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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1659**

State of Minnesota,
Respondent,

vs.

Kevin David Jones,
Appellant.

**Filed August 17, 2010
Affirmed
Stauber, Judge**

Sibley County District Court
File No. 72CR08177

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

David E. Schauer, Sibley County Attorney, Donald E. Lannoye, Assistant County Attorney, Winthrop, Minnesota (for respondent)

Jeff DeGree, Torres, DeGree & Associates, Minneapolis, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Lansing, Judge; and Worke, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant argues that the district court abused its discretion by denying his motion for a downward durational departure. We affirm.

FACTS

In October 2008, appellant Kevin Jones was charged with multiple counts of first-degree criminal sexual conduct. The complaint alleged that while he was the transportation director for the Sibley East School District, appellant developed a relationship with G which ultimately became sexual. Appellant and G engaged in multiple sexual encounters, including sexual intercourse, over many months beginning in the fall of 2007 and extending into the spring of 2008. G was 15 years old at the time of the sexual encounters.

While the charges were pending, a second complaint was filed in March 2009 charging appellant with violating an earlier restraining order prohibiting contact with the victim. This complaint alleged that as part of the conditions of his release, appellant was ordered to have no direct or indirect contact with G. The complaint further alleged that appellant violated the restraining order in February 2009, by using his son's email address to converse with G using an internet instant messaging system.

Appellant pleaded guilty to one count of first-degree criminal sexual conduct and one count of violating a restraining order. The plea agreement did not recommend a particular sentence. Appellant subsequently moved for a downward dispositional departure on two grounds: (1) that he was amenable to probation and (2) that, at the time of his offense, he suffered from a major depressive episode such that he lacked substantial capacity for judgment.

The state opposed appellant's motion to depart and presented evidence at the sentencing hearing that appellant had been regularly accessing pornographic websites

using his work computer. Frank Weber, a court-appointed therapist who performed a psychosexual evaluation of appellant, testified at the sentencing hearing. Weber testified that he diagnosed appellant with a “major depressive disorder,” which was triggered by the death of his daughter in 2003. According to Weber, appellant began accessing pornography after the death of his daughter as a way to escape. Weber further testified, after conducting several personality tests, that there was no indication that appellant suffered from any personality or antisocial disorders. Thus, Weber concluded that appellant would be amenable to treatment.

Appellant also presented the testimony of psychologist Dr. Peter Marston. Dr. Marston testified that he had been retained by appellant to perform a sex-offender assessment and psychosexual evaluation of appellant. Dr. Marston agreed with Weber’s diagnosis and testified that he believed appellant would be amenable to probation because of his low risk to reoffend.

The district court agreed that “[t]he [appellant] here suffered from depression, there is no doubt that the death of his daughter and his inability or unwillingness to accept his family’s advice to get counseling, contributed to the depression.” But the court found that appellant’s depression did not “impair his mental abilities or judgment to such an extent that he was unable to plan and execute his plan.” The court also found that “I am not so confident that [appellant] is amenable to probation.” Thus, the district court denied appellant’s motion and sentenced appellant to the presumptive sentence of 144 months in prison. The appeal followed.

DECISION

A district court may depart from the presumptive guideline sentence only when “substantial and compelling circumstances are present.” *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). “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). Whether to depart from the guidelines rests within the district court’s discretion, and this court will not reverse the district court absent an abuse of that discretion. *Id.* Only in a “rare” case will a reviewing court reverse a district court’s refusal to depart. *Kindem*, 313 N.W.2d at 7.

The Minnesota Sentencing Guidelines provide a nonexclusive list of factors that a district court may use as reasons for granting a departure. Minn. Sent. Guidelines II.D.2.a. A departure may be based on the mitigating factor that an “offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed.” Minn. Sent. Guidelines II.D.2.a(3). Although not one of the factors listed in the sentencing guidelines, a defendant’s amenability to probation is also a sufficient basis for a downward dispositional departure. *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). This court recently held that a district court does not abuse its discretion when it refuses to dispositionally depart even if there is evidence in the record that the defendant would be amenable to probation. *State v. Olson*, 765 N.W.2d 662, 665 (Minn. App. 2009).

Appellant argues that the district court abused its discretion by denying his motion for a downward departure because the testimony of Weber and Dr. Marston concludes

that he is amenable to probation and that, at the time of the offense, he was depressed and lacked substantial capacity for judgment. We disagree. Although the district court agreed that appellant suffered from depression that resulted from the death of his daughter, the court found that appellant “clearly had the mental capacity to know that his actions were wrong, that they needed to be kept secret and to plan to ensure that it would in fact be kept secret.” The court also considered the other mitigating factors listed in the sentencing guidelines and determined that they were not applicable. Finally, the district court considered appellant’s claim that he was amenable to probation and determined that “I am not so confident that [appellant] is amenable to probation” because of his “blatant disregard . . . [of] the Court’s specific order that he have no contact with the victim” and his “disregard [of] what that contact would do to the victim.” Thus, the district court did not abuse its discretion by denying appellant’s motion for a downward departure.

Appellant also argues that the district court erred by “applying the wrong standard in determining that appellant’s mental impairment was not a mitigating factor in determining his sentence.” To support his claim appellant points out that in rejecting his claim that he “lacked the substantial capacity for judgment” at the time of the offense, the district court stated that appellant “clearly had the mental capacity to know his actions were wrong.” Appellant contends that the proper standard under the sentencing guidelines is that appellant “lacked the substantial capacity for judgment.” Minn. Sent. Guidelines II.D.2.a(3).

Appellant cannot demonstrate reversible error. As addressed above, the district court considered appellant’s claim that he “lacked substantial capacity for judgment” at

the time of the offense, and concluded that the claim lacked merit. Although the phrase used by the district court on the record was not the specific language used in the sentencing guidelines, the language indicates that the court properly considered appellant's claim. Moreover, the district court was not required to provide an explanation for its reasoning in denying the departure. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985) (stating that if the district court "considers reasons for departure but elects to impose the presumptive sentence," an explanation for denying the downward departure motion is not necessary). This is not the "rare" in which the district court abused its discretion by imposing the presumptive sentence. *See Kindem*, 313 N.W.2d at 7.

Affirmed.