**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A12-0718**

State of Minnesota,
Respondent,

vs.

Randolph Arthur Johnson,
Appellant.

**Filed May 28, 2013**
**Affirmed**
**Stauber, Judge**

Sherburne County District Court
File No. 71CR10891

Lori Swanson, Minnesota Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Kathleen A. Heaney, Sherburne County Attorney, Suzanne Bollman, Assistant County Attorney, Elk River, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and Stauber, Judge.

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

**STAUBER**, Judge

On appeal from his conviction of third-degree criminal sexual conduct, appellant argues that (1) the evidence was insufficient to support his conviction and (2) the district

court abused its discretion by denying his motion for a downward dispositional departure. Appellant also filed a pro se supplemental brief claiming that he was denied the effective assistance of counsel. We affirm.

## FACTS

Appellant Randolph Johnson was charged with one count of third-degree criminal sexual conduct (force or coercion) in violation of Minn. Stat. § 609.344, subd. 1(c) (2008), and one count of fourth-degree criminal sexual conduct (force or coercion) in violation of Minn. Stat. § 609.345, subd. 1(c) (2008). The complaint alleged that on June 19, 2010, appellant sexually assaulted his girlfriend, K.L. At trial, K.L. testified that she lived with appellant, with whom she had an intimate relationship. K.L. testified that in June 2010, she travelled to Georgia to visit her son. While she was in Georgia, K.L. began receiving sexually explicit text messages from appellant. In the messages, appellant insisted that K.L. have sex with him when she returned from Georgia. K.L. responded by telling appellant that he was "gross" and that she wanted out of the relationship.

K.L. testified that when she arrived home, appellant "met me at the door and gave me a kiss and immediately groped my crotch." According to K.L., appellant insisted that she have sex with him that night. K.L. told appellant that she was not going to have sex with him, and that she just wanted to unpack and relax. K.L. claimed that appellant then followed her around the house telling her that she was going to have sex with him that night, and "that the sooner [she] agreed to it . . . , the sooner [they] could have a good evening."

K.L. testified that after the couple had an altercation in the garage, she went downstairs to her bathroom to "[g]et away" from appellant. According to K.L., appellant confronted her in the bathroom saying "you're going to f--- me" while grabbing her breasts and her shirt. Although K.L. told appellant to leave her alone, he kept "grabbing" at her and somehow they "ended up on the floor." Appellant eventually got K.L.'s pants off and inserted his finger into K.L.'s vagina. K.L. testified that she screamed from the pain and told appellant to stop. Appellant then left the room to get some lubricant.

K.L. testified that after appellant left, she grabbed her cell phone and texted a friend: "come here and bring the police. Rape!" Appellant then returned with the lubricant, squirted it on K.L., and again inserted his fingers in K.L.'s vagina. K.L. claimed that she told appellant "no" and that his actions caused her "[e]xtreme" pain. According to K.L., appellant stopped when her dogs began barking upstairs and she screamed for help because she thought her friend had arrived. K.L. testified that when the dogs started barking, "I think [appellant] got nervous and he ran upstairs." K.L. followed appellant upstairs where she waited until the police arrived. K.L. was then taken to a hospital, and a subsequent examination revealed that she had several bruises, abrasions, and a seven millimeter tear in the vaginal area.

On cross examination, K.L. admitted that some of the bruising and abrasions were unrelated to the incident that night, and that some of the bruises may have occurred from the altercation the couple had in the garage before the alleged sexual assault occurred. Moreover, the nurse who examined K.L. admitted that K.L.'s vaginal tear was "[p]retty small" and that K.L's physical injuries may not have come from the alleged sexual

assault. Appellant testified in his defense and admitted that he had an altercation with K.L. in the garage. But appellant claimed that the two eventually calmed down and engaged in consensual sexual contact on the floor of the bathroom. Appellant testified that he eventually stopped touching K.L.'s vagina when she told him that "this just isn't working."

A jury found appellant guilty of the charged offenses. Appellant subsequently moved for a downward dispositional departure. The district court denied the motion and sentenced appellant to 48 months in prison. This appeal followed.

## D E C I S I O N

### I.

When reviewing a challenge to the sufficiency of the evidence, this court conducts a thorough analysis of the record to determine whether the jury reasonably could find the defendant guilty of the offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, the reviewing court views the evidence in the light most favorable to the verdict and assumes that the jury believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. *State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010). This court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably could conclude that the defendant is guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

Appellant was convicted of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(c). To convict appellant of this offense, the state was required to prove, beyond a reasonable doubt, that appellant engaged in sexual penetration with K.L. and that he used force or coercion to accomplish the penetration. *Id*. "Force" is defined as:

> the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another, which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the complainant to submit.

Minn. Stat. § 609.341, subd. 3 (2008). "Coercion" is defined as:

> the use by the actor of words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon the complainant or another, or the use by the actor of confinement, or superior size or strength, against the complainant that causes the complainant to submit to sexual penetration or contact against the complainant's will. Proof of coercion does not require proof of a specific act or threat.

*Id.*, subd. 14 (2008).

Appellant argues that the evidence was insufficient to support his conviction of third-degree criminal sexual conduct because K.L.'s credibility was substantially undermined and the independent corroborating evidence of force or coercion and lack of consent was minimal. We disagree. Uncorroborated testimony may be insufficient to convict a defendant if there are "additional reasons to question the victim's credibility." *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (citations omitted). But absent

such reasons, appellate courts have been reluctant to reverse convictions based on the lack of corroboration of a victim's testimony because "the task of weighing credibility [is] for the jury, not this court." *State v. Reichenberger*, 289 Minn. 75, 79, 182 N.W.2d 692, 695 (1970); *see also Foreman*, 680 N.W.2d at 539 (affirming conviction of assault in domestic-abuse case based on victim's uncorroborated testimony when no reasons existed to question victim's credibility and her testimony at trial was uncontradicted).

Here, K.L. testified that appellant forcibly inserted his finger into her vagina, that the sexual contact hurt, and that she did not consent to the sexual contact. If believed, this testimony alone is sufficient to sustain appellant's conviction. *See Foreman*, 680 N.W.2d at 539 (stating that "a conviction can rest on the uncorroborated testimony of a single credible witness") (quotation omitted). Moreover, evidence was presented that K.L. had various bruises and scrapes on her body, including a small vaginal tear. These injuries tended to corroborate K.L.'s testimony. The record also reflects that when police arrived at the house, K.L. was crying and visibly upset. K.L.'s demeanor further tends to corroborate her testimony. *See State v. Mosby*, 450 N.W.2d 629, 635 (Minn. App. 1990) (sexual-assault victim's demeanor after assault corroborated her testimony), *review denied* (Minn. Mar. 16, 1990). Although appellant testified that the sexual contact was consensual, and testimony was presented indicating that K.L.'s bruises and abrasions may have occurred before the alleged sexual assault, the jury did not believe this evidence and testimony. It is well settled that this court defers to the jury's credibility determinations, and the jury believed the evidence and testimony presented by the state and disbelieved any evidence and testimony to the contrary. *See State v. Watkins*, 650 N.W.2d 738, 741

(Minn. App. 2002); *see also State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989) (stating that when considering a claim of insufficient evidence, the reviewing court assumes that "the jury believed the state's witnesses and disbelieved any evidence to the contrary"). Accordingly, the evidence was sufficient to sustain appellant's conviction of third-degree criminal sexual conduct.

**II.**

The district court must order the presumptive sentence unless "substantial and compelling circumstances" justify departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Whether to depart from the sentencing guidelines rests within the district court's discretion, and this court will not reverse the decision 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). Only in a "rare" case will an appellate court reverse a sentencing court's refusal to depart. *Kindem*, 313 N.W.2d at 7.

In weighing whether to impose a downward dispositional departure from the presumptive sentence, a district court considers "the defendant as an individual and [focuses] on whether the presumptive sentence would be best for [the defendant] and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). One factor to consider is the defendant's amenability to probation. *Id.* Other relevant factors include the defendant's age, prior criminal history, remorse, cooperation, attitude while in court, and support from family and friends. *Id.* (citing *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)).

Here, in considering appellant's motion to depart, the district court specifically referenced the *Trog* factors, the pre-sentence investigation (PSI), and the psychosexual evaluation. The court found that both the probation agent and the psychosexual evaluator did not believe that appellant is amenable to probation. Although the court found that appellant has the support of his family, the court stated that after considering the relevant factors, "I cannot find that [appellant] is amenable to probation or treatment. He has resisted every effort to have a meaningful psychosexual evaluation, and has said that this behavior is not his responsibility but is the responsibility of everybody but himself." Thus, the district court denied appellant's motion for a downward dispositional departure.

Appellant argues that the district court clearly erred by concluding that the psychosexual evaluator did not believe he was amenable to probation because a review of the evaluation reveals that "the evaluator presented a much more nuanced assessment, one that concluded that [appellant] would benefit from treatment." Appellant argues that because the district court relied heavily on the evaluator's assessment in denying his departure motion, the decision was clearly erroneous. Appellant further contends that a review of the *Trog* factors establishes the presence of mitigating factors supporting his request for a dispositional departure. Specifically, appellant points out that he has (1) no prior criminal record; (2) established ties to the community; (3) a strong support network; (4) a remarkably stable work history; and (5) ultimately accepted responsibility for his actions. Thus, appellant argues that the district court abused its discretion by denying his departure motion.

We agree that there are mitigating factors that could support a decision to depart. But, it is well established that the presence of mitigating factors does not require the district court to place a defendant on probation or impose a shorter term than the presumptive sentence. *See State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) (stating that even if there were reasons to depart, an appellate court will not disturb the district court's sentence if the district court had reasons for refusing to depart). The district court declined to depart, in part, because the PSI and the psychosexual evaluation indicated that appellant is not amenable to probation. And despite appellant's argument to the contrary, the district court's findings that the psychosexual evaluation indicates that appellant is not amenable to probation is supported by the evaluation. The record reflects that after indicating that appellant would benefit from treatment, the evaluation goes on to state that appellant "will still likely resist psychological interpretations. His defensiveness and cognitive construction will likely be barriers to his treatment." Moreover, the evaluation states that appellant (1) "continues to deny his behaviors were non-cooperative in nature"; (2) "presents . . . no insight into his motivations for offending"; (3) identifies no specific steps to prevent future offending; and (4) is "unable or unwilling to express empathy for the victim of his offense." Although the psychosexual evaluation indicates that outpatient treatment is a viable option for appellant, the overall language of the evaluation supports the district court's conclusion that the evaluator did not believe appellant is amenable to probation.

The court also relied on the PSI recommendation that appellant be committed to the Department of Corrections for his offense. To support the recommendation, the PSI

notes that appellant refused to acknowledge responsibility for his actions and that the "disconnect from the reality of this offense and the impact it could have had on the victim makes his amenability to supervision and treatment questionable at best." The PSI further notes that appellant's "lack of awareness and empathy are significant treatment deterrents as there would need to be an awareness of a problem requiring the need for treatment for there to be any possibility of success." The PSI supports the district court's conclusion that appellant is not amenable to probation. Moreover, the district court considered the *Trog* factors in making the decision and concluded that in light of the *Trog* factors and the language contained in the PSI and psychosexual evaluation, "I cannot find . . . that [appellant is] amenable to probation or to treatment in a way that would justify a departure downward." Accordingly, this is not the "rare" case in which the district court abused its discretion by denying appellant's motion for a downward dispositional departure.

**III.**

In his pro se supplemental brief, appellant claims that he was denied the effective assistance of counsel. To establish ineffective assistance of counsel, a defendant "must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Caldwell*, 803 N.W.2d 373, 386 (Minn. 2011). An attorney acts within an objective standard of reasonableness by exercising the customary skills and diligence of a reasonably competent attorney under similar circumstances. *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009). There is a strong presumption that

counsel's representation was reasonable. *State v. Pearson*, 775 N.W.2d 155, 165 (Minn. 2009).

Appellant argues that his trial counsel was ineffective because she failed to object to K.L.'s testimony, failed to make objections during the testimony of the state's other witnesses, failed to introduce evidence of appellant's good character, and generally failed to have a competent trial strategy. But, "[w]hat evidence to present to the jury, what witnesses to call, and whether to object are part of an attorney's trial strategy which lie within the proper discretion of trial counsel." *Bobo*, 770 N.W.2d at 138. It is well settled that an attorney's trial strategy will generally not be reviewed later for competence. *Id.* Here, appellant's ineffective-assistance-of-counsel claim involves matters of trial strategy. Thus, appellant's claims are not reviewable. *See State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999).

Appellant also appears to claim that his counsel was ineffective because, even though she was retained as a private attorney, his trial counsel failed to disclose to him that she was also a public defender in Sherburne County. But claims contained in a pro se supplemental brief with "no argument or citation to legal authority in support of the allegations" are deemed waived. *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002); *see also State v. Ture*, 632 N.W.2d 621, 632 (Minn. 2001). This court will not consider arguments that the defendant has waived in this manner "unless prejudicial error is obvious on mere inspection." *State v. Bartylla*, 755 N.W.2d 8, 23 (Minn. 2008) (internal quotation marks omitted). Appellant here offers no legal support for his assertion and there is nothing in the record to indicate obvious prejudicial error by counsel's failure to

disclose her position as a public defender. Therefore, appellant's argument is waived.

**Affirmed.**