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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0427**

State of Minnesota,
Respondent,

vs.

Trent Theodore Horning,
Appellant.

**Filed January 6, 2020
Affirmed
Segal, Judge**

Washington County District Court
File No. 82-CR-18-2452

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Johnson, Judge; and Segal, Judge.

UNPUBLISHED OPINION

SEGAL, Judge

In this direct appeal from his sentence for identity theft, appellant argues that the district court abused its discretion by denying his motion for a downward dispositional or durational departure from the sentencing guidelines. We affirm.

FACTS

On April 19, 2018, J.S.T. went to Xperience Fitness in Woodbury to work out. After he completed his workout, he returned to the locker room and discovered that the lock he had placed on his locker had been cut off and replaced with a new lock. A staff member cut off the lock and J.S.T. discovered that his wallet had been stolen. He contacted his credit card issuers and learned that two of his credit cards had been used to purchase a total of \$1,857 worth of prepaid debit cards. The following day, B.J.L. went to the same Xperience Fitness. When he returned to his locker, he similarly discovered that his lock had been cut off and replaced with a new lock, and that his wallet had been stolen. One of his credit cards was used to make a purchase at a nearby store.

Following the two thefts, a Woodbury police detective started investigating the matter. Based on a review of the entry records from Xperience Fitness and the security footage from the stores where the credit cards were used, appellant Trent Theodore Horning was identified as a suspect. On April 20, the detective requested that Xperience Fitness notify law enforcement the next time Horning entered one of their facilities. Later that day, staff from the Xperience Fitness in Blaine contacted the detective and informed him that Horning had just entered the health club. Horning was taken into custody, and

S.J.R. subsequently discovered that his lock had been cut off and replaced with a new lock and that his wallet had been stolen. His wallet was found in Horning's possession.

The Woodbury detective interviewed Horning that day. Horning ultimately admitted to committing the thefts and was released pending charges. Law enforcement continued to investigate the matter and discovered that Horning had also broken into gym lockers and stolen wallets on April 5 and April 11. After his arrest and release on April 20, Horning committed five additional thefts in the same manner. On June 15, respondent State of Minnesota charged Horning with identity theft (eight or more victims) in violation of Minn. Stat. § 609.527, subds. 2, 3(5) (2016).

On September 6, Horning pleaded guilty. In exchange for the guilty plea, the state agreed to dismiss similar charges pending against him in Olmsted County. Horning admitted to cutting the locks off of ten gym lockers and stealing the identifying information, credit cards, and money from the wallets inside the lockers. He also admitted to resealing the lockers with new locks to bide himself time to use the credit cards before the owners discovered the thefts. On nine occasions, he was able to successfully use the credit cards. Additionally, he admitted to creating and possessing checks from his former employer that contained the correct routing number but a fictitious account number. The district court accepted Horning's guilty plea and released him pending sentencing.

On December 17, the district court held a sentencing hearing. Horning moved for a downward dispositional or durational departure. He argued that there were substantial and compelling circumstances to support a downward dispositional departure because his criminal conduct was motivated by his addiction to Adderall and he was amenable to

treatment in a probationary setting. He also argued that a downward durational departure was warranted, claiming that his conduct was less serious than the typical identity-theft offense. The district court denied the motion and sentenced Horning to the presumptive sentence of 68 months in prison. Horning appeals.

D E C I S I O N

The district court must impose the presumptive sentence unless “identifiable, substantial, and compelling circumstances” justify a downward departure. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (quotation omitted), *review denied* (Minn. Sept. 17, 2013). The sentencing court has “broad discretion” and an appellate court will only reverse a sentencing court’s refusal to depart in a “rare” case. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). We generally will not disturb the imposition of a presumptive sentence when “the record shows that the sentencing court carefully evaluated all the testimony and information presented” before imposing a sentence. *Johnson*, 831 N.W.2d at 925 (quotation omitted).

Dispositional Departure

A district court may grant 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). In determining whether an individual is particularly amenable to probation, the district court may consider the offender’s age, prior record, remorse, cooperation, attitude in court, and the support of friends and family. *Id.*

Horning argues that the district court abused its discretion by denying his motion for a downward dispositional departure. He argues that he is amenable to probation because he cooperated with law enforcement, displayed a good attitude in court, showed remorse and accountability, is only 34 years old, and has support from his friends, family, and members of the community. He emphasizes that his criminal conduct was grounded in his addiction to Adderall, and that he demonstrated a motivation to change after being released pending sentencing by attending Narcotics Anonymous and obtaining employment, a car, a place to live, and enrolling in school.

In denying the motion for a downward dispositional departure, the district court expressed concern that Horning had a history of crimes of dishonesty, and that he had continued to commit the very same type of crime even after being taken into custody and released pending charges on April 20. The district court noted that this history made it unlikely that Horning would be able to “self-correct” if he were granted probation. Moreover, when Horning was released prior to sentencing, he was referred to continuing chemical-dependency programming but was discharged because he failed to attend. The district court acknowledged that Horning’s behavior was motivated by his addiction to Adderall, but determined that his addiction alone was not an excuse for the behavior. Finally, the district court observed that Horning had “been cooperative to a certain extent” but that he had already benefited from his cooperation by virtue of having the charges dismissed against him in Olmsted County.

On this record, the district court did not abuse its discretion by denying Horning’s motion for a downward dispositional departure. The district court appropriately considered

Horning's cooperation, remorse, motivation to change, and prior criminal history before determining that Horning would not be particularly amenable to probation. And while there are factors that may have weighed in favor of a departure, "the mere fact that a mitigating factor is present in a particular case does not obligate the court to place [the] defendant on probation or impose a shorter term than the presumptive term." *State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011) (quotation omitted). The record reflects that the district court carefully considered Horning's argument and the evidence he presented in support of his motion and, therefore, the district court did not abuse its discretion by imposing a guidelines sentence. *See Johnson*, 831 N.W.2d at 925 (stating that the sentencing court does not abuse its discretion so long as it considers all the evidence presented before imposing a sentence).

Durational Departure

Horning next challenges the district court's denial of his motion for a downward durational departure. A district court may grant a downward durational departure "if the defendant's conduct is significantly less serious than that typically involved in the commission of the offense." *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985). Unlike a dispositional departure, the appropriateness of a durational departure depends only on the nature of the offense. *State v. Behl*, 573 N.W.2d 711, 713 (Minn. App. 1998), *review denied* (Minn. Mar. 19, 1998). We review the district court's refusal to depart from the presumptive sentence for an abuse of discretion. *Id.* at 714.

In determining whether an offense was less serious than a typical offense, the district court "must analyze the act as compared with other acts constituting the same offense." *Id.*

at 713 (quotation omitted). An individual commits the offense of identity theft when he “transfers, possesses, or uses an identity that is not the person’s own, with the intent to commit, aid, or abet any unlawful activity.” Minn. Stat. § 609.527, subd. 2. The statute provides for various penalties based on the number of victims and/or combined loss to the victims. *Id.*, subd. 3 (2016). For the felony-level offenses, the penalty levels are based on the number of victims *or* the amount stolen. *Id.*, subd. 3(3)-(5). Horning was convicted under Minn. Stat. § 609.527, subd. 3(5), which applies when there are eight or more direct victims or the total loss to the victims exceeds \$35,000.

Horning argues that the district court abused its discretion by denying his motion for a downward durational departure because his conduct was significantly less serious than a typical identity-theft offense. He argues that his case is unlike a typical identity-theft case because the thefts he committed were noticed quickly by the victims, the amounts stolen were relatively modest and he did not “do any lasting damage to their credit.” He asserts that he therefore “did not steal their identity in the way that the society has become accustomed to hearing about.” But the district court rejected this argument and concluded that the case “is probably exactly the kind of case that the legislature was picturing.” The district court observed that the legislature provided for harsher penalties if more victims were involved regardless of the magnitude of the amounts stolen. In this case, the harshest penalty applied because there were eleven direct victims. The district court compared Horning’s conduct with other acts constituting the same offense, and determined that his conduct was not less serious than the typical offense because the legislature explicitly provided for a harsher penalty when there are more victims, regardless of the financial

benefit the offender received. Consequently, the district court's denial of Horning's motion for a downward durational departure does not constitute an abuse of discretion.

Affirmed.