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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1770**

State of Minnesota,
Respondent,

vs.

Joseph Raymond Kost,
Appellant.

**Filed August 12, 2019
Affirmed
Worke, Judge**

Kanabec County District Court
File No. 33-CR-18-62

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

Barbara McFadden, Kanabec County Attorney, Robb G. Hunter, Assistant County
Attorney, Mora, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that the district court abused its discretion by denying his motions for downward dispositional and durational departures from the presumptive sentence because he demonstrated that he was particularly amenable to probation, and because his kidnapping offense was less serious than typical. We affirm.

FACTS

On February 10, 2018, police officers responded to a 911 call from E.R., who reported that she was being assaulted at a residence. When officers arrived they found appellant Joseph Raymond Kost trying to get his vehicle unstuck in the driveway of his friend's home. Officers found E.R. in the home covered in blood, with a white belt around her wrist.

E.R. reported that after she entered the home, Kost hit her in the back of the head and choked her until she lost consciousness. When she regained consciousness, she was in a bedroom taped and tied up. Kost was outside, where he had backed his car up to the deck with the trunk open, causing E.R. to believe that Kost intended to put her in the trunk. E.R. freed herself, locked the door, found her cellphone in a cooler, and called the police.

Kost was charged with first-degree burglary, kidnapping, third-degree assault, and fifth-degree drug possession. On May 18, 2018, Kost entered an *Alford* plea, wherein he agreed to plead guilty to kidnapping and assault in exchange for dismissal of the remaining charges. The parties agreed to a presumptive 58-month prison sentence, with the understanding that Kost would move for a downward departure, but that any decision to

depart would ultimately reside within the district court's discretion. The district court denied Kost's departure motion and sentenced him to 58 months in prison on the kidnapping conviction, and at Kost's election, an executed concurrent one-year-and-one-day sentence on the assault conviction. This appeal followed.

D E C I S I O N

Kost argues that the district court abused its discretion by denying his motion for downward dispositional and durational departures. "This court will not generally review a district court's exercise of its discretion to sentence a defendant when the sentence imposed is within the presumptive guidelines range." *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). Only in a "rare" case will an appellate court reverse a sentencing court's refusal to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Dispositional departure

Kost argues that he demonstrated his particular amenability to treatment in a probationary setting under the factors set forth in *State v. Trog*, and therefore the district court abused its discretion in declining to depart from the presumptive prison sentence. 323 N.W.2d 28, 31 (Minn. 1982). A defendant's particular amenability to probation is a mitigating factor that may support a downward departure from a presumptive sentence. Minn. Sent. Guidelines 2.D.3.a.7 (Supp. 2017). "The requirement that a defendant be 'particularly' amenable to probation ensures that the defendant's amenability to probation distinguishes the defendant from most others and truly presents the substantial and

compelling circumstances necessary to justify a departure.” Minn. Sent. Guidelines cmt. 2.D.303 (Supp. 2017).

In determining whether a defendant is particularly amenable to treatment in a probationary setting, a district court considers: “the defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family.” *Trog*, 323 N.W.2d at 31. Kost argues that all of the *Trog* factors support his motion for a dispositional departure.

Regarding his age, the district court noted that Kost “is not a young person.” Regarding his prior record, the district court found that Kost “does have a criminal history,” which includes a felony issuance of a dishonored check, misdemeanor and gross-misdemeanor theft offenses, and a misdemeanor issuance of a worthless check. Because Kost entered an *Alford* plea, the district court found the issue of remorse to be an open question. After noting that Kost disagreed with the state’s rendition of the facts, the district court concluded, rhetorically, “Is it really remorse because he finds himself where he’s sitting, or is he sorry for what he did, or is it a combination of those?”

In Kost’s favor, the district court concluded that he was cooperative and had a good attitude in court. The district court found the factor regarding the support of his friends and family to be neutral, stating: “[T]here does appear to be a strained family relationship and whether . . . Kost is able to abstain in the future and maintain a healthy relationship and restore some of those family relationships that make him more likely to be successful in his future are yet to be seen.”

Finally, the district court noted that Kost has a “substantial and lengthy history of substance abuse,” but had never sought treatment. The district court concluded: “[W]hether or not he’s particularly amenable to treatment is still a question in my mind. It may be that . . . this is the turning point in his life, but I can’t be convinced of that.” The record reflects that the district court fully evaluated Kost’s particular amenability to probation under the *Trog* factors, ultimately concluding that a dispositional departure was not warranted. On this basis, the district court did not abuse its discretion in declining to dispositionally depart.

Durational departure

Kost argues that his kidnapping offense was significantly less serious than the typical kidnapping, and therefore the district court abused its discretion by denying his motion for a durational departure. “A durational departure must be based on factors that reflect the seriousness of the *offense*, not the characteristics of the offender.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). “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 (quotation omitted).

Kost argues that the district court failed to explain its reasoning for denying his motion to durationally depart, but that assertion is not supported by the record. Kost claimed that the kidnapping offense was significantly less serious because he only removed E.R. a short distance of approximately 20 feet and confined her for a short period of time so that he could clean up the blood from her head injuries. The district court noted that, even accepting Kost’s rendition of the facts as true, it did not lessen the severity of the

crime, because he did not show any concern for E.R. or her injuries. The district court stated:

The real issue in this case . . . is not so much of how far Mr. Kost had moved [E.R.] from the incident where she was injured, but really what was the purpose of that. What was the purpose of her belongings . . . being in a cooler? . . . What was the purpose in binding her instead of calling law enforcement? And if he truly were attacked, why didn't he call law enforcement to report it so that they could respond and take appropriate measures?

And so in the grand scheme of things . . . it does not appear to me that this particular kidnapping offense is less serious than others

And so the real danger . . . is if she had not woken up, what was next? . . . I don't find that Mr. Kost was particularly caring about [E.R.'s] condition or that he was likely to get her help after that took place.

The record reflects that the district court fully considered the undisputed facts and found that they did not support Kost's assertion that this kidnapping was significantly less serious than the typical kidnapping. Therefore, the district court did not abuse its discretion by denying Kost's motion for a downward durational departure.

Affirmed.