**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A19-0358**

State of Minnesota,
Respondent,

vs.

Darrell Wayne Brownbull, Jr.,
Appellant.

**Filed December 23, 2019**
**Affirmed**
**Reilly, Judge**

Sherburne County District Court
File No. 71-CR-18-597

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

Kathleen A. Heaney, Sherburne County Attorney, George R. Kennedy, Assistant County Attorney, Elk River, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Bjorkman, Judge; and Cochran, Judge.

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

**REILLY**, Judge

In this direct appeal from judgment of conviction for second-degree criminal sexual conduct, appellant argues (1) the district court erred by admitting the victim's out-of-court

statements that were not consistent with her trial testimony and were prejudicial to appellant's defense; and (2) the district court abused its discretion by denying appellant's motion for a downward dispositional sentencing departure. Because the district court did not err when it admitted the out-of-court statements and did not abuse its discretion regarding sentencing, we affirm.

## FACTS

In March 2018, appellant Darrell Brownbull Jr. took the 13-year-old victim,[1] her siblings, and their mother to the Mall of America, where the children's mother met up with her sisters to attend a concert that evening. The victim and her siblings were to stay with appellant that night so he could watch them. After spending the day out, appellant and the children returned to appellant's apartment where they all watched movies in appellant's living room. The younger children were on an air mattress, while appellant and the victim were on the couch. Eventually, the victim fell asleep on the couch.

The victim woke up and found appellant standing beside her and propping her up into a seated position. She noticed that her leggings and underwear were down around her knees and her vagina felt "irritated." The victim stood to pull her leggings up, and appellant grabbed her hand and attempted to lead her toward his bedroom. The victim sat back down on the couch and appellant went to bed. The victim then attempted to call her mother and her aunts, but was unable to reach them. After text messaging a friend, the victim decided to call the police and left appellant's apartment to do so. The victim reported to the police

[1] The victim refers to appellant as her uncle, but she and appellant are not biologically related.

that she "might have just got raped." The police arrived at the apartment and transported the victim to the police station where she was questioned. While at the station, the victim was able to reach her mother, who arrived at the police station and took the victim to the hospital for examination.

DNA results indicated a match between a sample taken from appellant and samples from the victim that were obtained during the sexual-assault exam as well as from the victim's underwear. Appellant was subsequently charged with two counts of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1 (b), (e)(ii) (2016).

Prior to trial, the state filed a notice of intent to use the victim's out-of-court statements. The state identified Minn. R. Evid. 801(d)(1)(B), 803(5), and 807 as its bases for admission and disclosed that it intended to introduce statements made by the victim to the detective, the nurse who performed the victim's sexual assault exam, and the victim's mother. The defense did not object to the admission of the statements prior to or during the trial.

At trial, the victim testified to various statements that appellant made to her after she woke up and noticed that her leggings were down at her knees. The victim testified that appellant told her he was sorry, he was drunk, he "didn't mean to," he would buy her anything she wanted, and "not to tell anyone." The nurse who conducted the victim's sexual assault exam also testified. She stated that the victim told her that appellant had said to the victim "I didn't mean to do that to you," and that he "didn't want to go to jail."

Following a trial, the jury found appellant guilty of both charged offenses. At the sentencing hearing, appellant requested a downward dispositional departure. Appellant argued he was particularly amenable to probation because he took full responsibility for his actions, he is remorseful, he has no criminal history, he has been an "outstanding individual up to [the] incident," he is a leader in his community, and he is respected in his job. The state opposed appellant's motion and argued that appellant should be sentenced to 108 months in prison.

The district court reviewed 32 letters of support submitted on behalf of appellant. It also heard arguments from appellant's counsel and the state, an impact statement from the victim, and a statement from appellant in which appellant apologized to the victim and the victim's mother. The district court noted that it reviewed the *Trog* factors and determined that there was not a basis for a downward dispositional departure despite the letters of support and appellant's lack of criminal history. *State v. Trog*, 323 N.W.2d 28 (Minn. 1982). The district court therefore denied appellant's departure motion and sentenced him to 90 months in prison on one count of second-degree criminal sexual conduct. This appeal follows.

## D E C I S I O N

### I. The district court did not plainly err when it admitted the victim's prior out-of-court statements.

Appellant argues that the district court prejudicially erred when it admitted evidence of the victim's prior out-of-court statements under Minn. R. Evid. 801(d)(1)(B). Specifically, appellant contends that the victim's testimony that appellant told her he was

sorry, he was drunk, he "didn't mean to," he would buy her anything she wanted, and "not to tell anyone" is not consistent with the victim's out-of-court statements offered by the nurse, who testified that the victim told her that appellant said to the victim "I didn't mean to do that to you," and that he "didn't want to go to jail."

Generally, hearsay is not admissible. Minn. R. Evid. 802. However, pursuant to Minn. R. Evid. 801(d)(1)(B), "a witness's prior statement that is consistent with his trial testimony is admissible as nonhearsay evidence if the statement is helpful to the trier of fact in evaluating the witness's credibility, and if the witness testifies at trial and is subject to cross-examination about the statement." *State v. Bakken*, 604 N.W.2d 106, 108-09 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). The district court must determine "whether the prior statement and the trial testimony are consistent with each other." *Id*. at 109. "The trial testimony and the prior statement need not be verbatim" in order to be considered consistent. *Id*. Rather, the statements must be "reasonably consistent" with each other. *In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998). "[W]here inconsistencies directly affect the elements of the criminal charge, the Rule 801(d)(1)(B) requirement of consistency is not satisfied and the prior inconsistent statements may not be received as substantive evidence under that rule." *Bakken,* 604 N.W.2d at 110.

Appellant does not dispute that he failed to object to the admission of the statements prior to trial or during trial. "On appeal, an unobjected-to error can be reviewed only if it constitutes plain error affecting substantial rights." *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006) (citing Minn. R. Crim. P. 31.02). Under the plain-error standard, the appellant must show: (1) error, (2) that was plain, and (3) that affected substantial rights.

*State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "An error is plain if it is clear and obvious at the time of appeal. An error is clear or obvious if it contravenes case law, a rule, or a standard of conduct." *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014) (citation and quotations omitted).

We discern no plain error because we conclude that the challenged out-of-court statements are consistent with the victim's testimony. First, the statement that appellant "didn't mean to do that to you" is consistent with the victim's testimony that appellant said he "didn't mean to." Second, appellant's statement that he "didn't want to go to jail," is "reasonably consistent" because it is another admission of guilt similar to the others the victim testified to (appellant told the victim he was sorry, he was drunk, he "didn't mean to," he would buy her anything she wanted, and "not to tell anyone"). Moreover, the discrepancy does not "directly affect the elements of the criminal charge." *Bakken*, 604 N.W.2d at 110. The district court did not err when it admitted the out-of-court statements because they were "reasonably consistent" and did not affect the elements of the criminal charge.

## II. The district court did not abuse its discretion when it denied appellant's motion for a downward dispositional departure.

Appellant argues that the district court abused its discretion by denying his motion for a dispositional departure and imposing a 90-month sentence pursuant to the Minnesota Sentencing Guidelines.

The Minnesota Sentencing Guidelines prescribe a sentence or range of sentences that "is presumed to be appropriate." *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014)

(quotation omitted). "[A] sentencing court can exercise its discretion to depart from the guidelines *only if* aggravating or mitigating circumstances are present, and those circumstances provide a substantial and compelling reason not to impose a guidelines sentence." *Id*. (quotations and citations omitted). "[A]n explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence." *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). A district court's decision to depart from the presumptive guidelines sentence is reviewed for an abuse of discretion. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). A district court "abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013) (quotation omitted). 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).

Appellant argues that the district court erroneously concluded that his exercise of his constitutional right to a jury trial demonstrated a lack of remorse. Appellant also contends that because various factors support his particular amenability to probation, the district court abused its discretion by "treating a supposed lack of adequate remorse as dispositive of the departure analysis."

Pursuant to the sentencing guidelines, a defendant's particular amenability to probation is a mitigating factor that may be used as a reason for a downward dispositional departure. Minn. Sent. Guidelines 2.D.3.a(7) (2016). "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." *Trog*, 323 N.W.2d at 31. Remorse is a factor that may support a downward dispositional departure. *Solberg*, 882 N.W.2d at 625. "A primary justification for considering remorse in sentencing is that a defendant's remorse bears on his or her ability to be rehabilitated." *Id*. The "district court is properly tasked with deciding whether a defendant's actions express genuine remorse and how much weight to give to that remorse." *Id*. at 626. While the district court "has discretion to impose a downward dispositional departure if a defendant is particularly amenable to probation, . . . [the court] is not required to do so." *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009). "The reviewing court may 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." *Van Ruler*, 378 N.W.2d at 80-81.

The district court denied appellant's request for a downward dispositional departure. The presumptive guidelines sentence is 90 months' imprisonment with a presumptive range of 90 to 108 months' imprisonment. The district court sentenced appellant to 90 months in prison. Because the district court imposed a presumptive sentence, it was not required to explain its decision to do so. *See Van Ruler*, 378 N.W.2d at 80 (stating that the district court need not provide an explanation when it considers reasons for departure but imposes a presumptive sentence).

Moreover, the record shows that the district court considered reasons for departure. The district court reviewed all 32 letters of support submitted on behalf of appellant and the presentence investigation (PSI). The district court considered the letters of support and

appellant's absence of criminal history, but ultimately denied appellant's motion for a downward dispositional departure based on appellant's lack of genuine remorse. Appellant's lack of genuine remorse is supported by the record. The PSI writer noted that while appellant was remorseful, "[t]here is some question as to what [appellant] is remorseful for as he reported perjury occurred by the victim and victim's mother during trial."

The district court carefully evaluated all of the information presented to it before making a determination. Moreover, even if there were factors that supported appellant's amenability to probation, the district court is not required to impose a downward dispositional departure when such factors are present. The district court did not abuse its discretion when it imposed a presumptive sentence under the guidelines.

**Affirmed.**