

NOT DESIGNATED FOR PUBLICATION

No. 125,569

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BENEDICT OKWO,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; SETH L. RUNDLE, judge. Submitted without oral argument. Opinion filed December 1, 2023. Affirmed.

Emily Brandt, of Kansas Appellate Defender Officer, for appellant.

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

Before WARNER, P.J., ATCHESON, J., and MARY E. CHRISTOPHER, S.J.

WARNER, J.: Benedict Okwo pleaded guilty to aggravated indecent liberties with a child under the age of 14. Under Kansas law, this offense carries a presumptive sentence of life in prison without the possibility of parole for 25 years. Before sentencing, Okwo requested a departure sentence, arguing several mitigating circumstances warranted the imposition of a less severe sentence. The district court ultimately disagreed and imposed the presumptive life sentence. Okwo challenges that decision on appeal, asserting that the district court abused its discretion in denying his departure request. After carefully considering the parties' arguments and the case record, we affirm the court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2022, Okwo pleaded guilty to aggravated indecent liberties with a child under the age of 14 under K.S.A. 2019 Supp. 21-5506(b)(3)(A), (c)(3)—an off-grid person felony. Okwo's plea agreement referenced the State's criminal complaint, which included an affidavit that explained the circumstances leading to this conviction. Okwo admitted at the hearing on his plea that he had received the complaint and discussed it with his attorney.

According to the affidavit attached to the complaint, Okwo was at a relative's home in Wichita in December 2019, along with a one-year-old child and the child's mother. The mother had placed the child in a baby-gated area and briefly left the room; she returned to find the child was no longer there. The mother then overheard what she believed was pornography playing over a Bluetooth speaker Okwo had connected to his cell phone. She began searching for the child and found Okwo and the child in a bedroom. Okwo was standing about a foot away from the bed masturbating in the direction of the child, who was standing on the bed. Okwo later informed law enforcement that he took the child into the bedroom, removed the child's pants and diaper, and watched porn while touching the outside of the child's genitals to arouse himself. He also told a police detective that he intended to rape the child.

At the plea hearing, Okwo did not contest any of these allegations. His attorney informed the court that the plea did not give Okwo "much of a deal" because he was pleading guilty to the crime charged. The attorney explained that Okwo was "acknowledg[ing] his guilt and accept[ing] responsibility" and would be seeking a departure sentence. The plea agreement noted that the presumptive penalty for Okwo's offense was a hard 25 sentence—life in prison without the possibility of parole for 25 years. See K.S.A. 2019 Supp. 21-6627(a)(1). The plea agreement also acknowledged that

while Okwo was free to seek a downward durational departure from this presumptive sentence, the State would oppose it.

Before sentencing, Okwo filed a motion requesting that the district court impose a departure sentence. Okwo asserted that several mitigating factors, taken together, justified a departure. The motion alleged that Okwo has not been diagnosed with pedophilia; rather, he suffers from a mental impairment affecting his judgment and self-medicates with illegal drugs. The motion also argued that the degree of harm is less than typical for his offense because the victim will likely not remember the incident due to young age, and it pointed out that the child's father (who is related to Okwo) asked the court for leniency. The motion surmised that Okwo could be subject to abuse in prison because he was convicted of a child-sex offense. And the motion noted that Okwo had accepted responsibility for his actions by pleading guilty, saving the State time, expenses, and inconveniences that would result from a trial.

Okwo attached three documents to his motion: a letter from the child's father, a letter from one of Okwo's brothers, and a forensic psychological evaluation by Dr. Jarrod Steffan. Dr. Steffan diagnosed Okwo with persistent depressive disorder with suicidal thoughts. He also concluded that Okwo did not have pedophilic disorder, believing this was an isolated incident. Dr. Steffan added that Okwo "does not present a heightened risk for adverse outcomes to the community compared to other sexual offenders" and "can be safely maintained in the community."

At Okwo's sentencing hearing, the court heard sentencing recommendations from the State and Okwo's attorney. The State maintained that a hard 25 sentence was appropriate given the age and vulnerability of the victim and the nature of the offense. Okwo's attorney asked the court to depart to a grid sentence for the reasons presented in Okwo's departure motion.

After hearing these recommendations, the court denied Okwo's departure request. It explained that "[a]fter reviewing the motion for durational departure and the other information, including Dr. Steffan's report, I cannot find that there are substantial and compelling reasons to depart from the presumptive sentence." The court thus imposed the presumptive hard 25 sentence. Okwo appeals.

DISCUSSION

Okwo argues that the district court abused its discretion in denying his motion to depart to a grid sentence. He asserts that the district court did not give appropriate consideration to the factors he claimed should have mitigated his sentence. And he asserts that the district court's denial of his motion resulted from improper consideration of an unproven aggravating circumstance. We find neither argument persuasive.

Jessica's Law provides a presumptive hard 25 sentence for a defendant who is 18 or older and convicted of certain sex offenses. K.S.A. 2022 Supp. 21-6627(a)(1). When the conviction is the defendant's first conviction for an offense listed in subsection (a)(1), K.S.A. 2022 Supp. 21-6627(d)(1) grants the district court the discretion to sentence the defendant under the Kansas Sentencing Guidelines Act instead if the court "finds substantial and compelling reasons, following a review of mitigating circumstances, to impose a departure."

The Kansas Supreme Court has emphasized K.S.A. 21-6627's unique sentencing framework. In *State v. Jolly*, 301 Kan. 313, 324, 342 P.3d 935 (2015), the court explained that this framework involves a three-step process to determine whether a departure sentence is appropriate:

- First, a sentencing court must "review the mitigating circumstances" proposed by the defendant "without any attempt to weigh them against any aggravating

circumstances" to determine whether those proposed circumstances could potentially form the basis for a departure sentence in the abstract. 301 Kan. at 324.

- Second, the sentencing court must consider "the facts of the case" and assess "whether the mitigating circumstances rise to the level of substantial and compelling reasons to depart" from the presumptive life sentence. 301 Kan. at 324.
- Third, if the court finds that the mitigating circumstances warrant a departure, the court must state the substantial and compelling reasons for the departure sentence on the record. 301 Kan. at 324.

Put another way, under the first step of the *Jolly* framework, a court reviews any mitigating factors the defendant proposed—without balancing them against any other circumstances—to determine whether they could potentially be a basis for a departure sentence. 301 Kan. at 324. Then, it assesses whether the factors that could support a departure are sufficiently substantial and compelling to warrant a lesser sentence than life imprisonment. This second step necessarily requires an assessment of "the facts of the case—including any egregious ones." 301 Kan. at 323.

"Simply stated, a judge does not sentence in a vacuum. The sentencing judge is to consider information that reasonably might bear on the proper sentence for a particular defendant, given the crime committed, including the manner or way in which an offender carried out the crime. This includes those 'circumstances inherent in the crime and the prescribed sentence.'" 301 Kan. at 324.

The sentencing decision is entrusted to the district court's "best judgment, common sense, and judicial discretion." 301 Kan. at 324. Appellate courts will only reverse such a decision if the district court judge abused that discretion—when no reasonable person would take the view adopted by the judge or when the judge's ruling relies on a legal or factual error. 301 Kan. at 324-25. Kansas courts have cautioned,

however, that a court abuses its discretion when it deviates from the sentencing statute's legal framework or fails to properly consider statutory limitations. *State v. Powell*, 308 Kan. 895, 903, 425 P.3d 309 (2018).

The party alleging an abuse of discretion bears the burden of proving it. 308 Kan. at 910-11. Appellate courts do not reweigh the evidence, assess the credibility of the witnesses, or resolve evidentiary conflicts. *State v. Reed*, 300 Kan. 494, 499, 332 P.3d 172 (2014).

Okwo claims that the district court deviated from the *Jolly* framework in two ways. *First*, he asserts that the district court ignored the mitigating factors he proposed because it did not individually analyze each factor on the record. But a district court is not required to explain its rationale when it denies a departure request at sentencing. *Powell*, 308 Kan. at 908. Rather, appellate courts presume that a district court properly considered the arguments before it. Thus, a defendant challenging that decision on appeal must point to portions of the record that indicate that the district court arbitrarily disregarded the factors the defendant presented or that its rulings were inconsistent with its judicial role. See 308 Kan. at 911 ("nothing in *Jolly* altered the general principles underlying abuse of discretion review").

Our review of the record shows the district court considered the proposed mitigating factors in Okwo's departure motion at the sentencing hearing. The court discussed some of those factors at the hearing. For example, the court discussed Okwo's suggestion that the child would not remember the crime and explained that it had reviewed Okwo's psychological evaluation. The fact that the court did not elaborate on other factors does not mean that it disregarded them. See 308 Kan. at 908-12. Nor does it demonstrate that the district court abused its discretion in denying Okwo's motion.

Second, Okwo argues that the district court misapplied the *Jolly* framework itself. He asserts that the court's discussion of his claim about the child's potential lack of memory of the encounter demonstrates that the court improperly weighed his proposed mitigating factors against aggravating circumstances. We disagree.

Our discussion of this argument benefits from some additional background. Okwo's departure motion argued that his actions warranted a lesser sentence because given the child's age at the time of the offense, the child would not remember that this had occurred; thus, Okwo's conduct would have less of a lasting impact on the child's life. At the sentencing hearing, the court acknowledged that it had no evidence as to whether the child would be able to remember what had happened. But the court noted that this consideration was less compelling because other people involved in the events, such as the child's mother, would remember and have to grapple with what took place. The court further expounded that this proposed mitigating circumstance did not warrant a departure because "but for the intervention of the child's mother, this would have possibly been an actual, completed rape." On appeal, Okwo argues that the district court impermissibly weighed this "unproven fact" against the proposed mitigating circumstances and thus deviated from *Jolly's* analytical framework.

We note that although Okwo describes the circumstance the district court referenced at sentencing—that he could have raped the child but for the mother's intervention—as "unproven," he does not challenge the factual basis for his plea. Nor does he challenge the accuracy of the court's statement—which was based on the information in the affidavit accompanying the complaint and summarized Okwo's admission to a police detective. Rather, Okwo argues that the district court used that circumstance as an aggravating factor and weighed it against the potentially mitigating factor that the one-year-old child would have no recollection of what had occurred.

As we have noted, under *Jolly*, a sentencing court first examines the proposed mitigating factors without weighing them against any aggravating factors. 301 Kan. at 324. It then considers "the facts of the case" to determine whether those mitigating factors are sufficiently substantial and compelling to warrant a departure sentence. 301 Kan. at 323-24.

The district court here did not deviate from this framework. Our review of the record shows that the court analyzed whether the mitigating circumstance Okwo proposed—the child's memory, in light of the child's age—was substantial and compelling, in light of the other facts in the case. This is the process *Jolly* requires.

Okwo has not shown that the district court abused its discretion by denying his request for a departure sentence.

Affirmed.