**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A18-0137**

State of Minnesota,
Respondent,

vs.

DeAntae Demond Davis,
Appellant.

**Filed December 24, 2018**
**Affirmed**
**Halbrooks, Judge**

Stearns County District Court
File No. 73-CR-15-10453

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Bratvold, Judge; and Klaphake, Judge.*

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

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

**HALBROOKS**, Judge

Appellant challenges his conviction of being an ineligible person in possession of a firearm, arguing that (1) the district court erred by denying his motion to suppress evidence discovered during a search of his bedroom, (2) he was deprived of his right to a fair trial, and (3) the district court abused its discretion by denying his motion for a downward dispositional departure. We affirm.

## FACTS

On October 14, 2015, T.B. contacted the St. Cloud Police Department to report that he had been robbed at gunpoint the previous night. He provided a physical description of the robber, and law enforcement determined that the description matched that of appellant DeAntae Demond Davis. The following day, Officer Matthew Pribnow of the St. Cloud Police Department learned that there was probable cause to arrest Davis for the robbery. He went to Davis's address, but Davis was not home. His mother's fiancé, J.J., answered the door and signed a form consenting to a search of the residence.

Officer Pribnow was unable to locate the firearm used during the robbery. But he discovered a photo strip in Davis's bedroom that depicted Davis holding a firearm that was consistent with the description of the one used during the robbery. Officer Pribnow sent the photograph to Nancy Lang, an investigator with the St. Cloud Police Department. Investigator Lang observed that the photo strip listed a web address at which a video could be viewed. She ultimately obtained a video recorded on October 12, 2015, at a mall in

St. Cloud. In the video, Davis is holding the firearm and points it at the camera. Davis is ineligible to possess a firearm based on a prior juvenile adjudication for a crime of violence.

Davis was charged with being an ineligible person in possession of a firearm and certified as an adult. Davis moved to suppress the evidence discovered during the search, arguing that J.J. did not have authority to consent to the search of his bedroom. Following a hearing, the district court denied the motion. At the conclusion of trial, the jury found Davis guilty. Davis moved for a downward durational or dispositional departure. The district court denied the motion and imposed a presumptive 60-month sentence. This appeal follows.

## D E C I S I O N

### I.

When reviewing a pretrial order on a motion to suppress evidence, we independently review the facts and determine, as a matter of law, whether the district court erred in denying the motion. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). When the facts are not in dispute, our review is de novo, and we must determine whether the police articulated an adequate basis for the search or seizure. *Id*. We will not reverse the district court's factual findings unless they are clearly erroneous. *State v. Ruoho*, 685 N.W.2d 451, 458 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

The Fourth Amendment protects against unreasonable searches and seizures. *State v. Stavish*, 868 N.W.2d 670, 674-75 (Minn. 2015). A search is presumptively unreasonable when police do not have a warrant. *Id.* at 675. Evidence collected through an illegal search may be excluded. *State v. Lindquist*, 869 N.W.2d 863, 868 (Minn. 2015). A warrantless

search is reasonable only if it falls within a defined exception to the warrant requirement. *Stavish*, 868 N.W.2d at 675. Consent is an exception to the warrant requirement. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011).

Davis argues that J.J.'s consent to search Davis's bedroom was invalid, and therefore the district court erred by denying his motion to suppress the evidence obtained during the search. He argues that J.J. did not have actual or apparent authority to consent to the search of his bedroom. A third party has the authority to consent to a search if the person "possessed common authority over or other sufficient relationship to the premises." *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 993 (1974). If, based on the facts available, the officer objectively believes the third party has authority over the premises and could give consent, then the consent is valid. *State v. Thompson*, 578 N.W.2d 734, 740 (Minn. 1998). Whether actual or apparent authority exists is a legal question that we review de novo. *State v. Dotson*, 900 N.W.2d 445, 450 (Minn. App. 2017).

Here, J.J. answered the door when the police arrived. J.J. indicated that both he and Davis lived at the residence and identified himself as the fiancé of Davis's mother. The police asked if he would consent to a search of the property, and J.J. agreed. He read the consent-to-search form, indicated that he did not have any additional questions, and signed the form. He then led the officers to Davis's bedroom and again gave them permission to search it. Under these circumstances, it was objectively reasonable for Officer Pribnow to believe that J.J. had authority to consent to the search.

The Minnesota Supreme Court has previously held that a parent may validly consent to a search of their adult child's room if the child still lived in the parent's home. *State v.*

*Schotl*, 182 N.W.2d 878, 879-80 (Minn. 1971); *State v. Kinderman*, 136 N.W.2d 577, 580 (Minn. 1965). Davis argues that these cases are distinguishable because J.J. was not his parent or stepparent, but rather the fiancé of his mother. But as noted above, a third party may have the authority to consent if they possess a "sufficient relationship to the premises." *Matlock*, 415 U.S. at 171, 94 S. Ct. at 993. J.J. and Davis both lived at the residence, which was leased in J.J.'s name, and J.J. was engaged to Davis's mother. And unlike the children in *Schotl* and *Kinderman*, Davis was a minor at the time of the search. Accordingly, we conclude that J.J. had a sufficient relationship to the premises to give him apparent authority to consent to the search.

**II.**

Davis argues that the prosecutor committed prosecutorial misconduct by failing to adequately prepare his witnesses. "The state has a duty to prepare its witnesses, prior to testifying, to avoid inadmissible or prejudicial statements." *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). Improper testimony by a state's witness may be considered prosecutorial misconduct and justify reversal. *State v. Mahkuk*, 736 N.W.2d 675, 689-90 (Minn. 2007). We are "much more likely to find prejudicial misconduct when the state intentionally elicits impermissible testimony." *McNeil*, 658 N.W.2d at 232. "[A]n intentional elicitation of impermissible testimony, although erroneous, will warrant reversal only when it is likely that the impermissible testimony substantially weighed on the jury's decision." *Id.*

Davis argues that he was deprived of a fair trial based on improper testimony from one of the state's witnesses. At trial, the prosecutor called several witnesses to testify as

to how it determined that the firearm in the photo strip and video was real and not a replica. David Sohm, a retired police officer, testified about his experience with the model of firearm in the video. He testified that he was 99% certain that the firearm was real. During cross-examination, he was questioned about the possibility that he was wrong. He testified that he was "99 percent certain that this is a real firearm. Is there a potential one percent? There is always that potential. But I'm certain beyond a reasonable doubt that this is a gun." Defense counsel objected to Sohm's statement that he was certain beyond a reasonable doubt that the firearm was real. The district court sustained the objection and instructed the jury to disregard the statement.

We discern no prosecutorial misconduct. Sohm's statement was in response to a question during cross-examination; it was not elicited by the prosecutor. Sohm made the statement after being pressed by defense counsel about the possibility that his determination that the firearm was real was incorrect. And as noted, we will reverse a conviction only if it determines the statement "substantially weighed on the jury's decision." *Id.* The district court immediately ordered the jury to disregard the statement. We presume that the jurors follow the district court's instruction and that curative instructions are effective. *State v. Gatson*, 801 N.W.2d 134, 151 (Minn. 2011).

Moreover, the state presented extensive testimony to support its assertion that the firearm was real. Daniel Trautman, an officer with the St. Cloud Police Department, similarly testified that he was 98% certain that the firearm was real. Investigator Lang testified that during the investigation she examined real and replica firearms. She indicated that the firearm in the video had features that were consistent with real firearms but

inconsistent with replicas. Finally, the officers identified the firearm as a Springfield Armory XD-S .45 caliber handgun. Sohm testified that Springfield Armory does not make a replica of that model. Accordingly, it is unlikely that the improper statement substantially influenced the jury's decision.

**III.**

The district court has broad discretion in sentencing and 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." *State v. Van Ruler*, 378 N.W.2d 77, 81 (Minn. App. 1985). 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 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.* We will reverse a district court's refusal to depart only in a "rare" case. *Id.*

Davis argues that the district court abused its discretion by denying his motion for a downward dispositional departure.[1] He argues that he is particularly amenable to probation and that his age and traumatic background warrant a dispositional departure. He argues that he is only 19 and that he has demonstrated "a capacity for positive change" throughout the proceedings. He also argues that he had a traumatic childhood, including losing his father and a stepfather figure, and his mother being imprisoned. He argues that, because he "satisfied several factors" that support a dispositional departure, this court should reverse his guidelines sentence and impose a probationary sentence.

But a district court is not required to depart even when it finds that some factors support a departure. *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009). And other factors weighed against granting a dispositional departure. As the district court noted, Davis has an extensive juvenile record, and although he received various services while in the juvenile-justice system, he continued to commit crimes. Davis was designated for prosecution as an extended-jurisdiction juvenile (EJJ) in two cases, but had his EJJ status revoked and an adult sentence imposed in both cases. On this record, the district court did not abuse its discretion by imposing a guidelines sentence.

**Affirmed.**

[1] Davis does not appeal the denial of his motion for a downward durational departure.