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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2062

State of Minnesota,
Respondent,

vs.

John Oliver Dybedahl,
Appellant.

Filed November 30, 2020
Affirmed
Jesson, Judge

Roseau County District Court
File No. 68-CR-19-7

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

Kristy Kjos, Roseau County Attorney, Michael P. Grover, Assistant Roseau County Attorney, Roseau, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Larkin, Judge; and Reilly, Judge.

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

JESSON, Judge

After molesting his daughter, appellant John Oliver Dybedahl asks this court to reverse the denial of his motion for a downward dispositional departure primarily due to a study stating that intrafamilial sex offenders have a low risk of recidivism. We affirm.

FACTS

Dybedahl pleaded guilty to criminal sexual conduct in the first degree for molesting his daughter. At the plea hearing, Dybedahl admitted that sometime between the dates of November 2018 and December 2018, he committed first-degree criminal sexual conduct against his daughter by repeatedly touching her, including up to ten instances of touching her vagina, while he was in a position of authority. The district court accepted Dybedahl's plea, found him guilty, and ordered a presentence investigation. The parties did not reach a sentencing agreement. The presentencing investigator concluded that while Dybedahl "verbalized remorse . . . it did not sound . . . entirely sincere," bore "undertones of victim blaming," and that Dybedahl struggled to demonstrate appreciation for the reasons why he was in trouble. The presentencing investigator recommended a sentence of 144 months.

Prior to sentencing, Dybedahl also underwent a psychosexual evaluation. The evaluator said that Dybedahl suffered from "surrogate spouse syndrome," where a parent in a poor marital relationship develops an overly close or "surrogate" relationship with their child. The evaluator recommended that Dybedahl be rehabilitated through community treatment since intrafamilial sex offenders have a low risk of recidivism.

At sentencing, the court accepted the presentencing investigation and psychosexual evaluation. The minor victim expressed, in an impact statement, that Dybedahl "doesn't believe he did anything wrong." The victim's mother told the court, recounting that her daughter had been secretly molested for years, that Dybedahl "should receive the maximum time and receive treatment in prison." The state argued for an executed top-of-the-box sentence of 172 months in prison. The state expressed concern that Dybedahl did not fully admit his actions during his psychosexual evaluation, and emphasized the gravity of the offense and its repetition over several years.

In response, Dybedahl sought a downward dispositional departure from the presumptive execution of the 144- to 172-month sentence for conviction of criminal sexual conduct in the first degree. Dybedahl, relying primarily on the psychosexual evaluation, stressed that his extensive support from his family and his employer would help him succeed on probation.

The district court sentenced Dybedahl to 144 months, the lower end of the presumptive range, concluding that a departure would not be appropriate for someone who committed crimes against his daughter for three to four years. Dybedahl appeals.

DECISION

The Minnesota Sentencing Guidelines establish presumptive sentences for felony offenses. Minn. Stat. § 244.09, subd. 5 (2018). The presumptive guidelines sentence is "presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics." Minn. Sent. Guidelines. 1.B.13 (2019). A district court may

depart from the presumptive sentence only when there exist "identifiable, substantial, and compelling circumstances to support a departure." Minn. Sent. Guidelines. 2.D.1 (2019).

As a general rule, this court will not review a district court's sentencing discretion "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. Jan. 10, 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). Even if there are grounds to depart, the district court is not required to do so. *State v. Olson*, 459 N.W.2d 711, 716 (Minn. App. 1990), *review denied* (Minn. Oct. 25, 1990).

A district court may impose a downward dispositional departure from the presumptive guidelines sentence if a defendant has a "particular amenability to individualized treatment in a probationary setting." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). In considering whether a defendant is particularly amenable to probation so as to justify a departure, a district court may consider 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." *Id.* If a defendant requests a departure, the district court must "deliberately consider" the factors that are urged by a defendant in support of the motion. *State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984). If a district court denies a defendant's motion for a downward dispositional departure, the district court need not discuss all of the *Trog* factors. *State v. Pegel*, 795 N.W.2d 251, 253–54 (Minn. App. 2011). This court applies a very deferential standard of review to a district court's denial of a defendant's motion for a departure, and we will only reverse such a decision if there is a

clear abuse of the district court's discretion. *State v. Givens*, 544 N.W.2d 774, 776 (Minn. 1996).

Dybedahl offers four arguments for reversal. First, he argues that several *Trog* factors show that he is amenable to probation. Second, he contends that the risk of reoffense and the projected effectiveness of community rehabilitation are central to whether a defendant is particularly amenable to probationary treatment. Third, he argues that the record establishes that the intrafamilial nature of Dybedahl's offense makes him less likely to reoffend. Lastly, Dybedahl contends that the court erred in finding him unamenable to probationary treatment.

The first argument is based on the *Trog* factors of his age, remorse, and support of his family and friends. But these factors as applied here do not support departure. Dybedahl notes that the likelihood of sex offending decreases with age and so, as a 45-year-old, he is unlikely to reoffend. But Dybedahl molested his daughter while he was in his forties. This combined with the sentence occurring roughly a year after the offense suggests that he has not aged out of offending. Nor is the remorse factor entirely supportive. The presentencing investigation report casts doubt on the extent to which Dybedahl was remorseful and accepted responsibility. These factors do not show that Dybedahl is amenable to probation.[1]

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[1] Dybedahl argued that he has family members and friends that support him, but especially in light of the offense being against a family member, and with little other examples to back this up, this claim is unpersuasive.

The other three arguments rely on the results of the psychosexual evaluation. While a court abuses its discretion by relying on "findings unsupported by evidence," here there is evidence in the record that supports the court's determination, including from Dybedahl's own description of the offenses. *Johnson-Smolak v. Fink*, 703 N.W.2d 588, 591 (Minn. App. 2005). Dybedahl's criminal offense had a serious impact on his daughter, which could be reasonably weighed against the evaluator's finding of low recidivism. Dybedahl's argument that because the offense was an intrafamilial act he is more amenable to probation ignores that he knowingly used his position of authority as a father to commit the offenses.

While Dybedahl characterizes his psychosexual evaluation as insurmountable proof that he would succeed on probation, he does not assign error to the district court's decision-making process; he simply argues that the record supports a different decision. That argument is unpersuasive because the district court was not required to depart. We cannot classify this case as "substantial," "compelling," or "rare" enough to require a departure. *Kindem*, 313 N.W.2d at 7.

In sum, because Dybedahl did not identify convincing, substantial, or compelling justifications for his situation to be considered rare, we will not reverse the sentencing court's decision.

Affirmed.