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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0726**

State of Minnesota,
Respondent,
vs.

Weston Marshal Voeltz,
Appellant.

**Filed August 21, 2023
Affirmed
Segal, Chief Judge**

Olmsted County District Court
File No. 55-CR-19-8187

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

Mark A. Ostrem, Olmsted County Attorney, James E. Haase, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

James McGeeney, Doda & McGeeney, P.A., Rochester, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Segal, Chief Judge; and Worke, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Respondent State of Minnesota charged appellant Weston Marshal Voeltz with first-degree criminal sexual conduct after M.S., who had attended a party at Voeltz's house, reported that Voeltz had sexually assaulted her at the party. On appeal, Voeltz argues that

the district court abused its discretion in denying his pretrial motion to prohibit the state's DNA experts from using the term sperm-cell fraction when testifying about their testing methodology; violated his constitutional right to confrontation by requiring trial witnesses to wear face shields despite reflected glare on the shields from overhead lighting; and abused its discretion in denying his motion for a downward dispositional departure. He further contends that the postconviction court erred in summarily denying his petition for postconviction relief. We discern no error or abuse of discretion and therefore affirm.

FACTS

In November 2019, M.S. went to the emergency room (ER) for a sexual-assault examination. M.S. stated during an interview with law enforcement at the ER that she sought the examination because, two nights earlier, Voeltz had sexually assaulted her. M.S. reported that she was at a party at Voeltz's house and agreed to go outside with him and sit in his truck. She said that, when she was with Voeltz in his truck, he tried to kiss her and then penetrated her vagina with his fingers and his penis despite M.S. saying "no" and telling him to stop. M.S. said that Voeltz ejaculated onto her stomach and then used a shirt to wipe off the ejaculate.

Two days after M.S. went to the ER, law enforcement searched Voeltz's truck and home pursuant to a warrant. During the search, they found a shirt in Voeltz's bedroom that matched the shirt described by M.S. The shirt appeared to have semen stains on it.

An officer interviewed Voeltz while law enforcement performed the search. Voeltz told the officer that while he and M.S. were in his truck during the party they kissed and he digitally penetrated her vagina, but that this contact was consensual. Voeltz said that he

asked M.S. if she wanted to have sex and she said “no,” so he stopped. He claimed that he never took his pants off or removed his penis from his pants and that he did not ejaculate. The officer then told Voeltz that law enforcement had located a shirt in Voeltz’s bedroom that appeared to have semen stains on it and that the shirt matched the description of the shirt that M.S. reported Voeltz had used to wipe his semen off her stomach. Voeltz told the officer that the shirt must have been left from sex with his ex-girlfriend before they broke up.

The stained shirt, M.S.’s underwear, and the swabs taken during the sexual-assault examination of M.S. were submitted to the Minnesota Bureau of Criminal Apprehension (BCA) for DNA testing. DNA samples from Voeltz and his ex-girlfriend were also submitted to the BCA. The testing identified sperm cells both on the shirt found in Voeltz’s bedroom and M.S.’s underwear. The testing also indicated that the sample from the shirt contained a single-source male DNA profile that matched the sample provided by Voeltz and “[w]ould not be expected to occur more than once among unrelated individuals in the world population.” Voeltz’s ex-girlfriend was excluded from being a DNA contributor to the sample from the shirt. The results of the sample from M.S.’s underwear showed that M.S. and Voeltz could not be excluded as the sources of the DNA, while 99.99997% of the population could be excluded. The results of the DNA testing of the samples from the swabs showed that “[n]either [Voeltz] nor any of his paternally-related male relatives [could] be excluded as the contributor of this male DNA.”

The state charged Voeltz with first-degree criminal sexual conduct. Before trial, Voeltz moved for an order to prevent the BCA witnesses from using the term “sperm-cell

fraction” in describing their DNA testing methodology. The district court denied the motion.

The jury trial took place in December 2021. Due to the ongoing COVID-19 pandemic, the operations of the court during the trial were governed by an order of the Chief Justice of the Minnesota Supreme Court (the Chief Justice’s order). *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001 (Minn. Oct. 18, 2021).¹ Consistent with that order, the district court required the trial witnesses to wear clear plastic face shields while testifying.

The witnesses testifying at the trial included M.S., four individuals who attended the party at which the alleged criminal sexual conduct occurred, a friend of M.S. who M.S. communicated with while she was at the party, two members of law enforcement, the nurse who performed the sexual-assault examination of M.S., two BCA forensic scientists, and Voeltz.

The jury found Voeltz guilty of first-degree criminal sexual conduct. At sentencing, the district court denied Voeltz’s motion for a downward dispositional departure and sentenced Voeltz to 144 months in prison, the presumptive sentence. Voeltz appealed, and this court stayed the appeal while Voeltz pursued postconviction relief. We reinstated Voeltz’s appeal after the postconviction court summarily denied Voeltz’s petition.

¹ The Chief Justice’s order was the most recent iteration of the continuity-of-operations orders governing the judicial branch during the COVID-19 pandemic. The initial order was issued by the Chief Justice in March 2020. *See, e.g., Continuing Operations of the Courts of the State of Minnesota Under a Statewide Peacetime Declaration of Emergency*, No. ADM20-8001 (Minn. Mar. 13, 2020).

DECISION

I. The district court did not abuse its discretion by allowing the BCA witnesses to use the term sperm-cell fraction.

We begin our analysis by addressing Voeltz's argument that the district court abused its discretion in denying his pretrial motion to prohibit the BCA scientists from using the term sperm-cell fraction. As explained by a BCA scientist at the hearing on Voeltz's motion, the term sperm-cell fraction and the corresponding term, non-sperm-cell fraction, refer to the two sections of cells obtained from the differential-extraction process used to extract and identify DNA in a sample that likely contains semen. The scientist testified that "[t]he way the extraction is designed is to separate sperm cells from all non-sperm cells leaving us with a sperm cell fraction that would have most of the sperm cells present." She stated that, "[a]lthough it's not a perfect extraction, if we have a lot of male DNA present in a sperm cell fraction, we can be pretty confident that most of the DNA would be from sperm cells, and that's how the process works." The scientist noted that other scientists may "call them epithelial and sperm cell fractions, but the concept is that if there are sperm cells present in the sample, they would be expected to end up in the sperm cell fraction." She also noted that "we have decades of experience doing differential extractions."

The scientist acknowledged that the testing in this case identified female DNA in the sperm-cell fraction of the sample from M.S.'s underwear. She admitted that to be certain that DNA in a sperm-cell fraction came from sperm cells, one would have to observe the sperm with a microscope before the differential-extraction process.

Microscope identification was performed on the samples from M.S.'s underwear and Voeltz's shirt and sperm cells were identified in the samples from both clothing items, but microscope identification was not performed on the samples from the swabs taken during the sexual-assault examination. She commented that, while it would be possible for Voeltz's DNA in the sperm-cell fraction to come from a source other than sperm, it is unlikely because bodily fluids contribute much more DNA than touch.

Voeltz argued that the label "sperm-cell fraction" was unfairly prejudicial because the testing process cannot guarantee that DNA found in that fraction comes from sperm cells, as opposed to other sources of DNA. He maintained that the use of the term would suggest to the jury that the sample necessarily contained his sperm. This contradicted his defense that his only sexual contact with M.S. was consensual contact with his fingers and that any of his DNA found on her underwear and in the swab samples was transferred by touch, not by semen. Voeltz's counsel suggested that alternative terms could be used instead of sperm-cell and non-sperm-cell fractions, such as lower and upper fractions.

The district court denied Voeltz's motion. The district court stated that this is a "piece of terminology that apparently . . . they commonly use" and disagreed with defense counsel that the terms posed a danger of unfair prejudice. The district court reasoned that "any realistic possibility of unfair prejudice of a misunderstanding that will be to the unfair detriment of the defendant" could be dispelled through explanation of the extraction process. The district court concluded that "we're talking about the label, and when that label is explained for what it is, I think it's understandable to the jury and not prejudicial to the defense."

We review evidentiary rulings, including the admission of expert testimony, for abuse of discretion. *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014); *State v. Thao*, 875 N.W.2d 834, 840 (Minn. 2016). “A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted).

Voeltz does not dispute the relevance of the experts’ DNA testimony but argues, as he did before the district court, that the state’s experts should not have been allowed to use the terms sperm-cell and non-sperm-cell fraction. He maintains that “allow[ing] an expert to testify that [Voeltz’s] DNA was located in the sperm cell fraction, without the ability to testify that that DNA came from a sperm cell[,] was misleading to the jury” and “would cause the jury to incorrectly infer . . . that his DNA must have come from a sperm cell.” *See* Minn. R. Evid. 403 (providing that “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”).

Voeltz’s argument falls short, however, of establishing an abuse of discretion. First, the district court’s denial is supported by testimony from the BCA scientist at the motion hearing that the terms at issue are commonly used in describing the differential-extraction process. Second, the risk of any unfair prejudice was mitigated by the testimony presented at trial that explained the methodology and the possibility that DNA found in the sperm-cell fraction may not have come from a sperm cell. Indeed, the BCA scientist testified at the trial, on both direct and cross-examination, that it is possible for a cell other than a

sperm cell to end up in the sperm-cell fraction, and that microscopic sperm identification was performed only on M.S.'s underwear and Voeltz's shirt, not on the samples taken during the sexual-assault examination. *Cf. State v. Garland*, 942 N.W.2d 732, 748 (Minn. 2020) (affirming district court's admission of DNA evidence because the probative value was not outweighed by unfair prejudice where the BCA analyst utilized methods commonly used by forensic scientists and the defense had the opportunity to highlight weaknesses of the evidence during cross-examination). One of the BCA trial witnesses also agreed during cross-examination that it is possible that Voeltz's DNA found in the sperm-cell fraction from the swab samples could have come from Voeltz's fingers when he inserted them in M.S.'s vagina. The same witness acknowledged that M.S.'s DNA, which clearly could not have been derived from a sperm cell, was found in the sperm-cell fraction in the sample taken from M.S.'s underwear. Thus, as the district court reasoned in its pretrial ruling, ample testimony was provided at trial to dispel any confusion that may have been caused by the term.

Finally, microscope identification confirmed the presence of sperm cells and Voeltz's DNA in the samples from M.S.'s underwear and the shirt that M.S. said Voeltz used to wipe his ejaculate off her stomach. This evidence provided objective proof that contradicted Voeltz's theory of the case that he "never took [his] penis out of [his] pants" and did not ejaculate during the interaction with M.S. The microscope identification and DNA test results thus further minimized any risk of unfair suggestion.

For these reasons, we discern no abuse of discretion by the district court in allowing the BCA scientists to use the term sperm-cell fraction during their testimony.

II. The district court did not violate Voeltz’s confrontation rights.

Next, Voeltz argues that his confrontation rights were violated because the district court required witnesses to wear face shields when testifying, even though glare from overhead lighting partially concealed their facial expressions. He argues that the ability of the jury to assess witness credibility was impaired in violation of the Confrontation Clause.

Both the United States Constitution, U.S. Const. amend. VI, and the Minnesota Constitution, Minn. Const. art. I, § 6, guarantee criminal defendants the right to confront the witnesses against them through “a face-to-face meeting with witnesses appearing before the trier of fact.” *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988); *see also State v. Hull*, 788 N.W.2d 91, 100 (Minn. 2010) (stating that appellate courts apply the same analysis to state and federal Confrontation Clauses). However, “this right is not absolute: it may be satisfied without a full physical, face-to-face confrontation at trial if (1) the interference with confrontation is necessary to further an important public policy and (2) the reliability of the testimony is otherwise assured.” *State v. Modtland*, 970 N.W.2d 711, 717 (Minn. App. 2022) (applying test set forth in *Maryland v. Craig*, 497 U.S. 836, 850 (1990)), *rev. granted* (Minn. Apr. 27, 2022) *and ord. granting rev. vacated* (Minn. Mar. 14, 2023). We review de novo claims asserting a violation of the Confrontation Clause. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

The district court’s face-shield requirement was pursuant to the Chief Justice’s order. *See Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001 (Minn. Oct. 18, 2021). In the order, the Chief Justice reinstated certain “exposure prevention and mitigation measures” because of a recent significant increase in

COVID-19 positivity rates and community transmission; similar measures had previously been in place but had been relaxed when transmission rates were lower. The Chief Justice's order provided that

every person entering a court facility must wear a face covering at all times when in public areas served by the Judicial Branch or other common areas of the facility and in the courtroom during proceedings. [This requirement] appl[ies] to Judicial Branch staff and judges, attorneys, parties, witnesses, case participants including jurors, those who attend in-person hearings, and any person who enters a court facility to use public services provided by the Judicial Branch.

Id. The order contained an exception allowing that “[t]he presiding judge has the discretion to permit individuals to remove a face covering during an in-person proceeding for case-specific reasons.” *Id.*

M.S. was the first witness to testify during the trial. After the prosecutor asked M.S. several introductory questions, defense counsel interjected, stating that he could not see M.S.'s face due to the reflection of light on the face shield and that this concealment violated Voeltz's confrontation rights. The prosecutor agreed that the reflection on the shield from the lights in the courtroom intermittently obscured M.S.'s face. A bailiff told the district court that a juror also stated that it was difficult to see M.S.'s face. The district court declined Voeltz's request that M.S. not wear a mask or shield, stating “she's going to be either masked or she's going to be shielded.”

The district court and court staff then experimented with the lights in the courtroom and with the way M.S. wore the shield; the changes reportedly did not improve visibility. The court said, “So, folks, I think we are where we are on it and we're just going to have

to ask witnesses to try to remember to turn toward the jury. Maybe that will help a little bit.” M.S. continued to testify. During the course of her testimony, she made several additional adjustments to the face shield at the suggestions of a juror and the bailiffs in the courtroom, and eventually was provided with a different model of face shield. When M.S. put the different face shield on, defense counsel said there was still reflection, but “[i]t’s a little bit better than previous for sure.” At the conclusion of M.S.’s testimony, the court asked the jurors if the reflection was better with the second face shield and the jurors indicated that it was. The remaining witnesses wore the second type of face shield when testifying.

With this background in mind, we now address Voeltz’s argument that his confrontation rights were violated because the interference was not necessary and the reliability of the testimony was not otherwise assured.

A. Necessity

The “critical inquiry” under the necessity prong is whether the precautions taken by the district court which limited Voeltz’s right to confrontation were “necessary to further an important state interest.” *Craig*, 497 U.S. at 852. “To satisfy this prong of the *Craig* analysis, the district court must support its determination that an interference with physical confrontation is necessary to further an important public policy with case-specific findings.” *Modtland*, 970 N.W.2d at 717 (citing *Craig*, 497 U.S. at 850, 855). But the district court is not required to “explore less-restrictive alternatives before determining that a certain interference is necessary.” *Id.*

Voeltz contends that this prong is not met because “the trial court made no detailed, case-specific findings to justify its decision to require witnesses . . . to wear face shields.” At the time, the state was in the midst of the global COVID-19 pandemic and the courts were operating pursuant to the provisions of the Chief Justice’s order. The order required the wearing of a facial covering by everyone in the courtroom, including witnesses, except that “[t]he presiding judge ha[d] the discretion to permit individuals to remove a face covering during an in-person proceeding for case-specific reasons.” *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001 (Minn. Oct. 18, 2021). We held in *Modtland* that the public-policy interest of “protecting the health and safety of everyone in the courtroom from the spread of COVID-19 [during the pandemic] . . . clearly qualifies as an important public policy.” 970 N.W.2d at 718 (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (“Stemming the spread of COVID-19 is unquestionably a compelling interest . . .”)); *see also State v. Tate*, 985 N.W.2d 291, 302-03 (Minn. 2023) (concluding that, “[g]iven this extraordinary context of courts trying to administer justice safely during a virulent and deadly outbreak of disease,” preventing the spread of COVID-19 served a valid public-policy interest).

In *Modtland*, we addressed the question of whether having witnesses testify in a criminal trial while wearing face masks violated the defendant’s confrontation rights. 970 N.W.2d at 716. The face masks were of the opaque type that covered the nose and mouth of the witnesses. *Id.* at 720. The mask requirement was in accordance with the provisions of an earlier version of the Chief Justice’s order. *Id.* at 717. We concluded that the defendant’s confrontation rights were not violated even though the district court had made

only limited case-specific findings to the effect that the trial was occurring in a small courtroom and research indicated that masks decreased infection risk. *Id.* at 718-19. We noted that the version of the Chief Justice’s order in effect at that time granted

discretion to allow witnesses to remove their masks, but it did not require the district court to do so. Rather, the Chief Justice’s orders regarding courtroom safety procedures *support*, rather than undermine, the district court’s determination [to have witnesses testify while wearing masks].

Id. at 718.

A similar conclusion is warranted here. We reach this conclusion even though the district court, admittedly, made no case-specific findings as to the size of the courtroom or other reasons why the district court was declining to exercise its discretion to depart from the face-covering requirement in the Chief Justice’s order. We do so because, in requiring witnesses to wear face shields, the district court was adhering to the provisions of the Chief Justice’s order, which set forth ample justification for the face-covering requirement. And, while the Chief Justice’s order allowed district courts to exercise their discretion to have witnesses remove their face coverings, this exception required the district court to provide case-specific reasons to justify such an exercise of discretion.

In addition, the face coverings at issue in this case were clear face shields, not the opaque variety at issue in *Modtland*, such that the jury could observe (aside from intermittent obstruction by the reflections from courtroom lighting) the witnesses’ full faces. Thus, the burden, if any, imposed on Voeltz’s confrontation rights was less than what we allowed as constitutional in *Modtland*. Moreover, once the reflection issue was brought to the district court’s attention, the court went to significant lengths to try to

eliminate the issue, including turning off various courtroom lights, changing the type of face shield worn by witnesses, and asking the witnesses to face the jury when speaking. The evidence indicates that the different model of face shield reduced the reflection issue.

On this record, we conclude that *Craig*'s necessity prong was satisfied.

B. Reliability

In addition to the necessity prong, *Craig* requires that “the reliability of the testimony . . . be otherwise assured.” *Modtland*, 970 N.W.2d at 720 (citing *Craig*, 497 U.S. at 850). “Testimony is generally reliable under the Confrontation Clause if a witness testifies in the physical presence of the defendant, is sworn under oath, is subject to cross-examination, and can be properly observed by the trier of fact.” *Tate*, 985 N.W.2d at 304. Voeltz maintains that the jury could not properly observe the witnesses because of the reflected glare on the face shields. He contends that the jurors’ observation of witness demeanor was particularly important in this case because the outcome hinged on witness credibility.

In *Modtland*, we concluded that even though witnesses’ faces were partially obscured by the opaque face masks, the reliability prong was satisfied because the jurors could still observe “crucial credibility indicators”:

Although the mask requirement did limit the jury’s view of the witnesses’ mouths and noses, the jury could still see the witnesses’ eyes, observe witnesses’ body language, and hear witnesses’ tone and vocal inflection. Because all testifying witnesses wore a face mask, the jury could consider each witness’s demeanor to the same extent and based on the same factors. The masks therefore did not impair the jury’s ability to observe demeanor to such an extent that the reliability of the testimony was no longer assured.

Modtland, 970 N.W.2d at 720.

Those same credibility factors were, if anything, more accessible to the jurors in this case. Though the jurors were initially able to only intermittently see M.S.’s entire face due to the glare caused by the lights, M.S.’s physical presence meant that the jurors could still observe her body language, tone, and inflection. Further, as noted above, the district court took several measures during M.S.’s testimony to decrease the effect of the reflection on her face shield, including having M.S. turn her head to face the jury in order to reduce the glare and providing M.S. with a different type of face shield partway through her testimony. The jurors indicated that they were better able to see M.S.’s face with the new type of face shield, and the remaining witnesses each wore that type of shield. *See id.* (“Because all testifying witnesses wore a face mask, the jury could consider each witness’s demeanor to the same extent and based on the same factors.”).

Despite these apparent similarities to *Modtland*, Voeltz maintains that his case is more analogous to *People v. Sammons*, 478 N.W.2d 901, 908 (Mich. Ct. App. 1991), in which the Michigan Court of Appeals held that the defendant’s right to confrontation was violated when “the prosecution’s chief witness was permitted to testify while wearing a mask that covered both his face and head.” As we stated in *Modtland*, the *Sammons* opinion, which is from a different jurisdiction and is not binding on this court, is “easily distinguishable.” *Modtland*, 970 N.W.2d at 720. In *Sammons*, the witness wore a mask that covered his entire head in order to conceal the witness’s identity. 478 N.W.2d at 904,

908. In this case, the identity of the witnesses was known, and they wore clear face shields that only intermittently may have obscured full visibility of the witnesses' faces.

We thus reject Voeltz's challenge on the grounds of reliability and conclude that the district court's requirement that the witnesses wear face shields did not violate Voeltz's confrontation rights under the facts of this case.

III. The district court did not abuse its discretion by denying Voeltz's motion for a downward dispositional departure.

Voeltz argues, in the alternative, that the district court abused its discretion in denying his motion for a downward dispositional departure. The Minnesota Sentencing Guidelines seek to "maintain uniformity, proportionality, rationality, and predictability in sentencing," in part by setting presumptive sentences for felony offenses. Minn. Stat. § 244.09, subd. 5 (2022). As such, "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 (2021); *see also State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). But a district court is not required to depart from the guidelines even if substantial and compelling circumstances exist. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018).

Appellate courts will not reverse a district court's refusal to depart from the sentencing guidelines absent a clear abuse of discretion. *State v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2005). This court "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) (quotation omitted), *rev. denied* (Minn. Sept. 17, 2013); *see also State v. Mendoza*, 638 N.W.2d 480, 484 (Minn. App. 2002) (remanding for resentencing where the district court did not appear to exercise any discretion in denying a departure motion), *rev. denied* (Minn. Apr. 16, 2002).

“A dispositional departure places the [defendant] in a different setting than that called for by the presumptive guidelines sentence” based on characteristics that make the defendant particularly amenable to individualized treatment in a probationary setting. *Solberg*, 882 N.W.2d at 623. If the record suggests factors exist that might support a departure, the district court should deliberately consider those factors along with what would be best for society. *State v. Curtiss*, 353 N.W.2d 262, 263-64 (Minn. App. 1984). Factors to examine when considering a defendant’s particular amenability to individualized treatment in a probationary setting 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.” *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

Voeltz argued to the district court that a departure was merited because he was particularly amenable to individualized treatment in a probationary setting. During the sentencing hearing, the district court heard testimony from the psychosexual evaluator who assessed Voeltz and the probation officer who completed Voeltz’s presentence investigation report. When asked whether Voeltz was particularly amenable to community-based sex-offender treatment, the psychosexual evaluator responded that Voeltz “has a lot of traits that would make him a good candidate for outpatient,” but his

“biggest roadblock . . . would be working through [his] denial [that he committed the criminal sexual conduct].” The evaluator said that Voeltz is particularly amenable “[i]f he works through denial.”

Several of Voeltz’s family members and friends provided statements in writing or at the sentencing hearing in support of Voeltz’s character, and M.S.’s parents and M.S. spoke about the impact of the criminal sexual conduct on M.S.

The district court denied Voeltz’s motion for a downward dispositional departure and imposed the presumptive 144-month prison sentence. The district court acknowledged that several factors “militate toward amenability to probation,” such as Voeltz’s compliance with his release conditions, lack of prior criminal history, and steady employment. However, the court said that “[a]menability to sex offender treatment . . . is another story” due to Voeltz’s denial of the crime. The district court emphasized the testimony of the psychosexual evaluator that Voeltz’s denial of the crime would be a roadblock to successful completion of sex-offender treatment, and that he could not be successful on probation if he does not complete sex-offender treatment. The district court concluded:

This is a crime of such a serious nature that our laws presume its punishment by a prison sentence and by one of significant duration. Against the serious criminality of this forcible sexual assault, I have considered and weighed all of those factors favoring probation, and there are such factors, and I am convinced that the presumption of prison has not been overcome.

The district court here carefully evaluated the information presented and considered factors relevant to departure before imposing the presumptive sentence. After hearing the

testimony of the psychosexual evaluator who assessed Voeltz, the probation officer who conducted the presentence investigation, Voeltz's family and friends, M.S.'s parents, and M.S., the district court took a 34-minute recess to consider the decision. Upon returning to the bench, the district court noted that it had evaluated factors relevant to Voeltz's amenability to probation, including Voeltz's age, lack of criminal history, steady employment, and support of family and friends. The district court also expressed its reason for denying the downward dispositional departure—that Voeltz was not particularly amenable to probation because he persisted in denying that he had committed a crime. Based on the record here, we conclude that the district court acted well within its discretion and, therefore, affirm the district court's denial of Voeltz's request for a dispositional departure. *See Walker*, 913 N.W.2d at 468.

IV. The postconviction court did not abuse its discretion by summarily denying Voeltz's petition for postconviction relief.

Finally, Voeltz argues that the postconviction court abused its discretion by denying his petition for postconviction relief without holding an evidentiary hearing. Voeltz sought postconviction relief on the basis that a statement made by M.S. at sentencing suggested that she had lost her memory of the sexual assault and only regained it through Eye Movement Desensitization and Reprocessing (EMDR) therapy. Specifically, in her victim statement, M.S. said:

For over a year, I felt like my life and nothing around me was real. I soon lost memories from my past and events of the night I was assaulted. I began going to therapy and went to many therapists until I found one that provided EMDR. I continue to go to therapy to this day. This has helped me be able to cope with the trauma of the assault and help me gain

back memories of the assault. I was diagnosed with posttraumatic stress disorder.

Voeltz argues that this was newly discovered evidence that at least entitled him to a postconviction evidentiary hearing.

The postconviction court, in denying Voeltz’s petition, construed Voeltz’s petition as positing that “if the jury knew that [M.S.] had been having memory lapses in the months following the assault, and that [M.S.’s] trial testimony was given on the basis of ‘recovered’ memory, that would have impacted the jury’s evaluation of [M.S.’s] credibility.” The postconviction court stated that this evidence was merely impeaching and thus not a basis for postconviction relief.

Minnesota law “authorizes ‘a person convicted of a crime’ to seek postconviction relief by filing a petition claiming that the conviction ‘violated the person’s rights under the Constitution or laws of the United States or of the state.’” *Andersen v. State*, 913 N.W.2d 417, 422 (Minn. 2018) (quoting Minn. Stat. § 590.01, subd 1(1) (2016)). When a petition for postconviction relief is filed, the postconviction court must hold an evidentiary hearing “[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief.” Minn. Stat. § 590.04, subd. 1 (2022).

“In determining whether an evidentiary hearing is required, a postconviction court considers the facts alleged in the petition as true and construes them in the light most favorable to the petitioner.” *Brown v. State*, 895 N.W.2d 612, 618 (Minn. 2017). An appellate court reviews “a postconviction court’s summary denial of a petition for postconviction relief for an abuse of discretion.” *Andersen*, 913 N.W.2d at 422. “A

postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *Brown*, 895 N.W.2d at 617 (quotation omitted). A postconviction court’s legal determinations are reviewed de novo, and its factual findings are reviewed for clear error. *Id.*

“To receive an evidentiary hearing on a timely postconviction claim of newly discovered evidence, [the petitioner] is required to allege facts that, if proven by a fair preponderance of the evidence, would satisfy the four-prong test set forth in *Rainer v. State*, 566 N.W.2d 692 (Minn. 1997).” *Bobo v. State*, 820 N.W.2d 511, 517 (Minn. 2012). Under the *Rainer* test, the petitioner must establish:

(1) that the evidence was not known to the defendant or his/her counsel at the time of the trial; (2) that the evidence could not have been discovered through due diligence before trial; (3) that the evidence is not cumulative, impeaching, or doubtful; and (4) that the evidence would probably produce an acquittal or a more favorable result.

Rainer, 566 N.W.2d at 695. The petitioner must establish all four prongs to obtain relief. *Miles v. State*, 840 N.W.2d 195, 201 (Minn. 2013).

The district court denied Voeltz’s petition under the third *Rainer* prong, determining that the new evidence of M.S.’s memory recovery through therapy was merely impeaching.

The court reasoned:

The only new evidence revealed in [M.S.’s] sentencing statements was that she possibly experienced some amount of memory loss months or years after the assault occurred, for which she sought and obtained treatment. If that memory loss (and commencement of EMDR treatment) . . . was known by [Voeltz] at the time of trial, it would have only gone to the reliability of [M.S.’s] testimony, not to any of the material elements of the alleged offense.

Voeltz admits that M.S.’s statements could “be used regarding the truthfulness of [Voeltz’s] testimony.” However he claims, for the first time on appeal, that the evidence could “be both substantive and impeaching.”

Voeltz contends that the new evidence was not merely impeaching because, had he known “that [M.S.] was testifying using recovered memories, [he] would have had a pretrial opportunity to seek exclusion of this testimony” as “the theory of repressed and recovery memory does not satisfy the *Frye/Mack* requirement” based on *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 169-171 (Minn. 2012). Voeltz, however, presented no basis in his petition for concluding that the EMDR treatment referenced in M.S.’s victim statement was in any way related to the type of repressed or recovered memory treatment found deficient in *Doe*. See *Vance v. State*, 752 N.W.2d 509, 512 (Minn. 2008) (stating that a postconviction “petitioner has the burden of establishing by a preponderance of the evidence facts that would warrant relief”).

In addition, Voeltz failed to argue in his postconviction petition how the evidence could be used substantively; he simply asserted that the evidence “is not cumulative, impeaching or doubtful.” “This court generally will not decide issues which were not raised before the district court” *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996); see *Brown*, 895 N.W.2d at 618 (“The [postconviction] petition must allege more than argumentative assertions without factual support.” (quotation omitted)).

Moreover, *Doe*, which Voeltz cites as support for his argument, is inapposite. In *Doe*, the supreme court addressed the admissibility of expert testimony regarding

recovered memories in a civil case in which the plaintiff argued that the statute of limitations for his negligence and fraud claims should be tolled because he had repressed, but later recovered, his memory of sexual abuse by a priest controlled by the diocese. *Doe*, 817 N.W.2d at 154. The supreme court concluded that “the district court did not abuse its discretion when it excluded [the plaintiff’s] expert testimony” because the evidence presented “to prove the existence of repressed and recovered memory lacked foundational reliability.” *Id.* at 169-70.

By contrast here, M.S. made an almost contemporaneous report of the crime to law enforcement. Indeed, M.S. provided a detailed report, and a sexual-assault examination was performed less than two days after the crime occurred and before any alleged memory lapses. And at trial, M.S. testified consistently with her initial report. Thus, there is no claim here of delayed reporting due to recovery of a repressed memory. *Id.* at 155.

Because Voeltz failed to demonstrate that the evidence of M.S.’s participation in EMDR therapy would be anything other than impeaching, we discern no abuse of discretion by the postconviction court in its summary denial of Voeltz’s petition for postconviction relief.

Affirmed.