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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-96**

State of Minnesota,
Respondent,

vs.

Fredrick Wayne Allen,
Appellant.

**Filed November 2, 2010
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-CR-09-27792

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Ngoc Nguyen, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

Fredrick Allen appeals his prison sentence for making terroristic threats. Allen
argues that his 39-month sentence must be reduced because it reflects an upward

durational departure that is not based on any district court findings of fact made on the record at sentencing. Because the prosecutor stated a valid departure ground at sentencing and the court adopted that ground, the record does not leave us guessing about the reason for departure, and we affirm.

FACTS

Fredrick Allen was charged with and pleaded guilty to second-degree assault, making terroristic threats, and domestic assault by strangulation after he grabbed his girlfriend by the neck, held a knife to her throat, and threatened to kill her, all in front of her three-year-old daughter. Allen pleaded guilty to all three counts. In pleading guilty, he also agreed to a prison sentence of 39 months, a duration that is at the low end of the Sentencing Guidelines' presumptive range for his second-degree assault conviction. Allen also waived his right under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), to have a jury determine whether facts existed to support a sentencing departure, and he admitted that a child was present during the crime. The prosecutor indicated that the state would seek an upward departure if Allen failed to appear for sentencing. The prosecutor agreed to dismiss the two less serious counts, terroristic threats and domestic assault by strangulation, if he appeared. Allen asked the prosecutor instead to dismiss the second-degree assault conviction and keep the terroristic-threats conviction, and the prosecutor agreed.

Allen appeared for sentencing three weeks later, and, in keeping with the agreement, the prosecutor dropped all but the terroristic-threats charge and asked the district court to sentence him to 39 months in prison. But Allen requested that the court

sentence him instead to 28 months, a duration at the high end of the presumptive range for the terroristic-threats conviction, ignoring his agreement to be sentenced within the presumptive range of the assault charge. Given the dismissal of that charge, the prosecutor explained that to impose a 39-month sentence for terroristic threats—an upward departure—the court would need to state on the record the grounds for the departure, “specifically . . . the small child who was present during the assault.” The court stated, “But we did a waiver of *Blakely*,” to which the prosecutor responded, “We did. I just wanted to make sure it’s clear now.” The court stated, “Right. Okay,” and the proceeding concluded.

Allen appeals.

DECISION

Allen argues that the district court erred by imposing a 39-month sentence for his terroristic-threats conviction because the sentence was an upward departure and the court failed to state findings of fact to support the departure. We review a district court’s decision to depart from the presumptive guideline sentence for abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). But we review de novo matters of law, including the interpretation of procedural rules. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

A sentence within the sentencing guidelines range is presumed appropriate. Minn. Sent. Guidelines II.D (2008). The district court must impose that presumptive sentence unless “substantial and compelling circumstances” based on aggravating factors warrant an upward departure. *Id.*; *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008). Here,

the district court imposed an upward departure pursuant to a plea agreement. “A plea agreement standing alone, however, does not create [substantial and compelling] circumstances in its own right. Rather, when reviewing a plea agreement that includes a sentencing departure, the [district] court must determine whether the offense of conviction reflects any aggravating or mitigating circumstances that warrant a departure.” *State v. Misquadace*, 644 N.W.2d 65, 71 (Minn. 2002).

Allen had admitted to the existence of an aggravating sentencing factor before sentencing—the presence of a child during the crime. The presence of children during an assault is a valid aggravating factor. *State v. Hart*, 477 N.W.2d 732, 740 (Minn. App. 1991). But the district court did not expressly restate this factor at the sentencing hearing. When departing upward in a felony case, the district court must state on the record findings of fact as to the reasons for departure. Minn. R. Crim. P. 27.03, subd. 4(C). “[A]bsent a statement of the reasons for the sentencing departure placed on the record at the time of sentencing, no departure will be allowed.” *Geller*, 665 N.W.2d at 517.

We recognize that the exchange between counsel and the district court at the sentencing hearing by itself would fail to identify the reason for the departure. But we hold that the exchange, considered in context with the discussion at the plea hearing about the plea agreement, demonstrate that the district court satisfied rule 27.03, subdivision 4(C) and *Geller* by adopting the departure ground stated by the prosecutor at sentencing. The district court indicated that it was departing based on the presence of a child during the crime by stating, “Right. Okay,” after the prosecutor indicated that the

relevant aggravating factor was the presence of a child. The district court's statement implicitly adopted the presence-of-a-child factor, satisfying the requirement that the facts supporting departure be stated on the record at the time of sentencing.

The district court's adoption also fulfilled rule 27.03's purpose. The purpose of requiring the court to state facts supporting departure at the time of sentencing is to give the defendant an opportunity to evaluate and prepare an appeal and to facilitate meaningful appellate review of departures. *State v. Peterson*, 405 N.W.2d 545, 547 (Minn. App. 1987). In *Geller*, there was no indication that the record at sentencing contained any hint of the reasons justifying the departure. But here we are not left to speculate as to the ground for departure because the prosecutor stated the departure ground at sentencing and Allen had already admitted to the relevant facts before sentencing. *Cf. Misquadace*, 644 N.W.2d at 71 (suggesting that "the parties might agree on grounds for departure that the [district] court could review for adequacy").

We observe too that justice strongly weighs against invalidating this departure. Under the parties' plea agreement, Allen's 39-month sentence would not have been a departure at all because his second-degree assault conviction would remain, and 39 months' imprisonment was within the presumptive second-degree-assault sentencing range. Indeed, 39 months was at the low end of Allen's presumptive punishment for that offense. It appears that Allen preferred a terroristic-threats conviction for prison custody-status purposes. The prosecutor accommodated by dismissing the second-degree assault conviction at Allen's request, leaving instead the terroristic-threats conviction. Allen

now attempts to turn the prosecutor's accommodation to his tactical advantage. The attempt fails.

II

In his pro se supplemental brief, Allen argues that the district court used the wrong criminal history score when sentencing him. Allen appears to argue that he was erroneously sentenced based on a criminal history score of four rather than the correct score of three. But there is no basis in the record to evaluate the argument. The appellant has the burden to present a record adequate to facilitate appellate review. *Truesdale v. Friedman*, 267 Minn. 402, 404, 127 N.W.2d 277, 279 (1964). The record does not contain a presentence investigation report or any other document that would allow us to assess the accuracy of Allen's criminal history score.

Affirmed.