

*This opinion is nonprecedential except as provided by  
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A22-0295**

State of Minnesota,  
Respondent,

vs.

Jonathon Charles Kalvoda,  
Appellant.

**Filed December 19, 2022  
Affirmed  
Rodenberg, Judge\***

Clay County District Court  
File No. 14-CR-20-4214

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Pamela L. Foss, Chief Assistant County Attorney,  
Moorhead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Max Brady Kittel, Assistant  
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Cochran, Judge; and  
Rodenberg, Judge.

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to  
Minn. Const. art. VI, § 10.

## NONPRECEDENTIAL OPINION

**RODENBERG**, Judge

Appellant Jonathon Charles Kalvoda appeals from his conviction for first-degree criminal sexual conduct, specifically challenging his sentence and arguing that the district court abused its discretion when it denied his motions for downward durational and dispositional departures from the Minnesota Sentencing Guidelines. We affirm.

### FACTS

In December 2020, appellant was charged with two counts of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a) (2014).<sup>1</sup> In August 2021, pursuant to a plea agreement, appellant pleaded guilty to one of those counts.

Appellant's criminal sexual conduct took place between August 2014 and August 2017. Appellant was born on June 22, 1999, so he was approximately 15-17 years old during this time period. His victim, J.K., is 6 or 7 years younger than appellant and was under 13 years old during this time period.<sup>2</sup> J.K. told police that the abuse occurred over the course of at least two years, in appellant's home. While appellant pleaded guilty to only one count involving penetration of J.K, he admitted to police that he anally and vaginally penetrated J.K. three times during this time period. Appellant's plea agreement

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<sup>1</sup> Appellant was initially charged as a juvenile in February 2020. The district court certified appellant for prosecution as an adult in November 2020. Thereafter, an adult criminal complaint was filed.

<sup>2</sup> The parties disagree concerning the exact ages of appellant and the victim during the time period of appellant's criminal sexual conduct, but agree that appellant was a minor at the time of his conduct, and that the elements of the offense to which appellant pleaded guilty were satisfied by the respective ages of appellant and the victim.

included no agreement concerning sentencing—only that one count of first-degree criminal sexual conduct would be dismissed in exchange for appellant’s guilty plea to the other count.

Appellant moved the district court for a downward dispositional departure from the presumptive sentence of a commitment to prison under the Minnesota Sentencing Guidelines. In the alternative, appellant moved the district court for a downward durational departure from the guidelines. In support of his motion, appellant submitted a psychosexual evaluation, several letters of support, a memorandum from a dispositional advisor, and a sentencing brief.

At the sentencing hearing, the district court noted that it had also received a sentencing worksheet and presentence investigation (PSI) report. Appellant argued that several factors supported his motions: his intent to seek therapy, his honesty and responsibility during the investigation, his lack of behavioral issues in grade school, his community support, his respectfulness toward the court, his lack of criminal history, and his youth and immaturity at the time of his conduct.

The state argued against any departure. It noted that appellant appeared to have no motivation to do anything other than sleep and play video games, and that in the two years since the allegations against him surfaced, he had not yet pursued any treatment. The state acknowledged that J.K. expressed that she felt the guideline sentence of 12 years was “a long time,” and that the state had considered agreeing to a downward durational departure to three years’ incarceration. But, the state argued, because durational departures must be based on offense-related factors, and it could identify none to support a durational

departure, it opposed any departure from the guidelines. Near the end of the sentencing hearing, appellant withdrew his request for a durational departure. The district court continued the sentencing hearing for one month to allow time for it to consider the parties' arguments.

A month later, at the final sentencing hearing, the district court heard a statement from appellant's father in support of granting appellant's motion for a downward dispositional departure. The district court stated that, in addition to the father's statement and the documents it had previously reviewed, it had considered several factors in making its decision. It noted that "[t]here are strong arguments on both sides as it relates to the sentencing decision." And the district court recognized that this was appellant's first offense, it occurred when he was a juvenile, and appellant was honest during the investigation. But it observed that to grant a downward dispositional departure it must find that appellant was "particularly amenable" to probation, considering his age, prior record, remorse, cooperation, attitude before the court, and social support.

The court determined that it could not find sufficient evidence that appellant was particularly amenable to probation, noting that it was "an incredibly serious offense for which [appellant was] the only culpable party"; appellant did not demonstrate remorse; he made no effort to pursue treatment or employment during the two years the case was pending; he made no effort to cooperate with the PSI, even in scheduling; and he appeared to lack "any motivation or have a plan." The court also stated that it had considered a durational departure, but that the relevant offense-related factors to justify a durational

departure “are not present in this case.” It sentenced appellant to an executed 144-month prison sentence, consistent with the sentencing guidelines.

Over the next two days, appellant moved the court “to reopen and reconsider sentencing” and for a downward durational departure. Appellant argued that he sought the departure because his offense was less onerous than the typical such offense, he was remorseful, and he “accepts responsibility.” He also argued that his having committed the crime while a juvenile justified the requested durational departure.

The district court denied appellant’s motion for a durational departure in a written order two days later. The order summarized all the facts, documents, statements, and arguments outlined above. It specified that while some factors “might suggest” appellant would be amenable to probation, he had not demonstrated that he would be “*particularly* amenable.” The court also reiterated that it had considered a durational departure at the final sentencing hearing, and that “no basis for such a departure existed.”

## **DECISION**

The Minnesota Sentencing Guidelines establish presumptive sentences for felony offenses. Minn. Stat. § 244.09, subd. 5 (2020). The guidelines seek to “maintain uniformity, proportionality, rationality, and predictability in sentencing.” *Id.* “Consequently, departures from the guidelines are discouraged and are intended to apply to a small number of cases.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). A district court may depart from the presumptive sentence only when there are “identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent’g Guidelines 2.D.1 (2020); *see also State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). A

district court's refusal to depart from the sentencing guidelines will not be reversed absent a clear abuse of discretion. *State v. Givens*, 544 N.W.2d 774, 776 (Minn. 1996).

**I. The district court acted within its discretion when it denied appellant's motion for a downward durational departure.**

District courts have broad discretion to durationally depart from a presumptive sentence if substantial and compelling circumstances are present, and we generally will not interfere with an exercise of that discretion. *Kindem*, 313 N.W.2d at 7. Likewise, only in a "rare" case will we reverse the district court's refusal to depart from a presumptive sentence. *Id.*

A durational departure must be based on factors that reflect "the seriousness of the offense, not the characteristics of the offender." *Solberg*, 882 N.W.2d at 623 (emphasis omitted). "A downward durational departure is justified only if the defendant's conduct was significantly less serious than that typically involved in the commission of the offense." *Id.* at 624 (quotation omitted). When exercising its sentencing discretion, a district court "must consider circumstances supporting a downward durational departure from the presumptive sentence," and a district court errs if it fails to consider "legitimate" and "significant" reasons for a departure. *State v. Curtiss*, 353 N.W.2d 262, 262-63 (Minn. App. 1984). "Although the [district] court is required to give reasons for departure, an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence." *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). An offender's age, while relevant to a dispositional departure, is not a basis for a

durational departure. *State v. Bauerly*, 520 N.W.2d 760, 762 (Minn. App. 1994), (citing *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)), *rev. denied* (Minn. Oct. 27, 1994).

Here, the district court carefully considered appellant's request for a durational departure, correctly observing that such a departure requires consideration of offense-related factors, which it determined "are not present in this case." It concluded that "no basis for such a departure exist[s]." Appellant asks us to reverse the district court, insisting that a downward durational departure is warranted because his "conduct was significantly less serious than the typical first-degree criminal sexual conduct because of [his] young age at the time." He concedes that the district court (and the state) considered reasons for a durational departure "but could not find one." Appellant cites several cases to support his argument that his "age mitigated his culpability," but none of those cases address the propriety of considering an offender's age in determining whether to grant a durational departure from a presumptive felony sentence under the guidelines.<sup>3</sup> Indeed, as we have repeatedly held, "Caselaw is settled that offender-related factors do not support durational

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<sup>3</sup> See, e.g., *State v. McLaughlin*, 725 N.W.2d 703, 716 (Minn. 2007) (discussing the relevance of youth to a district court's determination whether to impose concurrent or consecutive sentences); *Trog*, 323 N.W.2d at 31 (listing factors relevant to dispositional departures); see also *Graham v. Florida*, 560 U.S. 48, 68, 82 (2010) (observing that "parts of the brain involved in behavior control continue to mature through late adolescence," and holding that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide"); *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (noting that "only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood" and concluding that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed" (quotation omitted)); *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (noting that "a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury" that is considering a death sentence).

departures,” and “age and lack of a felony record are not valid bases for durational departures.” *State v. Peter*, 825 N.W.2d 126, 130 (Minn. App. 2012), (citing *State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995) and *Bauerly*, 520 N.W.2d at 762), *rev. denied* (Minn. Feb. 27, 2013).<sup>4</sup>

The district court thoughtfully considered appellant’s request for a downward durational departure and acted well within its discretion when it denied the request.

## **II. The district court acted within its discretion when it denied appellant’s motion for a downward dispositional departure.**

A downward dispositional departure may be based on a defendant’s “particular amenability to individualized treatment in a probationary setting.” *Trog*, 323 N.W.2d at 31. But “merely being amenable to probation” is insufficient; “requiring a defendant to be *particularly* amenable to probation . . . distinguishes the defendant from most others and . . . presents the substantial and compelling circumstances that are necessary to justify a departure.” *State v. Soto*, 855 N.W.2d 303, 308-9 (Minn. 2014) (quotation omitted). The

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<sup>4</sup> After this case was submitted for decision, the Minnesota Supreme Court released *In re Welfare of H.B.*, \_\_\_ N.W.2d \_\_\_, 2022 WL 16954540 (Minn. Nov. 16, 2022). In *H.B.*, a 15-year-old was charged in juvenile court with aiding and abetting second-degree murder and first-degree aggravated robbery. *H.B.*, 2022 WL 16954540 at \*2. The district court denied the state’s motion to certify H.B. for adult prosecution, and the state appealed. *Id.* at \*3-4. We reversed the district court’s denial of adult certification, and the supreme court affirmed. *Id.* at \*5, 15. One of the certification factors analyzed by the supreme court was H.B.’s “culpability.” *Id.* at \*7-9; *see* Minn. Stat. § 260B.125, subd. 4(2) (2020). It concluded that the district court’s consideration of “U.S. Supreme Court precedent regarding child brain development [including *Roper* and *Graham*] to support a finding of mitigating factors [for culpability] outside of the sentencing guidelines” was improper. *Id.* at \*12. As with the cases appellant relies upon in his culpability argument, *H.B.* is readily distinguishable from this appeal because it involved an adult-certification question and did not involve the sentencing guidelines.



factors district courts examine in considering a defendant's "particular amenability" to probation include "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family." *Trog*, 323 N.W.2d at 3.

Even if a district court finds the existence of one or more mitigating factors, the district court is not *required* to depart. *Wells v. State*, 839 N.W.2d 775, 781 (Minn. App. 2013), *rev. denied* (Minn. Feb. 18, 2014). "We will affirm the imposition of a presumptive guidelines sentence when the record shows [that] the sentencing court carefully evaluated all the testimony and information presented before making a determination." *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (alteration in original), *rev. denied* (Minn. Sept. 17, 2013). A district court's refusal to depart from the guidelines will be reversed only in "rare" cases. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018) (quoting *Kindem*, 313 N.W.2d at 7).

Here, appellant argues that the district court erred because he is particularly amenable to probation. He contends that his particular amenability is illustrated by his willingness to enter treatment, his youth, his lack of criminal history, his acceptance of responsibility, his community support, his attitude in court, and his cooperation during the investigation. The district court carefully considered appellant's departure request and the relevant factors at great length, including continuing the sentencing date to allow additional time for consideration. It concluded that appellant is not particularly amenable to probation, a conclusion which the record supports. This is not the "rare case" where reversal of a guidelines sentence on appeal is warranted. As with its denial of appellant's

request for a durational departure, the district court acted well within its discretion when it denied appellant's request for a dispositional departure.

We see no error in the district court's imposition of the presumptive guidelines sentence for this first-degree sex crime.

**Affirmed.**