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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0093**

State of Minnesota,
Appellant,

vs.

John Thomas Elliott,
Respondent.

**Filed October 8, 2018
Reversed and remanded
Kirk, Judge**

Hennepin County District Court
File No. 27-CR-17-12392

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for appellant)

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Considered and decided by Kirk, Presiding Judge; Reilly, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

KIRK, Judge

The state appeals from the district court's decision granting respondent's motion for a downward durational departure for his conviction of agreeing to hire an individual he believed to be under the age of 18 to engage in sexual contact. The state argues that the district court

improperly considered offender-based mitigating factors, failed to find on the record that the offense was *significantly* less serious than typically involved in the commission of the offense, and erred in finding the offense less serious than typical. We reverse and remand.

FACTS

On March 2, 2017, 22-year-old respondent John Thomas Elliott responded by text to an advertisement on Backpage.com posted by an undercover officer. During the text exchange, the decoy told respondent that she was “almost 16,” and respondent replied, “16 is fine.” Respondent arrived to an agreed-upon location and was arrested. In his interview with police, he admitted that he had agreed to pay the decoy \$120 to engage in sexual contact with him, and stated that he believed that she was 16.

The state charged respondent with one felony count of hiring or agreeing to hire an individual whom he believed to be between 16 and 18 years old to engage in sexual contact, in violation of Minn. Stat. § 609.324, subd. 1(c)(3) (2016). Respondent entered a straight guilty plea. During a presentence investigation (PSI), respondent stated that he replied to that particular advertisement because it was for an 18-year-old woman who “looked closer” to his age than the women in other advertisements. Respondent admitted that he learned that the decoy was 16, but that he responded that “as long as she was 16 and could show me her ID, that would be fine.” Respondent explained that, when he arrived at the designated location, he left his wallet and condoms in the car so that he could check the woman’s ID.

Before sentencing, respondent filed a motion for a downward durational departure from a felony sentence to a gross-misdemeanor sentence. Over the state’s objection, the district court granted respondent’s motion and imposed a sentence of 365 days, with 364 days

stayed for two years. The district court reasoned that respondent's conduct was less onerous than the typical offense for four reasons: respondent had shown an appropriate level of remorse, respondent was relatively close in age to the decoy, respondent tried to verify that the decoy was at least 16 years old, and respondent did not seek out an underage prostitute. In its departure report, the district court noted that respondent "contacted [an] on-line ad for sex, not thinking [that the] person was underage. Police initiated the issue that she was underage." The state appeals.

D E C I S I O N

We 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). A district court may depart from the presumptive sentence provided under 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 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 (quotation omitted). "When the district court gives improper or inadequate reasons for a downward departure, we 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).

The imposition of a gross-misdemeanor sentence for a felony conviction is a downward durational departure. *State v. Bauerly*, 520 N.W.2d 760, 762 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994). In granting a durational departure, a district court may

only consider factors bearing on the severity of the offense itself, and not on the characteristics of the defendant. *Solberg*, 882 N.W.2d at 623. “A downward durational departure is justified only if the defendant’s conduct was ‘significantly less serious than that typically involved in the commission of the offense.’” *Id.* at 624 (quoting *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985)).

Here, the district court downwardly departed after finding that respondent’s conduct was less serious than typical for four reasons. We address each in turn. The state argues that the district court erred by not explicitly stating that respondent’s conduct was *significantly* less serious than the typical offense. Assuming without deciding that the state is correct, we nonetheless scrutinize the record to determine whether it supports such a finding. *Id.* at 623.

First, the district court noted respondent’s remorse. “[A] defendant’s remorse generally does not bear on a decision to reduce the length of a sentence.” *Id.* at 625. A durational departure may be granted based on a defendant’s remorse only if “a defendant can show that his demonstrated remorse is directly related to the criminal conduct at issue and made that conduct significantly less serious than the typical conduct underlying the offense of conviction.” *Id.* at 626. Here, the district court did not explain how respondent’s remorse might directly relate to his criminal conduct to make it significantly less serious than typical, and the record does not support a finding that respondent’s remorse directly related to his criminal conduct. Accordingly, the district court erred in relying on respondent’s remorse to support a downward durational departure.

Second, the district court found that respondent’s closeness in age to the decoy made his conduct less serious than the typical offense. Respondent acknowledges that age is

generally an offender-based factor and cannot support a durational departure. *See id.* at 624. Respondent argues, however, that under these circumstances, respondent's closeness in age to the decoy makes his offense less serious than the typical offense. Respondent cites no caselaw that supports his argument, and we disagree with his contention. The exploitative nature of an adult agreeing to hire a minor to engage in sexual contact is no less serious based on the fact that he was "only" six years older than she. *Cf. State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985) (upholding an upward durational departure and noting that "[a]n age difference of 7 years when the victim is only 14 and the defendant 21 is more significant than it would be if the victim were an adult").

Third, the district court found that respondent's conduct was less serious because he stated that he intended to verify that the decoy was 16 years old before following through on the transaction. The state argues that the district court should not have relied on respondent's statements from the PSI report concerning his intent, and that, even if respondent did intend to verify her age, respondent's conduct was not any less serious than typical. We agree. Minnesota Statutes and the sentencing guidelines provide stronger penalties for a defendant who agrees to hire an individual that he believes to be younger than 16 to engage in sexual contact, compared to hiring an individual that he believes to be between 16 and 18. *See* Minn. Stat. § 609.324 (2016); Minn. Sent. Guidelines 4.A, 5.A (2016). Had respondent engaged in sexual contact with an individual under 16, the state could have charged him with fourth-degree criminal sexual conduct. Minn. Stat. § 609.345, subd. 1(b) (2016). Any intent to verify that the decoy was at least 16 years old merely amounts to not committing a more

serious crime. It does not make respondent's conduct in agreeing to hire an individual he believed to be 16 years old to engage in sexual contact any less serious.

Finally, the district court found that respondent's conduct was less serious because he responded to an advertisement for an 18-year-old woman and did not initially seek out a minor. The state argues that because some websites ban posts that explicitly advertise underage prostitution, it is typical for a defendant to initially respond to an advertisement listing an individual's age as over 18, later learn that the individual's actual age is under 18, and then agree to hire a minor to engage in sexual contact. Respondent argues that this case is similar to *State v. Bendzula*, in which this court upheld a downward departure, in part, because the police prompted the defendant to sell drugs. 675 N.W.2d 920, 924 (Minn. App. 2004). In that case, this court wrote that while the typical drug seller "is suspected, investigated, arrested, and prosecuted," the defendant "was 'prompted' to sell drugs by the efforts of the police in enlisting one whom respondent considered a friend as an informant because the police hoped respondent would, in turn, become an informant and identify his source of supply." *Id.*

Unlike *Bendzula*, the record here does not reflect that respondent needed to be "prompted" to commit the offense. He set out to hire an individual to engage in prostitution. When offered the opportunity to hire a minor, he immediately agreed. There is no indication that respondent was unsure, or required any prompting, when he learned the decoy's age. He believed that the decoy was 16 when he committed the charged offense. His opportunistic conduct is no less serious simply because it was not his initial intent when he responded to the advertisement.

We note that our analysis on this point is consistent with this court’s recent opinion, *State v. Dentz*, which held that when a person solicits a minor to engage in prostitution, in violation of Minn. Stat. § 609.324, subd. 1 (2016), the fact that the person did not set out specifically seeking a minor is not a proper ground for a durational sentencing departure. ___ N.W.2d ___, ___, 2018 WL 4056019, at *3, 5 (Minn. App. Aug. 27, 2018). This court “is bound by supreme court precedent and the published opinions of the court of appeals.” *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010). Although *Dentz* had not been published when the district court issued its decision, we are bound to apply its holding here. *See id.*

Respondent also argues that his lack of a “predatorial nature” shows that his conduct was significantly less serious than typical. Respondent argues that his conduct was not predatory because he was close in age to the decoy and was not actively seeking out an underage prostitute. However, both respondent’s age and the fact that he initially responded to an advertisement for an 18-year-old woman have been fully addressed above and do not provide a sufficient basis for a downward durational departure.

Because the district court gave inadequate reasons for granting a downward durational departure and no alternative grounds support the departure, we reverse and remand for resentencing that is consistent with this opinion.

Reversed and remanded.