This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).

STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0544

State of Minnesota,
Respondent,

vs.

Todd Sutton,
Appellant.

Filed June 3, 2008
Affirmed
Schellhas, Judge

Clay County District Court
File No. K9-06-1243

Lori Swanson, Attorney General, 445 Minnesota Street, Bremer Tower, Suite 1800, St. Paul, MN 55101; and

Brian Melton, Clay County Attorney, 807 North 11th Street, P.O. Box 280, Moorhead, MN 56560 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Bradford S. Delapena, Special Assistant Public Defender, P.O. Box 40418, St. Paul, MN 55104 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and Halbrooks, Judge.

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

SCHELLHAS, Judge

Appellant challenges his conviction of and sentence for second-degree assault. Appellant argues that there is insufficient evidence to support the jury's finding that he intended to cause the victim fear of immediate bodily harm and that the district court failed to fully exercise its discretion when it denied appellant's motion for a downward dispositional departure and did not consider the possibility that appellant's physical impairment might make him more likely to be victimized in prison. Because the evidence supporting the jury's finding of intent is sufficient and the district court did not abuse its discretion in sentencing appellant, we affirm.

FACTS

In the early morning hours of June 7, 2006, when Appellant Todd Sutton's live-in girlfriend, D.H., came home late from work, appellant expressed his suspicion that she was having an affair with another man. Appellant testified that he told D.H. that she must start coming home after work and said to her, "If you don't, I'm going to slice you up." D.H. testified that on the night of June 12, appellant was waiting for her when she returned home late from work. The minor child of appellant and D.H. was also in the home. Appellant testified that he said to D.H., "I told you about staying out late." He told D.H. that he had warned her already. D.H. testified that appellant then struck her in the forehead with the palm of his hand, and she then went to her bedroom to change clothes. Appellant testified that he went to the kitchen, grabbed a knife, went to the

bedroom, showed the knife to D.H., and said, "I ought to slice your a-s up." Appellant testified that he then returned the knife to the kitchen and went back to watching television.

D.H. testified that when appellant came to her bedroom, he told her that he "shoulda" or "oughta" kill her and that five or ten minutes later, he returned to the bedroom with the knife still in hand. She testified that she had told a police officer that appellant made the same threat he previously made, that he "should have cut [my] throat." Appellant testified that he did return to D.H.'s bedroom a second time but denied having the knife with him. He denied saying anything about cutting D.H.'s throat but testified that he said, "I would have been better off killing your a-s." Appellant acknowledged intending to scare D.H. and wanting D.H. to believe that he was capable of inflicting the threatened injuries. D.H. testified that after about a minute, appellant left the bedroom doorway, put the knife away, and returned to the living room. She then closed and locked the bedroom door, called her older son and two of her brothers, and told each of them that appellant had threatened to kill her. In separate messages left on her brothers' answering machines, D.H. asked each brother to take care of her younger son if anything happened to her. One of D.H.'s brothers called the police.

The jury heard two tape-recorded statements made by appellant. In the first statement, appellant told a police officer that he felt his girlfriend was "trying to test" him by staying out late so he "[t]ook out [his] knife and showed it to her. And told her 'you're lucky I don't start stabbing you now.'" Appellant stated that the knife was a

butcher knife. In the second tape-recorded statement, appellant told a social worker that in order to scare D.H., he asked her, “[H]ow would you like to be all sliced up?”

In 2004, appellant suffered a stroke and a heart attack. D.H. testified that even though appellant had regained a degree of independence, he still had significant physical impairments and required her assistance. Appellant also suffers from “frozen shoulders,” which prevent him from lifting his arms above his head or putting his arms behind his back. He can only walk a few blocks before his legs start aching. These disabilities have prevented appellant from working.

Following the two-day jury trial, appellant was found guilty of second-degree assault, terroristic threats, and domestic assault. Appellant moved for a downward dispositional departure. The state opposed the motion. In his motion papers, appellant argued that the court should depart from the sentencing guidelines because appellant lacked substantial capacity for judgment when the offense was committed given his physical impairment and lack of communication skills. At the hearing, appellant argued that his mental capacities have slowed along with his physical capacities, and that this puts him at high risk if he were sent to prison. The district court held that in order for appellant to demonstrate a lack of substantial capacity for judgment at the time of the offense due to impairment of physical or mental capacity, appellant would have needed to present expert testimony or other evidence to establish the degree of the impairment from which he suffered.

Following the district court’s ruling, appellant clarified that he is not actually mentally impaired, but that he appears to suffer a mental impairment due to his slowed

reactions caused by the stroke. Appellant argued that his physical condition would make him a target for victimization in prison. This argument was raised for the first time at the sentencing hearing and had not been briefed to the district court. Appellant's counsel also argued that appellant's offense was not a "typical second-degree assault," but "was, at best, a terroristic threat." The district court held that, from the evidence presented at trial, the jury could have concluded that appellant had enough physical capacity to commit the crime charged. The district court also held that "[appellant]'s physical or mental condition which may or may not create unique problems for him in a prison setting, is not the type of mitigating factor that is described by section II.D.101 [of the Minnesota Sentencing Guidelines]." The court denied appellant's motion and sentenced him to 33 months in prison. This appeal followed.

D E C I S I O N

I.

When assessing the sufficiency of evidence, our review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," was sufficient to permit the jury to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The verdict should stand "if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a

defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

Minnesota Statutes, section 609.222, subdivision 1 (2006), provides that "[w]hoever assaults another with a dangerous weapon may be sentenced to imprisonment for not more than seven years or to payment of a fine of not more than $14,000, or both." To commit an assault, a defendant must act "with intent to cause fear in another of immediate bodily harm or death." Minn. Stat § 609.02, subd. 10(1) (2006).

Appellant argues that his actions demonstrated a threat of future harm rather than an intention to cause D.H. immediate harm. "Intent is an inference drawn by the [finder of fact] from the totality of circumstances." *State v. Raymond*, 440 N.W.2d 425, 426 (Minn. 1989.) "A factfinder may reject such an exculpatory statement if the evidence as a whole supports a finding that the actor intended the natural and probable consequences of his actions." *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998).

Appellant argues that although there is no doubt that he intended to cause D.H. fear when he threatened her on June 12, 2006, there is insufficient evidence to support the jury's finding that he intended to cause her fear of immediate bodily injury. He argues therefore that his conviction of terroristic threats should stand, but that his conviction of second-degree assault should be reversed. The record demonstrates that appellant's argument is without merit. By his own admission, appellant asked D.H. how she would like to be "all sliced up"; showed her a butcher knife and told her she was "lucky [he didn't] start stabbing [her] now"; followed her to her bedroom and told her "I ought to slice your a-s up"; and returned a few minutes later to tell her, "I would have been better

off killing your a-s." Appellant admitted that his actions were intended to cause D.H. to believe that he was capable of inflicting the injuries he had threatened previously.

Viewing the evidence in the light most favorable to the conviction, there is sufficient basis to allow the jury to reach a guilty verdict as to second-degree assault.

II.

A sentencing court may depart from the presumptive sentence provided by the Minnesota Sentencing Guidelines only if "substantial and compelling circumstances" warrant such a departure. Minn. Sent. Guidelines II.D; *State v. Kindem*, 313 N.W.2d 6, 7-8 (Minn. 1981) (affirming district court's refusal to downwardly depart for lack of substantial and compelling circumstances). "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). A district court has broad discretion in determining whether to depart from the guidelines, and this court will not reverse the decision absent an abuse of that discretion. *Kindem*, 313 N.W.2d at 7. Even if there are some reasons for departing downward, a reviewing court will not disturb the district court's sentence if it had reasons for denying departure. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). The mere existence of mitigating factors does not obligate the sentencing court to depart from the presumptive sentence. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Only in a "rare" case will a reviewing court reverse a district court's refusal to depart from a presumptive sentence. *Kindem*, 313 N.W.2d at 7.

At the sentencing hearing, appellant argued that he suffers from impairments that caused a lack of substantial capacity for judgment at the time the offense was committed. The district court found that appellant provided no evidence to demonstrate a lack of substantial capacity for judgment at the time of the offenses and that the jury could have concluded that appellant had sufficient physical capacity to commit the offenses charged. Appellant also argued that his impairments could subject him to potential victimization in prison. The district court found that potential victimization in prison was not what the guidelines contemplated in section II.D.2.a.(3), on which appellant relied in his motion papers. On appeal, appellant blurs the distinction between these two arguments.

Appellant argues that the district court abused its discretion because it concluded that a dispositional departure could not be based on a physical impairment. But that was not the district court's conclusion. The court stated: "[appellant]'s physical or mental condition which may or may not create unique problems for him in a prison setting, is not the type of mitigating factor that is described by section II.D.101."[1] Appellant argues that *State v. Trog*, 323 N.W.2d 28 (Minn. 1982), recognizes a defendant's unamenability to incarceration as appropriate for a district court to consider when ruling on a dispositional departure motion, making the district court's statement "plainly incorrect." But the district court's statement was correct. In *Trog*, the supreme court affirmed a downward dispositional departure based on "[n]umerous factors, including the

[1] We note that "section II.D.101" does not actually appear in the Minnesota Sentencing Guidelines. Rather, II.D.101 is a comment provided for section II.D.1. The nonexclusive list of factors that may be used by the district court as mitigating factors when determining departures is discussed in Minn. Sent. Guidelines II.D.2.a.

defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family." 323 N.W.2d at 31. *Trog* discusses unamenability to incarceration in dicta and does not mandate consideration of that as a factor. *Id.*

Section II.D.2.a.(3) of the Minnesota Sentencing Guidelines, upon which appellant's motion to the district court relied, does not address physical or mental conditions that may create problems for a criminal defendant in a prison setting. Instead, this section recognizes a potential mitigating factor when the offender "lacked substantial capacity for judgment *when the offense was committed*." Minn. Sent. Guidelines II.D.2.a.(3) (emphasis added). Appellant cites this provision to support his argument that the district court abused its discretion. But appellant fails to acknowledge that the district court separately considered and ruled on his motion based on this provision.

The record demonstrates that the district court understood and properly applied the guidelines. The court fully considered the issue of whether appellant's physical impairments caused him to lack substantial capacity for judgment at the time the crime was committed and rejected that argument. The court's characterization of the factors set forth in the sentencing guidelines is accurate and its decision not to consider factors outside the scope of the guidelines was not an abuse of discretion.

Affirmed.