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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A10-854**

State of Minnesota,  
Respondent,

vs.

Robert Irving Cross,  
Appellant.

**Filed January 23, 2012  
Affirmed  
Minge, Judge**

Hennepin County District Court  
File No. 27-CR-09-27517

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County  
Attorney, Minneapolis, Minnesota (for respondent)

Craig E. Cascarano, Minneapolis, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Ross, Judge; and Huspeni,  
Judge.\*

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

## UNPUBLISHED OPINION

MINGE, Judge

Appellant challenges his sentencing and convictions for first-degree and third-degree criminal sexual conduct, arguing that the district court: (1) abused its discretion in denying his motion for a dispositional sentencing departure; (2) erred in denying his request for postconviction relief based on a claim of ineffective assistance of counsel; and (3) abused its discretion in failing to afford him an evidentiary hearing incident to his postconviction petition to prove that, if placed on probation, he would have been admitted into a sex-offender treatment program. We affirm.

### FACTS

I.C., the 8-year-old daughter of appellant Robert Cross, reported that Cross had touched her in a way that made her feel uncomfortable. This report prompted A.C., Cross's stepdaughter, to report to police that appellant had been sexually abusing her for several years. Cross was charged with three counts of first-degree criminal sexual conduct and four counts of third-degree criminal sexual conduct. He waived his right to a jury trial and agreed to proceed on a stipulated-facts trial. The stipulated facts recounted the testimony that A.C. would give were she called to testify. In addition, the stipulated facts identified three *Spreigl* witnesses and recounted what they would testify to regarding the sexual abuse they experienced from Cross.

The district court found Cross guilty on all seven counts and ordered a presentence investigation and sex-offender evaluation. The presentence investigation indicated that Cross was not a treatment candidate because he denied needing treatment or having any

issues related to sexuality and because no mitigating factors were present. A separate sex-offender evaluation noted that Cross was amenable to treatment but that progress may be hampered by his denial of wrongdoing.

At sentencing, the district court declined to grant Cross's request for a dispositional departure and instead imposed the presumptive 86-month sentence. The district court also denied Cross's petition for postconviction relief and request for an evidentiary hearing. This appeal follows.

## **D E C I S I O N**

### **I. Dispositional Departure**

The first issue is whether the district court abused its discretion in denying Cross's motion for a dispositional departure. A district court may order a downward departure from the presumptive sentence only if "substantial and compelling" circumstances warrant such a departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); Minn. Sent. Guidelines II.D. (1998). The decision to depart is within the discretion of the district court and will not be reversed absent a clear abuse of that discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). When considering whether to grant a dispositional departure, a court is to focus on the defendant as an individual and whether or not the presumptive sentence would be best for him and society. *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). To determine this, the court considers the defendant's amenability to probation, taking into account such factors as the defendant's age, prior record, remorse, cooperation, attitude while in court, and support from friends and family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn.

1982). A district court need not discuss all of these factors before the imposition of a presumptive sentence, *State v. Pegel*, 795 N.W.2d 251, 254 (Minn. App. 2011), and the existence of mitigating factors does not require the imposition of a departure, *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984).

Cross argues that the district court did not adequately consider all of the factors indicating amenability to probation. Indeed, the district court did not discuss several indicators of amenability to probation, including Cross's compliance with all conditions of release and the continued support of his family. However, the district court is not required to discuss every factor. The district court focused on the severity of Cross's offenses, his lack of remorse, and his denial of wrongdoing in determining that probation and treatment would not be effective. The record supports these district court findings. Cross denied a need for counseling and viewed the allegations of the various victims as a "conspiracy" devised by "scorned women." Cross argues that his acceptance of responsibility would come with time but offered no other support for a finding of amenability to treatment.

Given this record and the severity of the offenses, we conclude that the district court did not abuse its discretion in concluding that Cross failed to demonstrate amenability to treatment and denying a dispositional departure.

## **II. Ineffective Assistance of Counsel**

The second issue is whether the district court erred in denying Cross's petition for postconviction relief based on a claim of ineffective assistance of counsel. A postconviction decision regarding a claim of ineffective assistance of counsel involves

mixed questions of fact and law and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced by counsel's deficient performance. *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). In making a determination, this court considers the totality of the evidence and is not required to "address both the performance and prejudice prongs if one is determinative." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). A strong presumption exists "that a counsel's performance falls within the wide range of reasonable professional assistance." *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) (quotation omitted). Appellant bears the burden of proof when alleging otherwise. *State v. Heinkel*, 322 N.W.2d 322, 326 (Minn. 1982).

Here, Cross asserts that he agreed to a stipulated-facts trial solely to increase his chances of receiving probation as a dispositional departure based on amenability to treatment, that trial counsel erred by not having him interviewed for a sex-offender treatment program, and that such error is egregious because acceptance into a program is necessary to demonstrate amenability to treatment. Cross provided no authority indicating that admittance into a sex-offender treatment program would establish amenability to probation and we are not willing to make that assumption. The district court clearly stated that Cross's unwillingness to own up to the offending conduct was the determinative factor precluding a downward departure. Thus, Cross's task was more than showing acceptance into a program; he needed to establish a basis for indicating the

treatment could be successful. He needed to show that such success was not just possible but was sufficiently probable to constitute a substantial and compelling basis for a dispositional departure. Absent a strong showing that treatment could be successful, Cross cannot meet his burden of proving that his trial counsel's failure to arrange an interview with a treatment program was an error or that this potential error prejudiced the outcome of the proceeding. Moreover, there is no basis for finding that a reasonably competent attorney would have performed differently. In sum, we conclude that the district court did not err in determining that Cross has not demonstrated that he received ineffective assistance of counsel and in denying his petition for postconviction relief.

### **III. Evidentiary Hearing**

The third issue is whether the district court abused its discretion in denying an evidentiary hearing, which Cross contends would have shown that he had been interviewed by and accepted into a recognized sex-offender treatment program. A postconviction court must hold an evidentiary hearing unless the petition and the record conclusively show that the petitioner is not entitled to relief. Minn. Stat. § 590.04, subd. 1 (2010). To receive an evidentiary hearing, a petitioner “must allege facts that would, if proved by a fair preponderance of the evidence, entitle him to relief.” *Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002). These facts must be “more than argumentative assertions without factual support.” *Beltowski v. State*, 183 N.W.2d 563, 564 (Minn. 1971); *see also Dobbins v. State*, 788 N.W.2d 719, 734 (Minn. 2010) (stating that the factual-support requirement may be satisfied by submitting sworn witness affidavits with

the petition). This court reviews the postconviction court's decision to deny an evidentiary hearing for an abuse of discretion. *Ferguson*, 645 N.W.2d at 446.

Cross argues that an evidentiary hearing would have demonstrated that he was interviewed and accepted into a recognized sex-offender treatment program. Cross did not include any letters or affidavits. Instead he relied on assertions that, based on appellate counsel's description of Cross and his crimes, a treatment program indicated it would accept him. No evidence was offered regarding the nature of this evaluation, what type of program Cross might be accepted into, or what outcomes were possible. Cross must provide more than the representations of his attorney in order to create a factual issue sufficient to warrant an evidentiary hearing. Because Cross did not provide sufficient factual support for his request, the district court did not abuse its discretion in denying an evidentiary hearing.

In sum, because the district court did not abuse its discretion in imposing the presumptive 86-month prison sentence, because Cross did not demonstrate ineffective assistance of counsel, and because Cross did not provide sufficient basis to require an evidentiary hearing, we affirm.

**Affirmed.**

Dated: