

*This opinion is nonprecedential except as provided by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
A23-0558**

State of Minnesota,
Respondent,

vs.

Siyam Abdi Kusow,
Appellant.

**Filed October 28, 2024
Affirmed
Wheelock, Judge**

Ramsey County District Court
File No. 62-CR-21-6771

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Daniel S. Adkins, North Star Law Group, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Wheelock, Judge; and Kirk,
Judge.*

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

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

In this direct appeal from his sentence for felony threats of violence, appellant argues that the district court abused its discretion by denying his motion for a downward durational departure and that his attorney provided ineffective assistance of counsel. We affirm.

FACTS

One evening in late November 2021, officers in downtown St. Paul responded to a call from a 16-year-old female, K.P. She reported that a man had watched her from his parked car, followed her as she ran to a bus stop, got out of his car and talked to her, told her that he would “pop her and beat her ass,” and revealed a firearm in his pocket. K.P. told the officers that she feared she would be shot, so she ran away and hid in a nearby parking ramp and called the police and her brother. K.P. had never seen the man before but provided a description of the man and his car’s license plate. Roughly an hour later, the officers spotted the car and noted that its driver matched K.P.’s description of the man who had threatened her.

The officers initiated a traffic stop and spoke with appellant Siyan Abdi Kusow, who told the officers that he had done nothing wrong and that he had a conceal-and-carry permit. One officer spotted an empty gun holster on the front passenger floor, and when the officers searched the vehicle, they recovered a handgun from beneath the front passenger seat. The officers subsequently arrested Kusow for threats of violence. Kusow said, “She was going to call her brother on me, and I have the right to defend myself.” He

then explained that he had wanted to talk to K.P. and get her number, but she was disrespectful and rude, and that he felt afraid when she began to call her brothers. Kusow later admitted the following facts during his plea colloquy: he noticed a “younger female” on the street and was romantically attracted to her, but when he tried to talk to her, he received the impression that she was not interested in him and became upset; he said he would “pop her ass” and showed her the handle of his firearm while making the statement; he admitted that this statement constituted one that “was recklessly made that would have caused her to be afraid that [he was] gonna seriously hurt her.”

Respondent State of Minnesota charged Kusow with second-degree assault with a dangerous weapon in violation of Minn. Stat. § 609.222, subd. 1 (2020), and felony threats of violence with reckless disregard of the risk of causing terror in violation of Minn. Stat. § 609.713, subd. 1 (2020).

In November 2022, Kusow submitted a petition to enter a guilty plea. In exchange for the plea, the state agreed to dismiss the second-degree assault charge and to limit probationary jail time to 60 days, though Kusow retained the ability to argue for a durational departure. The district court accepted Kusow’s plea, finding that both Kusow’s plea and the waiver of his rights were made knowingly, intelligently, and voluntarily and that the facts established during the plea colloquy were sufficient to support the plea.

Prior to sentencing, the district court ordered a presentence-investigation report (PSI). The PSI recommended sentencing consistent with the plea agreement and stated that Kusow’s criminal-history score was zero. Relevant to this appeal, Kusow had several

pending charges in the State of Wisconsin that were dismissed on the same day Kusow appeared for sentencing in the present case.

In January 2023, Kusow moved for a downward durational departure to a gross-misdemeanor sentence. Specifically, he argued that a departure was warranted based on two mitigating factors set forth in Minnesota Sentencing Guidelines 2.D.3a (Supp. 2021). First, Kusow’s counsel argued that “substantial grounds exist that tend to excuse or mitigate the offender’s culpability,” Minn. Sent’g Guidelines 2.D.3a(5), because Kusow did not plan to frighten or harm K.P., possessed his firearm lawfully, felt concerned for his own safety, and never fully removed the firearm from its place in his pocket or pointed the firearm at K.P. Second, counsel argued that Kusow was “particularly amenable to probation,” Minn. Sent’g Guidelines 2.D.3a(7), because he has minimal criminal history, has been cooperative throughout the process, has taken responsibility for his actions, and has expressed remorse.

The state opposed Kusow’s motion, arguing that this was “every woman’s worst nightmare, walking alone and being approached by a strange man . . . when there’s nobody else around” and that, “[e]ven if you take [Kusow] at his word that . . . he expressed interest in her; she didn’t reciprocate; and he didn’t pull the gun out until she made a reference to calling her brothers, that’s not a reasonable reaction in this circumstance.” The district court received two victim-impact statements and placed them in the record, one from K.P. and another from her mother. Kusow spoke at the hearing, expressing his regret and wishing K.P. “a life that is full of peace and happiness.”

The district court denied Kusow’s motion for a downward durational departure because to grant it would “depreciate the seriousness of the offense” and sentenced Kusow to a term of imprisonment of twelve months and one day, stayed for three years of probation. At the end of the hearing, the district court emphasized, “If you stay out of trouble, you wouldn’t be—you don’t have to worry about going to prison. I understand you have other pending cases. . . . And I don’t need to mention the one that’s in—I think it’s in Wisconsin.” This is the only time the Wisconsin charges were referenced in the proceedings.

Kusow filed a notice of appeal, then moved to stay the appeal because he intended to file a petition for postconviction relief to develop the factual record for a claim of ineffective assistance of counsel; this court granted the stay. In September 2023, Kusow’s new counsel moved the district court to reopen sentencing and argued that the district court’s mention of the Wisconsin charge at the end of the sentencing hearing demonstrated that the pending charge affected the district court’s decision and caused it to deny Kusow’s motion for a downward durational departure. Kusow argued that, therefore, the dismissal of the Wisconsin charges provided new evidence and grounds to reopen sentencing.

In February 2024, Kusow appeared for resentencing and his new counsel explained that Kusow did not have intent to cause terror, had a valid conceal-and-carry permit, and had been trained in firearm safety. Kusow’s counsel argued that these facts are “less onerous than someone who simply doesn’t care how he’s perceived, doesn’t have the training, simply carries his firearm.” The state again opposed the motion, restating its arguments and adding that a victim advocate had spoken with K.P.’s mother, who “didn’t

want to give a new impact statement, but her feelings are the same. Both she and the victim want to see this sentenced as a felony.” The district court then stated:

I have reviewed all of the documents that were submitted, I have reviewed my notes that I took during the course of this case, and I reviewed the Pre-Sentence Investigation.

....

Based on the facts here, I just can't find that it's less onerous than other typical threats of violence.

The district court again denied Kusow's motion.

This court dissolved the stay of appeal in March 2024. Kusow moved a second time to stay the appeal to develop the record for his ineffective-assistance-of-counsel claim, but this court denied the motion.

DECISION

Kusow argues that (1) the district court abused its discretion by denying his motion for a downward durational departure and (2) his first attorney provided ineffective assistance of counsel. He also requests that we remand for an evidentiary hearing on the latter issue. We address each argument in turn.

I. The district court did not abuse its discretion by denying Kusow's motion for a downward durational departure.

Kusow argues that the district court abused its discretion by denying his motion for a downward durational departure because the facts of his offense make it less onerous than other threats-of-violence offenses. He argues that (1) his personal characteristics make him less culpable than other offenders because, although he acted impulsively, he is otherwise

“peaceable and law-abiding”; (2) his conduct was less serious than that in a typical threats-of-violence offense because at the time of the offense he had received training on the use of firearms, carried his firearm pursuant to a valid conceal-and-carry permit, was not intoxicated, and was “battling anxiety and depression”; and (3) his personal characteristics make him amenable to probation because he is young, feels remorse, and had only one prior misdemeanor. The state contends that the district court did not abuse its discretion because it thoroughly considered the arguments in favor of Kusow’s motion, as demonstrated by its statements on the record, and because it granted a resentencing hearing even though there was no need.

Appellate courts review a district court’s decision whether to depart from a presumptive sentence for an abuse of discretion. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). The Minnesota Sentencing Guidelines limit a district court’s discretion by prescribing presumptive sentences. *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). The district court must adhere to those presumptive sentences unless “identifiable, substantial, and compelling” reasons support its decision to depart. Minn. Sent’g Guidelines 2.D.1 (Supp. 2021). Appellate courts will reverse a district court’s denial of a departure only in a “rare” case. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

In determining whether to grant a durational departure, a district court considers “factors that reflect the seriousness of the *offense*, not the characteristics of the offender.” *Solberg*, 882 N.W.2d at 623. “A downward durational departure is justified only if the defendant’s conduct was ‘significantly less serious than that typically involved in the commission of the offense.’” *Id.* at 624 (quoting *State v. Mattson*, 376 N.W.2d 413, 415

(Minn. 1985)). When denying a motion for a sentencing departure, a district court must demonstrate that it “carefully evaluated all the testimony and information presented before making a determination.” *State v. Van Ruler*, 378 N.W.2d 77, 80-81 (Minn. App. 1985).

The district court did not abuse its discretion when it denied Kusow’s motion for a downward durational departure because it evaluated the testimony and information presented and determined that Kusow’s conduct was not less serious than the typical conduct involved in a felony threats-of-violence offense. At the January 2023 sentencing hearing, the district court heard arguments from Kusow’s counsel and the state, received two victim-impact statements, the PSI, and Kusow’s statement. The district court denied Kusow’s motion for a downward departure because it would “depreciate the seriousness of the offense.” At the resentencing hearing in February 2024, the district court heard arguments from Kusow’s new counsel and the state, which reiterated its previous arguments and informed the district court that K.P.’s mother requested that Kusow receive a felony-level sentence. The district court explained on the record that it had reviewed all the documents, its notes from the first sentencing, and the PSI. Then it again denied Kusow’s motion, determining that there were no substantial and compelling reasons to grant the departure because Kusow’s offense was not less serious than other threats-of-violence offenses. Because Kusow’s other arguments on appeal highlight his personal characteristics and not factors that reflect the seriousness of the offense, they do not apply to a durational departure and we do not address them. We conclude that, because the district court carefully evaluated the testimony and information in favor of and against

granting Kusow's motion, the district court did not abuse its discretion by denying his motion for a downward durational departure.

II. Kusow's attorney did not provide ineffective assistance of counsel at the January 2023 sentencing.

Kusow asserts that he received ineffective assistance of counsel at his initial sentencing hearing when his attorney did not investigate and inform the district court that the Wisconsin charges had been dismissed, and he argues that this information would have persuaded the district court to grant his motion for a downward durational departure. He therefore requests that we remand his case for an evidentiary hearing.

Criminal defendants have a right to the effective assistance of counsel for their defense. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *Crow v. State*, 923 N.W.2d 2, 14 (Minn. 2019). In a direct appeal, an ineffective-assistance-of-counsel claim is reviewed de novo. *Taylor v. State*, 887 N.W.2d 821, 823 (Minn. 2016); *see also State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017) (explaining that, if the record is adequate, an ineffective-assistance-of-counsel claim may be brought in a direct appeal). Here, although Kusow did not develop the record for this claim while the direct appeal was stayed for him to file a postconviction petition, we conclude that the record is adequate for us to review this claim now.

Appellate courts review an ineffective-assistance-of-counsel claim under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 694 (1984), which requires the defendant to show that (1) their attorney's representation "fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but

for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. King*, 990 N.W.2d 406, 417 (Minn. 2023) (quotations omitted). “A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome of the case.” *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017) (quotation omitted). If an appellant cannot meet one of the prongs, then the claim fails, and we need not address the other prong. *Peltier v. State*, 946 N.W.2d 369, 372 (Minn. 2020).

Here, Kusow’s new counsel informed the district court prior to the resentencing hearing that Wisconsin had dismissed its charges and the district court still denied Kusow’s motion for a downward durational departure. Therefore, even if Kusow’s counsel at the 2023 sentencing erred by failing to investigate and inform the district court of this change, the error did not prejudice Kusow because it is evident that correcting this asserted error would not have resulted in a different outcome. Because Kusow cannot demonstrate that the result of the proceeding would have been different but for the asserted error of his previous counsel, his claim fails the second prong of *Strickland*. In sum, we conclude that Kusow cannot succeed on his ineffective-assistance-of-counsel claim, and there is no need to remand for an evidentiary hearing to develop the record on this claim.

Affirmed.