

*This opinion is nonprecedential except as provided by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
A24-1110**

State of Minnesota,
Respondent,

vs.

Ashir Hassan Kimbrough,
Appellant.

**Filed July 28, 2025
Affirmed
Worke, Judge**

Kandiyohi County District Court
File No. 34-CR-22-169

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

Shane D. Baker, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Eva F. Wailes, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Worke, Judge; and Smith,
John, Judge.*

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

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant challenges his first-degree criminal-sexual-conduct conviction and sentence, arguing that his *Norgaard* plea was invalid, and that the district court abused its discretion by denying him a sentencing departure and imposing an aggravated sentence. We affirm.

FACTS

Appellant Ashir Hassan Kimbrough sexually assaulted a hotel employee after she checked him into the hotel. Respondent State of Minnesota charged Kimbrough with second-degree assault and two counts of first-degree criminal sexual conduct. *See* Minn. Stat. §§ 609.222, subd. 1 (2020), .342, subds. 1(a), 1(b) (Supp. 2021). The presumptive sentence was 144 months in prison, with a permissible range between 144 and 172 months. The state sought a sentencing departure based on the aggravating factors of particular cruelty and zone of privacy, pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004).

On January 5, 2024, Kimbrough entered a *Norgaard* plea¹ to one count of criminal sexual conduct and admitted to the *Blakely* factors, acknowledging that the state would request a 344-month prison sentence. Kimbrough and his attorney engaged in the following exchange while entering Kimbrough's *Norgaard* plea.

¹ A defendant enters a *Norgaard* plea when asserting a lack of memory on the essential elements of the offense but pleads guilty because the record establishes, and the defendant believes, that the evidence is sufficient to obtain a conviction. *State v. Ecker*, 524 N.W.2d 712, 716-17 (Minn. 1994); *State ex rel. Norgaard v. Tahash*, 110 N.W.2d 867, 871 (Minn. 1961).

Q: And were you under the influence of a controlled substance at the time of the crime?

A: Yes.

Q: All right. And, um, you don't recall what happened at the time of the crime?

A: No.

Q: All right. And, you have reviewed the evidence that the [s]tate would offer against you if there was a trial, correct?

A: Yes.

Q: And, do you believe that there's a substantial likelihood that you would be found guilty beyond a reasonable doubt, um, if the [s]tate presents the evidence that you have reviewed?

A: Yes.

Q: All right. And you don't make any claim today that you are innocent, correct?

A: Correct.

Q: All right. And you understand that if the judge accepts your *Norgaard* plea, you would be considered to be just as guilty if, um, you did remember the circumstances of the events and gave an allocution to the judge?

A: Yes, I understand.

Q: All right. You also understand that your lack of memory, um, has no impact on the terms and conditions of your sentence or your probation or collateral consequences stemming from your conviction, right?

A: I understand.

Q: And . . . you understand that also goes for *Blakely* factors too, right?

A: Yes, I understand.

After Kimbrough entered his plea, the district court asked the prosecutor to discuss the evidence that the state would present at trial. The prosecutor recited the following as the evidence that the state was prepared to present at trial.

The victim would testify that she was the sole employee working at a hotel on the night of February 27, 2022, when Kimbrough checked in as a guest. Kimbrough followed the victim around the hotel. She asked him to go to his room because he was making her

uncomfortable, and she was scared. The victim entered the employee restroom. When she exited, Kimbrough pushed her back into the restroom and locked the door behind him. Kimbrough pushed the victim to the ground and told her to “start sucking his d--k.” He put a gun to her head and said, “[Y]ou’re going to listen to me and do what I say.” The victim told Kimbrough that she was scared, and he fired the gun. The victim’s ears were ringing from the gunshot. The victim submitted to Kimbrough’s demand that she perform oral sex on him.

At one point, the victim attempted to crawl away, but Kimbrough pulled her back by her hair. Kimbrough punched the victim in the face “so hard that she saw stars.” Kimbrough choked the victim “multiple times,” once lifting her off the ground and impairing her breathing and causing her to become “dizzy.” Kimbrough told the victim repeatedly, “[Y]ou won’t forget my face and it’s just you and me forever.” The victim thought that she was going to die. She eventually kicked Kimbrough in the groin, ran out of the restroom, and called 911.

A police officer would testify that he responded to the 911 call and found the victim “extremely distraught” with “purple, red coloring on her face . . . [and] limping heavily.” The victim suffered “facial fractures, . . . a sinus fracture, . . . a small amount of hemorrhage, . . . an inwardly displaced fracture of her zygomatic arch, . . . several large bruises, and . . . a significant amount of pain.” Oral swabs were tested, which indicated the presence of sperm cells, but the DNA was insufficient for testing.

Another police officer would testify that Kimbrough had a video on his phone of him driving in the area, and an outgoing message stating that he was staying at a hotel.

Evidence showed that Kimbrough used his credit card at an establishment in the area and provided his contact information and identification when he checked into the hotel. Surveillance video from the hotel shows Kimbrough waiting outside the employee restroom and pushing the victim into the restroom. The video shows the victim attempting to crawl out of the restroom and Kimbrough pulling her back by her hair.

A deputy would testify that, while a gun was not recovered, there was “lead and copper bullet fragments scattered throughout the bathroom floor and . . . a divot on the west wall of the bathroom in front of the toilet, which appeared to be where the bullet struck.”

The district court asked Kimbrough if, after hearing the state’s evidence, he believed that there was a substantial likelihood that a jury would find him guilty beyond a reasonable doubt. Kimbrough replied: “Yes, Your Honor.” The district court then asked Kimbrough if, after hearing the state’s evidence, he believed that there was a substantial likelihood that a jury would find the existence of the “*Blakely* factors . . . [invasion of the victim’s] zone of privacy and particularly cruelty.” Kimbrough replied: “Yes, Your Honor.”

At sentencing, Kimbrough moved for a downward dispositional departure and a downward durational departure. He argued that he should receive a dispositional departure because he was only 33 years old, he had no criminal record, he was remorseful, he cooperated, he complied with sex-offender treatment, and he had support from family and friends. The victim submitted an impact statement describing details about the assault, stating that she thought she was “going to die,” and explaining how her life has been “forever changed.”

The district court denied Kimbrough a dispositional departure, determining that Kimbrough failed to show that he is particularly amenable to probation and that probation “would be grossly disproportionate and severely understate the severity of [the] offense.” The district court determined that the presence of aggravating factors negated a downward durational departure. Regarding an aggravated sentence, the district court determined that Kimbrough demonstrated particular cruelty and assaulted the victim in her zone of privacy. The district court determined that the facts provided a “[s]ubstantial and compelling” basis for a 344-month prison sentence. This appeal followed.

DECISION

Guilty plea

Kimbrough first argues that he should be permitted to withdraw his *Norgaard* plea because it was invalid. A defendant may appeal directly from a judgment of conviction, claiming that his guilty plea is invalid. *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989). We review the validity of a guilty plea de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). Kimbrough has the burden to prove that his guilty plea is invalid. *See State v. Epps*, 977 N.W.2d 798, 801 (Minn. 2022). “To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent.” *Raleigh*, 778 N.W.2d at 94. Kimbrough argues that his *Norgaard* plea is not accurate or intelligent.

Accurate

“The accuracy requirement protects a defendant from pleading guilty to a more serious offense than that for which he could be convicted if he insisted on his right to trial.” *Id.* An accurate guilty plea is supported by a proper factual basis, *Ecker*, 524 N.W.2d

at 716, that is generally established by the defendant explaining the circumstances of the offense in his own words. *Williams v. State*, 760 N.W.2d 8, 12 (Minn. App. 2009), *rev. denied* (Minn. Apr. 21, 2009). But when a defendant enters a *Norgaard* plea, a different approach is used to establish a factual basis because, due to the absence of memory, the defendant cannot explain the circumstances of the offense in his own words. *Id.*

An adequate factual basis for a *Norgaard* plea consists of two components. *Id.* First, there must be a strong factual basis, and second, the defendant must acknowledge “that the evidence would be sufficient for a jury to find the defendant guilty beyond a reasonable doubt.” *Id.* at 12-13. The existence of these two components allows the court “to independently conclude that there is a *strong* probability that the defendant would be found guilty of the charge to which he pleaded guilty.” *Id.* at 13 (quotation omitted).

Kimbrough argues that his plea is not accurate because he was not questioned about the evidence regarding the elements of the offense. He similarly argues that the *Blakely* factors were not explained to him.

Kimbrough pleaded guilty to first-degree criminal sexual conduct. A person is guilty of first-degree criminal sexual conduct when he “engages in sexual penetration with another person” and “is armed with a dangerous weapon.” Minn. Stat. § 609.342, subd. 1(b). “Sexual penetration” includes “fellatio.” Minn. Stat. § 609.341, subd. 12 (1) (Supp. 2021).

The prosecutor stated that the victim would testify that Kimbrough pushed her into the restroom, put a gun to her head, pulled her hair, choked her, punched her, and forced her to perform oral sex. Police officers would testify about the victim’s injuries, the

presence of semen on an oral swab taken from the victim, Kimbrough's confirmed presence at the hotel, and bullet fragments found in the restroom. The factual basis, therefore, sufficiently established the elements of the offense.

Kimbrough then agreed, after hearing the evidence, that there was a substantial likelihood that a jury would find him guilty beyond a reasonable doubt. This "strong factual basis and [Kimbrough]'s agreement that the evidence is sufficient to support his conviction provide[d] the court with a basis to independently conclude that there is a *strong* probability that [Kimbrough] would be found guilty" of first-degree criminal sexual conduct. *See Williams*, 760 N.W.2d at 13.

Further, at the plea hearing, Kimbrough agreed that he was "waiving . . . [his] right to a trial and [was] admitting *Blakely* factors of [his] own free will." The district court asked Kimbrough if he understood that the evidence the prosecutor discussed would be used to support the *Blakely* factors, and if he believed that, "having heard the likely testimony . . . , that there would be a substantial likelihood the jury would find . . . those *Blakely* factors, including a zone of privacy and particularly cruelty?" Kimbrough replied: "Yes, Your Honor." The evidence supporting the *Blakely* factors included Kimbrough waiting outside of and pushing the victim into an employee's-only restroom. He then physically assaulted her, which is not an element of the criminal-sexual-conduct offense, causing several injuries. Based on this record, we conclude that Kimbrough's *Norgaard* plea and his admission to the *Blakely* factors are accurate.

Intelligent

Kimbrough also argues that his plea and his admission to the *Blakely* factors were not intelligent. A plea is intelligent if the defendant understands the charges, the rights he is waiving by pleading guilty, and the consequences of the plea. *State v. Farnsworth*, 738 N.W.2d 364, 372 (Minn. 2007). Kimbrough claims that the charge was not explained, the elements of the offense were not discussed, and he was not advised of the consequences of an enhanced sentence. We disagree.

The district court asked Kimbrough: “You understand . . . you’d be pleading guilty to a felony offense of Criminal Sexual Conduct in the First Degree, violation of [Minn. Stat. §] 609.342, subd. 1(b) and subd. 2(a).” Kimbrough replied: “Yes, I do.” The district court did not need to explain the elements of the offense at that time, because the elements were raised when the factual basis was established and Kimbrough admitted that the state’s evidence was sufficient for the jury to find him guilty beyond a reasonable doubt.

Kimbrough also agreed that he was admitting to the *Blakely* factors with the understanding that the state was requesting a 344-month prison sentence. The district court explained that Kimbrough could have a separate trial on the *Blakely* factors. The district court stated: “[T]here’d be a requirement . . . that [the jury] unanimously decided that those *Blakely* factors have been proven at trial and again you could question all the [s]tate’s witnesses or cross examine them with regard . . . to those *Blakely* factors.”

And after the prosecutor recited the evidence, the district court, again, asked Kimbrough if he understood that the witnesses would testify to those facts and that “a jury . . . would have to find [him] guilty beyond a reasonable doubt . . . with regard to . . . those

Blakely factors, including a zone of privacy and particularly cruelty.” Kimbrough indicated that he understood. We conclude that Kimbrough’s *Norgaard* plea and admission to the *Blakely* factors were intelligently made.

Based on the entire record, the district court proceeded cautiously to ensure that an adequate factual basis supported Kimbrough’s *Norgaard* plea and that his plea and admissions were intelligently entered. We conclude that Kimbrough’s plea and admissions are valid.

Sentence

Dispositional departure

Kimbrough argues that the district court abused its discretion by denying his motion for a downward dispositional departure. Kimbrough does not challenge the district court’s denial of his motion for a downward durational departure.

A district court may depart in sentencing only when there are “identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent’g Guidelines 2.D.1 (Supp. 2021). If substantial and compelling circumstances exist, the district court has broad discretion to depart, and this court will generally avoid interfering with the district court’s decision. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). This court will reverse the district court’s refusal to depart only in a “rare” case. *Id.* “[A]s long as the record shows the [district] court carefully evaluated all the testimony and information presented before making a determination,” this court will not interfere with a district court’s decision. *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011) (quotation omitted).

When considering a dispositional departure, the district court focuses “more on the defendant as an individual and on whether the presumptive sentence would be best for him and for society.” *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). A defendant’s particular amenability to probation can justify a downward dispositional departure. *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). The defendant’s particular amenability to probation “distinguishes [him] from most others and truly presents the substantial and compelling circumstances that are necessary to justify a departure.” *Id.* at 309 (quotation omitted).

Relevant factors for determining whether the defendant is particularly amenable to probation include the defendant’s age, prior criminal record, remorse, cooperation, attitude in court, and support of friends and family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). Even when evidence shows that the defendant would be particularly amenable to probation, a district court need not grant a dispositional departure. *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009).

Here, the district court heard arguments on Kimbrough’s request for a probationary sentence. But the district court stated that a departure was not appropriate because “there has been no persuasive showing that [Kimbrough] is *particularly* amenable to probation, and . . . a probationary sentence would be grossly disproportionate and severely understate the severity of [Kimbrough]’s offense.” The record shows that the district court considered Kimbrough’s request; therefore, the district court did not abuse its discretion by denying Kimbrough’s request for a probationary sentence.

Aggravated sentence

Kimbrough also argues that the district court abused its discretion by imposing a sentence that was double the highest possible presumptive sentence because he was intoxicated during the offense, and he is remorseful. He also claims that the district court should not have considered the victim's statement when imposing sentence. Again, a district court enjoys broad discretion in sentencing matters. *Kindem*, 313 N.W.2d at 7.

Kimbrough admitted that the state's evidence supported the conclusion that a jury would find that he committed the offense with particular cruelty and invaded the victim's zone of privacy. The district court stated:

The facts in this matter demonstrate particularly cruelty by [Kimbrough] when he pulled [the victim]'s hair, pushed [her], struck [her] causing a face fracture and bruising, strangled her, and injured her leg. The face fractures have caused [the victim] to have tendinitis in her jaw, which causes ear pain and pressure, headaches, and tooth sensitivity. During the assault [Kimbrough] demanded that [the victim] look at him while he forced her to perform oral sex and when she looked away, he would slap [her]. This behavior was particularly cruel. [Kimbrough] also told [the victim] that she would "never forget his face" and repeatedly said "it's you and me forever now." [Kimbrough] further fired a handgun in a small employee-only area where he trapped [the victim] to gain compliance. [Kimbrough] made statements that he was going to require the victim to ingest [a] controlled substance which greatly concerned the victim in light of her long-term sobriety. These sorts of statements and actions clearly rise to the level of psychological cruelty.

"[P]articular cruelty involves the gratuitous infliction of pain and cruelty of a kind not usually associated with the commission of the offense in question." *State v. Rourke*, 773 N.W.2d 913, 922 (Minn. 2009) (quotations omitted). The finding of particular cruelty

alone can justify a double upward durational departure. *State v. Martinez*, 319 N.W.2d 699, 701 (Minn. 1982). The district court did not abuse its discretion by imposing the enhanced sentence after finding the existence of the aggravating factors.

Pro se claims

Kimbrough raised several claims in a pro se supplemental brief. He argues that (1) he received ineffective assistance of counsel, (2) he would not have pleaded guilty had he known that a sentencing departure was impossible, (3) his jail credit must be adjusted to include time on electronic home monitoring, (4) his sentence is based on impermissible factors, and (5) the district court relied on hearsay (the victim's impact statement) when imposing sentence. Because Kimbrough provides no legal authority or support for his assertions, we deem his pro se claims forfeited. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (stating that claims deemed forfeited when brief contains no citation to legal authority in support of the claims).

Affirmed.