

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1867**

State of Minnesota,
Respondent,

vs.

Mitchell Laine Sanchez,
Appellant.

**Filed October 9, 2012
Affirmed
Kirk, Judge**

Stearns County District Court
File No. 73-CR-09-13319

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Carl Ole Tvedten, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Bjorkman, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

KIRK, Judge

On appeal from his conviction of three counts of third-degree criminal sexual conduct and two counts of fourth-degree criminal sexual conduct, appellant argues that the district court abused its discretion by (1) granting the state's motion to exclude opinion testimony from the victim's sister and (2) denying appellant's motion for a downward dispositional departure. We affirm.

FACTS

In December 2009, the state charged appellant Mitchell Laine Sanchez with four counts of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(d), (e), (f) (2008), one count of fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1(d) (2008), and one count of fifth-degree criminal sexual conduct in violation of Minn. Stat. § 609.3451, subd. 1(1) (2008), stemming from three incidents that occurred between January 2004 and August 2009.¹ The victim, A.T., is mentally impaired and has been diagnosed with ADHD and an adjustment disorder. In July 2009, when A.T. was 19 years old, she reported to police that appellant, her stepfather, sexually assaulted her on three occasions. A.T. was under 18 years old at the time of one of the incidents.

After a bench trial, the district court found appellant guilty of three counts of third-degree criminal sexual conduct and two counts of fourth-degree criminal sexual conduct.

¹ We note that, while the state charged appellant with conduct occurring over a period of time beginning in 2004, we cite to the 2008 statutes because the substance of these statutes has remained the same.

At the sentencing hearing, appellant moved for a downward dispositional departure. The district court denied appellant's motion and committed appellant to the commissioner of corrections for 48 months for one count of third-degree criminal sexual conduct, 60 months for a second count of third-degree criminal sexual conduct, and 48 months for one count of fourth-degree criminal sexual conduct, to be served concurrently.²

This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by granting the state's motion in limine to exclude opinion testimony from A.T.'s sister.

Appellant argues that the district court abused its discretion when it granted the state's motion to exclude testimony from A.T.'s sister about A.T.'s character for untruthfulness. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

In general, evidence of a witness's character is inadmissible "for the purpose of proving action in conformity therewith." Minn. R. Evid. 404(a). However, Minn. R. Evid. 608(a) provides that:

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to

² The district court did not impose a sentence for the two additional counts because they arose out of the same incident as the third-degree criminal sexual conduct count for which it imposed a 48-month sentence.

these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Even if the district court determines that evidence of a victim's character is admissible under rule 608(a), the "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403.

Here, the state filed a motion in limine to prevent "any witness from testifying about the victim's reputation in the community for untruthfulness" and "any witnesses from testifying about their speculations or personal beliefs about the credibility of the victim and about whether they believe the defendant sexually abused the victim." The state attached two investigative reports to the motion that were prepared by a defense investigator and summarized interviews with the victim's mother and sister, respectively. Shortly before the trial began, the district court granted the state's motion "in total." The district court observed that "the defense will have the opportunity to cross-examine the alleged victim. The [c]ourt in this case still has to make judgments about the credibility of all of the witnesses. And I think that generally any probative value of any such testimony is outweighed by its potential for prejudice." The district court further noted that, although there are exceptions, "character evidence is generally excluded under the rules and it's not admissible to prove that an individual is acting in conformity with their character on the specific occasions." While this statement is correct regarding character evidence under rule 404, evidence of a witness's character for truthfulness is generally admissible under rule 608 for impeachment purposes. However, appellant did not fully

develop a foundation for the offered opinion and reputation evidence and the court considered whether the probative value was substantially outweighed by the danger of unfair prejudice.

At trial, A.T.'s 17-year-old sister, B.C., testified for the defense. B.C. testified that A.T. appeared to be fine around appellant and would hug him and sometimes call him "dad." She further testified that A.T. told her that "she wanted to get [appellant] into trouble" and asked B.C. to help her.

Appellant argues that the district court abused its discretion by not allowing B.C. to testify about her opinion of A.T.'s general untruthfulness. Appellant specifically refers to two statements that were included in the investigative reports that were attached to the state's motion in limine: (1) B.C. reported that she and A.T.'s older sister "would lie and tell stories" and B.C. "does not know if [A.T.] has the same problems"; and (2) B.C. stated that A.T. "is not a truthful person." In response, the state contends that appellant's argument is moot because the district court "did not specifically bar opinion testimony as to A.T.'s character for truthfulness."

We first conclude that appellant's argument is not irrelevant.³ The state moved to exclude "any witness from testifying about the victim's reputation in the community for untruthfulness" and "from testifying about their speculations or personal beliefs about the credibility of the victim," and the district court granted the motion "in total." Because the

³ Mootness refers to an inability to grant effective relief because of intervening events. *State v. Brooks*, 604 N.W.2d 345, 347 (Minn. 2000). The state's argument goes to whether appellant's argument is supported by the record.

district court barred all opinion testimony regarding A.T.'s character for truthfulness, appellant's argument is relevant.

We also disagree with appellant's argument. It was within the district court's discretion to exclude opinion evidence. The district court conducted a balancing test under rule 403, determined that the potential for prejudice outweighed any probative value, and excluded the evidence. We conclude that the district court did not abuse its discretion by excluding testimony from B.C. about A.T.'s character for truthfulness.

II. The district court did not abuse its discretion by denying appellant's motion for a downward dispositional departure.

Appellant argues that the district court abused its discretion when it denied his motion for a downward dispositional departure. A district court may depart from the presumptive sentence provided by the sentencing guidelines only if "identifiable, substantial, and compelling circumstances" warrant such a departure. Minn. Sent. Guidelines II.D (2005).⁴ "Substantial and compelling circumstances are those circumstances that make the facts of a particular case different from a typical case." *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). The decision whether to depart from the guidelines is within the district court's discretion, and this court will not reverse that decision "absent an abuse of that discretion." *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011). This court will only reverse a district court's refusal to depart in a "rare" case. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

⁴ The district court applied the 2005 sentencing guidelines based on the offense date appellant was charged with. Because neither party argues that the wrong version of the guidelines was applied, we also apply the 2005 guidelines.

In determining whether to depart from a presumptive sentence, a district court may “focus . . . on the defendant as an individual and on whether the presumptive sentence would be best for him and society.” *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). The district court may consider the individual’s amenability to probation. *Id.* In addition, the district court may consider factors such as “the defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family.” *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

Here, appellant moved for a downward dispositional departure prior to the sentencing hearing. In support of his argument, appellant’s counsel referenced the pre-sentence investigation (PSI), in which the author observed that appellant “would be an appropriate candidate for dispositional departure.” Appellant’s counsel argued that the district court could depart from the presumptive sentence based on four *Trog* factors: (1) appellant has a very limited criminal history, with one theft conviction in 2004 and two traffic tickets in 2006 and 2009; (2) appellant is amenable to probation, as demonstrated by the fact that he did not commit any new offenses during the approximately four years that this case was pending; (3) appellant is amenable to treatment in the community, as the psychosexual evaluation report recommendations demonstrate; and (4) appellant has the support of his family.

The district court denied appellant’s downward-dispositional-departure motion, stating that while it usually “give[s] great deference to the recommendations of PSI writers,” it “was surprised by the recommendation in this case.” The district court also noted that appellant’s comments during the sentencing hearing “confirmed” its decision

to deny the motion because appellant “tried to place the blame for this incident in large portion on the victim.” The district court did not address the four *Trog* factors that appellant’s counsel raised at the hearing.

Appellant contends that the district court abused its discretion by failing to address all of the *Trog* factors before denying his motion for departure. But the district court was not required to discuss the *Trog* factors before imposing a presumptive sentence, although it is helpful for the court to “deliberately consider[] circumstances for and against departure” before exercising its discretion. *Pegel*, 795 N.W.2d at 254; *see also State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985) (“Although the trial court is required to give reasons for departure, an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence.”). While the district court did not discuss the *Trog* factors on the record, the record establishes that the district court considered possible reasons for departure before it decided not to depart. The district court presided at the sentencing hearing and heard appellant’s arguments in support of departure. In denying appellant’s motion, the district court explained that appellant’s lack of remorse contributed to its decision to deny the motion. The district court properly exercised its discretion and imposed the presumptive sentence.

Appellant also argues that the district court inappropriately focused on the fact that appellant appeared to blame the victim and did not show remorse. However, “[t]he presence or absence of remorse can be a very significant factor in determining whether a defendant is particularly amenable to probation.” *State v. Sejnoha*, 512 N.W.2d 597, 600

(Minn. App. 1994), *review denied* (Minn. Apr. 21, 1994). The district court appropriately considered appellant's lack of remorse in deciding not to depart.

Accordingly, we conclude that the district court did not abuse its discretion by denying appellant's motion for a downward dispositional departure.

Affirmed.