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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0341**

State of Minnesota,
Respondent,

vs.

Kevin Lamarr Ousley,
Appellant.

**Filed February 11, 2019
Affirmed
Smith, Tracy M., Judge**

Sherburne County District Court
File No. 71-CR-16-1245

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Kathleen A. Heaney, Sherburne County Attorney, George R. Kennedy, Assistant County Attorney, Elk River, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Smith,
Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Kevin Lamarr Ousley challenges the district court's denial of his motion for a downward dispositional departure in sentencing, arguing that he is particularly amenable to probation. We affirm.

FACTS

In December 2012, when Ousley was living with a girlfriend, he, on multiple occasions, touched his girlfriend's minor daughter's intimate parts. In 2016, the state charged Ousley with one count each of first-degree and second-degree criminal sexual conduct. Ousley reached a plea agreement with the state under which he pleaded guilty to second-degree criminal sexual conduct in exchange for dismissal of the first-degree-criminal-sexual-conduct charge. At the plea hearing, Ousley asked that a sentencing hearing be set about 90 days out to enable him to complete a psychosexual evaluation to support a departure motion. Sentencing was scheduled accordingly, and Ousley filed a motion for a downward dispositional departure.

At the sentencing hearing, the district court granted Ousley's request to continue sentencing for another month because Ousley had not yet obtained a psychosexual evaluation. On the date of the rescheduled sentencing hearing, Ousley again appeared without a psychosexual-evaluation report. Ousley had notified his attorney of his failure to obtain the report only the day before the hearing. Ousley asserted, as he had at the initial scheduling hearing, that he could not obtain the report due to financial difficulties. The district court refused to continue sentencing any further, finding that the lack of a

psychosexual evaluation was not “truly just a financial problem.” The court denied Ousley’s motion to depart and sentenced him to 90 months’ imprisonment and 10 years of conditional release.

This appeal follows.

D E C I S I O N

Ousley argues that the district court abused its discretion by denying his motion to depart from the presumptive sentence under the sentencing guidelines. Appellate courts “afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion.” *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (quotation omitted). A district court abuses its discretion when its decision is premised on legal errors or clearly erroneous findings of fact. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016).

A sentence or range of sentences prescribed under the Minnesota Sentencing Guidelines “is presumed to be appropriate.” *Soto*, 855 N.W.2d at 308 (quotation omitted). A district court may depart from the presumptively appropriate guidelines sentence only if substantial and compelling circumstances warrant doing so. *Solberg*, 882 N.W.2d at 623. “Substantial and compelling circumstances are those demonstrating that the defendant’s conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question.” *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (quotation omitted). Substantial and compelling circumstances justifying a downward dispositional departure include “a defendant’s particular amenability to individualized treatment in a probationary setting.” *State v. Trog*, 323

N.W.2d 28, 31 (Minn. 1982). Factors relevant to determining if a defendant is particularly amenable to treatment in a probationary setting include “the defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family.” *Id.*

Ousley argues that the district court abused its discretion by denying his departure request because application of the *Trog* factors demonstrates his particular amenability to probation. However, even assuming, without deciding, that the *Trog* factors show Ousley’s particular amenability to probation, reversal of his sentence is not warranted. “[T]he presence of factors supporting departure does not require departure.” *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008). Courts distinguish between sentencing appeals from departures and refusals to depart. The supreme court stated in *State v. Kindem*:

[W]e do not intend entirely to close the door on appeals from refusals to depart. However, we believe that it would be a rare case which would warrant reversal of the refusal to depart. . . . [T]he Guidelines state that when substantial and compelling circumstances are present, the judge “may” depart. This means that the trial court has broad discretion and that we generally will not interfere with the exercise of that discretion.

In this case, there were valid reasons for adhering to the presumptive sentence Thus, while there may have been arguments for departing downward, there were also reasons for not doing so. That being so, the determination whether or not to depart was clearly a discretionary decision for the trial court to make.

313 N.W.2d 6, 7-8 (Minn. 1981).

Under *Kindem*, a district court’s refusal to depart must not be disturbed if “there were valid reasons for adhering to the presumptive sentence,” even though “there were also

reasons for not doing so”—specifically, aggravating or mitigating factors. *Id.*; see *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *review denied* (Minn. July 20, 2010) (“This court will not generally review a district court’s exercise of its discretion to sentence a defendant when the sentence imposed is within the presumptive guidelines range.”). Also, we have held that district courts need not express reasons for nondeparture. *State v. Theisen*, 363 N.W.2d 867, 869 (Minn. App. 1985), *review denied* (Minn. May 20, 1985); see *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (“[T]he district court is not required to explain its reasons for imposing a presumptive sentence.”), *review denied* (Minn. Sept. 17, 2013); *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985) (“[A]n explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence.”).

In this case, the district court explained why it refused to depart from the guidelines, and its reasons are supported by the record. First, the district court could not be assured that Ousley was particularly amenable to probation because the court did not have a psychosexual evaluation. Second, Ousley took no initiative to arrange for a psychosexual evaluation and this failure, along with his repeated neglect to contact his attorney about his missing appointments, persuaded the district court that the lack of a psychosexual evaluation was not “truly just a financial problem.” Lastly, the district court questioned the defense attorney’s assertion that Ousley did not pose any threat to the public, in light of another charge of criminal sexual conduct pending against him in a different county. The district court’s reasons for nondeparture tended to suggest that a guidelines sentence would be best for Ousley and society. See *Abrahamson*, 758 N.W.2d at 337 (“A district court

considering a dispositional departure may focus ‘on the defendant as an individual and on whether the presumptive sentence would be best for him and society.’” (quoting *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983))). The district court did not abuse its discretion by denying Ousley’s motion for a downward dispositional departure.

Affirmed.