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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A25-1553**

State of Minnesota,
Respondent,

vs.

Nathan Leonard Hernandez,
Appellant.

**Filed August 3, 2026
Affirmed
Frisch, Chief Judge**

Dakota County District Court
File No. 19HA-CR-24-1313

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

Kathryn M. Keena, Dakota County Attorney, Cheri A. Townsend, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Evan Ottaviani, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Harris, Presiding Judge; Frisch, Chief Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Chief Judge

In this direct appeal from judgment of conviction for first-degree criminal sexual conduct, appellant Nathan Leonard Hernandez challenges his 188-month sentence, arguing

that the district court abused its discretion in denying his motion for a downward dispositional departure and in granting the state’s motion for an upward durational departure. Because we discern no abuse of discretion by the district court, we affirm.

FACTS

On multiple occasions in April 2024, Hernandez penetrated his 14-year-old stepdaughter’s vagina with his penis. For this conduct, respondent State of Minnesota charged Hernandez with one count of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1a(h)(iii) (2022) (providing that person is guilty where they engage in penetration of a person under 18, the “complainant was under 16 at the time of the act,” “the actor had a significant relationship to the complainant,” and “the sexual abuse involved multiple acts committed over an extended period of time”). The presumptive sentencing range for an offender with Hernandez’s criminal-history score is 144 to 172 months. *See* Minn. Sent’g Guidelines 4.B. (Supp. 2023). Shortly after filing the charges, the state filed a notice of intent to seek an aggravated durational sentencing departure. *See* Minn. Sent’g Guidelines 1.B.5.b(1) (Supp. 2023) (defining “aggravated durational departure” as “when the court pronounces a prison duration that is more than 20 percent higher than the [presumptive] fixed duration”).

Hernandez pleaded guilty. Pursuant to the parties’ plea agreement, Hernandez agreed to submit to a presentence investigation (PSI) and a psychosexual evaluation, and the state agreed not to argue for a sentence greater than 188 months. In the factual basis for Hernandez’s plea, he admitted that he engaged in penetration of his 14-year-old stepdaughter on multiple occasions, and at least one of the acts took place in his

stepdaughter's bedroom, a place "that would be a zone where she would have some privacy." The district court accepted the plea and adjudicated Hernandez guilty. Based on the presence of "[m]ultiple aggravating factors," making the offense "especially egregious," the PSI recommended a sentence of 188 months.

Before the sentencing hearing, Hernandez moved through counsel for a downward dispositional sentencing departure, asserting that he is particularly amenable to probation. *See* Minn. Sent'g Guidelines 1.B.5.a (Supp. 2023) (defining "dispositional departure" as "when the court orders a disposition other than that recommended in the Guidelines").

At the sentencing hearing, the district court stated that it had reviewed the PSI, the psychosexual evaluation, letters of support from Hernandez's family and a close friend, and a sentencing memorandum provided by defense counsel. The district court heard two victim-impact statements: one from Hernandez's stepdaughter and one from the stepdaughter's mother, Hernandez's ex-wife. Hernandez also addressed the court directly.

The state asked the district court to impose a 188-month aggravated prison sentence, relying on Hernandez's admission that the acts occurred in his stepdaughter's bedroom and therefore invaded her zone of privacy. The state further argued that Hernandez is not particularly amenable to probation because he "is an extreme public safety risk" and "verbalize[s] that he's taking accountability while also discussing all of the other things that he uses to rationalize and explain his behaviors."

Hernandez sought a downward dispositional sentencing departure, arguing that he is remorseful, has accepted accountability for his actions, is cooperative in court, and is therefore particularly amenable to probation. *See State v. Trog*, 323 N.W.2d 28, 31 (Minn.

1982) (stating that factors “relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting” include the defendant’s age, prior record, remorse, cooperation, attitude while in court, and support of friends and/or family).

In response to the state’s request for the imposition of an aggravated durational sentencing departure, Hernandez’s counsel suggested that the zone-of-privacy aggravating factor was not an appropriate basis for such a departure: “Your Honor, I’m 45 years old, maybe I’m a boring guy, but where do people have sexual contact? I don’t know. Would this have been better if it was in a kitchen, the basement, the garage, a different bedroom in the house?”

The district court denied the motion for a downward dispositional departure, granted the motion for an upward durational departure, and sentenced Hernandez to 188 months in prison. In so doing, the district court addressed the *Trog* factors, which the district court described as “not an exhaustive list but they’re certainly factors I need to consider.” The district court acknowledged that certain *Trog* factors—lack of a prior record, cooperation, attitude in court, and support of friends and family—weighed in favor of a downward dispositional departure. But the district court also stated that two factors—age and remorse—did not support a downward dispositional sentencing departure. In pertinent part, the district court identified “some recurring themes,” including Hernandez’s blaming his “toxic” relationship with his ex-wife and “subtly blaming the victim” for his actions. The district court determined that the evidence did not reflect “a compelling case for remorse,” but rather reflected “an ongoing pattern of deflection, denial, and blame.” The

district court ultimately concluded that a downward dispositional departure was not appropriate.

In evaluating the state's motion for an upward durational departure, the district court rejected several bases for an aggravated sentence, but agreed with the state that the evidence established that Hernandez invaded the victim's zone of privacy through the commission of acts occurring in the victim's bedroom, where she had an expectation of privacy. Ultimately, the district court granted the state's motion, reasoning that "case law makes it very clear to me that incidents happening within that zone of privacy, where the victim had an expectation of privacy, her bedroom, that that is enough to justify an aggravated sentence."

The district court entered judgment of conviction on one count of first-degree criminal sexual conduct and sentenced Hernandez to 188 months in prison, a 16-month upward durational departure from the presumptive guidelines range. *See* Minn. Sent'g Guidelines 4.B.

Hernandez appeals.

DECISION

On appeal, Hernandez argues that the district court abused its discretion in denying his motion for a downward dispositional sentencing departure and in granting the state's motion for an upward durational sentencing departure. District courts have a great deal of discretion in their sentencing decisions. *State v. Soto*, 855 N.W.2d 303, 307 (Minn. 2014). However, that discretion is limited by the Minnesota Sentencing Guidelines, which prescribe sentences that are "presumed to be appropriate for the crimes to which they

apply.” Minn. Sent’g Guidelines 2.D.1 (Supp. 2023). A district court may exercise its discretion to depart from the presumptive sentence only when there are “identifiable, substantial, and compelling circumstances to support a departure.” *Id.* But “a sentencing court has no discretion to depart from the sentencing guidelines unless aggravating or mitigating factors are present.” *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999).

We review a district court’s sentencing departure for an abuse of discretion. *State v. Vanengen*, 3 N.W.3d 579, 582 (Minn. 2024). “A district court abuses its discretion when its reasons for departure are not legally permissible or when the evidentiary record is insufficient to justify the departure.” *Id.* We will affirm a sentencing departure if the reasons for the departure “are legally permissible and factually supported in the record.” *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009).

I. Downward Dispositional Departure

Hernandez first argues that the district court abused its discretion when ruling on his motion for a downward dispositional departure because the district court “treated the *Trog* factors as prerequisites that must be met for departure.” According to Hernandez, this “failure” was “compounded by the court’s consideration of the PSI writer as an expert on whether Hernandez was particularly amenable to probation.” We disagree.

A dispositional departure “occurs when the presumptive guidelines sentence calls for imprisonment but the district court instead stays execution or imposition of the sentence.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). When considering a dispositional departure, a 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).

The Minnesota Sentencing Guidelines provide a nonexclusive list of mitigating factors that can justify a downward dispositional departure, including that “[t]he offender is particularly amenable to probation.” Minn. Sent’g Guidelines 2.D.3.a(7) (Supp. 2023). The requirement of *particular* amenability ensures that “the defendant’s amenability to probation distinguishes the defendant from most others and truly presents the substantial and compelling circumstances that are necessary to justify a departure.” *Soto*, 855 N.W.2d at 309 (quotation omitted). District courts consider factors such as a defendant’s age, prior criminal record, remorse, cooperation, attitude in court, and support of friends and family in evaluating particular amenability to probation. *Trog*, 323 N.W.2d at 31. But even if the record contains evidence of particular amenability to probation, a district court is not required to grant a dispositional departure. *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009); *see also State v. Walker*, 913 N.W.2d 463, 468-69 (Minn. App. 2018) (concluding that district court did not abuse its discretion denying a downward dispositional departure despite evidence of mitigating factors that could have supported a departure).

We disagree with the characterization that the district court abused its discretion by treating the *Trog* factors as “necessary and sufficient conditions for a departure.” The record shows that the district court carefully evaluated the PSI, the psychosexual evaluation, letters of support from Hernandez’s family and a close friend, defense’s sentencing memorandum, victim-impact statements from Hernandez’s stepdaughter and

ex-wife, Hernandez's allocution, and the parties' respective sentencing arguments. Each of the district court's findings regarding the *Trog* factors is grounded in this evidence. The district court found that four *Trog* factors—Hernandez's prior record, cooperation, attitude in court, and support of friends and family—supported a dispositional departure. The district court found that two factors did not support a departure—Hernandez's age and absence of remorse—and ultimately declined to grant the departure. We discern no abuse of discretion by the district court in its evaluation of the evidence. *See State v. Sejnoha*, 512 N.W.2d 597, 600 (Minn. App. 1994), *rev. denied* (Minn. Apr. 21, 1994) (stating that we “must defer to the district court’s assessment of the sincerity and depth of the remorse and what weight it should receive in the sentencing decision,” because “the district court has an opportunity to actually observe the defendant throughout the proceedings”); *Soto*, 855 N.W.2d at 310 (rejecting district court’s conclusion that 37-year-old defendant’s age made him particularly amenable to probation).¹ Accordingly, we conclude that the district court did not abuse its discretion in denying Hernandez’s motion for a downward dispositional departure.

¹ Hernandez also assigns error to the district court’s reliance on the information set forth in the PSI and its comment during the sentencing hearing that probation officers “are experts in determining whether someone is particularly amenable to probation.” Hernandez relies on *Soto*, in which the supreme court reasoned that the “mere fact that the person who prepared a report for the district court reached a certain conclusion does not necessarily justify departing from the presumptive disposition under the guidelines.” 855 N.W.2d at 309 (quotation omitted). In *Soto*, a conclusion in the PSI was one of the “primary reasons” for the district court’s decision. *Id.* That is not the case here. Our review of the record confirms that the district court’s sentencing order clearly reflect an independent analysis of the evidence presented by the parties in support of their respective sentencing motions and the district court’s independent exercise of discretion in the imposition of the sentence.

II. Upward Durational Departure

Hernandez next argues that the district court abused its discretion in imposing an upward durational sentencing departure based on the zone-of-privacy aggravating factor as duplicative of an element of the offense to which Hernandez pleaded guilty. He argues that “[t]he invasion of the victim’s zone of privacy was already considered when the legislature determined the severity level that applies to a criminal sexual conduct involving a significant relationship.” We disagree.

“The Minnesota Sentencing Guidelines provide a non-exclusive list of aggravating factors that may be used as reasons to impose an upward sentencing departure.” *Vanengen*, 3 N.W.3d at 582; Minn. Sent’g Guidelines 2.D.3.b (Supp. 2023); *see also* Minn. Stat. § 244.10, subd. 5a (2022). “[A]ggravating factors may not be used to impose an upward sentencing departure for a crime of conviction when the aggravating factor is an element of that same offense.” *Vanengen*, 3 N.W.3d at 583. One aggravating factor permitting an upward sentencing departure is that “[t]he offense was committed in a location in which the victim had an expectation of privacy.” Minn. Sent’g Guidelines 2.D.3.b(14); Minn. Stat. § 244.10, subd. 5a(a)(14). An upward durational sentencing departure is justified under such circumstances because the victim must “contend psychologically not only with the fact that [they were] sexually assaulted in a brutal way but also with the fact that [their] home is no longer the island of security that [they] perhaps thought it was.” *State v. Van Gorden*, 326 N.W.2d 633, 635 (Minn. 1982).

An invasion of the victim’s zone of privacy is not an element of the offense for which Hernandez was convicted. The elements of Minn. Stat. § 609.342, subd. 1a(h)(iii),

are that a person engaged in penetration with anyone under 18 years of age, and (1) “the complainant was under 16 years of age at the time of the act,” (2) “the actor has a significant relationship to the complainant,” and (3) “the sexual abuse involved multiple acts committed over an extended period of time.” In the factual basis for the plea, Hernandez admitted that he penetrated his 14-year-old stepdaughter’s vagina with his penis multiple times in April 2024 and that the acts occurred in his stepdaughter’s bedroom. To prove the significant relationship element of the offense, the state relied on Hernandez’s status as the victim’s stepparent, not that Hernandez was “an adult who jointly resides intermittently or regularly in the same dwelling as the complainant and who is not the complainant’s spouse.” *See* Minn. Stat. § 609.341, subd. 15(1), (3) (2022) (defining a “[s]ignificant relationship”). Accordingly, there is no reference to Hernandez and the victim living together in the factual basis for the plea. And even if the state had relied on Hernandez and the victim living together, that does not necessarily mean that the zone-of-privacy aggravating factor would be precluded. *Compare* Minn. Stat. § 244.10, subd. 5a(a)(14) (providing that the zone-of-privacy aggravating factor means that “the offense was committed in a location in which the victim had an expectation of privacy”), *with* Minn. Stat. § 609.341, subd. 15(3) (stating that a “[s]ignificant relationship” means the actor is “an adult who jointly resides intermittently or regularly in the same dwelling as the complainant and who is not the complainant’s spouse”).

We are unpersuaded by Hernandez’s attempt to equate the significant-relationship element of the offense—the “who”—with the location where Hernandez perpetrated the offense—the “where.” The supreme court has made clear that the “zone-of-privacy factor

focuses solely on *where* the offense was committed and not on the *type* of case committed or *how* it was committed.” *Vanengen*, 3 N.W.3d at 585. The supreme court concluded that “if the facts show that an offense is ‘committed in a location in which the victim had an expectation of privacy,’ a district court has discretion to impose an upward departure.” *Id.* (quoting Minn. Sent’g Guidelines 2.D.3.b(14)).

During the factual basis for his plea, Hernandez admitted to penetrating his 14-year-old stepdaughter’s vagina with his penis and that this encounter took place in his stepdaughter’s bedroom, a place “that would be a zone where she would have some privacy.” When the offender and the victim share a home, “the zone-of-privacy aggravating factor is limited to a bedroom within their home.” *State v. Mohamed*, 779 N.W.2d 93, 100 (Minn. App. 2010). The district court therefore properly applied the plain language of the zone-of-privacy aggravating factor as a basis to impose an upward sentencing departure. *See* Minn. Stat. § 244.10, subd. 5a(14); Minn. Sent’g Guidelines 2.D.3.b(14); *Vanengen*, 3 N.W.3d at 585.² Because the district court’s reasons for granting the upward durational departure are “legally permissible and factually supported in the record,” we discern no abuse of discretion. *Edwards*, 774 N.W.2d at 601.

Affirmed.

² Accordingly, we decline to consider Hernandez’s argument that the presence of the zone-of-privacy aggravating factor did not make this offense “significantly more serious than typical.”