence that he did not tell the police officer that the incident in Minnesota was consensual. Both the United States and Minnesota Constitutions guarantee the right of a person in a criminal matter to remain silent. U.S. Const. amend. V; Minn. Const. art. I, § 7. In *Doyle v. Ohio*, the Supreme Court held that impeaching a defendant on the basis of his silence following a *Miranda* warning violates the defendant's right to due process. 426 U.S. 610, 611, 96 S. Ct. 2240, 2241 (1976). But the Supreme Court clarified in *Anderson v. Charles* that when a defendant makes a statement to police after receiving a *Miranda* warning, the defendant can be

questioned about later inconsistent testimony. 447 U.S. 404, 408, 100 S. Ct. 2180, 2182 (1980).

Relying on *Anderson*, the Minnesota Supreme Court held that "where the record clearly shows that the defendant chose not to rely on his right to remain silent, but instead made statements to police, the prosecution may show and comment upon the defendant's failure to relate to police crucial exculpatory statements recited by the defendant at trial." *State v. Darveaux*, 318 N.W.2d 44, 49-50 (Minn. 1982) (quotation omitted). In *Darveaux*, the defendant, after receiving a *Miranda* warning, told police that he could not have committed the crime in question because he had never been to the location of the crime. *Id.* at 49. The defendant did not mention an alibi when speaking with the police but testified at trial that he had an alibi for the time of the crime. *Id.* The Minnesota Supreme Court held that the prosecutor was entitled to show and comment on the defendant's failure to communicate the alibi to police to impeach the defendant's testimony. *Id.* at 50. The supreme court noted that a defendant "has no right to remain silent selectively." *Id.* at 49.

In this case, Walker voluntarily spoke to police following the *Miranda* warning, stating that he "took things too far," that "things got out of hand," and that he was "really drunk." But during trial, Walker testified that the sexual contact in Minnesota was consensual. Walker has no right to remain selectively silent, and, under *Darveaux*, the prosecutor was entitled to impeach Walker's testimony by introducing evidence of Walker's failure to tell police that the sexual contact was consensual.

B. Use of post-*Miranda* silence for substantive purposes.

During oral arguments, Walker argued that we should distinguish *Darveaux* because that case involved evidence of Darveaux's post-*Miranda* silence only for impeachment purposes. Walker did not make this argument in his brief or suggest in his brief that we should apply a different rule when evidence of post-*Miranda* silence is introduced in the state's case-in-chief rather than for impeachment purposes. Matters not addressed in an appellant's brief are not properly before this court. *See State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009) (holding that issues raised for the first time in an appellant's reply brief were deemed waived); *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (noting that inadequately briefed issues are not properly before an appellate court), *review denied* (Minn. Aug. 5, 1997). Because Walker did not brief this issue, it is not properly before this court.

But even if we did consider this issue, Walker did not cite to any precedent, even during oral arguments, establishing that *Darveaux's* rule that a defendant does not have a right to stay selectively silent is limited to cases involving impeachment. In the absence of any such caselaw, we cannot say that the prosecutor's conduct contravened "caselaw, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. Accordingly, we cannot say that the prosecutor's conduct constituted error that is plain.

II. The district court did not abuse its discretion in granting Walker's motion for a downward dispositional departure.

Appellate courts afford a district court "great discretion in the imposition of sentences" and reverse only for an abuse of that discretion. *State v. Soto*, 855 N.W.2d 303,

307-08 (Minn. 2014) (quotation omitted). Appellate courts rarely hold that a district court has abused its discretion in sentencing. *Id.* at 305. A district court may depart from the presumptive sentence provided by the Minnesota Sentencing Guidelines when there are "substantial and compelling" reasons justifying a departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); *see also* Minn. Sent. Guidelines 2.D.1 (2016). A district court abuses its discretion if its reasons for departing are "improper or insufficient and there is insufficient evidence of record to justify the departure." *Soto*, 855 N.W.2d at 308 (quotations omitted). Although appellate courts "afford the trial court great discretion over decisions to depart," an appellate court's deferential review "is not a limitless grant of power to the trial court." *Id.* at 312 (quotations omitted).

"When the district court gives improper or inadequate reasons for a downward departure, [a reviewing court] may scrutinize the record to determine whether alternative grounds support the departure." *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (emphasis omitted). "[A] defendant's particular amenability to individualized treatment in a probationary setting will justify departure in the form of a stay of execution of a presumptively executed sentence." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). "Numerous factors, including the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family, are relevant to a determination [of] whether a defendant is particularly suitable to individualized treatment in a probationary setting." *Id.*

In this case, the district court granted Walker's motion for a downward dispositional departure based on his particular amenability to probation. In granting Walker's motion,

the district court discussed the factors that it considered, but did not explicitly state that it found Walker to be "particularly amenable to probation." In the absence of an explicit finding that Walker is particularly amenable to probation, we may scrutinize the record to determine whether it supports such a finding. *See Soto*, 855 N.W.2d at 308-14 (scrutinizing the record after determining that the district court erred by granting a downward departure after finding that the defendant was "amenable to probation," rather than "particularly amenable to probation").

In this case, the district court noted Walker's age, his criminal history score of zero, and his attitude in court and cooperation with the court proceedings. The district court also considered the psychosexual report and Walker's strong family support system. These are potentially relevant factors in determining whether an individual is particularly amenable to probation. *See Soto*, 855 N.W.2d at 310 (recognizing a variety of factors relevant to determining whether a defendant is particularly amenable to probation); *Trog*, 323 N.W.2d 28, 31.

The state argues that several of these factors, particularly Walker's age, Walker's criminal history, and the psychosexual report do not support a finding that Walker is particularly amenable to probation. Although we agree that those factors may be of limited weight under the specific circumstances of this case, the district court did not base its decision solely on those factors. Rather, the district court also considered Walker's attitude in court and cooperation with the court proceedings, as well as his strong family support. The district court considered all of these factors in combination when determining that a departure was warranted. We conclude that the record supports a finding that Walker is

particularly amenable to probation and that the district court did not abuse its discretion in granting Walker's motion for a downward dispositional departure.

III. Walker's pro se claims are without merit.

Walker's pro se supplemental brief is without legal citation or reference to the record. "An assignment of error based on mere assertion and not supported by any argument or authorities . . . is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." *State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015). We discern no prejudicial error on mere inspection. While we could end our analysis here, we briefly address Walker's arguments.

Walker first argues that the police officer should not have been allowed to testify about the incident that took place in Iowa because it prejudiced the jury against him. But the defense filed a motion in limine requesting that evidence about the Iowa incident be admitted, arguing that the incident "put[] the alleged crime in the context of that relationship." During pretrial discussions, defense counsel explained that "this incident that happened in Iowa is a major part of the defense case." "Under the invited error doctrine, a party cannot assert on appeal an error that he invited," unless he can establish that the "error meets the plain error test." *State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012). Here, defense counsel made a strategic decision to introduce evidence of the Iowa incident. We discern no error, much less plain error, in the district court's decision to allow the police officer to testify about the incident that took place in Iowa.

Walker also argues that the jury did not constitute a jury of his peers. Walker's pro se brief includes statements about the jurors' ages and various comments that he alleges

that the jurors made. But the jurors' ages and alleged comments are not in the record. The record on appeal consists of the documents, exhibits, and transcript from the district court proceeding. Minn. R. Civ. App. P. 110.01. Appellate courts may not base their decisions on matters outside the record on appeal. *State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003). Walker's allegations about improper comments by the jurors are outside the record on appeal and not properly before this court.

Affirmed.