STATE OF MINNESOTA
IN COURT OF APPEALS
A09-713

State of Minnesota,
Respondent,

vs.

Kellie Ann Lundon Cormican,
Appellant.

Filed March 9, 2010
Affirmed
Worke, Judge

Polk County District Court
File No. 60-CR-07-3585

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

Gregory Widseth, Polk County Attorney, Crookston, Minnesota (for respondent)

Earl P. Gray, Earl P. Gray & Associates, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Shumaker, Judge; and Worke, Judge.

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

WORKE, Judge

Appellant challenges the sentence imposed as a result of her guilty pleas to five counts of third-degree criminal sexual conduct, arguing that the district court abused its discretion by (1) denying her motion for a downward dispositional departure, and

(2) imposing an unreasonable, excessive, and unjustifiably disparate sentence. We affirm.

D E C I S I O N

Appellant Kellie Ann Lundon Cormican pleaded guilty to five counts of third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(b) (2006), stemming from a sexual relationship with her 14-year-old neighbor, J.H. At her sentencing hearing, appellant moved for a downward dispositional departure based on her amenability to probation. The district court denied appellant's motion and sentenced her to concurrent executed terms of 36, 48, 70, 91, and 119 months based on her guilty pleas to each felony charge. Appellant now challenges her imposed sentence.

A district court may depart from the presumptive sentence provided in the sentencing guidelines 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). The presence of a mitigating factor does not require departure from the guideline sentence. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Whether to depart from the guidelines rests within the district court's discretion, and this court will not reverse the decision "absent a clear abuse of 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.

Downward Dispositional Departure

Appellant first argues that the district court abused its discretion in denying her motion for a downward dispositional departure. The district court may consider the *Trog* factors in determining a defendant's amenability to probation, including the defendant's age, prior record, remorse, cooperation, attitude while in court, and the support of friends or family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

Remorse

Appellant argues that she demonstrated sufficient evidence of remorse. Appellant voluntarily sought therapy after criminal charges were filed against her. Appellant's therapist testified that appellant had made significant progress during the nine months of therapy, and that her progress was especially attributable to her noticeable and sincere remorse for her offenses.

The district court disagreed. The court was particularly concerned with evidence of appellant having contact with other students at J.H.'s school after being charged in this matter. Most troubling to the court was a flurry of text messages sent by appellant to another juvenile male in a 24-hour period, specifically the following message: "Hey, I am in trouble, too, for f-ing [J.H.]. But I f-ed the wrong dude. I took the blame for all this just so he wouldn't get in trouble and then he turns on me. He took advantage of me. That's why I had to find myself a new boy toy." The district court noted:

> this [c]ourt's not convinced of the sincerity of her remorse for the victim. . . . a common theme . . . throughout this is that she claims her fragile emotional state . . . led to her being in such a situation that she was susceptible to this immoral[] illegal conduct. But she indicates that the victim is the one

> who asked her to teach him how to kiss, she indicates that the victim said he was ready for sex, she indicate[s] that the victim asked for oral sex. . . . Also extremely telling for the [c]ourt is the text messages that were sent subsequent to her admission of guilt in this matter to other juvenile males . . . talking about another boy toy, talking about that . . . she's kind of the victim here and that [J.H.] is the one who is at fault.

Appellant argues that the district court abused its discretion by focusing on appellant's lack of remorse at or near the time of her offense. The statements pertaining to the victim's willingness to participate in the sexual encounters cited by the court were made by appellant to police during their investigation. Likewise, appellant argues that the text messages were improperly relied on by the court because they were sent no more than two months after she was charged with her offenses. The court was well-aware of the proximity of the statements and the text messages to appellant's apprehension, however, and still noted that "the point that the [c]ourt [is] trying to make is that even after approximately two months after the confession, after she'd been seeing the therapist . . . we've still got this kind of conduct."

Ultimately, "[b]ecause the district court has an opportunity to actually observe the defendant throughout the proceedings, a reviewing court must defer to the district court's assessment of the sincerity and depth of the remorse and what weight it should receive in the sentencing decision." *State v. Sejnoha*, 512 N.W.2d 597, 600 (Minn. App. 1994), *review denied* (Minn. Apr. 21, 1994). The district court conducted a thorough assessment of appellant's remorse and concluded that this factor did not support a departure. There is insufficient reason to conclude that the district court abused its discretion.

Other Trog Factors

While the district court noted that it considered the *Trog* factors, the only enumerated criterion the court analyzed on the record was remorse. The district court was not required to make findings on all of the *Trog* factors. *See State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985) (stating if the district court "considers reasons for departure but elects to impose the presumptive sentence," an explanation for denying the departure is not necessary). Appellant offers several other *Trog* factors supporting her amenability to probation, including appellant's cooperation, lack of criminal history, and the support of family and friends. Appellant presented these arguments to the district court. Nevertheless, the district court concluded: "I have reviewed the *Trog* factors, I've reviewed the arguments and the memorandums in support thereof, I've reviewed [the state's] arguments to the contrary, and it is this [c]ourt's finding that there are not any substantial compelling factors that allow for dispositional departure." There is no basis to conclude that the district court abused its discretion in weighing the *Trog* factors not explicitly analyzed on the record.

Even if the district court wrongly discounted appellant's amenability to probation, as appellant asserts, a defendant's amenability to probation does not require a district court to depart from the presumptive sentence. *State v. Evenson*, 554 N.W.2d 409, 412 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996). When considering whether to depart, the district court may focus "on the defendant as an individual and on whether the presumptive sentence would be best for [her] and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). Appellant's pre-sentence investigation provided that

"[a]ny potential for amenability to community supervision should not be outweighed by the seriousness of [appellant's] actions. . . . Any departure from the guidelines may depreciate the severity of the offense." The district court echoed this concern at the sentencing hearing, concluding:

> Ultimately, the [c]ourt's determination is that not following the guidelines, in this [c]ourt's opinion, would unreasonably depreciate the severity of these offenses. We've got, admittedly, five offenses of inappropriate sexual contact between a thirty-eight year old adult and a fourteen year old juvenile . . . [which] occurred over a period of four months. . . . The [c]ourt, in making this finding, also takes into consideration the extreme negative impact that these actions of [appellant] have had on this particular victim.

Accordingly, the district court did not abuse its discretion by concluding that appellant failed to present compelling circumstances warranting a downward departure.

Expert Testimony

Appellant also argues that the district court abused its discretion by ignoring expert testimony of her amenability to probation. The district court sits as a fact-finder during sentencing, in a unique position to assess the credibility of witnesses. *State v. Spanyard*, 358 N.W.2d 125, 127 (Minn. App. 1984), *review denied* (Minn. Feb. 27, 1985). As such, the court determines the weight and credibility of evidence relevant to sentencing. *State v. McCoy*, 631 N.W.2d 446, 452 (Minn. App. 2001).

Dr. Nancy Hein testified about appellant's emotional and sexual issues. Dr. Hein concluded that appellant presented a low risk to re-offend. Dr. Hein further testified that appellant's desire to be with her young children would strongly motivate her to abide by probation and treatment requirements.

The district court rejected this testimony based upon "factual gaps in the information provided to [Dr. Hein] by [appellant]" exposed during cross-examination. Dr. Hein acknowledged on cross-examination that she based her conclusions largely on information from appellant and had not read the police reports. She was unfamiliar with the allegations that appellant masturbated in front of J.H. via webcam. She was also unaware that appellant and J.H. had been chatting online for a month prior to engaging in sexual relations, or that appellant had worked as a paraprofessional at J.H.'s school during the year before their sexual relationship developed. While the court speculated that had this "information [] been made available to Dr. Hein, [it] may have led [her] to a different conclusion[,]" the court simply was not persuaded by her testimony. The court instead focused on several of appellant's behaviors as "grooming" tendencies: seeking emotional comfort from J.H., allowing J.H. to discuss pornographic websites in her presence, complimenting his physique, and giving him gifts during the time period when the sexual relations occurred. The district court determined that this evidence "certainly leads to a different conclusion in this [c]ourt's mind when I weigh [Dr. Hein's] testimony that [appellant] is at low risk to [re-]offend."

The district court did not accord significant weight to the testimony of appellant's expert in light of the deficiencies in her report exposed on cross-examination and the weight of the countervailing evidence. Thus, the district court did not abuse its discretion in discounting Dr. Hein's testimony in considering appellant's amenability to probation. Because the district court did not err in weighing the factors advanced as justification for

a departure or the expert testimony in support thereof, the court did not abuse its discretion in denying appellant's motion for a downward departure.

Excessive and Unfairly Disparate Sentence

Appellant also challenges her overall sentence as excessive and unfairly disparate, and asks this court to reduce the sentence to 60 months. This court reviews an unfairness challenge for an abuse of discretion. *State v. Ford*, 539 N.W.2d 214, 229 (Minn. 1995). We have the power to modify a sentence that is unreasonable, excessive, unjustifiably disparate, or otherwise unwarranted. Minn. Stat. § 244.11, subd. 2(b) (2006); Minn. R. Crim. P. 28.05, subd. 2. But we generally will not modify sentences "fall[ing] within the presumptive sentence range." *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) (quotation omitted).

Appellant was charged with one count of third-degree criminal sexual conduct for each of the five times she had sexual intercourse with J.H., and received concurrent executed terms of 36, 48, 70, 91, and 119 months under the *Hernandez* method of sentencing. Appellant argues that the district court's use of the *Hernandez* sentencing model resulted in an inappropriate and unfair sentence, claiming that the circumstances surrounding her offenses do not justify the sentence she received and that the resulting sentence is disproportionate compared to similar sentences for similar crimes.

Appellant contends that the circumstances surrounding her offense do not support the length of her sentence for two reasons. First, she asserts that the harm incurred by the victim was "not more serious than the harm that typically results from this sexual-abuse

that occurred here." And second, she claims that the "kind of sexual abuse that occurred here is most-often resolved without prison time."

The district court clearly believed the negative impact on the victim was extreme in this case:

> He's gone from a B Honor Roll student to failing, apparently in most of his [classes]. He's dropped out of intramural activities and [] tennis [and] football. He's been the subject matter, [] apparently, of some unmerciful teasing by students . . . . And it's, again, something that as a fourteen-year-old, an adult[] who brought him into this situation[] bears the responsibility and burden for.

The state also presented evidence of J.H. battling depression and anger management since the offense. Additionally, J.H. also feared retaliation from appellant's husband, and the family had to obtain a restraining order against him. Appellant sets forth no evidence or argument establishing that the district court incorrectly assessed the impact of her crimes on the victim; thus the district court did not abuse its discretion in this respect.

Appellant's argument that her offenses are usually corrected without incarceration is equally unconvincing. Appellant seems to assert that, but for the myriad of psychological issues she was suffering from during the commission of these offenses, she would not have initiated sexual contact with a juvenile. Appellant presented evidence of her battle with depression after the death of her mother and the development of her marital problems, and speculated that she was also suffering from postpartum depression while committing these crimes. The district court considered this evidence, and did not abuse its discretion in weighing this evidence during sentencing.

Appellant next relies on statistics in arguing that the district court's use of the *Hernandez* model resulted in a disparate sentence compared to other sentences received for similar crimes. A review of the record indicates that a near totality of all female offenders convicted of the same crime as appellant were sentenced within the presumptive guidelines, as was appellant. Appellant's statistical argument is, therefore, unsuccessful.

The district court simply followed the *Hernandez* method of sentencing as adopted by the Minnesota Sentencing Guidelines. *See* Minn. Sent. Guidelines II.B.1 ("[T]he offender is assigned a particular weight . . . for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing or for which a stay of imposition of sentence was given before the current sentencing. Multiple offenses are sentenced in the order in which they occurred."); *see also* Minn. Sent. Guidelines II.B.105 ("When multiple current offenses are sentenced on the same day before the same judge, sentencing shall occur in the order in which the offenses occurred.") In doing so, the district court adopted the presumptive sentence of 119 months for appellant's fifth count.

Appellant's argument that her sentence is excessive is based on her desire for this court to ignore the district court's permissible use of the *Hernandez* sentencing method, and focus instead on the final 119-month sentence in isolation. Appellant's argument amounts to nothing more than a disagreement with the presumptive sentencing formula codified in the sentencing guidelines, and is not a basis for this court to reduce the sentence. *See State v. Litzinger*, 394 N.W.2d 803, 805 (Minn. 1986). Accordingly,

appellant's sentence is not excessive, unfairly disparate, or otherwise unwarranted. The district court thus did not abuse its discretion in sentencing.

Affirmed.