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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0375**

State of Minnesota,
Respondent,

vs.

Timothy Daniel Miller,
Appellant.

**Filed November 25, 2019
Affirmed
Reilly, Judge**

McLeod County District Court
File No. 43-CR-18-51

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

Michael K. Junge, McLeod County Attorney, Daniel R. Provencher, Assistant County Attorney, Glencoe, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

REILLY, Judge

In this direct appeal from final judgment, appellant challenges his sentence arguing that the district court abused its discretion when it denied his motion for a downward dispositional departure. Because we discern no abuse of discretion, we affirm.

FACTS

In January 2018, appellant was charged with felony first-degree assault in McLeod County. The state filed a motion for an aggravated departure based on the victim's particular vulnerability due to age, infirmity or reduced physical or mental capacity.

In August 2018, appellant pleaded guilty admitting the following facts. In January 2018, appellant was caring for his three young children and the victim, who was approximately five months old at the time. On the day of the offense, the victim was sick and was vomiting. Appellant was feeding the victim when the victim began vomiting. Appellant shook the victim for approximately one to two minutes. Appellant then saw the victim's eyes roll back in his head.

The chief of police for the city of Glencoe was dispatched to appellant's residence. Upon arrival, the police officer observed that the victim was unresponsive and exhibiting shallow breathing. A medical exam was conducted at the Children's Hospital in St. Paul, Minnesota. The victim was diagnosed with a subdural hemorrhage and a massive brain injury.

Appellant admitted that his actions were not accidental and that his actions resulted in injuries to the victim. Appellant also admitted to the existence of the aggravating factor of particular vulnerability due to age.

The presumptive guidelines sentence for the crime to which appellant pleaded guilty is a term of imprisonment of 74 to 103 months. Appellant moved the court for a mitigated dispositional departure. Appellant submitted letters of support from his family members and other community members to support his motion for departure. The district court heard victim impact statements and statements in support of appellant. Appellant also gave a statement and apologized for his actions. The district court denied appellant's request for a downward dispositional departure and sentenced appellant to 75 months in prison. This appeal follows.

D E C I S I O N

Appellant argues that the district court abused its discretion when it refused to grant a downward dispositional departure and imposed a 75-month executed sentence pursuant to the sentencing guidelines.

The Minnesota Sentencing Guidelines prescribe a sentence or range of sentences that is presumed 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.* (citations and quotations omitted). The district court is not required to give an explanation when it considers reasons for departure, but elects to impose the presumptive sentence.

State v. Van Ruler, 378 N.W.2d 77, 81 (Minn. App. 1985). “We review a district court’s decision to depart from the presumptive guidelines sentence for an abuse of discretion.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). “The reviewing court may not interfere with the sentencing courts 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. 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 he is particularly amenable to probation given his young age, lack of any serious prior criminal record, his remorse and cooperation, and the overwhelming support of his family and community members.

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) (2018). “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). While the district court “has discretion to impose a downward dispositional departure if a defendant is particularly amenable to probation, . . . [it] is not required to do so.” *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009).

The district court reviewed appellant’s presentence investigation report (the PSI), appellant’s sentencing memorandum and supplemental memorandum, and the letters of

support submitted on appellant's behalf. At sentencing, the district court heard victim impact statements from the victim's parents and three other individuals; arguments and recommendations from both parties; statements from appellant's father and appellant's former teacher; and a statement from appellant.

The district court also considered appellant's young age,¹ the fact that he has maintained employment, has participated in individual counseling, and has expressed remorse. However, the district court concluded there were not substantial and compelling reasons present to grant a downward departure from the presumptive sentence. While the district court was not required to provide an explanation, the court explained that it imposed a presumptive sentence for the following reasons.

First, even though numerous letters of support were submitted on appellant's behalf, appellant's wife did not write a letter or provide a statement at sentencing. The court acknowledged that information contained in the PSI indicated that appellant's relationship with his wife was ending and noted concern that appellant's "primary support person [would] no longer be there for [him]." Regarding appellant's wife and mother of his children, the court went on to note concerns about "the lack of support from a person who could say more about [appellant's] abilities with children than anyone else." These findings are supported by the record.

Second, the court noted that the PSI "reflects a lack of insight" as to how the offense impacted the victim and his family. Instead, appellant focused on himself and his family.

¹ Appellant was 23 years old at the time of the offense.

This, the district court noted, was “the strongest indicator . . . that a departure was not justified.” This is supported by the record. The PSI writer concluded that appellant “shows minimal insight as to how the instant offense has impacted the lives of his victim as well as the victim’s family.” The PSI writer explained that when asked about the first thing that comes to mind when thinking of the trouble appellant has been in, appellant responded “not being able to be with my kids.” When asked who has been affected by his actions, appellant responded that his family, children and marriage have been affected.²

The district court carefully considered all of the testimony and information presented to it in determining whether to grant appellant’s request for a downward dispositional departure. The district court’s findings regarding its reasons for denying the downward departure are supported by the record. The district court did not abuse its discretion when it denied appellant’s request for a downward dispositional departure.

Affirmed.

² The record demonstrates the following impacts on the victim and his family: the victim is blind due to the assault; he was not mobile at the age of 16 months and his future mobility is unknown; the sensory and optical portions of the victim’s brain appear to have no function; and he must regularly attend occupational, physical, and speech therapy. Due to the child’s new care requirements, the victim’s mother left her employment and the family has struggled with housing since the assault.