

*This opinion is nonprecedential except as provided by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
A25-0708**

State of Minnesota,
Appellant,

vs.

Timothy Michael Leistiko,
Respondent.

**Filed April 6, 2026
Reversed and remanded
Smith, Tracy M., Judge**

Carver County District Court
File No. 10-CR-24-109

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

Mark Metz, Carver County Attorney, Angella M. Erickson, Assistant County Attorney,
Chaska, Minnesota (for appellant)

Cathryn Middlebrook, Chief Appellate Public Defender, John Patrick Monnens, Assistant
Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Smith, Tracy M., Judge; and
Wheelock, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this sentencing appeal, appellant State of Minnesota argues that the district court abused its discretion by departing durationally from the presumptive guidelines sentence. Because nothing in the record establishes that respondent Timothy Michael Leistiko's

conduct was less serious than typical for the offenses that he committed, we reverse and remand for resentencing.

FACTS

By an amended complaint, Leistiko was charged with 29 counts of possessing child-sexual-abuse material involving a minor under the age of 14, in violation of Minnesota Statutes section 617.247, subdivision 4(a), (b)(3) (2022).¹ Pursuant to a plea agreement, Leistiko agreed to plead guilty to counts 2, 8, 12, 15 and 19. In exchange, any remaining counts would be dismissed, and the state would argue for a commitment to the department of corrections of no more than 102 months—the low end of the presumptive range given Leistiko’s criminal-history score based on *Hernandizing*.² Leistiko would remain free to argue for a durational and a dispositional departure. At the plea hearing, Leistiko admitted to viewing, accessing, and downloading child-sexual-abuse images from February to August in 2023.

In January 2025, the district court held a sentencing hearing. The state requested a 102-month commitment. Leistiko’s counsel argued for a dispositional departure to probation. Leistiko also addressed the district court personally, expressing remorse and recognition of his personal issues and need for therapy.

¹ At the time of appellant’s offenses, the relevant statute stated that it criminalized the possession of “pornographic work” involving a minor. Minn. Stat. § 617.247 (2022). In 2025, the legislature amended the statute and changed the phrase “pornographic work” to “child sexual abuse material.” Minn. Stat. § 617.247 (Supp. 2025). Because this amendment does not affect the resolution of the case, we use the updated language.

² As further explained below, *Hernandizing* is a method for incorporating in an offender’s criminal-history score other offenses that are sentenced on the same day.

The district court then proceeded with sentencing. It followed the guidelines for the first three counts, *Hernandizing* as it went. This resulted in the following concurrent sentences for the first three counts:

Count 2: 24 months' imprisonment, stayed

Count 8: 36 months' imprisonment, stayed

Count 12: 60-month commitment.

The district court then continued to *Hernandize* for the last two counts but departed durationally from the presumptive sentences for each count. This resulted in the following concurrent sentences for the last two counts:

Count 15: 60-month commitment (presumptive 78 months)

Count 19: 60-month commitment (presumptive 120 months).

The state appeals.

DECISION

The state argues that the district court abused its discretion by durationally departing from the guidelines on counts 15 and 19 and asks us to reverse and remand with instructions to impose a sentence within the guidelines. Leistiko makes two arguments in support of his sentence: (I) in imposing the 60-month concurrent sentences on counts 15 and 19, the district court was not departing but was effectively choosing not to *Hernandize* the last two offenses, which was a proper exercise of its discretion; and (II) alternatively, even if the district court did depart, the departure is justified. We address these arguments in turn.

I. The district court *Hernandized* counts 15 and 19 according to the guidelines.

Leistikio argues that the 60-month sentences for counts 15 and 19 resulted from the district court's discretion not to *Hernandize*, rather than from a durational departure.

Hernandizing is a process defined in the sentencing guidelines for counting criminal history when, like here, the offenses being sentenced arose out of separate behavioral incidents and are sentenced on the same day before the same court. Minn. Sent'g Guidelines 1.B.10, 2.B.1.e (2022); see *State v. Hernandez*, 311 N.W.2d 478, 481 (Minn. 1981). In those circumstances, the district court sentences each offense in the order in which it occurred and, as each offense is sentenced, includes it in the criminal-history score of the next offense. Minn. Sent'g Guidelines 1.B.10, 2.B.1.e.

Leistikio argues that the district court stopped *Hernandizing* after the third offense sentence when it imposed 60-month sentences for the last two offenses. He asserts that district courts have the discretion not to *Hernandize* and that the district court properly exercised that discretion here. The state counters that *Hernandizing* is mandatory, arguing that it is part of the guidelines and cannot be deviated from without "aggravating or mitigating factors."

As Leistikio points out, this court has characterized *Hernandizing* as discretionary. See *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985) ("The *Hernandez* method may be used by the trial court, in its discretion, . . . provided it is not used to achieve a substantive result not intended by the guidelines."). But we need not further address whether the district court had discretion not to *Hernandize* because it explicitly did *Herndandize* here. When sentencing on counts 8, 12, 15, and 19, the district court

incorporated the prior counts to calculate the criminal-history score. After *Hernandizing*, the presumptive sentences for counts 15 and 19 were, respectively, 78 months (range of 67-93 months) and 120 months (range of 102-120 months). *See* Minn. Sent’g Guidelines 4.B (2022). The district court imposed 60-month sentences for counts 15 and 19 and stated that each sentence constituted a durational departure. The district court therefore departed, and we turn to the question whether the departure was proper.

II. The district court’s durational departure was an abuse of discretion.

The state argues that the district court abused its discretion by durationally departing from the guidelines on counts 15 and 19.

Appellate courts review a district court’s decision to depart from the presumptive guidelines sentence for an abuse of discretion. *Taylor v. State*, 670 N.W.2d 584, 588 (Minn. 2003). The district court abuses its discretion when the “reasons for departure are improper or inadequate.” *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009) (quotation omitted). “If the reasons given are improper or inadequate and there is insufficient evidence of record to justify the departure, the departure will be reversed.” *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003) (quoting *State v. Williams*, 361 N.W.2d 840, 844 (Minn. 1985)).

The district court may depart from the guidelines only when “there exist identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent’g Guidelines 2.D.1 (2022). Departures from the guidelines are meant to apply only to a small number of cases. *State v. Misquadace*, 644 N.W.2d 65, 71 (Minn. 2002); Minn. Sent’g Guidelines cmt. 2.D.301 (2022). “Durational departures may be justified by offense-related reasons only.” *State v. Rund*, 896 N.W.2d 527, 533 (Minn. 2017). “[T]o support a

downward durational departure, the reason must demonstrate that the defendant's conduct was significantly 'less serious than that typically involved in the commission of the crime in question.'" *Id.* at 535 (quoting *State v. Leja*, 684 N.W.2d 442, 450 (Minn. 2004)).

Here, the district court made several statements in support of its departure. First, it stated:

I just think this *Hernandizing* cases, while it's the only vehicle the state has to them, is so unfortunate that the Commission on Sentencing has not given us guidelines for what similar sentences should be. It's just absurd to me that counties can continuously offer probationary sentences and counties can continuously provide 120-month sentences. Just depending upon where you commit the crime is largely determinative of what type of sentence you're going to experience, and it seems wrong to me. But that's what we have.

Next, it recognized Leistiko's cooperation and good behavior since the offense, determining that Leistiko was unlikely to reoffend but declining to make a finding that he was particularly amenable to probation. The district court then stated:

For the most part, I'm going to follow the guidelines with the understanding that the length of prison time, in my opinion, is not corresponding to what your crime is, if that makes sense.

Finally, it imposed guidelines sentences for the first three counts, and then durationally departed for counts 15 and 19, stating:

The court specifically finds that *Hernandizing* unfairly exaggerates the criminality of the offense, and therefore the durational departure for this crime is appropriate.

....

Again, departure to 60 months based on the unfair exaggeration of the criminality based on the only option that the court has, which is *Hernandizing*.

The district court gave no further reasoning for its departure. It also did not disclose the reasons for departure in the sentencing order, and no departure report is found in the record.³

To support a downward durational departure, there must “exist identifiable, substantial, and compelling circumstances,” Minn. Sent’g Guidelines 2.D.1, that “demonstrate that the defendant’s conduct was significantly less serious than that typically involved in the commission of the crime in question.” *Rund*, 896 N.W.2d at 535 (quotation omitted). Here, the district court made no findings discussing the seriousness of Leistiko’s conduct. It failed to identify what specific conduct was less serious than typical or what circumstances made it less serious. The district court also made no findings comparing Leistiko’s conduct to that typical of the offense.

Leistiko relies on the district court’s reasoning that the sentence “exaggerates the criminality of the offense” and argues that this is “simply another way of saying that sentence is greater than what the conduct deserves.”⁴ This argument is unconvincing for two reasons.

³ The sentencing guidelines and Minnesota Rules of Criminal Procedure require that the reasons for departure be stated in the sentencing order or recorded in a departure report and filed with the Sentencing Guidelines Commission. Minn. Sent’g Guidelines 2.D.1.c (2022); Minn. R. Crim. P. 27.03, subd. 4(C); *see also* Minn. Stat. § 244.10, subd. 2 (2022) (requiring “written findings of fact as to the reasons for departure”). However, “failure to file a departure report is not itself sufficient grounds for reversal.” *State v. Stempfley*, 900 N.W.2d 412, 417 (Minn. 2017).

⁴ The state argues that whether multiple sentences “unfairly exaggerate the criminality of the conduct” can be considered only when the crimes arise from a single behavioral incident. Neither party disputes that the Leistiko’s offenses did not arise from a single behavioral incident. But, while unfair exaggeration of the criminality of a defendant’s

First, the district court stated that the sentence “unfairly exaggerates the criminality of the *offense*,” not Leistiko’s *conduct*. This word choice, along with the district court’s commentary on unfair sentencing disparity among counties, suggests that it departed because it thought that *Hernandizing* multiple convictions under the statute prohibiting child-sexual-abuse materials “unfairly exaggerates” the criminality of that offense in general.⁵ In *State v. Bakken*, the Minnesota Supreme Court recognized the potential harsh effects of the child-sexual-abuse-materials statute when an offender is convicted of possessing multiple images. 883 N.W.2d 264, 272 (Minn. 2016). It observed that those effects may be addressed through “general sentencing discretion,” noting that the district court in that case exercised its general discretion by sentencing at the bottom of the presumptive range. *Id.* But the district court here exceeded its general discretion to impose a sentence at the bottom of the presumptive range and instead departed durationally. And a downward durational departure from the guidelines must rely on the seriousness of the offender’s conduct, not on whether the guidelines generally punish a crime fairly. *See Rund*, 896 N.W.2d at 535.

conduct is considered when multiple sentences arise out of a single behavioral incident, *State v. Skipin the day*, 717 N.W.2d 423, 426 (Minn. 2006), this does not mean such unfair exaggeration cannot also be considered in another context. Regardless, the district court’s reliance on this reasoning is insufficient because it fails to establish why Leistiko’s conduct was less serious than typical.

⁵ Leistiko also argues that the district court properly departed because it compared the sentence to sentences imposed in other counties. But again, the issue is not whether the *sentence* is typical of the crime, but rather, whether Leistiko’s *conduct* was less serious than typical.

Second, even if we assume that the district court meant that the sentence here unfairly punished Leistiko's *conduct*, this does not resolve the issue. The district court still made no specific findings showing why Leistiko's conduct was less serious than conduct that is typical of the offense. These findings are required for downward durational departures, *id.*, and without them, the departures lack the necessary "identifiable, substantial, and compelling circumstances," Minn. Sent'g Guidelines 2.D.1.

Leistiko argues that even if the district court's departure was not justified on the grounds given by the district court, we should still affirm because departure is supported by the record. "When the district court gives improper or inadequate reasons for a downward departure, [the appellate court] may scrutinize the record to determine whether alternative grounds support the departure."⁶ *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (emphasis omitted). Proper justifications for a downward durational departure include, for example, remorse that relates back to the offense, *id.* at 626, the lessened severity of the victim's injuries, *State v. Cox*, 343 N.W.2d 641, 644-45 (Minn. 1984), the offender's minor or passive role in the crime, Minn. Sent'g Guidelines 2.D.3.a(2) (2022), or a victim acting as the first aggressor, Minn. Sent'g Guidelines 2.D.3.a(1) (2022).⁷ None

⁶ While this practice is not appropriate for an *upward* departure given an offender's constitutional right to a jury trial on the existence of aggravating factors, *see State v. Jones*, 745 N.W.2d 845, 851 (Minn. 2008) (citing *Blakely v. Washington*, 542 U.S. 296 (2004)), it is permissible for a *downward* departure, *see Rund*, 896 N.W.2d at 534-35.

⁷ The parties and the district court discussed Leistiko's particular amenability to probation at the sentencing hearing in the context of a *dispositional* departure. But particular amenability to probation or treatment is an offender-related factor and cannot justify a downward *durational* departure. *Rund*, 896 N.W.2d at 533.

of these are applicable here. And, upon our independent review of the record, no part of Leistiko's conduct justifies a downward durational departure. Count 15 was based on Leistiko's possession of a video showing a young child being orally penetrated by a penis, and count 29 was based on his possession of an image of a four-year-old child being digitally penetrated by an adult male. Nothing about this conduct indicates that it was less serious than typical for this offense.

Leistiko identifies his "remorse" as alternative support for the departure. Although remorse may generally be relevant to a downward dispositional departure, *see State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982), it does not justify a downward durational departure "unless a defendant can show that his demonstrated remorse is directly related to the criminal conduct at issue and made that conduct significantly less serious than the typical conduct underlying the offense of conviction." *Solberg*, 882 N.W.2d at 626. "[W]hether a defendant's actions express genuine remorse and how much weight to give to that remorse" are questions for the district court. *Id.*

Leistiko asserts that "[t]he district court found that [he] was remorseful," but the district court made no such finding. Even assuming that the district court did find his remorse genuine, Leistiko "did not engage in any remorse-driven conduct that lessened the impact of the crime on the victim or made his crime any less serious." *Solberg*, 882 N.W.2d at 626; *see also Rund*, 896 N.W.2d at 535. During the PSI and the sentencing hearing, Leistiko expressed shame and took responsibility for his actions. But neither of these expressions of remorse led Leistiko to take any actions that lessened the impact or

seriousness of his conduct. Our independent review of the record shows that Leistiko's remorse, even if genuine, does not justify a downward durational departure.

Neither the district court's stated reasons nor the facts in the record establish substantial and compelling circumstances demonstrating that Leistiko's conduct was significantly less serious than typical for his offenses. *See Rund*, 896 N.W.2d at 535. Therefore, the district court's downward durational departure is not justified by the law or the facts and constitutes an abuse of discretion. We reverse and remand Leistiko's sentence for imposition of a sentence within the presumptive range for counts 15 and 19 under the guidelines.

Reversed and remanded.