STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0217
A19-0218

State of Minnesota,
Respondent,

vs.

Richard Danell Dunston,
Appellant.

Filed December 23, 2019
Affirmed
Larkin, Judge

Stearns County District Court
File Nos. 73-CR-18-3558, 73-CR-15-3366

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Chief Deputy County Attorney, St. Cloud, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Reyes, Judge; and Slieter, Judge.

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

LARKIN, Judge

In this consolidated appeal, appellant challenges his conviction and sentence for a 2018 felony domestic assault, his sentence for a 2015 second-degree assault, and the district court's revocation of his probation for the 2015 offense. He argues that the district court erred by refusing to allow him to withdraw his guilty plea to the 2018 offense, refusing to recalculate the criminal-history score used to sentence him for the 2015 and 2018 offenses, denying his request for a downward dispositional departure on the 2018 offense, and revoking probation on the 2015 offense based on his commission of the 2018 offense. We affirm.

FACTS

In April 2018, respondent State of Minnesota charged appellant Richard Danell Dunston with two counts of felony domestic assault for conduct that allegedly occurred that month. The complaint alleged that Dunston had assaulted V.A.C., his then girlfriend. The district court issued a domestic abuse no contact order (DANCO), prohibiting Dunston from having contact with V.A.C. and two of his children. At the time of the 2018 offense, Dunston was on probation for a 2015 second-degree assault against a different victim. The 2018 charges triggered revocation of Dunston's probation for the 2015 offense.

Dunston resolved his 2018 charges and the resulting alleged probation violation with a "global resolution." He agreed to plead guilty to one count of felony domestic assault in the 2018 case with the understanding that the state would dismiss the second count, as well as domestic assault charges in a third case not at issue in this appeal. Dunston

also agreed to admit that he violated probation in his 2015 case. As part of the settlement, the state agreed to a sentencing cap of 36 months of imprisonment.

At the plea hearing, Dunston admitted that he "grab[bed] V.A.C. by the wrist forcefully and ben[t] it in a way that it wasn't supposed to be bent" and "ended up leaving a bruise on V.A.C.'s wrist from how hard [he] grabbed her." As to the alleged probation violation, Dunston admitted that his plea of guilty was an admission that he had "failed to remain law abiding while on probation," that he "intentionally and inexcusably violated [the] terms of probation," and that he "broke the law."

The district court released Dunston from custody pending sentencing. After Dunston's guilty plea and release, V.A.C. met with a victim-assistance coordinator and recanted her claim that she had been assaulted by Dunston. The state disclosed V.A.C.'s recantation to the defense, as well as communications that it had had with V.A.C. prior to Dunston's guilty plea. In those other communications, V.A.C. told the victim-assistance coordinator that Dunston assaulted her in front of their children and that she was concerned that one of her children might have to testify. V.A.C. also told the victim-assistance coordinator that she did not want Dunston to be charged with a crime. Lastly, V.A.C. and the victim-assistance coordinator discussed the possibility of the state helping V.A.C. find a place to live and pay her bills.

While Dunston was released from custody, the state charged him with one count of engaging in sex trafficking and 15 counts of violation of a no-contact order based on conduct that occurred after his release. V.A.C. was the alleged victim of those offenses.

After the state disclosed its communications with V.A.C., Dunston moved to withdraw his guilty plea. At a hearing on Dunston's motion, defense counsel informed the district court that V.A.C. had spoken with a defense investigator and "basically gave the same version of [the recantation] that she gave to [the state]." Defense counsel argued that V.A.C. was sober when she recanted and that there were now "two consistent statements that recant what happened, . . . [and] one drunken statement that alleges [Dunston] committed a crime." Defense counsel further argued that "two sober statements that are consistent with each other [are] more credible than one drunken statement." Lastly, defense counsel argued that if she had known that V.A.C. was not credible and that V.A.C.'s story had changed, she would have advised Dunston to proceed to trial.

The district court denied Dunston's motion for plea withdrawal, noting that V.A.C.'s recantation coincided with Dunston's new charges and that the court had "a really difficult time with the timing" because it called into question the validity of V.A.C.'s recantation. The district court reasoned that V.A.C.'s recantation after Dunston was released from custody "negatively impacts the County because, as [defense counsel] said, now there would be two allegedly sober statements versus one on the night of the offense in which [V.A.C.] . . . allegedly was intoxicated." The district court therefore concluded that allowing Dunston to withdraw his plea would be "very prejudicial to the State."

Before sentencing, Dunston once again moved to withdraw his guilty plea, asking the district court to reconsider its decision. Dunston also moved the district court to correct the sentence for his 2015 second-degree assault. Specifically, Dunston challenged the weight assigned to two prior Illinois convictions that were included in his criminal-history

score when sentencing that offense. The parties and the district court treated Dunston's criminal-history-score challenge as applying both to Dunston's motion to correct his sentence for the 2015 second-degree assault and to sentencing for his 2018 felony domestic assault. Lastly, Dunston moved for a downward dispositional departure, arguing that his recent success on probation justified a sentencing departure on his felony domestic assault.

The district court rejected Dunston's renewed plea-withdrawal motion, his criminal-history-score challenge, and his request for a downward dispositional departure. The district court sentenced Dunston to an executed term of imprisonment of 30 months for his 2018 felony domestic assault and revoked the stayed prison term of 54 months for his 2015 second-degree assault.

Dunston appeals.

D E C I S I O N

I.

Dunston contends that the district court erred by denying his presentence motion to withdraw his guilty plea. We understand his briefing to present two theories in support of relief.[1] First, he argues that he is "entitled to presentence plea withdrawal because the state failed to disclose exculpatory and impeaching evidence in the form of statements from [V.A.C.]." As support for that argument, he relies on *Brady v. Maryland*, 373 U.S.

[1] Because the parties did not request oral argument, the arguments are limited to their briefs. *See* Minn. R. Civ. App. P. 133.03 (providing that "[i]f a party desires oral argument, a request must be included in the statement of the case"); *see also* Minn. R. Civ. App. P. 134.01(a) (stating that oral argument will be allowed unless "no request for oral argument has been made by either party in the statement of the case required by Rule 133.03").

83, 83 S. Ct. 1194 (1963), and Minn. R. Crim. P. 9.01. Second, he contends that even if the state did not violate *Brady* or rule 9.01, "the concerns raised were sufficient to establish that plea withdrawal would be fair and just prior to sentencing" under a traditional plea-withdrawal analysis. *See* Minn. R. Crim. P. 15.05 (authorizing plea withdrawal under two circumstances). We address each argument in turn.

"Entitlement" to Plea Withdrawal

The so-called *Brady* rule provides that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97. Thus, the state has an affirmative constitutional duty to disclose evidence that is favorable and material to the defense. *Id.* at 87-88, 83 S. Ct. at 1196-97; *see* Minn. R. Crim. P. 9.01, subd. 1(6) (providing that the prosecution must disclose "[m]aterial or information in the prosecutor's possession and control that tends to negate or reduce the defendant's guilt"); *see also Pederson v. State*, 692 N.W.2d 452, 460 (Minn. 2005) (stating that rule 9.01 embodies the first two components of the test for alleged *Brady* violations).

A *Brady* violation includes three elements: (1) the evidence at issue must be favorable to the defendant, either because it is exculpatory or it is impeaching; (2) the evidence was willfully or inadvertently suppressed by the state; and (3) the evidence must be material—in other words, the absence of the evidence prejudiced the defendant. *Zornes v. State*, 903 N.W.2d 411, 417 (Minn. 2017); *Pederson*, 692 N.W.2d at 459.

The parties disagree regarding whether the state's failure to disclose V.A.C.'s statements before Dunston pleaded guilty constitutes a *Brady* violation. We note that the *Brady* rule was announced in response to a prosecutor's failure to disclose material evidence *before trial*. *Brady*, 373 U.S. at 84, 83 S. Ct. at 1195. The Supreme Court explained that the rule was based on "avoidance of an unfair trial to the accused" stating, "Society wins not only when the guilty are convicted but when criminal trials are fair." *Id.* at 87, 83 S. Ct. at 1197. Dunston does not cite any authority indicating that the *Brady* rule applies outside of the trial context or that a *Brady* violation can result from a prosecutor's failure to disclose evidence prior to a defendant's guilty plea. In fact, the United States Supreme Court has held that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." *United States v. Ruiz*, 536 U.S. 622, 633, 122 S. Ct. 2450, 2457 (2002). Thus, we are not persuaded that Dunston is entitled to withdraw his guilty plea based on the alleged *Brady* violation.[2]

The state's duty to disclose evidence to the defense is also governed by Minn. R. Crim. P. 9.01. Minn. R. Crim. P. 9.01 requires prosecutors to disclose written or recorded statements and written summaries of oral statements that relate to the case. Minn. R. Crim. P. 9.01, subd. 1(2). Under Minn. R. Crim. P. 9.01, subd. 1(6), the prosecution must disclose

[2] Nonetheless, we observe that although V.A.C.'s recantation was exculpatory, it did not occur until after Dunston pleaded guilty. We fail to discern how V.A.C.'s post-plea recantation prejudiced Dunston's original decision to plead guilty. Although the absence of that evidence may seem prejudicial in hindsight, the state did not suppress that evidence prior to Dunston's guilty plea. It simply did not exist at that time.

"[m]aterial or information in the prosecutor's possession and control that tends to negate or reduce the defendant's guilt." This obligation extends to materials in possession or control of the prosecutor's staff and any others who have participated in the investigation or evaluation of the case. Minn. R. Crim. P. 9.01, subd. 1a(1); *see Woodruff v. State*, 608 N.W.2d 881, 885 (Minn. 2000) (discussing previous version of rule 9.01). The supreme court has explained that the mandatory language of rule 9.01 requires the state to disclose the substance of every oral statement by a witness that relates to the case, even if the witness does not disclose new or different information from previously disclosed statements. *State v. Palubicki*, 700 N.W.2d 476, 489-90 (Minn. 2005).

"Each party has a continuing duty of disclosure before and during trial." Minn. R. Crim. P. 9.03, subd. 2(c). If "after compliance with any discovery rules or orders, a party discovers additional material, information or witnesses subject to disclosure, that party must promptly notify the other party of what it has discovered and disclose it." Minn. R. Crim. P. 9.03, subd. 2(b). All material must be disclosed "in time to afford counsel the opportunity to make beneficial use of it." Minn. R. Crim. P. 9.03, subd. 2(a).

The state acknowledges—and we agree—that "it did not comply with Minn. R. Crim. P. 9.01, subd. 1(2) when it failed to disclose the contents of oral communications with V.A.C. that occurred before [Dunston] pleaded guilty."

As to the remedy for the state's violation of rule 9.01, we note that "[a] defendant has no absolute right to withdraw a guilty plea after entering it." *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). With the exception of one case, all of the cases on which Dunston relies for his assertion that he is entitled to withdraw his guilty plea based on the

discovery violation are cases discussing the new-trial remedy for such violations. *See State v. Jackson*, 770 N.W.2d 470, 478-81 (Minn. 2009) (determining that even if the state violated the discovery rule, there was no reasonable probability that the outcome at trial would have been different); *State v. Schwantes*, 314 N.W.2d 243, 244-45 (Minn. 1982) (granting a new trial in the "interests of justice and to [ensure] that the reciprocal discovery rules" are observed by both the prosecution and defense where state failed to notify the defense of a statement that discredited the defendant's alibi); *State v. Zeimet*, 310 N.W.2d 552, 553-54 (Minn. 1981) (granting new trial because the state, without justification, failed to disclose exculpatory, important evidence to the defense); *State v. Moore*, 493 N.W.2d 606, 609 (Minn. App. 1992) (concluding that where the defendant would have chosen a different trial defense but for the discovery violation, district court abused its discretion by not ordering a new trial as a sanction for the violation), *review denied* (Minn. Feb. 12, 1993).

The single plea-withdrawal case that Dunston cites, *Shorter v. State*, involved an exercise of the Minnesota Supreme Court's supervisory powers to reverse the denial of a postconviction request for plea withdrawal based in part on newly discovered evidence. 511 N.W.2d 743, 745-47 (Minn. 1994). In granting relief, the supreme court found persuasive "the unusual fact that the Minneapolis police department reopened its investigation and was prepared to testify before the [district] court that the original police investigation into Shorter's case was incomplete." *Id.* at 746. The supreme court noted that "the highly unusual facts of [the] case render[ed] [Shorter's] plea suspect." *Id.*

The circumstances here are unlike those in *Shorter* in two ways. First, V.A.C.'s statements to agents of the prosecutor's office do not render Dunston's guilty plea suspect. Instead, as the district court reasonably concluded, V.A.C.'s recantation was suspect because it occurred after Dunston was released from jail and allegedly contacted her. Second, the supreme court granted relief in *Shorter* based on an exercise of its "supervisory powers," which are powers this court lacks. *Id.* at 747; *see State v. Gilmartin*, 535 N.W.2d 650, 653 (Minn. App. 1995) (emphasizing that as an intermediate appellate court, this court cannot properly exercise "supervisory powers reserved to this state's supreme court"), *review denied* (Minn. Sept. 20, 1995). Even if this court had such powers, justice would not require their exercise under the circumstances of this case, which reasonably suggest that Dunston used his opportunity for presentence release to further victimize V.A.C., resulting in her recantation.

In sum, we are not persuaded that Dunston is "entitled" to withdraw his guilty plea based on the alleged *Brady* violation or the certain discovery violation.

Traditional Plea-Withdrawal Analysis

Minn. R. Crim. P. 15.05 authorizes plea withdrawal under two circumstances. First, "[a]t any time the court must allow a defendant to withdraw a guilty plea upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. Second, "[i]n its discretion the court may allow the defendant to withdraw a plea at any time before sentence if it is fair and just to do so." *Id.*, subd. 2. Dunston does not request relief under the manifest-

injustice standard. Instead, he argues that "it would have at least been fair and just to allow him to withdraw his plea."

Although the fair-and-just standard is "less demanding than the manifest injustice standard, it does not allow a defendant to withdraw a guilty plea for simply any reason." *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007) (quotation omitted).

> The fair and just standard requires district courts to give due consideration to two factors: (1) the reasons a defendant advances to support withdrawal and (2) prejudice granting the motion would cause the State given reliance on the plea. A defendant bears the burden of advancing reasons to support withdrawal. The State bears the burden of showing prejudice caused by withdrawal.

Raleigh, 778 N.W.2d at 97 (citations and quotations omitted). "[Appellate courts] review a district court's decision to deny a [plea] withdrawal motion [under the fair-and-just standard] for abuse of discretion, reversing only in the rare case." *Id.* (quotation omitted).

Given the state's failure to comply with its disclosure obligations under Minn. R. Crim. P. 9.01, Dunston has met his burden to advance reasons supporting plea withdrawal. As to the prejudice factor, the state argues that allowing Dunston to withdraw his plea would prejudice the state because "V.A.C. and her children were subpoenaed to testify at a trial on May 29, 2018 and had been cooperative" and that V.A.C. did not recant her assault accusation until after Dunston was released from custody and repeatedly contacted her.

The district court concluded that the state would be prejudiced if Dunston were allowed to withdraw his guilty plea, explaining:

> [I]t's pretty clear that given that [V.A.C.] has now recanted twice since he's been out, . . . I think clearly that definitely negatively impacts the County because, as [defense counsel] said, now there would be two allegedly sober statements versus one on the night of the offense in which she . . . allegedly was intoxicated. So I do find that that would be very prejudicial to the State in terms of this case.

As the district court noted, it was only after Dunston pleaded guilty and was released from custody that V.A.C. told the state that she no longer wished to cooperate as a witness and that "she lied about what happened so she would have a place to live." Under the circumstances, allowing Dunston to withdraw his guilty plea would significantly undermine the state's case. Although the state's failure to timely disclose V.A.C.'s pre-plea statements is inexcusable and provided support for Dunston's request for plea withdrawal, the district court did not abuse its discretion by denying the request based on its conclusion that plea withdrawal would not be fair and just given the questionable validity of V.A.C.'s recantation and the prejudice that would result to the state.

II.

Dunston contends that "by determining [his] two prior Illinois convictions were the equivalent of third-degree sales convictions in Minnesota," the district court erred in calculating his criminal-history score for sentencing of his 2015 and 2018 offenses. The state counters that this court should not consider that issue because Dunston has changed his theory on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating principle that an appellate court will not decide issues not raised in district court). Because a defendant may not waive review of his criminal-history-score calculation, *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007), we disagree.

The sentencing guidelines "provide uniform standards for the inclusion and weighting of criminal history information that are intended to increase the fairness and equity in the consideration of criminal history." *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001) (quotation omitted). Convictions from other jurisdictions must be considered in calculating a defendant's criminal-history score under the guidelines. *Id.*; *see* Minn. Sent. Guidelines 2.B.5.a (2014 & Supp. 2017).

The weight of an out-of-state felony offense "must be based on the severity level of the equivalent Minnesota felony offense." Minn. Sent. Guidelines 2.B.5.c (2014 & Supp. 2017). "The severity level ranking in effect at the time the current offense was committed determines the weight assigned to the prior offense." Minn. Sent. Guidelines 2.B.1 (2014 & Supp. 2017). "For prior non-Minnesota controlled substance convictions, the amount and type of the controlled substance should be considered in the determination of the appropriate weight to be assigned to a prior felony sentence for a controlled substance offense." Minn. Sent. Guidelines cmt. 2.B.503 (2014 & Supp. 2017).

"[T]he district court may not use out-of-state convictions to calculate a defendant's criminal-history score unless the state lays foundation for the court to do so." *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). The state has the burden of establishing the facts necessary to justify consideration of out-of-state convictions in determining a defendant's criminal-history score. *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983). The district court "must make the final determination as to whether and how a prior non-Minnesota conviction should be counted." Minn. Sent. Guidelines 2.B.5.a (2014 & Supp. 2017). This court reviews the district court's calculation of a defendant's criminal-history

score for an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

The record shows that Dunston has Illinois convictions for "possession of a controlled substance with intent to deliver . . . 1 gram or more but less than 15 grams" of "cocaine" and "possession of a controlled substance with intent to deliver . . . 1 or more grams but less than 15 grams" of "heroin." Dunston seems to concede that those were sale offenses, and not possession offenses. *See* Minn. Stat. § 152.01, subd. 15a (2014 & 2016) (providing that "sell" means "to possess with intent to [deliver]"). But he argues that because each of the Illinois offenses is the equivalent of both a third-degree and a fourth-degree controlled-substance crime under Minnesota law, they should have been counted as fourth-degree offenses.

In Minnesota, a person commits a controlled-substance crime in the third degree if "the person unlawfully sells one or more mixtures containing a narcotic drug." Minn. Stat. § 152.023, subd. 1(1) (2014 & 2016). A person commits a controlled-substance crime in the fourth degree if "the person unlawfully sells one or more mixtures containing a controlled substance classified in Schedule I, II, or III, except marijuana or Tetrahydrocannabinols." Minn. Stat. § 152.024, subd. 1(1) (2014 & 2016). A person also commits a controlled-substance crime in the fourth degree if "the person unlawfully possesses one or more mixtures containing a controlled substance classified in Schedule I, II, or III, except marijuana or Tetrahydrocannabinols, with the intent to sell it." *Id.*, subd. 2(2) (2014 & 2016).

Dunston argues that his Illinois convictions should be counted as fourth-degree controlled-substance crimes because "controlled substance" is defined to include cocaine and heroin. *See* Minn. Stat. § 152.02, subds. 2, 3 (2014 & 2016) (stating that heroin is an opium derivative and schedule I controlled substance and that cocaine is a schedule II controlled substance).[3] As support for that argument, Dunston relies on an outdated sentencing guidelines comment from the 2007 version of the Minnesota Sentencing Guidelines, which stated that "[w]here multiple severity levels are possible for a prior felony sentence . . . the lowest [possible] severity level should be used." Sent. Guidelines cmt. II.B.101 (Supp. 2007). That comment is not included in the guidelines that govern calculation of Dunston's criminal-history score for sentencing of his 2015 and 2018 offenses. *See* Minn. Sent. Guidelines cmt. 2.B.101 (2014 & Supp. 2017); *see also* Minn. Sent. Guidelines 2.B.5.c (2014 & Supp. 2017).

Dunston also argues that "[t]he fourth-degree controlled substance statute is the more specific equivalent of the Illinois crime" and therefore should control. "When two statutes, one general and one specific, cover the same conduct, the specific statute controls the general statute, unless the legislature manifestly intends the general statute to control." *State v. Lewandowski*, 443 N.W.2d 551, 553 (Minn. App. 1989). Dunston asserts that "[b]ecause the fourth-degree controlled substance statute specifically covers the possession with intent conduct described in [his] conviction and the third-degree statute does not, the fourth-degree statute is the most equivalent Minnesota offense and must control."

[3] Minn. Stat. § 152.02, subd. 2, was amended in 2017, but that change is not relevant here. *See* 2017 Minn. Laws ch. 95, art. 5, § 1, at 952-62.

The state counters that Dunston's argument fails under this court's decision in *State v. Richmond*, 730 N.W.2d 62 (Minn. App. 2007), *review denied* (Minn. June 19, 2007). In *Richmond*, this court held that the sale of fewer than three grams of cocaine, a schedule II narcotic drug, is punishable as a third-degree controlled-substance crime, which proscribes the sale of one or more mixtures containing a *narcotic drug*, and not as a fourth-degree controlled-substance crime, which proscribes the sale of one or more mixtures containing a schedule I, II, or III *controlled substance*. 730 N.W.2d at 65.

In doing so, we reasoned that the third- and fourth-degree controlled-substance statutes "are not irreconcilably in conflict because, under the statutory scheme as a whole, they proscribe different crimes." *Id.* at 69. We explained that the essential elements of third-degree controlled-substance crime required the state to prove that the defendant unlawfully sold one or more mixtures containing a "narcotic drug," whereas the essential elements of a fourth-degree offense require proof that the defendant unlawfully sold "one or more mixtures containing a schedule I, II, or III controlled substance." *Id.* Because "a narcotic drug is specifically and narrowly defined, not all schedule I, II, or III controlled substances are narcotic drugs, and therefore, not all sales of those controlled substances will also constitute a third-degree controlled-substance crime." *Id.* at 69-70. We concluded that "[t]he provision of the third-degree statute . . . is expressly limited to the sale of 'narcotic drugs,' and therefore is more specific than the fourth-degree statute, which generally proscribes the sale of schedule I, II, or III controlled substances, a much broader classification." *Id.* at 70.

Dunston's Illinois convictions are for "possession . . . with intent to deliver" cocaine and heroin. A "[n]arcotic drug" is defined as "opium, coca leaves, opiates, and methamphetamine," Minn. Stat. § 152.01, subd. 10(1) (2014 & 2016), and includes "a compound, manufacture, salt, derivative, or preparation of opium, coca leaves, opiates, or methamphetamine," *Id.*, subd. 10(2) (2014 & 2016). Because heroin and cocaine are "narcotic drugs," *see* Minn. Stat. § 152.02, subds. 2, 3, the district court did not abuse its discretion by counting Dunston's Illinois offenses as third-degree, and not fourth-degree, controlled-substance offenses when calculating his criminal-history score. *See Richmond*, 730 N.W.2d at 68 (stating that the legislature clearly intended to prohibit the sale or possession of "narcotic drugs" as a first-, second-, or third-degree, and not as a fourth-degree, controlled-substance crime).

III.

Dunston contends that the district court erred by denying his motion for a downward dispositional sentencing departure. "A district court's departure decision will not be reversed absent a clear abuse of discretion." *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008), *review denied* (Minn. Mar. 31, 2009).

A district court must order the presumptive sentence provided under the Minnesota Sentencing Guidelines unless the case involves "substantial and compelling circumstances" that justify a downward departure. *State v. Soto*, 855 N.W.2d 303, 308-09 (Minn. 2014) (quotation omitted). When considering a dispositional departure, the district court focuses "more on the defendant as an individual and on whether the [guidelines] sentence would be best for him and for society." *State v. Heywood*, 338 N.W.2d 243, 244

(Minn. 1983). "Numerous factors, including the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family, are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

"[A] defendant's *particular* amenability to individualized treatment in a probationary setting will justify departure" from a guidelines sentence. *Soto*, 855 N.W.2d at 308 (quotation omitted). The particular amenability requirement "ensure[s] that the defendant's amenability to probation distinguishes the defendant from most others and truly presents the substantial and compelling circumstances that are necessary to justify a departure." *Id.* at 309 (quotation omitted). But a district court does not abuse its discretion by refusing to depart "from a presumptively executed prison sentence, even if there is evidence in the record that the defendant would be amenable to probation." *State v. Olson*, 765 N.W.2d 662, 663 (Minn. App. 2009). "Only in a rare case will a reviewing court reverse a district court's imposition of the presumptive sentence." *Id.* at 664 (quotation omitted). This court will not interfere with the district 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. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011) (quotation omitted).

The district court considered Dunston's arguments for departure and determined that a departure was not warranted. The district court explained:

> [Y]ou're on probation on a downward dispositional departure; you pled guilty to a felony. . . . [y]ou're also alleged to have committed another felony as well, and honestly, I don't know how I could make findings that . . . you're particularly amenable under those circumstances. . . . I would have to find that you're particularly amenable to probation and I would have to find substantial and compelling reasons, and given the situation I don't see how [I] possibly could.

Dunston asserts that the district court abused its discretion because "[his] personal history and his particular amenability to probation and treatment established substantial and compelling circumstances to justify a departure." He argues that his "particular amenability to a treatment program is . . . evidenced by the fact that he satisfactorily completed his drug testing requirements and that, while on probation he completed a domestic abuse program, chemical dependency treatment with aftercare, moral recognition therapy, an anger management assessment, a psychological assessment and paid all of his restitution." He also argues that the district court "had a nearly three-year period to observe [his] capacity and true motivation for change."

Dunston's arguments are unavailing given his commission of a felony domestic assault while on probation for second-degree assault. Regrettably, despite any completion of the services described above, he did not demonstrate a change to law-abiding behavior. Indeed, his commission of a felony domestic assault despite his completion of multiple assessments and programs while on probation suggests that he is particularly unamenable to probation. In sum, the district court did not abuse its discretion by imposing a presumptive prison sentence.

IV.

Dunston contends that the district court abused its discretion by revoking his probation "based on the single violation where the policies favoring probation were not outweighed by a need for confinement."

The district court has "broad discretion in determining if there is sufficient evidence to revoke probation and should be reversed only if there is a clear abuse of that discretion." *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). "The decision to revoke [probation] cannot be a reflexive reaction to an accumulation of technical violations but requires a showing that the offender's behavior demonstrates that he or she cannot be counted on to avoid antisocial activity." *Id.* at 251 (quotations omitted).

Before a district court may revoke a defendant's probation, it "must (1) designate the specific condition or conditions that were violated; (2) find that the violation was intentional or inexcusable; and (3) find that need for confinement outweighs the policies favoring probation." *Id.* at 250. In assessing the third *Austin* factor, the district court should consider whether "confinement is necessary to protect the public from further criminal activity by the offender," whether "the offender is in need of correctional treatment which can most effectively be provided if he is confined," and whether "it would unduly depreciate the seriousness of the violation if probation were not revoked." *Id.* at 251 (quotations omitted).

The district court made findings regarding all of the *Austin* factors. As to the third factor, the district court found that revocation was "necessary in terms of public safety" and that "to not send [Dunston] to the Commissioner would reduce the seriousness of the

offense." Dunston argues that the district court's finding on the third factor is not supported by the record and that the "district court erroneously evaluated the seriousness of the offense rather than the seriousness of the violation."

Once again, Dunston's argument focuses on his cooperation with probationary requirements and largely ignores the fact that he nonetheless committed another felony assault while on probation for felony assault. As to the district court's reference to the seriousness of the offense, the guidelines allow such consideration. *See* Minn. Sent. Guidelines 3.B (2014) (explaining that when considering whether to revoke a stayed sentence, "[l]ess judicial tolerance is urged for offenders who were convicted of a more severe offense"); *State v. Fleming*, 869 N.W.2d 319, 331 (Minn. App. 2015) (explaining that in deciding whether to revoke probation, district court's grant of a downward dispositional departure was a proper consideration), *aff'd on other grounds*, 883 N.W.2d 790 (Minn. 2016). And, as the state points out, "[i]t is unclear how the district court could have turned around and imposed a local jail sanction in such circumstances without depreciating the seriousness of the domestic assault, the violation at issue." On this record, the district court did not abuse its discretion by revoking Dunston's probation.

In conclusion, the district court did not abuse its discretion by denying Dunston's motion to withdraw his guilty plea, refusing to recalculate his criminal-history score, denying his motion for a downward dispositional departure, or revoking his probation.

Affirmed.