

*This opinion is nonprecedential except as provided by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
A25-1850**

Luke Joshua Cain,
Respondent,

vs.

State of Minnesota,
Appellant.

Filed April 27, 2026
Affirmed
Bratvold, Judge
Dissenting, Ross, Judge
Hennepin County District Court
File No. 27-CR-24-29006

Marsh J. Halberg, Debbie E. Lang, David J. Risk, Halberg Criminal Defense, Bloomington,
Minnesota (for respondent)

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

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Considered and decided by Worke, Presiding Judge; Ross, Judge; and Bratvold,
Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Respondent pleaded guilty to second-degree unintentional murder. At sentencing,
the district court granted respondent a downward durational departure from the
presumptive sentence under the Minnesota Sentencing Guidelines on the grounds that he

was remorseful and that his offense was significantly less serious than the typical offense of its kind based on a comparison of the circumstances in his case to the elements of second-degree manslaughter. The State of Minnesota appeals, arguing that the district court abused its discretion by relying on improper grounds for departure and in the length of its departure. Because the reasons supporting the departure justify it, we conclude that the district court did not abuse its discretion. Thus, we affirm.

FACTS

Respondent Luke Joshua Cain awoke abruptly in his downstairs bedroom at about 3:30 a.m. on December 6, 2024. His dog was going “absolutely ballistic, barking really loud,” and woke him from “a deep sleep.” Cain thought that an intruder was inside his house. He grabbed a firearm from his desk so he could check to see what was going on. During the three months preceding this incident, Cain experienced three break-ins at his Richfield home—to his garage, his car, and his girlfriend’s car, from all of which items were taken.

As Cain came around the corner, his girlfriend told him from the top of the stairs that someone was inside his van parked outside. The van held Cain’s drywall equipment—saws, drill, batteries, stilts, and ladders. Cain ran outside and saw that the thieves “started fleeing.” They got into a pickup truck and started driving away. Cain raised his firearm and shot twice. Cain was “trying to scare them away and make sure they didn’t come back.” The truck continued speeding away. Cain did not think that he had hit the truck or anyone inside it.

Shortly afterward, Minneapolis law enforcement officers responded to a 911 call and found the pickup truck in south Minneapolis with one person inside. Police later identified her as S.O.; they transported her to a hospital, where she died from her injuries. S.O. had a single gunshot wound to the back of her head.

Law enforcement investigators followed up on a shots-fired report from a location near Cain's home and spoke to Cain later that morning. Cain told investigators that he saw people who appeared to be stealing from his van and that Cain confronted the thieves, who fled in a grey Ford F-150 pickup truck. Cain did not tell police that he had a firearm or that he fired at the pickup truck. Sometime later, Cain hid his gun at his Aitkin cabin.

Law enforcement investigators spoke with Cain again on December 18. Cain identified some of his stolen property from items found in the grey pickup truck with S.O. When asked, Cain denied that the thieves threatened him and denied hearing any shots. When investigators told Cain that police were aware shots had been fired, Cain admitted shooting at the pickup truck. Cain also told investigators that his gun was in his cabin. Police took Cain into custody.

The next day, appellant State of Minnesota charged Cain with one count of second-degree unintentional murder under Minnesota Statutes section 609.19, subdivision 2(1) (2024), based on an underlying felony of second-degree assault with a firearm.

About five months later, the parties reached an agreement in which Cain would plead guilty to the offense as charged, the state would ask for a guidelines sentence of 128 months' imprisonment, and Cain would ask for downward departures at sentencing.

At his plea hearing, Cain testified to the facts described above.¹ The district court accepted Cain's plea, ordered a presentence-investigation (PSI) report, and set the matter for sentencing. The PSI report stated that, based on Cain's criminal-history score of zero and the severity of the offense at level ten, the writer recommended a guidelines sentence of 128 months' imprisonment. The presumptive sentencing range for Cain's offense under the Minnesota Sentencing Guidelines was 128 to 180 months' imprisonment, but the plea agreement capped the sentence duration at 128 months.

Cain filed a sentencing brief arguing for both downward durational and dispositional departures from the presumptive sentence. Cain contended that two factors favored a durational departure: his crime was significantly less serious than a typical second-degree unintentional murder offense, and his remorse related to the seriousness of the offense. Cain argued that he admitted guilt and expressed genuine remorse when law enforcement told him that someone inside the pickup had been killed and that he quickly pleaded guilty to end the litigation and bring closure for S.O.'s family.

Acknowledging that durational departures are "not common," Cain attached a data report from the Minnesota Sentencing Guidelines Commission. The report tabulated the frequency of downward durational departures for convictions identical to Cain's offense over the course of five years. The report found that 13 of 172 offenders convicted of second-degree unintentional murder received downward durational departures. The most

¹ In his plea colloquy, Cain also acknowledged that the state's complaint was substantively accurate. *See Rosendahl v. State*, 955 N.W.2d 294, 300-01 (Minn. App. 2021) (explaining that the factual basis of a guilty plea includes evidence that the defendant expressly admits is truthful and accurate).

common justification was remorse and acceptance of responsibility (about 60%) along with the justification that the offense was less serious than the typical offense (about 30%). In Hennepin County, seven downward durational departures were granted out of the 60 total convictions of this type over the same five-year period. Cain also attached criminal complaints and nonprecedential opinions concerning second-degree unintentional murders and, as comparators of his offense's seriousness, second-degree manslaughter convictions.

At sentencing, the district court denied Cain a dispositional departure, granted him a downward durational departure, and sentenced him to 60 months in prison. The district court stated that it "reviewed very carefully" the materials submitted to it along with the cited cases. The district court identified two "substantial and compelling" justifications for departing. First, the district court found that Cain showed "genuine and deep remorse" and that his remorse led to "resolving this case quickly." Second, the district court determined that the "facts and the context and circumstances of [Cain's] crime do make it different from a typical second-degree murder" and "make it more analogous" to the crime of "reckless manslaughter." The district court reasoned that Cain "was not in a heated argument, drawing a gun, or committing a robbery gone bad," but "[h]e made a horrible, reckless decision in the context of being victimized multiple times and awakened in the middle of the night."

After the sentencing hearing, the district court filed a form report stating that the reason for departure was "See below and significant mitigating factors not amounting to a defense." The district court checked the box for "Crime less onerous than usual" as a reason

“Related to Nature of Current Offense.” The district court did *not* check a box for “Shows remorse/accepts responsibility,” listed under reasons “Related to Individual Offender.”²

The state appeals.

DECISION

The Minnesota Sentencing Guidelines provide presumptively appropriate sentences for convicted offenders based on their criminal history and the severity of their offense. Minn. Sent’g Guidelines 1.A.3, 2.D.1 (2024). The guidelines also provide that the “sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence.” Minn. Sent’g Guidelines 1.A.5 (2024).

District courts must impose a sentence within the guidelines unless “identifiable, substantial, and compelling” reasons support a departure. Minn. Sent’g Guidelines 2.D.1. Even when factors supporting a departure are present, granting a departure is discretionary. *Id.* The reasons supporting a downward durational departure must be germane to the conduct of the offense itself, demonstrating that a defendant’s offense was “significantly less serious” than a typical offense of that kind. *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985). Offender characteristics are irrelevant to a durational departure. *State v. Solberg*, 882 N.W.2d 618, 623-24 (Minn. 2016). If a district court departs from the

² The state asserts that the district court’s departure report was not in the record until after the state filed its appeal, attaching to its reply brief an affidavit from the appellate-team supervisor of the Hennepin County Attorney’s Office. But the departure report appears in the appellate record as properly filed on the same day as Cain’s sentencing hearing. In any event, the report does not add to the district court’s departure rationale—the sole issue on appeal. Thus, even if we assume that the departure report is not in the appellate record, it does not affect our analysis.

sentencing guidelines, it must state its reasons for doing so in writing or on the record. Minn. Sent'g Guidelines 2.D.1.c.

The state raises two issues on appeal. First, it argues that the district court abused its discretion by relying on similarities between Cain's offense and a typical manslaughter offense and by citing remorse as a ground for its durational departure. Second, it argues in the alternative that, even if Cain's departure were warranted, the district court abused its discretion in the length of its departure. We address each issue in turn.

I. The district court did not abuse its discretion in granting Cain a durational departure.

The state argues that the district court abused its discretion in granting Cain a downward durational departure because its manslaughter comparison lacks record support and remorse is an improper justification for a durational departure. Even if we agree with the state that Cain's remorse does not support a durational departure, we affirm the district court's departure decision because its manslaughter comparison properly focuses on the conduct underlying Cain's offense and is supported by the record.

A. The district court did not abuse its discretion by departing on the grounds that Cain's offense was similar to a manslaughter offense.

A district court must find an offense "significantly less serious" than typical to justify a downward durational departure. *Mattson*, 376 N.W.2d at 415. We review de novo whether a particular reason for a departure is appropriate. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *rev. denied* (Minn. July 20, 2010). If the district court's reason for departure is appropriate, we review the district court's departure decision for abuse of

discretion. *Solberg*, 882 N.W.2d at 623; *see also* Minn. Sent’g Guidelines 2.D.1 (“A departure is . . . an exercise of judicial discretion . . .”).

District courts deserve deference because of their “unique perspective” on the proceedings; “the trial judge is in the best position to evaluate the offender’s conduct and weigh sentencing options.” *State v. Sanders*, 598 N.W.2d 650, 656 (Minn. 1999) (quotation omitted). This court must affirm a departure if the district court identified a proper reason for the departure and the reason is sufficiently supported by the record. *State v. Williams*, 361 N.W.2d 840, 844 (Minn. 1985).

Based on the analysis that follows, we conclude that the district court did not abuse its discretion in granting a downward departure by concluding that Cain’s offense was significantly less serious than a typical second-degree unintentional murder. Nor did the district court err by comparing Cain’s second-degree unintentional murder conviction to a “reckless manslaughter” offense as a way of determining that Cain’s offense was significantly less serious than the typical second-degree unintentional murder.³ Simply put, Cain’s conduct is akin to manslaughter offenses in which the offender intended to shoot

³ Cain was convicted of second-degree unintentional murder under Minn. Stat. § 609.19, subd. 2(1), which provides that a person is guilty of this offense if they cause “the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense.”

While the district court at sentencing referred to “reckless manslaughter,” it appears the court was referring to second-degree manslaughter under Minn. Stat. § 609.205(1) (2024), which provides that a person is guilty of this offense if they cause the death of another “by the person’s culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another.”

but did not intend to hit a victim and Cain’s conduct is less egregious than offenses in which the offender intended to hit, but not kill, the victim.

The district court relied on caselaw and record materials to demonstrate the atypicality of Cain’s conduct.⁴ We consider two categories of support for the district court’s departure decision. First, the record includes examples of manslaughter offenses that, Cain argued, typified the conduct underlying second-degree manslaughter under Minn. Stat. § 609.205(1), a severity-level-eight offense. Minn. Sent’g Guidelines 5.A (2024). For example, in *State v. Swanson*, Swanson shot a gun in the victim’s direction during an argument indoors before shooting the victim three more times and killing him. 240 N.W.2d 822, 824-25 (Minn. 1976). Swanson testified that he intended to shoot the victim but not to kill him. *Id.* at 825. The jury convicted Swanson of second-degree manslaughter, and the Minnesota Supreme Court affirmed. *Id.* at 823-24. The supreme court determined that the evidence supported the verdict because Swanson’s acts were negligent, explaining that Swanson’s “intentional act of shooting [the victim] while not intending to kill him is an act which a reasonably prudent man would recognize as involving a strong probability of death” to the victim. *Id.* at 825.

Cain also submitted the criminal complaint from a district court case in which the defendant pointed a gun at his friend to “scare” him, pulled the trigger, and killed his friend. The complaint alleges that the defendant did not know the gun was “cocked” and loaded;

⁴ The state asserts that the materials on which Cain based these comparisons are not in the record. But these materials are either decisions of this court or the supreme court or, if district court records, appear in the appellate record as exhibits supporting Cain’s sentencing memorandum.

the state charged him with second-degree manslaughter under Minn. Stat. § 609.205(1). With these examples, Cain argued that a typical second-degree manslaughter offense involves the offender pointing and firing a gun in the direction of his victim, perhaps in a moment of anger, killing the victim but without intending to hit and kill them.

Second, the record includes examples to establish a typical second-degree unintentional murder involving a firearm and distinguish it from Cain’s conduct. For example, the district court stated that robbery is a typical felony included in second-degree unintentional murder. The district court may have been referring to *State v. Back*, in which the supreme court affirmed the district court’s decision to durationally depart upward. 341 N.W.2d 273, 276-78 (Minn. 1983). The supreme court stated that, “[i]f there is such a thing as a typical felony-murder, it probably is an unintentional killing that occurs in the course of robbery or some other crime against the person.” *Id.* at 276-77.⁵ The state argues, and we acknowledge, that “some other crime against the person” includes second-degree assault, the felony included in the second-degree unintentional murder offense to which Cain pleaded guilty. *Id.* The supreme court chose, however, to enumerate robbery as the typical offense underlying felony murder; therefore, the district court did not abuse its discretion by stating that robbery is a typical felony included in second-degree unintentional murder.

⁵ The state is incorrect that Cain’s brief selectively omitted language from this quote—“or some other crime against the person.” This language is quoted in respondent’s brief to this court.

More specifically, Cain points to the nonprecedential opinion in *State v. Nelson* as a typical example of second-degree unintentional murder. No. A17-1429, 2018 WL 3966353 (Minn. App. Aug. 20, 2018), *rev. denied* (Minn. Nov. 13, 2018).⁶ In *Nelson*, the victim’s friend and Nelson argued in a bar and the argument moved to the parking lot. *Id.* at *1. Nelson got into his truck but continued to argue. *Id.* The victim punched Nelson through his open truck window; Nelson intentionally shot the victim twice, then drove away. *Id.* The jury found Nelson guilty of second-degree unintentional murder, and he was sentenced to 150 months in prison; this court upheld the sufficiency of the evidence because the record included evidence that Nelson intended to shoot his victim but did not intend to kill him. *Id.* at *1-2.

Cain argues that his behavior is significantly less serious than the second-degree unintentional murder typified by *Nelson* because, unlike Nelson, Cain did not intend to shoot the pickup or those inside and he did not knowingly point a gun at a person. The district court explained that it found Cain’s offense significantly less serious because he was not “committing a robbery gone bad” or “in a heated argument [or] drawing a gun” directly on a person. The district court’s analysis reflects its careful review of the record and the exercise of its discretion.

Overall, the district court’s departure decision rested on caselaw and record materials showing that a typical second-degree manslaughter could involve an offender shooting a firearm in the victim’s direction during a moment of anger without intending to

⁶ Nonprecedential opinions are not binding but may be cited as persuasive authority. Minn. R. Civ. App. P. 136.01, subd. 1(c).

hit or kill them and that a typical second-degree unintentional murder could involve a defendant intentionally shooting a victim without intending to kill the victim. In durationally departing, the district court described Cain’s “horrible, reckless decision” in response to what he believed was a middle-of-the-night home invasion after previous break-ins and thefts at his home. The district court aptly concluded that Cain’s behavior was “extremely reckless conduct [that] cost one person her young life.”

Still, the district court applied its criminal-law experience and agreed with Cain’s characterizations of what is a “typical” second-degree manslaughter and second-degree unintentional murder. The district court found that Cain’s conduct fit the former because he intended to shoot but not to hit the pickup or its occupants, and the district court determined that Cain’s offense therefore was significantly less onerous than the typical second-degree unintentional murder. *Cf. Mattson*, 376 N.W.2d at 415 (acknowledging appellate courts’ ability to apply their experience to determine the typicality of an offense).

The state challenges these comparisons and emphasizes the factual dissimilarities between Cain’s offense and the comparator cases. The state also cites other cases to argue that Cain’s second-degree unintentional murder was atypically serious. There are details of Cain’s offense that cut against any comparison to second-degree manslaughter, but this is inevitable given the fact-specific nature of these comparisons and departure decisions. *See Minn. Sent’g Guidelines cmt. 2.D.301* (2024) (explaining that factors supporting a departure should speak to the “specific situations” of the rare cases warranting departure). Cain also pleaded guilty to each element of second-degree unintentional murder.

Because the record establishes meaningful similarities between second-degree manslaughter and Cain’s offense, we cannot say that the district court abused its discretion by finding this comparison persuasive and then using it to conclude that Cain’s offense was significantly less serious than usual.

B. Even assuming that the district court abused its discretion by relying on Cain’s remorse to justify a durational departure, it did not abuse its discretion in granting a durational departure.

The state argues that the district court abused its discretion by relying on Cain’s remorse to justify a durational departure, maintaining that Cain’s remorse does not relate back to his criminal conduct such that it could justify his departure. Courts typically treat remorse as a factor supporting a downward *dispositional* departure because it speaks to a defendant’s amenability to probation. *See State v. Soto*, 855 N.W.2d 303, 311 (Minn. 2014). But remorse can be a factor supporting a downward *durational* departure when it relates back to the offender’s crime to somehow make it significantly less serious than a typical offense. *Solberg*, 882 N.W.2d at 626.

The district court found that Cain’s “genuine and deep remorse” was a substantial and compelling reason to grant the durational departure. The district court described Cain’s remorse as a “sadness at the loss that he’s caused” that “is palpable.” The district court also stated that Cain’s remorse led to “resolving this case quickly,” which is supported by Cain’s guilty plea less than six months after his crime. Still, nothing in the record shows that S.O.’s family experienced relief or closure—none of her three sisters spoke of it when they gave their victim-impact statements at the sentencing hearing.

The state makes a strong argument that any reliance by the district court on Cain's "genuine remorse" was improper because his remorse was not a substantial and compelling circumstance relating to his criminal conduct. Caselaw establishes that, to support a downward durational departure, the offender's remorse must relate back to the offender's conduct and somehow mitigate its effect on the victim to justify a downward durational departure. *Id.* at 625-26. Yet the Minnesota Sentencing Guidelines Commission reported that remorse is the most frequent justification for granting a downward durational departure when sentencing an offender for second-degree unintentional murder.

We need not further consider Cain's remorse as a justification for the district court's departure decision. A single mitigating factor may justify a downward durational departure. *Id.* at 624-25. And here, the district court's departure report omitted remorse as a reason for departure. We affirm the district court's decision to depart on the ground that Cain's offense was significantly less serious than usual through its comparison to a typical second-degree manslaughter offense.

II. The district court did not abuse its discretion in the length of sentence imposed by its departure.

We review the length of a district court's departure for abuse of discretion. *See State v. Martinson*, 671 N.W.2d 887, 892-93 (Minn. App. 2003) (concluding district court did not abuse its discretion based on the length of a sentence imposed in granting a downward durational departure), *rev. denied* (Minn. Jan. 20, 2004); Minn. Sent'g Guidelines 2.D.1. Even when a departure is justified, the sentence imposed must be proportional to the

offense, considering any mitigating or aggravating factors and the offender's criminal history. *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981).

The district court did not abuse its discretion because the length of its departure was rationally connected to the second-degree manslaughter comparison discussed above. In his sentencing memorandum, Cain argued that, if the district court were to durationally depart, it should sentence him to “a period of 48 months as this is the guideline sentence for second-degree manslaughter.”

The district court's decision to impose a 60-month prison sentence is proportional given its analysis of second-degree unintentional murder, second-degree manslaughter, and the facts of Cain's offense. All but two second-degree manslaughter offenses have a severity level of eight.⁷ Minn. Sent'g Guidelines 5.A. This severity level assigns second-degree manslaughter a presumptive sentence duration of 48 months and a range of 41 to 57 months for an offender with a criminal-history score of zero, such as Cain. Minn. Sent'g Guidelines 4.A (2024). Because the district court determined that Cain's offense was less serious than a typical second-degree unintentional murder based on its similarities to second-degree manslaughter, the duration imposed adheres to this analysis.

In short, the district court's departure decision and the sentence duration imposed reflect the mitigating circumstances of Cain's offense. At the same time, Cain committed a more serious crime than second-degree manslaughter, which is also reflected in the district court's duration decision. Because the district court's sentence was proportional

⁷ Those two offenses, second-degree manslaughter of an unborn child and for a hunting accident, carry a lower severity level of five. Minn. Sent'g Guidelines 5.A.

considering the mitigating circumstances, the district court did not abuse its discretion by imposing a 60-month sentence based on granting a durational departure. Thus, we affirm.

Affirmed.

ROSS, Judge (dissenting)

The majority concludes that the district court's halving of Luke Cain's presumptive prison term is justified because Cain's criminal conduct was significantly less serious than conduct in an ordinary second-degree felony-murder case. I believe instead that the additional factual details from the record lead to a different conclusion. I therefore respectfully dissent.

When Luke Cain learned that someone was rummaging through his parked work van outside his house, he charged outside with his loaded handgun, clearly saw that the presumed pilferers had entered their pickup truck and begun to drive away, and intentionally fired two shots toward them—one of which passed through the rear window of the pickup and into the back of Sofia Rose O'Hotto's head, killing her. Cain then reported to a police investigator that someone had broken into his van, and he boasted to a friend that he had chased away the would-be burglars (whom, according to the prosecutor's statements to the district court, Cain described with a racial slur). Next he lied to police when they asked if he had heard any gunshots. Cain then secreted his gun from his home and drove it to his cabin to prevent it from being discovered by police, and then he lied to police once more by again denying he was involved in any shooting. At last, 12 days into the homicide investigation and only after police informed him that one of his gunshots had killed someone, Cain finally admitted to police what they already suspected, which is that he was the shooter who fired the fatal shot.

Five months after the state charged Cain in December 2024 with second-degree unintentional felony murder, he petitioned the district court to change his plea to guilty in

a defendant-friendly deal that capped his prison sentence at 128 months—the very bottom of the presumptive 128-to-180-month imprisonment range under the guidelines. Cain had not finished lying to diminish his culpability; he lied again, this time under oath during his plea hearing. He falsely testified that he had moved his gun from his house to his cabin not to hide evidence of his crime, claiming instead, “I was hunting that weekend, and I always carry a firearm with me in the woods.”

Cain nevertheless asked the district court at sentencing to depart downward from his presumptive prison term. The district court responded in part by explaining how Cain’s conduct included “facts . . . that are aggravating rather than mitigating,” including that Cain “fired a gun twice at people fleeing the scene of a theft.” It bluntly and accurately recounted, “This is intentionally pulling the trigger while aiming at a [vehicle] with people inside.” It emphasized, “Not at the ground, not at the sky, [but] at the fleeing vehicle.” It imagined aloud that Cain’s “extremely reckless conduct cost one person her young life, and could easily have hit a cashier coming home from their late shift, could have hit a doctor or nurse going out on call in the middle of the night, could have hit any innocent night-owl who was unlucky enough to be in the area.” It clarified that “Cain knew [that] the people attempting to steal his van were not in his home, that he fired at them when they were leaving the scene, and that he knew his conduct was wrong right away,” and it added that he nevertheless “denied hearing any shots . . . knowing . . . at that time that he was the one who fired those shots.” It also recognized that Cain continued to falsely minimize his conduct even in his plea hearing, observing that, although “[h]e also hid the gun at his

cabin . . . he now claims he took it out for hunting.” This claim, the district court naturally found, “strikes as not credible.”

I believe that this series of events cannot support the conclusion that Cain’s criminal conduct was less serious than the typical conduct in a felony-murder case. But the district court decided differently. It announced, “I find . . . substantial and compelling reasons” to depart downward from the guidelines sentence “based on, first, Mr. Cain’s genuine and deep remorse,” and second, based on the district court’s assessment that “the circumstances of the crime . . . make it different from a typical second-degree murder” in that the circumstances here are “more analogous to . . . reckless manslaughter.” Neither of these stated reasons, in my view, has the necessary legal and factual support to justify the reduction to 60 months’ incarceration—a sentence of less than half the very bottom of Cain’s presumptive sentencing range.

The sentencing guidelines promote fairness by establishing a system of uniform punishment, requiring district courts to treat similar offenses similarly. *See* Minn. Sent’g Guidelines 2.D.1 (2024). Uniform sentencing helps to avoid both the appearance of injustice and actual injustice. A district court therefore has no discretion to depart from a presumptive guidelines sentence unless “identifiable, substantial, and compelling circumstances” justify a departure. *Id.*; *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011). For the following reasons, neither the district court’s primary reason (Cain’s alleged remorse) nor its secondary reason (the supposed similarity between Cain’s conduct and the elements of second-degree manslaughter) constitutes a substantial and compelling circumstance supporting its durational departure.

Remorse Does Not Justify the Downward Departure

Cain's alleged remorse is not a compelling circumstance justifying the district court's departure decision. The remorse basis is flawed primarily because "[a] durational departure must be based on factors that reflect the seriousness of the *offense*, not the characteristics of the offender," which is why the supreme court emphasized that it has "consistently treated remorse as a factor that may support a downward *dispositional* departure" rather than a factor bearing on a durational departure. *State v. Solberg*, 882 N.W.2d 618, 623, 625 (Minn. 2016); *see also State v. Soto*, 855 N.W.2d 303, 311 (Minn. 2014) (confirming that remorse is a permissible factor for determining particular amenability to probation); *State v. Back*, 341 N.W.2d 273, 275 (Minn. 1983) (holding that "a defendant's remorse bears only on a decision whether or not to depart dispositionally, not on a decision to depart durationally"). We have followed the supreme court's lead. *See, e.g., State v. Bauerly*, 520 N.W.2d 760, 762 (Minn. App. 1994) (recognizing that remorse "generally bears on the defendant's amenability to probation, and is relevant to a dispositional departure"), *rev. denied* (Minn. Oct. 27, 1994). The general rule that remorse bears on a dispositional rather than a durational departure is well established.

The supreme court reasoned in 1984, however, that "there may be cases" when an offender's lack of remorse might justify an upward durational departure because it relates back to the cruel nature of the defendant's criminal conduct. *State v. McGee*, 347 N.W.2d 802, 806 n.1 (Minn. 1984). Thirty-two years later it recognized that "[t]he logical inverse" allows for "the possibility that cases may exist in which the defendant's remorse could relate back and be considered as evidence of remediation that makes the conduct

significantly less serious than the typical conduct underlying the offense of conviction.” *Solberg*, 882 N.W.2d at 625–26. Since the supreme court announced that possibility, it has never—and we have only twice—affirmed a downward durational departure based on a defendant’s remorse.

A divided panel of this court did so in *State v. Gutierrez*, and Cain invites us to treat that case as “analogous” to this one. No. A24-1747, 2025 WL 2502564, at *1 (Minn. App. Sept. 2, 2025) (relying on remorse as an alternative basis to affirm a downward durational departure). No analogy can be drawn. In that nonprecedential opinion, the defendant had been convicted of second-degree unintentional murder after a shooting, but that case otherwise bears no similarity to this one. *Id.* Gutierrez had intervened to stop two men who were punching his brother in a two-against-one fight in a parking lot. *Id.* Gutierrez had seen the fight begin, but he did not involve himself until his brother became outnumbered. *Id.* He then grabbed a gun that he thought was unloaded and that his brother had just dropped onto the car seat beside him. *Id.* And Gutierrez used the gun to hit—not shoot—one of the men to stop him from punching his brother. *Id.* The gun discharged by accident on contact, and the bullet struck the man. *Id.* Gutierrez immediately handed the gun to his brother, dialed 9-1-1 to report what had happened and to obtain aid for the injured man, and remained at the scene for police to arrive. *Id.* This court affirmed a downward sentencing departure, concluding that Gutierrez’s remorse related back to the offense because his remorse led him to remain at the scene rather than run from law enforcement, he had dialed 9-1-1, he waited at the scene to ensure the gunshot victim received aid, and he cooperated with police. *Id.* at *6. Cain’s reliance on *Gutierrez* is misplaced.

I reiterate that our *Gutierrez* opinion is not precedential. And the dissenting judge in that case rejected the notion that the defendant's remorse related back to his offense, pointing out that the district court at sentencing, like the district court at Cain's sentencing, never found that his remorse lessened the impact on the victim or made the crime less serious. *Id.* at *12 (Larkin, J., dissenting). In any event, unlike Gutierrez's immediate demonstration of remorse and the idea that it immediately benefited the victim of his accidental discharge, Cain expressed no immediate remorse after his intentional discharge, lied to police about the shooting, and boasted about his having chased the alleged burglars from his property. His tardy remorse was not unlike the remorse that most defendants emphatically claim in the face of a sentencing judge. I'm not suggesting that Cain's remorse was insincere; I'm saying that it had no value to the deceased Sofia and in no logical way relates back to lessen the impact of his crime. The district court's reliance on it as a basis for departing durationally therefore calls for our reversal and a remand for resentencing.

The majority casts some doubt about the propriety of the district court's decision to base Cain's departure on his remorse, but it affirms the departure without addressing the remorse basis on its merits. It does so on the precept that even a single mitigating factor can justify a downward departure, *Solberg*, 882 N.W.2d at 624–25, and on its holding that the departure can stand because the “offense was significantly less serious than usual.” For the reasons that follow, I disagree with the less-serious-than-typical basis for departure in this case. But I first emphasize that, even if that basis were supported in this case, still we should reverse and remand because the record does not establish that the district court

would have imposed the same sentence had it not erroneously relied on Cain’s remorse as a factor justifying the departure. *See State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009) (“Only if we conclude that the district court would have imposed the same sentence absent the improper . . . factor will we affirm the sentence imposed by the court.”). The majority says that “the district court’s departure report omitted remorse as a reason for departure,” but the majority had previously accurately recognized what appears to be the reason for the omission, which is that the report is a checklist of options that (rightly) does not provide “remorse” as one of the options for a *durational* departure. The district court’s failure to indicate “remorse” on the form in no way indicates that it retreated from remorse being its primary reason for durationally departing, as it declared on the record during the hearing. I turn to the atypically-less-serious basis for the departure.

Atypicality Does Not Justify the Downward Departure

The atypically-less-serious basis for the departure is also not a substantial and compelling circumstance justifying the district court’s decision because Cain’s murder was so typical of a second-degree murder offense that we need not consider whether it was “*significantly* less serious than the typical conduct underlying the offense” so as to justify a downward departure. *Solberg*, 882 N.W.2d at 626 (emphasis added). The majority affords deference to the district court’s determination of atypicality. But our analysis should include no deference to this determination because the atypicality of an offense is not determined from the district court’s perspective but on a statewide basis by the appellate courts. *State v. Norton*, 328 N.W.2d 142, 146–47 (Minn. 1982) (stating that determining whether severe aggravating circumstances exist “must be based on our collective, collegial

experience in reviewing a large number of criminal appeals from all the judicial districts”); *see also State v. Yaritz*, 791 N.W.2d 138, 150 (Minn. App. 2010) (incorporating *Norton* in recognizing that the district court’s decision whether the offense occurred in a particularly serious way depends “[i]n the final analysis [on] an appellate court’s decision whether a particular durational departure is justified . . . based on its collective, collegial experience” of reviewing cases statewide (alterations omitted) (quotation omitted)), *rev. denied* (Minn. Feb. 23, 2011). And I believe our *de novo* appellate perspective demands that Cain’s conduct squarely typifies the conduct in second-degree felony-murder cases.

That Cain’s criminal conduct is not less serious than the typical second-degree felony-murder case is exactly what the supreme court has already declared: “If there is such a thing as a typical felony-murder, it probably is an unintentional killing that occurs in the course of robbery or some other crime against the person.” *Back*, 341 N.W.2d at 276–77. The majority seems to suggest that the *Back* court intentionally identified “robbery as the typical offense” in a felony-murder case and that this particularized reference justifies the district court in ignoring the fact that, in the very same phrase, the *Back* court included “some other crime against the person” as typifying an unintentional, felony-murder offense. This seems clearly to overemphasize *Back*’s reference to “robbery,” and Cain’s underlying crime of second-degree assault was in fact a crime against the person resulting in an unintentional killing. Indeed, Cain could have been charged with and convicted of both the underlying assault against the pickup’s driver and felony murder against Sofia. When the district court correctly pointed out some of the multiple ways in which Cain’s conduct included aggravating rather than mitigating circumstances, it overlooked that one.

The *Back* court also emphasized that “the felony-murder rule can be used even when the underlying felony is a property offense if that offense, as committed, involves special danger to human life.” *Id.* at 277. In other words, not only is it inaccurate to say that Cain’s felony-murder conduct of unintentionally killing a person while he was committing a crime against persons was less serious than the typical case, but it is especially wrong because committing a felony murder in that fashion is the most serious of the two felony-murder types the *Back* court described. Because the supreme court described the manner of Cain’s offense as typical, I do not think we can accurately describe it as atypical.

A comparison of Cain’s conduct to the conduct involved in several relatively recent second-degree unintentional-murder cases proves that Cain’s conduct is not less serious, let alone significantly less serious, than the typical case. The majority’s deference to the district court leads it to implicitly accept the legal conclusion that the criminal conduct in *State v. Nelson* provides “a typical example of second-degree unintentional murder.” No. A17-1429, 2018 WL 3966353, at *1 (Minn. App. Aug. 20, 2018), *rev. denied* (Minn. Nov. 13, 2018). It likewise seems to accept the district court’s legal assessment that Cain’s “behavior is significantly less serious than the second-degree unintentional murder typified by *Nelson*.” I believe that the district court is mistaken. I agree that *Nelson* includes conduct of a typical second-degree unintentional-murder case. But I cannot agree with the conclusion that Cain’s conduct was significantly less serious than Nelson’s, justifying the downward departure. I am convinced that Cain’s conduct was not at all less serious; it was *more* serious. Nelson was sitting in a parking lot in his truck when another man walked up and “punched him through [an] open window.” *Id.* The blow was so forceful that Nelson

had to seek emergency medical treatment the next day. *Id.* Instantly after he was punched in the head, Nelson fired two shots at the man. *Id.* When police spoke with Nelson, he promptly admitted that he had shot the man. *Id.* Nelson, like Cain, was convicted of second-degree felony murder. *Id.* Let's compare. Nelson was the victim of a violent crime against his person. Cain was not. Nelson fired "immediately" as he was being victimized. Cain did not. Nelson admitted to the shooting as soon as police asked him about it. Cain did not, instead lying when police asked about the shooting. Nelson shot toward only one person. Cain shot toward two. Nelson killed a man who remained in a position to continue physically harming him. Cain killed a woman who had never harmed him and who was in no position to do so. The majority has concluded that Cain's conduct was *significantly less serious* than Nelson's. I am certain that this is not so. Indeed, Cain's conduct was objectively *more serious* than Nelson's.

The *Gutierrez* majority surveyed statewide cases and presented three typical second-degree unintentional felony murders, all more recent than *Nelson* and none materially distinguishable from this case. *See* 2025 WL 2502564, at *5. It first identified *State v. Edmondson*, where the convicted defendant had fired a gun into an occupied car, killing one person and resulting in a presumptive sentence of 240 months' imprisonment. No. A23-0736, 2024 WL 910685, at *1–2 (Minn. App. Mar. 4, 2024). It next identified *State v. Reed*, where the convicted defendant had shot a man twice in the vicinity of others after the man shoved him, resulting in a presumptive 180-month prison sentence. No. A22-0107, 2023 WL 3048000, at *1–4 (Minn. App. Apr. 24, 2023). And third, it identified *Daniels v. State*, where the convicted defendant had fired three shots toward a group of

men who were fighting with a group the defendant was with, killing one man and resulting in a presumptive 180-month prison sentence. No. A17-0623, 2018 WL 817286, at *2 (Minn. App. Feb. 12, 2018), *rev. denied* (Minn. Apr. 25, 2018); *see also* No. A19-1279, 2020 WL 2118897, at *1 (Minn. App. May 4, 2020) (recounting Daniels’s imprisonment term), *rev. denied* (Minn. Sept. 15, 2020). It is plain to me that Cain’s conduct was at least as serious as, or more serious than, (but surely not significantly *less* serious than) the conduct in *Nelson*, *Edmondson*, *Reed*, *Daniels*, or any other typical second-degree unintentional felony-murder case I am aware of. Cain’s 60-month sentence, in the context of the sentences these defendants received for essentially the same conduct, is at odds with the state’s commitment to uniform sentencing.

I believe our analysis must focus particularly on how the seriousness of Cain’s felony-murder conduct compares with the conduct in the typical felony-murder cases. The majority bases its affirmance in substantial part on its conclusion that “the record establishes meaningful similarities between second-degree manslaughter and Cain’s offense” based on the district court’s assessment. I think this approach faces three problems. First, I believe it rests on the wrong issue. The issue is not whether the convicted defendant’s conduct resembles conduct that the district court believes resulted in convictions of a lesser crime. Whether the defendant’s conduct is typical of some *other* offense in the district court’s view or this court’s view is not relevant to the issue of whether the defendant’s conduct was significantly less serious than the conduct typically occurring in the *charged* offense. My disagreement lies in the fact that I believe the answer to *that* question is plainly no. The second problem with the majority’s approach is that it does not

seem to rest on binding appellate precedent establishing how we review durational departures. And the third problem is that this approach would invite a large number of durational departures for felony murders when departures are instead supposed to be the narrow exception. *See Solberg*, 882 N.W.2d at 623. Applying the typicality approach the majority has taken—comparing a defendant’s conduct to the conduct typically associated with a lesser crime rather than to the conduct typically associated with the charged crime—would result in more departures and, consequently, less uniformity in sentencing. For example, that approach could likely have opened the door for departures in all the typical felony-murder cases the *Gutierrez* court identified (*Edmondson*, *Reed*, and *Daniels*) and *Nelson* also.

For all these reasons, I agree with the state that the district court misapplied the law and erroneously granted Cain’s motion for a downward durational departure. I would reverse and remand for resentencing.