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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1396**

State of Minnesota,
Respondent,

vs.

Michael Carl Koch,
Appellant.

**Filed December 24, 2012
Affirmed
Stauber, Judge**

Mower County District Court
File No. 50CR111160

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

Jeremy Lee Clinefelter, Mower County Attorney, Austin, Minnesota (for respondent)

Thomas R. Braun, Anna R. Braun, Christopher W. Coon, George F. Restovich &
Associates, Rochester, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Stauber, Judge; and
Collins, 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.

UNPUBLISHED OPINION

STAUBER, Judge

On appeal from his convictions of and sentences for second- and fourth-degree criminal sexual conduct, appellant argues that the district court abused its discretion by failing to grant his motion for a downward dispositional departure where the psychosexual evaluation indicated that appellant exhibited a low risk to reoffend and was a good candidate for community-based outpatient treatment. We affirm.

FACTS

Appellant Michael Carl Koch was charged with multiple counts of criminal sexual conduct and child pornography. The complaint alleged that appellant began sexually abusing the victim when she was approximately eight years old, and that the abuse continued until she reported it at the age of 16. Appellant subsequently pleaded guilty to criminal sexual conduct in the second degree in violation of Minn. Stat. § 609.343, subd. 1(h)(iii) (2010); and criminal sexual conduct in the fourth degree in violation of Minn. Stat. § 609.345, subd. 1(g)(iii) (2010).

Appellant moved for downward dispositional and durational departures from the presumptive sentence, based primarily on his amenability to probation and the recommendations of a psychosexual assessment conducted as part of the presentence investigation (PSI) process. The district court denied the motion and sentenced appellant to the presumptive sentence of 90 months in prison for the second-degree criminal sexual conduct conviction. The court also imposed a concurrent 48-month sentence for the fourth-degree criminal sexual conduct conviction. This appeal followed.

DECISION

The district court must order the presumptive sentence unless “substantial and compelling circumstances” justify departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Whether to depart from the sentencing guidelines rests within the district court’s discretion, and we will not reverse the decision absent a clear abuse of that discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Only in a “rare” case will an appellate court reverse a sentencing court’s refusal to depart. *Kindem*, 313 N.W.2d at 7.

In weighing whether to impose a downward dispositional departure from the presumptive sentence, a district court considers “the defendant as an individual and [focuses] on whether the presumptive sentence would be best for [the defendant] and for society.” *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). One factor to consider is the defendant’s amenability to probation. *Id.* Other relevant factors include the defendant’s age, prior criminal history, remorse, cooperation, attitude while in court, and support from family and friends. *Id.* (citing *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)).

Appellant argues that he presented substantial and compelling reasons justifying a dispositional departure. According to appellant, these substantial and compelling reasons include the conclusion in the psychosexual assessment that “[a]ppellant was a low risk to reoffend and was a good candidate for community based outpatient treatment,” as well as appellant’s poor health, his age, his zero criminal-history score, and the fact that he has support from family members and friends. Thus, appellant argues that the “district

court's conclusion that substantial and compelling factors are not present to support appellant's motion for a downward dispositional departure and subsequent denial of that motion was an abuse of discretion."

We disagree. In considering appellant's motion, the district court on the record considered the validity of appellant's privately funded psychosexual assessment. The district court was also presented with photographs of the victim and appellant that were taken by appellant. The victim was approximately eight years old at the time the photographs were taken and they show appellant (1) digitally penetrating her vagina; (2) with his tongue near her vagina; and (3) with her face next to his exposed penis. The pictures depict the severity of the charges, and the district court recognized the severity of appellant's conduct. The court stated that: "I think the severity of these charges, after considering these factors, it's my belief that [appellant] is not remorseful, and if he is remorseful, it's to keep him out of prison at this point in time." The court considered the factors presented by appellant and concluded that this was not "an exceptional case that should allow [a downward dispositional] departure." Moreover, even if there were reasons to depart, an appellate court will not disturb the district court's sentence if the district court had reasons for refusing to depart. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). The district court's reasons for refusing to depart include the severity of the offenses and the district court's perception that appellant lacked remorse. This is not the "rare" case in which the district court abused its discretion by denying appellant's motion for a downward dispositional departure from the presumptive sentence.

Affirmed.