

NOT DESIGNATED FOR PUBLICATION

No. 126,010

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

LARRY BEASON JR.,
Appellant.

MEMORANDUM OPINION

Appeal from Douglas District Court; SALLY D. POKORNY, judge. Submitted without oral argument. Opinion filed December 8, 2023. Affirmed.

Peter Maharry, of Kansas Appellate Defender Office, for appellant.

Chad Cook, legal intern, *Brian Deiter*, assistant district attorney, *Suzanne Valdez*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before HILL, P.J., MALONE and ISHERWOOD, JJ.

PER CURIAM: Larry Beason Jr. appeals his sentence following his no-contest plea to one count of aggravated burglary. Beason's only claim on appeal is that the district court erred when it denied his motion for a dispositional departure. Finding no abuse of discretion, we affirm the district court's judgment.

FACTS

On July 13, 2021, the State charged Beason with one count of aggravated burglary and one count of aggravated intimidation of a witness or victim. After plea negotiations,

Beason pleaded guilty to one count of aggravated burglary and the State dismissed the other charge. The plea agreement required that Beason have no contact with the victim, J.H. In exchange for the plea, the State would recommend that the district court grant Beason both a durational and a dispositional departure and sentence him to probation. Beason later moved for a dispositional departure on various grounds including that he was taking full responsibility for the crime.

At the first scheduled sentencing hearing, the State argued that it was no longer bound by the plea agreement because Beason had violated the plea agreement by contacting J.H. through email. Beason denied sending the email and consented to a search of his email account. The district court continued the sentencing hearing to another date.

At the continued sentencing hearing, Beason stipulated that evidence supported a finding that an email was sent to J.H. from his account. The actual email is not a part of the record. Beason, through counsel, claimed that the exact wording of the email was, "For what it's worth. You were right. I was wrong. And I miss you terribly."

Beason argued at the hearing that the district court should follow the original plea agreement and sentence him to probation because the email was "not an intimidating email" and amounted to an apology for the crime. The State reiterated that it was no longer bound by the plea agreement because of Beason's breach and it now opposed a departure sentence. J.H. was also present at the hearing and described to the court her continued fear and anxiety since the burglary.

After hearing from the parties, the district court granted Beason's request for a downward durational departure and sentenced him to 43 months' imprisonment with 36 months' postrelease supervision. The district judge denied Beason's motion for a dispositional departure with these findings:

"And in good conscience, I cannot grant you probation. I understand that—I understand your argument of it wasn't threatening, I was just trying to apologize, but I know—I am sure you know and people have told you no contact means no contact. No flowers for the birthday, no Christmas cards, no nothing. It's no contact, and the reasons are, I think, set out very well. They were set out by the victim's statement here that when you have been in fear and you know this person has law enforcement saying, You can't contact that person; and even with that directive, it's frightening, and I think most people do not understand the level of fright that that can bring up in a person with this kind of charge pending, and I can't ignore it. I can't ignore it and I can't talk it away; and additionally, the fact that you lied to me. You said, No, I didn't send it, and we went to extra effort to—I think the State spent a considerable amount of time trying to exonerate you from that, and you let the State expend that time and energy that could have been spent on something much more serious and productive than for this."

The district court filed a journal entry committing Beason to the custody of the Secretary of Corrections. Beason timely appealed his sentence.

ANALYSIS

Beason's only claim on appeal is that the district court erred when it denied his motion for a dispositional departure. The State argues that the district court did not abuse its discretion in denying the motion. Because the district court granted a durational departure, we have jurisdiction under K.S.A. 2022 Supp. 21-6820(a) to review Beason's claim on appeal. See *State v. Looney*, 299 Kan. 903, 907-08, 327 P.3d 425 (2014).

Under K.S.A. 2022 Supp. 21-6815(a), the sentencing judge shall impose the presumptive sentence provided by the sentencing guidelines unless the judge finds substantial and compelling reasons to impose a departure sentence. K.S.A. 2022 Supp. 21-6815(c) sets forth a nonexclusive list of mitigating factors that may be considered in determining whether substantial and compelling reasons for a departure exist. We review the district court's determination of whether mitigating factors are substantial and

compelling reasons to depart for an abuse of discretion. *State v. Whorton*, 292 Kan. 472, 474, 254 P.3d 1268 (2011). A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *State v. Bilbrey*, 317 Kan. 57, 63, 523 P.3d 1078 (2023). The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *State v. Keys*, 315 Kan. 690, 708, 510 P.3d 706 (2022).

Beason argues that the district court abused its discretion by denying his motion for a dispositional departure merely because he violated the no-contact provision of the plea agreement. Beason argues that he contacted J.H. only to apologize for the crime and his request for probation should not have been denied for that reason alone. Instead, Beason argues that the district court should have granted his motion for a dispositional departure because he accepted responsibility for his crime.

The parties agree that acceptance of responsibility can be a mitigating factor supporting a departure sentence. See *State v. Morley*, 312 Kan. 702, 711-12, 479 P.3d 928 (2021). In reviewing whether the acceptance of responsibility was a mitigating factor, an appellate court will consider whether substantial competent evidence supports a factual finding that the factor exists and whether a reasonable person would have taken the view adopted by the district court. 312 Kan. at 711.

Beason concedes that there was a no-contact order in place and that he should not have sent the email. Even so, Beason argues that because he apologized in the email, it showed that he accepted responsibility for his crime. In addition, Beason argues that he was employed and was able to pay restitution to J.H. Thus, Beason argues there were substantial and compelling reasons to support a dispositional departure.

The State responds that Beason's email refutes—rather than supports—his claim that he fully accepted responsibility. We agree with the State. Beason's email to J.H.

demonstrates that he did not understand the gravity of his actions—both the burglary and sending the email. The district court succinctly summarized that "no contact means no contact" because, to the victim of a traumatic event, any form of contact from the person who caused the trauma might bring about renewed fear or anxiety and painful memories that others cannot understand. This conclusion was supported by J.H.'s victim impact statement where she described the ongoing negative effects of Beason's actions.

Moreover, the effectiveness of probation depends on a defendant's ability to follow a district court's orders. Beason's failure to honor the plea agreement contradicts his argument that he would be a successful candidate for a dispositional departure to probation. Beason also lied about sending the email, and neither admitted to sending it nor expressed regret for doing so until after his account was searched and the email was confirmed. Beason's initial denial of wrongdoing weighs against his acceptance of responsibility and his ability to follow the district court's orders on probation.

Under these facts, a reasonable person would agree with the district court's view. Beason may have taken limited responsibility for his actions, but he also ignored the plea agreement, showing an inability to follow simple, remedial instructions necessary to succeed on probation. The district court showed leniency by granting Beason's request for a durational departure. But Beason fails to show that the district court abused its discretion by denying his motion for a dispositional departure.

Affirmed.