

*This opinion is nonprecedential except as provided by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
A21-1726**

State of Minnesota,
Respondent,

vs.

Cree James Diver,
Appellant.

**Filed September 6, 2022
Affirmed
Slieter, Judge**

Otter Tail County District Court
File No. 56-CR-20-2395

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

Michelle M. Eldien, Otter Tail County Attorney, Kathleen J. Schur, Assistant County Attorney, Fergus Falls, Minnesota (for respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Slieter, Judge; and Bryan,
Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

Appellant argues that the district court abused its discretion by refusing to impose either a dispositional or durational sentencing departure, claiming he is particularly amenable to probation and his criminal conduct was substantially less serious than typical.

Because the district court did not abuse its discretion by sentencing appellant within the presumptive range, we affirm.

FACTS

On September 22, 2020, appellant Cree James Diver and his fiancée, T.H., began arguing after T.H. discovered evidence of Diver’s infidelity on his cellphone. The two pushed and shoved one another and then Diver punched T.H. in the mouth. Diver damaged T.H.’s front teeth and broke a bone in her mouth, for which she obtained root canals and partial teeth implants. The assault also resulted in stitches on Diver’s hand.

Respondent State of Minnesota charged Diver by an amended criminal complaint with first-degree assault—great bodily harm, third-degree assault—substantial bodily harm, and two counts of felony domestic assault. The complaint alleged that, due to Diver’s punch, “T.H. suffered a fractured jaw and it had to be wired to correct jaw placement.”

Pursuant to a plea agreement, Diver pleaded guilty to first-degree assault, in violation of Minn. Stat. § 609.221, subd. 1 (2020), in exchange for dismissal of the remaining counts, dismissal of pending criminal charges in three unrelated case files, and the expectation that Diver would ask for a departure from the presumptive sentence. The sentencing worksheet, included with the court-ordered presentence investigation (PSI),

indicated that Diver had a criminal-history score of one,¹ which results in a presumptive sentence range of 84 to 117 months' imprisonment. Minn. Sent. Guidelines 4.A (2020).

Diver moved for a dispositional departure, which the district court declined to grant. Diver's counsel then orally moved for a durational departure, requesting that the district court "impose a 60-month sentence in this matter," which the district court also denied.

The district court adjudicated Diver guilty of first-degree assault and sentenced him to 84 months' imprisonment, the lowest presumptive-range sentence. *Id.* Diver appeals.

DECISION

We review the district court's sentencing decision for an abuse of discretion. *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014); *State v. Larson*, 473 N.W.2d 907, 909 (Minn. App. 1991). We generally will not disturb a presumptive sentence if "the record shows that the sentencing court carefully evaluated all the testimony and information presented," even if reasons for a departure exist. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (quotation omitted), *rev. denied* (Minn. Sept. 17, 2013); *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). Only in a "rare" case will we reverse the district court's refusal to depart from a presumptive sentence. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018) (quoting *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981)).

The sentencing guidelines provide that "departures from the presumptive sentences established in the Sentencing Guidelines should be made only when substantial and

¹ The sentencing worksheet showed that Diver had one-half custody status point and one-and-one-half felony points. The district court, at sentencing, rounded down each partial point resulting in a criminal-history score of one. Minn. Sent. Guidelines 2.B.102 (2020).

compelling circumstances can be identified and articulated.” Minn. Sent. Guidelines 1.A.6 (2020).

Dispositional Departure

When considering a dispositional departure, the district court generally focuses on the defendant as an individual. *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). A defendant’s particular amenability to probation may justify a dispositional departure. *Soto*, 855 N.W.2d at 308. Relevant factors for determining whether the defendant is particularly amenable to probation include the defendant’s age, prior criminal record, remorse, cooperation, attitude in court, and support of friends and family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

Diver contends that the district court abused its discretion by denying a downward dispositional departure, arguing that he is particularly amenable to probation. Specifically, Diver claims the district court improperly refused to “fully consider” the factors he presented to demonstrate that he is particularly amenable to probation as set forth in *Trog*. *See id.* The record persuades us otherwise.

First, “an 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). Second, though not obligated to do so, the district court considered several *Trog* factors proffered by Diver and explained its basis for determining that Diver was not particularly amendable to probation.

Before making its determination, the district court considered:

- Diver’s extensive criminal history of three felony offenses since 2015, six probation violations, and 12² misdemeanor offenses;
- Diver’s past offenses, which could not be identified as singular or insignificant because they were not of the type that occurred in a “spree” and were not “low level”;
- Diver’s lack of “strong family support”;
- Diver’s “serious and persistent mental illness” for which he had not sought sufficient treatment; and
- Diver’s lack of remorse illustrated by his belief that T.H. “plays the victim and is very manipulative.”

The district court concluded that it could not find a basis for departure given Diver’s “assaultive history.” The district court stated:

And I agree with your attorney completely that your childhood and upbringing and the people that were around, it’s atrocious. But when I’m looking at these, I also have to look at public safety. And you’ve racked up now, this is felony conviction number five in about six, seven years. I just, I can’t do it, Mr. Diver. I cannot grant, I just can’t grant a departure in this matter.

Thus, the district court considered several *Trog* factors, explained its decision, and, therefore, acted within its discretion by denying a dispositional departure.

Durational Departure

In determining whether to grant a downward durational departure, a district court must focus on the defendant’s conduct and consider whether it was “significantly less serious than that typically involved in the commission of the offense.” *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985). “A durational departure must be based on factors that

² Diver’s PSI shows 11 misdemeanor offenses, not the 12 the district court counted.

reflect the seriousness of the offense, not the characteristics of the offender.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (emphasis omitted). When the defendant’s actions fit squarely within the conduct prohibited by the statute, the offense is not significantly less serious than typical. *State v. Rund*, 896 N.W.2d 527, 534 (Minn. 2017); *Solberg*, 882 N.W.2d at 627.

Diver argues that the district court “did not specifically address the question of whether Diver’s offense was less serious than typical.” We disagree.

We first note that Diver did not provide to the district court a basis upon which it should consider a durational departure. And, despite offering no basis, the district court did consider whether Diver’s conduct was “significantly less serious than that typically involved in the commission of the offense.” *Mattson*, 376 N.W. at 415. The district court noted that the victim suffered a fractured jaw as the result of Diver’s offense and that Diver played no “small role in the offense.”

Diver’s actions fit squarely within the conduct prohibited by the statute. *Rund*, 896 N.W.2d at 534; *Solberg*, 882 N.W.2d at 627. Therefore, the district court acted within its discretion by denying a durational departure.

Affirmed.