STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2013

State of Minnesota,
Respondent,

vs.

John Howard Bartz,
Appellant.

Filed September 10, 2012
Affirmed
Ross, Judge

Winona County District Court
File No. 85-CR-11-598

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

Karin L. Sonneman, Winona County Attorney, Justin A. Wesley Assistant County Attorney, Winona, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Ross, Judge; and Muehlberg, Judge.*

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

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

ROSS, Judge

John Bartz pleaded guilty to first-degree burglary, third-degree assault, and attempted first-degree assault after he broke into a home and choked his girlfriend and her mother. As part of his plea agreement, Bartz agreed that his sentences would be served consecutively but that he could move for a downward dispositional departure. Bartz moved for a downward departure, arguing that he is amenable to probation and that he was suffering from posttraumatic stress disorder when he committed the crimes. The district court denied his motion and imposed a prison sentence of 108 months, which was within the presumptive guidelines range. Bartz appeals his sentence, arguing that the district court did not apply the right factors when refusing to depart, that he is amenable to probation, and that his sentences should have been executed concurrently. Because the district court acted well within its discretion by rejecting Bartz's motion, we affirm.

FACTS

John Bartz and his live-in girlfriend, T.B., argued one evening in March 2011, prompting T.B. to leave for the home of her mother, J.S. Bartz drank for several hours the next day and then went to J.S.'s house looking for T.B. When no one answered the door, Bartz threw a table through a window and climbed inside.

J.S. and two of T.B.'s children were home. J.S. told Bartz that T.B. was not there and ordered Bartz to leave. Bartz was unconvinced, so he began searching through the house for T.B. Unsuccessful, he pushed J.S. onto a bed and began choking her. T.B.,

who had been hiding, revealed herself. Bartz let go of J.S. and began choking T.B. J.S. called the police.

When the police arrived, they found Bartz straddling T.B., who was on her back on the bed. Bartz was bouncing T.B. up and down as he choked her. His arms were straight and stiff. The officers forcibly removed him from T.B. A test revealed that Bartz was inebriated with a blood alcohol level of .30.

The state charged Bartz with ten criminal counts. He entered into a plea agreement with the state. Under the agreement, Bartz pleaded guilty to first-degree burglary, and he entered *Norgaard* pleas to third-degree assault with substantial bodily harm and attempted first-degree assault because he could not remember the contact he made with T.B. and J.S. as a result of his intoxication. *See State ex rel. Norgaard v. Tahash*, 261 Minn. 106, 111–12, 110 N.W.2d 867, 871 (1961) (holding that a criminal defendant may plead guilty even though he claims not to remember his alleged conduct). In exchange, the state agreed to dismiss the remaining charges. The agreement recognized that the district court could impose the presumptive guidelines sentence for each offense, which the parties expected would total 113 months imprisonment, and that the sentences would be served consecutively. The agreement contemplated that the state would argue for the sentences to be executed and that Bartz would argue for a downward dispositional departure with a stay of execution.

Bartz moved for a downward dispositional departure. He argued that when he committed the offenses he was "laboring under an unresolved mental illness . . . Post Traumatic Stress Disorder," which resulted from alleged childhood occurrences and

impaired his judgment. He asserted that he is amenable to probation and treatment for both chemical dependency and mental illness, that treatment for posttraumatic stress disorder is available outside of a correctional facility, and that he is remorseful and accepts responsibility for his actions.

Several witness testified at the sentencing hearing, including two psychologists with competing theories. Dr. Kenneth Dennis, a forensic psychologist testified for Bartz. He diagnosed Bartz with PTSD, alcohol dependency, partner and relational problems, and adult antisocial behavior. Dr. Dennis opined that Bartz was suffering the effects of PTSD and that the strangling "wasn't him having experiences at [the] time. It would be him dissociating and having the experience from the past." Dr. Katheryn Cranbrook testified on behalf of the state. She opined that Bartz does not have a mental illness. She believed that he suffers from chemical dependency and a personality disorder other than PTSD and that he is "fairly treatment resistant."

Winona County Jail Administrator Steven Buswell testified on behalf of Bartz. He stated that Bartz had been a "model inmate" who followed the rules and was polite and compliant—characteristics that he acknowledged were also present in most inmates. Buswell also testified that jail officials had placed a somewhat vulnerable inmate in Bartz's cell block without fearing that Bartz would take advantage of him.

T.B. also testified for Bartz. She described him as a "[v]ery loving person" who "cares about everybody" and is a "[v]ery good dad." She stated that Bartz was acting uncharacteristically on the night of the attack and that it was the first time she had been scared of him. She did not want him to be "sent away."

Two victim impact statements were also read to the court. The first statement was from J.S. Her statement described Bartz as "a good friend" who has always helped her and who did not appear to be in his normal state of mind during the attack. She did not believe that Bartz should go to prison but that he merely needed help. The second victim impact statement was from T.B.'s daughter. She described Bartz as "sweet, loving, and caring," someone who "always put others before himself." And she credited Bartz with helping her graduate from school. She stated that her family would not be the same if Bartz was not present.

The district court also had information about Bartz's criminal history, which includes assaultive behavior. He had been convicted for a pattern of harassing conduct and violating an order for protection, and he has at least four convictions for assault or battery. Bartz also has a history of alcohol abuse and drug use and two drunk-driving convictions.

The district court sentenced Bartz to 60 months in prison for the first-degree burglary, which is within the presumptive guidelines range for that offense based on Bartz's criminal history score, and to 48 months in prison for attempted first-degree assault, also within the presumptive range. It sentenced him to 15 months in prison for third-degree assault, but it conditionally stayed that presumptive sentence.

Before deciding to execute the bulk of the prison sentence, the district court evaluated restitution, rehabilitation, deterrence, punishment, and incapacitation. It denied Bartz's motion for a downward departure because it saw no substantial and compelling

reason to depart from the presumptive sentence. The district court ordered that Bartz's sentences for burglary and attempted assault run consecutively.

Bartz appeals his sentence.

D E C I S I O N

Bartz argues that the district court abused its discretion by denying his motion for a downward dispositional departure. We review a district court's decision of whether to depart for an abuse of discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). "[A]s long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination" we will not interfere with the district court's exercise of discretion. *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011). In 1981, the supreme court predicted that only the "rare case" would call for an appellate court's reversal of the district court's refusal to depart downward from the presumptive sentence under the guidelines, *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981), and that prediction has proven accurate. This is not a rare case in which the district court was compelled to grant a motion to depart downward.

A district court may depart from the presumptive guidelines sentence only if "substantial and compelling" circumstances exist. *Id.*; Minn. Sent. Guidelines II.D. (2011). The sentencing guidelines provide a nonexclusive list of aggravating and mitigating factors that may be considered by the district court when deciding whether to depart. Minn. Sent. Guidelines II.D.2. The supreme court listed several factors that can be considered when determining whether a defendant is particularly suitable to probation,

including the defendant's age, prior record, remorse, cooperation, attitude while in court, and the support of family and friends. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). But, contrary to Bartz's contention, the district court need not provide any explanation if it "considers reasons for departure but elects to impose the presumptive sentence." *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985); *see also Pegel*, 795 N.W.2d at 254 (holding that the district court is not required to discuss all of the *Trog* factors before imposing the presumptive sentence).

The record reveals that the district court considered reasons that had been offered to depart before it decided not to depart. It presided at a three-and-a-half-hour sentencing hearing during which it received testimony from two psychologists, Bartz, T.B., and the jail administrator. It also received two victim impact statements. When considering whether to depart, the district court discussed Bartz's history of drinking, trouble, and violence. It reasoned that the appropriate punishment for Bartz's conduct was incarceration. It noted that some evidence suggested that Bartz may be suffering from PTSD. It determined that Bartz is not a good candidate for treatment for chemical dependency and mental illness. The district court discussed its concern that Bartz is a repeat violent offender.

We are not persuaded by Bartz's implied contention that the district court was required to find that he has PTSD and that this mitigates his culpability, and even if we were, we are aware of no authority that requires an order for probation to accompany a sentencing court's finding of PTSD. The district court expressly considered the competing psychological evidence, and it was not moved to depart.

Bartz's supplemental brief argues that the district court abused its discretion by executing his sentences consecutively rather than concurrently. Consecutive sentences for a first-degree burglary conviction and a first-degree attempted assault conviction are permissive. Minn. Sent. Guidelines II.F.2 (2011). We will not reverse a district court's decision to permissively impose sentences consecutively unless it has clearly abused its discretion. *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007). No such abuse exists here.

Bartz's plea agreement acknowledged that his sentences would likely be consecutive. Bartz received the benefit of the state's dismissing seven of ten counts under that agreement. We repeat what we stated in *State v. Kilgore*: "Appellant made his deal. It was honored. He was most certainly not prejudiced by the voluntary plea agreement he entered into." 661 N.W.2d 654, 659 (Minn. App. 2003).

Bartz also argues that the district court judge was biased against him because of events that occurred in the judge's personal life. The record does not support Bartz's assertion that the district court judge acted on bias against him.

Affirmed.