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**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0317**

Nicholas Adam Willard, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed December 21, 2020
Affirmed
Cochran, Judge**

Hennepin County District Court
File No. 27-CR-17-26468

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Sarah J. Vokes, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Slieter, Presiding Judge; Bratvold, Judge; and Cochran, Judge.

UNPUBLISHED OPINION

COCHRAN, Judge

Nicholas Adam Willard appeals from the denial of his postconviction petition challenging the sentencing court's refusal to grant a downward durational departure for his

first-degree criminal-sexual-conduct conviction. Because the postconviction court acted well within its discretion when it denied his petition, we affirm.

FACTS

The state charged appellant Nicholas Adam Willard with first-degree criminal sexual conduct in October 2017, alleging that he sexually penetrated his stepdaughter when she was under 16 years old. Willard agreed to plead guilty, with no agreement as to sentencing. At the plea hearing, Willard entered a guilty plea, waived his trial rights, and admitted a factual basis for the plea. Specifically, Willard agreed that, on one occasion, he engaged in oral sex with his stepdaughter and that she was 15 years old at the time. The district court accepted Willard's guilty plea and continued the matter to a later date for sentencing.

Under the Minnesota Sentencing Guidelines, Willard faced a presumptive sentencing range of 144 to 172 months in prison for this felony offense because he had no criminal history. *See* Minn. Sent. Guidelines 4.B (Supp. 2017). At the sentencing hearing, the state asked the court to sentence Willard to the top of the sentencing range. Willard moved for a downward durational departure of 122 months. He emphasized that he had expressed remorse for the offense, had no criminal history, was unlikely to reoffend, and was capable of rehabilitation.

The sentencing court denied Willard's request for a downward durational departure. The sentencing court stated: "the only basis that I would be able to consider the downward departure on . . . would be that acceptance of responsibility." The sentencing court acknowledged Willard's statement that he "[felt] bad for what happened," but nonetheless

denied Willard’s downward-departure request. The sentencing court reasoned that it was “not supposed to use [remorse] as a stand-alone reason” for departing and that it “just [did not] see things here that allow the downward departure.” Highlighting the fact that Willard pleaded guilty so that the victim did not have to testify, the court sentenced Willard to the bottom of the presumptive range—144 months in prison.

Willard petitioned for postconviction relief in November 2019, asking that his sentence be reversed and that he be granted a downward durational departure because the sentencing court erred by denying his departure motion. The postconviction court denied Willard’s petition, concluding that the sentencing court properly considered the factors for and against departure, including Willard’s professed remorse, and appropriately rendered a presumptive sentence. Willard appeals.

D E C I S I O N

Willard argues that the postconviction court abused its discretion by denying his petition for relief from the sentencing court’s refusal to grant a downward durational departure. He contends that his showing of remorse supported his departure motion because it made his conduct less serious than the typical offense. We are not persuaded.

We review a district court’s denial of a postconviction petition for an abuse of discretion. *Reed v. State*, 793 N.W.2d 725, 730 (Minn. 2010). We likewise review a district court’s sentencing decision for an abuse of discretion. *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014). Under this standard of review, we will not reverse unless the district court exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings.

Reed, 793 N.W.2d at 729; *see also State v. Davis*, 546 N.W.2d 30, 35 (Minn. App. 1996), *review denied* (Minn. May 21, 1996).

We begin our review by considering the requirements of the Minnesota Sentencing Guidelines. The Minnesota Sentencing Guidelines establish sentencing ranges for felony offenses that “are presumed to be appropriate for the crimes to which they apply.” Minn. Sent. Guidelines 2.D.1 (Supp. 2017). The sentencing court must sentence a defendant within the presumptive range “unless there exist identifiable, substantial, and compelling circumstances to support a departure.” *Id.* Circumstances justifying a departure are those “that make the facts of a particular case different from a typical case.” *Taylor v. State*, 670 N.W.2d 584, 587 (Minn. 2003). “Whether to depart from the sentencing guidelines rests within the district court’s discretion.” *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011). Only in a “rare case” will this court reverse a sentencing court’s refusal to depart from the presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Under the guidelines, there are two types of sentencing departures: durational and dispositional. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). Willard sought a downward durational departure, which imposes a sentence different in length from the sentencing guidelines’ presumptive range. *Id.* The sentencing court may grant a downward durational departure “only if the defendant’s conduct was significantly less serious than that typically involved in the commission of the offense.” *Id.* at 624 (quotation omitted). By contrast, a downward dispositional departure places the defendant in a different setting than that called for by the sentencing guidelines (i.e. probation rather than prison). *Id.* at 623. When deciding whether to grant a downward dispositional departure, the

sentencing court generally focuses on the characteristics of the defendant. *Id.* But when, as here, the sentencing court considers whether to grant a downward durational departure, it must focus on the seriousness of the *offense*, not the defendant's characteristics. *Id.* at 623-24; *see also State v. Rund*, 896 N.W.2d 527, 533 (Minn. 2017) (“Offender-related reasons . . . are not legally permissible reasons for a downward durational departure.”).

Willard argues that the sentencing court erred by denying his departure request because his conduct was less serious than the typical first-degree criminal-sexual-conduct offense. The only circumstance that Willard advances on appeal as supporting a downward durational departure is his expression of remorse. Remorse is typically an offender-related characteristic and therefore is generally an appropriate consideration only for a downward *dispositional* departure. *See State v. Trog*, 323 N.W.2d 28, 30-31 (Minn. 1982) (noting that several factors, including a defendant's remorse, are relevant to determining whether a defendant is particularly amenable to probation for a downward dispositional departure); *see also Solberg*, 882 N.W.2d at 625 (stating that “a defendant's remorse *generally* does not bear on a decision to reduce the length of a sentence” (emphasis added)). The supreme court nonetheless has recognized that remorse may be a relevant consideration for a downward durational departure if the defendant's 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. To make this showing, the defendant's remorse must “relate back” to the offense. *Id.* at 625. In *Solberg*, the supreme court concluded that the defendant's expressions of regret during the criminal

investigation and district court proceedings did not show that his conduct was less serious at the time he committed the offense and, thus, did not justify a downward durational departure. *Id.* at 626.

Here, like the defendant in *Solberg*, Willard’s expression of remorse did not relate back to the time he committed the offense. At the sentencing hearing, Willard’s counsel told the court that Willard was “extremely remorseful” as evidenced by the fact that he pleaded guilty. Willard’s expression of remorse by pleading guilty relates to his conduct during the criminal proceedings, not his conduct at the time of the offense. *See id.* And the record—particularly the presentence investigation report and the plea colloquy establishing the factual basis for the offense—is devoid of any indication that Willard expressed remorse at the time he committed the offense such that it would lessen the offense’s seriousness. Because Willard’s remorse-based argument did not show how his remorse made his conduct less serious, the sentencing court properly denied Willard’s downward-durational-departure motion. *See id.*

Willard argues further that the sentencing court erred because it improperly concluded that it could not rely on his remorse as a sole reason for justifying a departure. The sentencing court was somewhat inconsistent on this matter. It recognized that “the only basis that I would be able to consider the downward departure on . . . would be that acceptance of responsibility,” and said, “It’s not just about looking back from the [date of the offense], but it’s specifically about that night.” The sentencing court then commented that, “although the case law allows me to consider [remorse], I’m not supposed to use it as a stand-alone reason.” To the extent that the sentencing court implied that it could not rely

on remorse alone, it was incorrect. In *Solberg*, the supreme court held that “a single mitigating factor, standing alone, may justify a downward durational departure.” *Id.* at 624-25. And, although the supreme court suggested that a downward durational departure based on remorse is unusual, it did not say that remorse alone could never justify a departure. *Id.* at 625-26. The sentencing court here nonetheless accurately described the focus for remorse in the downward-durational-departure context as relating back to the date of the offense. Because Willard did not present any arguments relating to his remorse on the day he committed the offense, the sentencing court properly denied his departure motion.

Finally, in his pro se brief, Willard argues this court should reduce his sentence. He contends that a reduced sentence is warranted because he has no criminal background, has had no incidents during his incarceration, and is not a threat to society. But Willard cites no legal authority that would authorize this court to reduce his sentence on these grounds. Because he does not provide any legal authority for his argument, the argument is forfeited and we decline to address it. *See State v. Krosch*, 642 N.W.2d 713, 719-20 (Minn. 2002) (providing that allegations made without argument or citation to legal authorities are forfeited). Willard also argues that he committed the offense unintentionally because he mistook his stepdaughter for his wife. He did not raise this argument at the plea hearing, and there was no mention of it when the district court was establishing the factual basis for his offense. We generally do not consider issues not raised before the district court, *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996), so this too is not a basis for us to reverse the district court.

In sum, the sentencing court did not abuse its discretion by denying Willard's downward-durational-departure motion, and the postconviction court likewise did not abuse its discretion by denying his requested relief.

Affirmed.