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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1996**

State of Minnesota,
Respondent,

vs.

Dustin J. Klein,
Appellant.

**Filed October 15, 2013
Affirmed
Schellhas, Judge**

Ramsey County District Court
File Nos. 62-CR-11-6256, 62-CR-11-6495

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

John Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, 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 Ross, Presiding Judge; Schellhas, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges the district court's denial of his request for a downward dispositional sentencing departure for his conviction of aiding and abetting second-degree burglary. We affirm.

FACTS

In August 2011, appellant Dustin Klein was on probation for criminal damage to property. By separate complaints in August 2011, respondent State of Minnesota charged Klein with aiding and abetting second-degree burglary between April 27, 2011, and May 9, 2011, and aiding and abetting second-degree burglary on May 19, 2011. Klein pleaded guilty to both charges with no sentencing agreement with the state, except that Klein reserved the right to move the district court for a downward dispositional departure.¹ For Klein's conviction of the first burglary, the district court imposed the presumptive guidelines sentence of 28 months' imprisonment stayed. For the second burglary, the sentencing guidelines called for an executed prison sentence, and Klein moved for a downward dispositional sentencing departure.

The district court denied Klein's motion for a downward dispositional sentencing departure for the second burglary and sentenced Klein to a presumptive guidelines sentence of 29 months' imprisonment. At Klein's request, the district court then executed

¹ At the plea hearing, Klein also pleaded guilty to an unrelated gross-misdemeanor charge of possessing a BB gun in a public place and the district court sentenced him to 180 days' incarceration.

his 28-month stayed sentence for the first burglary, to be served concurrently with his 29-month sentence for the second burglary.

This appeal follows.

D E C I S I O N

The district court must order the presumptive sentence provided by the sentencing guidelines “unless there exist identifiable, substantial, and compelling circumstances” that warrant a departure. Minn. Sent. Guidelines II.D (2010). Appellate courts apply the abuse-of-discretion standard to a sentencing court’s decision to deny a motion for a downward dispositional sentencing departure. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). “Departures from the presumptive sentence are justified *only* when substantial and compelling circumstances are present in the record.” *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008). Only a rare case warrants reversal of the refusal to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Claiming that he is amenable to probation, Klein argues that the district court abused its discretion by denying his motion for a downward dispositional sentencing departure. He argues that the court erred by not considering the *Trog* factors when it denied his motion and that if the court had applied the appropriate *Trog* factors, it would have granted his motion. In *State v. Trog*, the supreme court stated that the “defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family” are some of the factors relevant to a determination of whether a defendant is amenable to treatment in a probationary setting. 323 N.W.2d 28, 31 (Minn. 1982). Klein argues that the district court should have considered his

cooperation with the court and probation, his admission of guilt, his remorse, and his attitude in court. But the law does not require that the district court discuss all of the *Trog* factors on the record. *State v. Pegel*, 795 N.W.2d 251, 254 (Minn. App. 2011). As long as the “record demonstrates that the district court carefully considered circumstances for and against departure and deliberately exercised its discretion,” the court does not abuse its discretion. *Id.* at 255. The “presence of factors supporting departure does not require departure.” *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008), *review denied* (Minn. Mar. 31, 2009).

Here, the record shows that the district court carefully considered the circumstances for and against departure and deliberately exercised its discretion. The district court explained on the record that it had reviewed the presentence-investigation report completed in the burglary case, the presentence-investigation report completed in Klein’s first-degree aggravated-robbery case, Klein’s motion for a downward dispositional departure, a victim impact statement, and an e-mail sent by Klein’s significant other. Additionally, the court heard Klein’s argument that he was amenable to probation because his crimes were “committed under the haze of alcohol use”; he had completed treatment and was living in a half-way house; he had found a job; and he had “connections to the community” that were monitoring his sobriety, “will enhance his education,” and “will keep him employed so that the victims can be paid for the things that they have lost.” The court also heard Klein acknowledge his guilt and express remorse.

The district court expressed its concern about the nature of the burglaries—they were home burglaries—“the place where people should feel safest,” that Klein was on probation when he committed the burglaries, and that he committed the aggravated robbery shortly after he committed the burglaries. The court also noted that it could impose consecutive sentences. *See State v. Rivers*, 787 N.W.2d 206, 212–13 (Minn. App. 2010) (“When crimes are committed against multiple victims, even if the crimes are committed in a single behavioral incident, it has long been recognized that multiple and consecutive sentences are allowed.” (citing *State v. Cruz-Ramirez*, 771 N.W.2d 497, 512 (Minn. 2009)), *review denied* (Minn. Oct. 19, 2010)). But the court recognized that Klein had made “significant steps towards changing the rest of [his] life” and therefore sentenced him to 29 months’ imprisonment, concurrent with his 28-month stayed sentence in another case that the court executed at Klein’s request. The court stated that it wanted to give Klein some credit for the changes he had made.

The record clearly demonstrates that the district court considered the circumstances for and against a downward dispositional sentencing departure and did not abuse its discretion by denying Klein’s motion.

Affirmed.