

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0140**

State of Minnesota,
Respondent,

vs.

Devon Deshawn Gordon,
Appellant.

**Filed November 8, 2021
Affirmed
Frisch, Judge**

Crow Wing County District Court
File No. 18-CR-20-528

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

Donald F. Ryan, Crow Wing County Attorney, Janine LePage, Assistant County Attorney,
Brainerd, Minnesota (for respondent)

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

Considered and decided by Frisch, Presiding Judge; Bryan, Judge; and Kirk, Judge.*

NONPRECEDENTIAL OPINION

FRISCH, Judge

Appellant argues that the district court abused its discretion by denying his motion
for a downward durational departure from the Minnesota Sentencing Guidelines and

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

contends that his conduct is less serious than in the typical offense and that substantial and compelling reasons exist to justify the departure. We affirm.

FACTS

Respondent State of Minnesota charged appellant Devon Deshawn Gordon with one count of felony domestic assault, in violation of Minn. Stat. § 609.2242, subd. 4 (2018), and one count of felony threats of violence, in violation of Minn. Stat. § 609.713, subd. 1 (2018). Gordon entered into an agreement with the state, whereby he agreed to plead guilty to the threats-of-violence charge and in exchange, the state agreed to dismiss the domestic-assault charge. The state also agreed to support a request for a downward dispositional departure at sentencing if, among other conditions, Gordon completed a chemical-dependency treatment program with a mental-health component. The plea petition listed the presumptive guidelines sentence as 27-months' imprisonment, with a range of 23-32 months, based on Gordon's criminal-history score of five and an offense-severity level of four.

At the plea hearing, Gordon admitted that on February 5, 2020, he became angry with his girlfriend because she "wouldn't talk to [him]." At some point, he picked up a piece of wood and threatened to "beat her a-s." Gordon admitted that he was not joking when engaging in this conduct, and that the circumstances at the time would have caused his girlfriend to be afraid. Finally, Gordon admitted that he intended for his actions to make his girlfriend feel terror and believed that she was actually terrified by his actions.

In the time between the plea hearing and the sentencing hearing, Gordon failed to complete the chemical-dependency program and violated the terms of his conditional

release. Gordon was also charged with another count of domestic violence in an unrelated matter.

Before the sentencing hearing, Gordon filed a motion requesting a downward dispositional and/or durational departure from the sentencing guidelines. Upon learning Gordon had left his treatment program and had potentially committed another domestic assault, the state withdrew its support for a dispositional departure and instead requested a top-of-the-box sentence of 32 months.

At his sentencing hearing, Gordon argued that a durational departure was appropriate because the underlying offense was nothing more than a “domestic spat.” Gordon also argued that the events giving rise to the charge occurred in the “spur of the moment” and could be attributed to challenges in controlling his impulses. Finally, Gordon noted that nobody was hurt and that the offense was not “that big of a deal.”

The district court denied the departure motions. The district court acknowledged Gordon’s arguments about the circumstances giving rise to the offense but concluded that the conduct involved was not significantly less serious than conduct typically involved in the commission of the underlying offense. The district court imposed a guidelines sentence of 27-months’ imprisonment. Gordon appeals.¹

¹ Gordon does not appeal the denial of the motion for downward dispositional departure. In addition, we observe that a motion for durational departure was not contemplated by the plea agreement. But we do not address whether the district court would have abused its discretion if it granted the motion for durational departure as outside of the plea agreement because the state did not object to the motion on that basis.

DECISION

The Minnesota Sentencing Guidelines establish presumptive sentences for felony offenses. Minn. Stat. § 244.09, subd. 5(2) (2018). A district court may depart from a presumptive sentence only when there exists “identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent. Guidelines 2.D.1 (2018). “A durational departure must be based on factors that reflect the seriousness of the *offense*, not the characteristics of the offender.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). “[A] downward durational departure is justified 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).

District courts have great discretion when imposing sentences, and we reverse sentencing decisions only when a district court abuses that discretion. *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014). Only in a “rare” case will we reverse the district court’s refusal to depart from a presumptive sentence under the sentencing guidelines. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

When exercising sentencing discretion, the district court must consider circumstances supporting a departure from the presumptive sentence, and the court errs when it fails to consider legitimate and significant reasons for a departure. *See State v. Curtiss*, 353 N.W.2d 262, 263-64 (Minn. App. 1984). However, the district court is not ordinarily required to depart even when grounds exist to do so. *State v. Olson*, 459 N.W.2d 711, 716 (Minn. App. 1990), *rev. denied* (Minn. Oct. 25, 1990). While the district court must set forth its reasons for granting a sentencing departure, it is not required to set forth

its reasons for imposing a presumptive sentence as long as it considered the reasons for departure. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

Here, the record shows that the district court considered the arguments in support of the departure motion and rejected the same. The district court explicitly referenced Gordon's arguments in support of his motion, namely, that nobody was injured and his claim that he was simply involved in a "domestic spat."² The district court ultimately concluded that these offense-related factors did not render the underlying conduct significantly less serious than conduct typically involved in the commission of the offense of threats of violence. By considering the offense-based reasons offered by Gordon in support of his motion, the district court satisfied its obligation under Minnesota law and acted within its discretion to deny Gordon's motion for a durational departure.

Gordon argues that the district court was required to do more than consider his proffered reasons for departure, arguing that under *State v. Rund*, a district court must consider the "totality of the circumstances" before denying a durational departure in cases involving terroristic threats. 896 N.W.2d 527, 535 (Minn. 2017).

Rund involved a unique and then-novel circumstance whereby the defendant threatened to harm and kill members of law enforcement over social media. *Id.* at 530. The supreme court found the particular circumstances of the case required a more thorough analysis before a departure could be granted because of the novel medium by which the

² Although the district court did not comment on Gordon's argument that his challenges in controlling his impulses caused the incident, as set forth herein, such an argument relates to the characteristics of the *offender*, not the *offense* and cannot form the basis for a durational departure.

threats were made. *Id.* at 535. To decide whether the defendant’s durational departure was justified, the supreme court considered the totality of the circumstances and reversed the district court’s grant of a durational departure. *Id.* at 535-36.

We disagree with Gordon’s assertion that *Rund* requires a district court to consider the totality of the circumstances in all cases, rather than the reasons he offered in support of his motion. First, *Rund* involved the making of threats through a then-novel medium, a fact the supreme court expressly relied upon in considering the justifications for a departure. We do not believe the supreme court intended for *Rund* to apply to cases where threats are made through “traditional means.” *See id.* at 535. Second, *Rund* involved the question of whether the district court abused its discretion in *granting* a durational departure, not the *denial* of one and attendant imposition of a presumptive sentence. *Id.* at 532. Nothing in *Rund* suggests that a district court must consider the totality of circumstances when imposing a presumptive sentence under the sentencing guidelines.

Even so, the record supports the district court’s finding that Gordon’s conduct was not significantly less serious than in the typical threats-of-violence case. To be found guilty of making threats of violence, a defendant must have (1) made a threat to commit a crime of violence and (2) made the threat with the intent to terrorize or in reckless disregard of the risk of causing terror. Minn. Stat. § 609.713, subd. 1. The threat may be made directly or indirectly toward the victim. *Id.* “Crime of violence” is defined as any crime listed as a “violent crime” in Minn. Stat. § 609.1095, subd. 1(d) (2018). *Id.* And although Gordon concedes that his conduct satisfied the minimum threshold to sustain his conviction, he minimizes the seriousness of his threatening behavior and argues that because he did not

use a gun or threaten to kill his girlfriend, the district court abused its discretion in finding that his conduct was not significantly less serious than in the typical case. We disagree.

Here, Gordon's threat to his girlfriend was far more than a "spat." He told his girlfriend that he was going to "beat her a-s" while he was holding a piece of wood, conduct that may qualify as assaultive behavior included in Minn. Stat. § 609.1095, subd. 1(d), as crimes of violence. *See* Minn. Stat. §§ 609.222, .223 (2018). Although Gordon did not use a gun, he did make the threat while holding a wooden board that could be used as a weapon. Gordon admitted that the threat to "beat her a-s" while holding this weapon intended to terrorize his girlfriend and that he in fact believed that she was actually terrified by his actions. We therefore disagree with Gordon's characterization that this incident was not "that big of a deal."

Finally, Gordon argues that certain character traits justified the departure. Gordon points to facts related to his personal development, mental health, and upbringing and argues that "the lack of substantial capacity for judgment" are mitigating factors for consideration under the sentencing guidelines. While these offender-related factors may be considered in determining the propriety of a downward *dispositional* departure, such factors cannot serve as a basis for a downward *durational* departure.³ *Rund*, 896 N.W.2d at 533 (expressly rejecting the consideration of the defendant's lack of capacity for judgment to justify a durational departure due to it being an offender-related factor).

³ Gordon also cites to certain sentencing statistics arguably showing that district courts have granted durational-departure motions in similar cases. But he cites no authority, and we are aware of none, requiring a district court to grant a downward dispositional departure based on such statistics.

Because the district court considered Gordon's arguments in support of his motion for a downward durational departure and determined based on the underlying conduct that substantial compelling reasons did not exist to support the motion, we find no abuse of sentencing discretion by the district court and affirm the guidelines sentence.

Affirmed.