

NOT DESIGNATED FOR PUBLICATION

No. 125,221

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JAMES CIPRA,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Opinion filed September 15, 2023. Affirmed.

Ryan J. Eddinger, of Kansas Appellate Defender Office, for appellant.

Julie A. Koon, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., GREEN and HILL, JJ.

PER CURIAM: James Cipra was convicted by a jury of 10 counts of rape of a child under the age of 14, an off-grid felony, and sentenced to life in prison without the possibility of parole for 50 years. Cipra appealed, and this court reversed all but one of the convictions and remanded for resentencing. On remand, Cipra renewed a motion for a durational departure to a grid sentence. The district court denied the departure motion, sentencing Cipra to a life sentence without the possibility of parole for 25 years. Cipra now appeals for the second time, arguing the district court abused its discretion by denying the departure. After reviewing the record, we find no error and affirm.

FACTUAL AND PROCEDURAL HISTORY

In July 2019, a jury convicted Cipra of 10 counts of rape of a child under the age of 14. A full recitation of the facts is set out in *State v. Cipra*, No. 123,226, 2022 WL 68588, at *1-3 (Kan. App. 2022) (unpublished opinion), and need not be repeated here.

Cipra was denied a durational departure from his Jessica's Law mandatory sentence, asking the district court to impose a term of 77 months' imprisonment. The district court denied the departure motion, imposing two consecutive life sentences without the possibility of parole for 25 years, with the remaining eight counts running concurrently. Because all but one of his convictions were reversed on appeal, 2022 WL 68588, at *4-5, Cipra returned to the district court for resentencing.

The district court reconsidered Cipra's departure motion. The State asked the court to impose the presumptive hard 25 life sentence, arguing that the nature of the crime and the fiduciary relationship Cipra had with the victim were relevant considerations. The State acknowledged the lack of criminal history but said it was not independently a substantial and compelling reason to depart. The victim's mother and older sister addressed the court next, both describing the trauma the victim had endured because of Cipra's actions.

Cipra's defense counsel emphasized the lack of criminal history as a substantial and compelling reason to depart, stating that it "cannot be adequately accounted for in an off-grid case," and reiterated the factors raised in the written departure motion. Cipra also alleged that the prosecutor and defense counsel worked together to "inflame[] the already biased jury against [Cipra]" and that the prosecutor had maliciously charged Cipra based on false evidence. Cipra also alleged disparate treatment due to being transgender.

After Cipra's comments, the district court stated:

"All right. Thank you for your statement. I appreciate your comments. One thing I do want to say before sentencing, that I always listen to the comments that the attorneys make, the victims, the defendant, but the sentence is mine, and I take responsibility for it solely. I just—while I take—well, I take into consideration definitely everything people say, I don't want anybody leaving, well, the sentence was X, or wasn't Y, or whatever, because of something I said or did and then that individual takes on, falsely, the responsibility for what is only the judge's responsibility. So I just want to make that clear. Do appreciate all the comments."

The district court then announced it was denying Cipra's departure motion and imposing the presumptive life sentence without the possibility of parole for 25 years. In ruling on the motion, the court explained:

"Well, with regard to sentencing, this is an off-grid felony, carries a lifetime imprisonment with no eligibility for parole before 25 years. Upon these findings I will deny a departure for a lack of substantial and compelling reasons. I'll impose the presumptive imprisonment, that being life imprisonment with no parole before 25 years. And the defendant is subject to a lifetime of parole supervision.

"One thing I want to make clear, the jury's verdict—I'm trying to think, based on what the defendant said, but I am almost a hundred percent sure the issues of sexual orientation or transgender were not brought up at the trial and certainly there was no attempt to argue that or include that in any factfinding. Also, it is irrelevant to me, has nothing to do.

"I strongly believe—it's kind of like the words of Martin Luther King, people shouldn't be judged—and this is abridged, shouldn't be judged on anything but the content of their character, shouldn't have anything to do with their skin, their religion, their sexual orientation, their sexual identity, none of that.

"I strongly believe in that and believe that the law, both the State of Kansas and federally, stand for that proposition. And so I want to make it clear that absolutely has no bearing whatsoever on my sentence. No consideration whatsoever."

Cipra timely appealed.

ANALYSIS

In the sole issue raised on appeal, Cipra argues the district court abused its discretion in denying a motion for a departure after concluding that these factors did not constitute substantial and compelling reasons to justify a departure: (1) a lack of criminal history and (2) allegations of malicious prosecution. Cipra mainly challenges the district court's failure to explain on the record how it weighed these factors—and the evidence supporting them—in deciding to deny the departure.

An appellate court will not reverse a district court's denial of a departure under Jessica's Law unless the court abused its discretion in holding there was no substantial and compelling reason to depart. *State v. Powell*, 308 Kan. 895, 902, 425 P.3d 309 (2018). A judicial action constitutes an abuse of discretion if: (1) no reasonable person would take the view adopted by the district court; (2) it is based on an error of law; or (3) it is based on an error of fact. *State v. Willis*, 312 Kan. 127, 133, 475 P.3d 324 (2020). As the party asserting error, Cipra bears the burden of establishing the district court abused its discretion. See *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021). Notably, Cipra does not specifically assert the district court committed a legal or factual error, so this court is left only with determining whether no reasonable person would agree with the district court's decision.

Cipra was convicted of rape of child under the age of 14 under K.S.A. 2011 Supp. 21-5503(a)(3), which carries a mandatory life sentence without the possibility of parole for 25 years under what is commonly known as Jessica's Law. K.S.A. 2011 Supp. 21-6627(a)(1). A district court can depart, however, for any first-time conviction and impose a sentence on the sentencing grid if, "following a review of mitigating circumstances," the court finds substantial and compelling reasons to do so. K.S.A. 2011 Supp. 21-

6627(d)(1); *Powell*, 308 Kan. at 902. The Kansas Supreme Court defines "substantial" to mean "something that is real, not imagined; something with substance and not ephemeral," while the term "compelling" implies that the court is forced, by the facts of a case, to leave the status quo or go beyond what is ordinary." *State v. Jolly*, 301 Kan. 313, 323, 342 P.3d 935 (2015).

The Kansas Supreme Court, in *Jolly*, laid out the proper steps a district court must follow when deciding whether to depart in a Jessica's Law case. First, the district court must review the mitigating circumstances without attempting to weigh them against any aggravating circumstances. Then the district court determines, based on all the facts of the case, whether the mitigating circumstances rise to the level of "substantial and compelling reasons" to depart from the mandatory minimum sentence. *Jolly*, 301 Kan. at 324. Additionally, the Kansas Supreme Court clarified in *Powell* that the district court does not need to affirmatively state its reasons for denying a departure motion. *Powell*, 308 Kan. at 908.

Although Cipra asserted several mitigating factors below—both statutory and nonstatutory ones—the only two brought forward on appeal are: (1) a lack of criminal history; and (2) allegations of malicious prosecution.

Cipra is correct that lack of criminal history is one of the statutorily recognized mitigating circumstances that can support a departure from a mandatory sentence in a Jessica's Law case. K.S.A. 2022 Supp. 21-6627(d)(2)(A). The evidence supporting this fact is found in the presentence investigation report, which lists his criminal history score as I and shows no prior convictions. But the presence of one or more mitigating factors does not automatically warrant a departure. *Jolly*, 301 Kan. at 323.

Allegations of malicious prosecution are not a statutorily recognized mitigating circumstance. But the statutory list is nonexclusive. K.S.A. 2022 Supp. 21-6627(d)(2).

When reviewing whether a sentencing court erred in denying a departure based on a nonstatutory factor, we must determine whether the nonstatutory factor's existence is supported by the record. *State v. Morley*, 312 Kan. 702, 711, 479 P.3d 928 (2021).

Cipra suggests the fact that another panel of this court overturned all but one of the rape convictions "arguably supports [the] claims of malicious or overzealous prosecution." This suggestion is unfounded because this court's prior decision did not exonerate Cipra due to "false evidence" as implied because that would have required reweighing evidence or reassessing witness credibility. Rather, the panel on Cipra's direct appeal overturned the other rape convictions because it found the State had relied solely on a recorded statement by the victim estimating that Cipra had molested her "'about 10 times,'" which she later equivocated on. *Cipra*, 2022 WL 68588, at *5. This court's ruling only establishes that the State presented insufficient evidence to support the charges, not as a commentary on whether the victim's allegations were either true or false. Cipra also presented no evidence at the sentencing—let alone to support a malicious prosecution claim—so this court cannot say the district court ignored any such evidence in rejecting the unsupported allegations as a substantial and compelling reason to depart. In other words, Cipra's malicious prosecution claim is not supported by the record, leaving only one basis to depart, lack of criminal history.

That said, Cipra argues that the district court failed to affirmatively state how it applied the *Jolly* framework in deciding not to depart. Cipra does not claim the district court improperly weighed aggravating circumstances—like the statements made at the hearing about the effect of Cipra's actions on the victim and her family members—against mitigating circumstances, and nothing about the court's comments at the hearing inherently suggest that happened. Cipra's focus is on the second part of the *Jolly* analysis, which required the court to consider the facts of the case and determine whether the mitigating circumstances provided substantial and compelling reasons to depart from the mandatory sentence. See 301 Kan. at 323.

A review of the record does show that the district court did not explicitly recite any mitigating circumstances or refer to the facts of the case on the record when ruling on the departure motion, but that does not by itself establish an abuse of discretion. See *Powell*, 308 Kan. at 914. The court said it "appreciate[d]" the comments made at the hearing and that it would "take into consideration definitely everything people say," but emphasized that the sentencing decision was the judge's sole responsibility. Those comments included statements by the State that the court could recall the trial evidence showing "that the victim was abused repeatedly over a period of time." The State also mentioned "the fiduciary relationship [Cipra] had with the child, the nature of the abuse, [and] the extended period of time that it took place in" as relevant facts to consider.

Cipra does not adequately explain how these statements show the district court failed to engage in the proper legal analysis or considered facts beyond the evidentiary record. And Cipra did not offer any evidence to support the assertions about a malicious prosecution, so they are merely conclusory. Put simply, based on the record before us, this court cannot conclude that the district court applied an incorrect legal framework or that no reasonable person would take the view adopted by the district court. The district court acted within its discretion in denying the departure motion.

Affirmed.