**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A22-0775**

Donna Mae Bastyr, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed January 17, 2023**
**Affirmed**
**Segal, Chief Judge**

Hennepin County District Court
File No. 27-CR-18-11946

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Mary F. Moriarty, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Segal, Chief Judge; and Jesson, Judge.

**NONPRECEDENTIAL OPINION**

**SEGAL**, Chief Judge

Appellant challenges the denial of her petition for postconviction relief, arguing that she is entitled to be resentenced because the district court erred by relying on hearsay statements in denying her motion for a downward durational departure. We affirm.

## FACTS

In 2018, respondent State of Minnesota charged appellant Donna Mae Bastyr with one count of second-degree intentional murder. The complaint alleged that Bastyr killed her roommate, C.G. The complaint stated that, when C.G.'s body was discovered by law enforcement, an electrical cord was wrapped around C.G.'s neck and she appeared to have multiple injuries on her face and head. There was also a large amount of blood at the scene. The complaint further stated that law enforcement subsequently interviewed Bastyr's boyfriend, B.W., who informed law enforcement that Bastyr told him that she had killed C.G., that she was angry with C.G. because she believed C.G. had reported her for drinking at their sober-living community, and that C.G. "paid for what she did."

In August 2019, Bastyr pleaded guilty to the second-degree intentional murder of C.G. pursuant to a *Norgaard* plea.[1] In exchange for Bastyr pleading guilty, the state agreed not to seek an upward durational departure at sentencing based on the presence of aggravating factors. The state had previously filed a motion stating that it intended to seek an aggravated sentence because Bastyr subjected C.G. to gratuitous violence, inflicted multiple significant injuries, and failed to render aid, and because C.G. was particularly vulnerable due to her stature and illness.[2] At the plea hearing, Bastyr indicated that she

[1] A defendant may enter a *Norgaard* plea when the defendant "claims a loss of memory" but the record "establish[es] that the evidence against the defendant is sufficient to persuade the defendant and his or her counsel that the defendant is guilty or likely to be convicted of the crime charged." *State v. Ecker*, 524 N.W.2d 712, 716-17 (Minn. 1994); *see also State ex rel. Norgaard v. Tahash*, 110 N.W.2d 867, 871-72 (Minn. 1961).

[2] According to a statement made by the prosecutor at sentencing, C.G. was 69 years old, a cancer survivor, and weighed less than 100 pounds at the time of the murder.

was highly intoxicated on the night of the offense and could not remember what happened.[3] But she agreed that she had reviewed the evidence against her and believed that if the case went to trial there was a substantial likelihood that a jury would find her guilty beyond a reasonable doubt. Bastyr also indicated that she had seen the statement from B.W. and believed there was a substantial likelihood that a jury would believe him.

The state then summarized the evidence that it would present if the case went to trial. The state's summary included the following. At the time of the offense, Bastyr and C.G. were alone in their apartment. The two women got into an argument and, during the course of the argument, Bastyr assaulted C.G. According to the medical examiner's office, C.G. suffered injuries that were consistent with having her head banged against a metal bed frame and an electrical cord wrapped around her neck. She also suffered multiple fractured ribs and bruises to her body and face. C.G. was still alive when Bastyr began to strangle her, and the electrical cord was squeezed to the point that C.G. was unable to breathe and suffered thyroid cartilage fractures. The autopsy established that C.G. died from "complex homicidal violence."

The state indicated it would also present testimony by B.W. concerning statements that Bastyr made to B.W. shortly after the murder. According to B.W., he picked Bastyr up at her apartment on the date of the offense and Bastyr told him that she had "gotten into it" with C.G., that she had bludgeoned C.G. and wrapped an electrical cord around C.G.'s

[3] Shortly after C.G.'s body was discovered, law enforcement received an unrelated call about an intoxicated woman involved in a domestic disturbance a few blocks away from the crime scene. Law enforcement responded and identified the woman as Bastyr; subsequent alcohol testing revealed that she had an alcohol concentration of 0.25.

neck, and that she had killed C.G. B.W. initially did not believe Bastyr due to Bastyr's level of intoxication but, through the course of the evening and subsequent police investigation, realized that she was telling the truth. The state would also present forensic evidence regarding cell-phone records and locations to corroborate B.W.'s testimony. Finally, the state indicated that it would present evidence that a bloody ponytail holder that Bastyr was wearing on her wrist at the time of the offense contained DNA from both C.G. and Bastyr. The district court then asked Bastyr: "Do you believe all those facts are true even though . . . you don't have any independent memory because you were drunk . . . ?" And Bastyr responded, "Yes."

In October 2019, the district court held a sentencing hearing. At the hearing, the state requested that Bastyr be sentenced "at the top of the sentencing range" (367 months with a criminal-history score of zero). Bastyr requested a downward durational departure to 240 months in prison, 21 months less than the low end of the guidelines sentencing range. She argued that the offense was less serious than the typical offense because she lacked substantial capacity at the time due to her intoxication and chronic alcoholism, she showed remorse, and at the time of the offense was suffering from depression and a "change in medications."

The district court denied the motion and sentenced Bastyr to a presumptive term of 360 months in prison. The district court explained that it was "accept[ing] as true that [Bastyr] suffers from a long-term chronic chemical addiction and that at the point of the offense was intoxicated and . . . probably did not exercise the level of judgment and restraint that she would have had she been sober." But the district court stated that it had

to "take these things with a bit of salt" because they arise in "the miasma of post offense rationalizations" and there was evidence that Bastyr made post-offense statements indicating "that the victim[] kind of got hers for behavior . . . that [Bastyr] didn't approve of." The district court further explained that, "perhaps more importantly," it had to balance the alleged mitigating factors with the "somewhat grotesque or brutal or rageful way in which this crime was committed and the vulnerability of this victim." The district court determined that it was "appropriate to stay within the lanes given to [the court] by the Minnesota Sentencing Guidelines" under the circumstances of the case.

Bastyr filed a direct appeal, but voluntarily dismissed the appeal before it was considered by this court. Bastyr then filed a petition for postconviction relief. The petition alleged that the district court erred at sentencing by (1) "set[ting] aside proven mitigating factors in favor of unproven aggravating factors to reject [Bastyr's] downward-durational departure motion"; and (2) "rely[ing] on uncorroborated co-defendant statements taken out of context . . . to conclude that [Bastyr's] 'complete lack of . . . moral recognition of the nature of the act' warranted a 360-month sentence." The district court denied the petition without a hearing.

## DECISION

We review the denial of a petition for postconviction relief for an abuse of discretion. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012). An abuse of discretion occurs when a district court's "decision is based on an erroneous view of the law or is against logic and the facts in the record." *Id.* (quotation omitted). A district court may summarily deny a petition when the petition, files, and records conclusively show that the

petitioner is not entitled to relief. Minn. Stat. § 590.04, subd. 1 (2020). "A petitioner bears the burden to establish by a preponderance of the evidence that facts exist that warrant postconviction relief." *Tscheu v. State*, 829 N.W.2d 400, 403 (Minn. 2013).

Bastyr challenges the denial of her motion for a downward durational departure. She argues that the district court misapplied the law by "consider[ing] presumptively unreliable accomplice statements" during sentencing because the district court considered B.W.'s statement to law enforcement in which he alleged that Bastyr told him that she killed C.G. and that C.G. "paid for what she did." She argues that B.W.'s statements constitute hearsay and should not have been considered at sentencing and that the record, without the improperly considered statements, demonstrates that she is entitled to a downward durational departure.

A district court may grant a downward durational departure "if the defendant's conduct is significantly less serious than that typically involved in the commission of the offense." *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985). Unlike a dispositional departure, the appropriateness of a durational departure depends on the nature of the offense, not the individual characteristics of the offender. *State v. Behl*, 573 N.W.2d 711, 713 (Minn. App. 1998), *rev. denied* (Minn. Mar. 19, 1998). We review the district court's refusal to depart from the presumptive sentence for an abuse of discretion. *Id.* at 714. A district court abuses its discretion if it misapplies the law during sentencing. *State v. Hoskins*, 943 N.W.2d 203, 211 (Minn. App. 2020).

The Minnesota Rules of Evidence limit the admissibility of hearsay evidence, but these rules do not apply at sentencing hearings. *See* Minn. R. Evid. 801-807, 1101(b)(3). Bastyr acknowledges that the rules of evidence do not apply, but asserts that "the limitations on unreliable hearsay evidence at sentencing hearings [are] born of the Due Process [C]lause." *See* U.S. Const. amend. XIV, § 1; *see also* Minn. Const. art. I, § 7. She further argues that "this Court previously adopted the rule of law in the Ninth Circuit" that hearsay must have an indicia of reliability to be admissible at sentencing. *See United States v. Corral*, 172 F.3d 714, 716 (9th Cir. 1999); *United States v. Huckins*, 53 F.3d 276, 279 (9th Cir. 1995). Specifically, Bastyr contends that this court adopted the rule from the Ninth Circuit in *State v. Rodriguez*. 738 N.W.2d 422 (Minn. App. 2007), *aff'd on other grounds*, 754 N.W.2d 672 (Minn. 2008).

Bastyr's argument, however, mischaracterizes this court's decision in *Rodriguez*. In *Rodriguez*, this court held that "[t]he admission of testimonial hearsay evidence during a sentencing-jury proceeding does not violate a defendant's rights to confront all witnesses against him under the Sixth Amendment to the United States Constitution and Article I, § 6, of the Minnesota Constitution." *Id.* at 424. We analyzed the issue following the United States Supreme Court's decision in *Crawford v. Washington*, which held that the right to confrontation prohibited the admission of testimonial out-of-court statements in a criminal trial unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. 541 U.S. 36, 68 (2004).

This court observed that "[t]hus far, every federal circuit court of appeals that has addressed the issue has ruled that *Crawford* does not apply to sentencing proceedings, even after *Blakely*."[4] *Rodriguez*, 738 N.W.2d at 430. We noted that "[i]n general, the federal circuits have followed prior Supreme Court precedent . . . that the admission of hearsay evidence at sentencing does not violate the Due Process Clause." *Id.* (citing *Williams v. People of State of N.Y.*, 337 U.S. 241, 246 (1949) (addressing the admission of hearsay at sentencing)). In summarizing the decisions of the federal courts, we stated:

> The Ninth Circuit has concluded that because *Crawford* does not address sentencing proceedings, and *Williams* has not been expressly overruled, the law on hearsay at sentencing is still what it was before *Crawford:* "hearsay is admissible at sentencing, so long as it is 'accompanied by some minimal indicia of reliability.'" *United States v. Littlesun,* 444 F.3d 1196, 1200 ([9th Cir.] 2006) (citations omitted).

*Id.*

Bastyr argues that this reference to Ninth Circuit caselaw demonstrates that this court adopted the rule that hearsay must have an indicia of reliability to be admissible at sentencing. We disagree.[5] We do not read *Rodriguez*'s reference to Ninth Circuit caselaw as adopting that caselaw, but rather as acknowledging that the prior rule of law on hearsay

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[4] In *Blakely v. Washington*, 542 U.S. 296 (2004), the Supreme Court held that defendants have a Sixth Amendment right to have a jury determine the existence of aggravating factors before a sentence can be imposed that is in excess of the statutory maximum.

[5] This court recently addressed the same claim—that we adopted Ninth Circuit caselaw regarding the admission of hearsay at sentencing in *Rodriguez*—and rejected that argument. *State v. Sidney*, No. A22-0352, 2022 WL 17409898, at *3-5 (Minn. App. Dec. 5, 2022). We acknowledge that *Sidney* is nonprecedential, but find its reasoning persuasive. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c).

at sentencing remained unchanged following the United States Supreme Court's decision in *Crawford*. The rule in the Ninth Circuit was that hearsay must have an indicia of reliability to be admissible at sentencing, and that remained the law in the circuit following *Crawford*. But this court did not adopt that rule. Instead, we went on to observe that "our supreme court's holding in *State v. Adams* that the admission of hearsay evidence in sentencing proceedings does not violate due process has not been overruled." *Rodriguez*, 738 N.W.2d at 431 (citing *State v. Adam*s, 295 N.W.2d 527 (Minn. 1980)).[6] Because *Adams* continues to be controlling, it remains the law in Minnesota that hearsay evidence is admissible at sentencing.

Finally, even if Bastyr is correct that an indicia of reliability is required, we are satisfied that B.W.'s statement in this case had such an indicia. During the plea hearing, the state indicated that it would present evidence in the form of cell-phone records and location data to corroborate B.W.'s testimony. In addition, Bastyr acknowledged that she had reviewed the statement and believed that there was a substantial likelihood that, if the case were to go to trial, a jury would find B.W. credible. On this record, Bastyr was not denied her right to due process.

Bastyr also argues that B.W. was an accomplice and that "it is well-established that accomplice testimony is presumptively unreliable in Minnesota." She contends that B.W.'s statements therefore required corroboration to be considered at sentencing. But

[6] We note that the Minnesota Supreme Court granted review in *Rodriguez* and did not cite to or rely on Ninth Circuit caselaw in its decision. *See Rodriguez*, 754 N.W.2d 672.

even if we were to assume that B.W. was an accomplice,[7] we disagree that corroboration was required to allow B.W.'s statements to be considered in evaluating Bastyr's motion for a downward durational departure. It is true that accomplice testimony is considered inherently suspect. *State v. Jackson*, 746 N.W.2d 894, 898 (Minn. 2008). Accordingly, a *conviction* may not be based on accomplice testimony "unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense." Minn. Stat. § 634.04 (2016). But Bastyr is not challenging the validity of her conviction here—her only challenge is to the length of her sentence. And the corroboration rule does not apply to sentencing.

Bastyr next argues that, under this court's decision in *Rosendahl v. State*, the district court erred because it considered evidence at sentencing that she had not expressly acknowledged was accurate or truthful. 955 N.W.2d 294 (Minn. App. 2021). Our holding in *Rosendahl*, however, is not implicated here.

In *Rosendahl*, a defendant pleaded guilty and subsequently petitioned for postconviction relief on the ground that his plea did not establish an adequate factual basis. *Id.* at 297. We agreed and held: "In determining the accuracy of a guilty plea, the reviewing

[7] Accomplice liability is defined in Minn. Stat. § 609.495, subd. 3 (2016):

> Whoever intentionally aids another person whom the actor knows or has reason to know has committed a criminal act, by destroying or concealing evidence of that crime, providing false or misleading information about that crime, receiving the proceeds of that crime, or otherwise obstructing the investigation or prosecution of that crime is an accomplice after the fact . . . .

court does not consider allegations contained in the complaint unless the truthfulness and accuracy of the allegations have been expressly admitted to by the defendant." *Id.* at 296. But Bastyr is challenging the length of her sentence, not the validity of her guilty plea, and her reliance on *Rosendahl* is therefore misplaced. Additionally, unlike the defendant in *Rosendahl*, Bastyr pleaded guilty pursuant to a *Norgaard* plea. In *Rosendahl*, we expressly observed that "[l]ooking to 'the record' is indeed mandatory in . . . *Norgaard* pleas." *Id.* at 301. This is because defendants in *Norgaard* pleas are pleading guilty despite memory loss and, as such, cannot necessarily acknowledge the truth of the allegations or independently establish a factual basis for the plea. *Rosendahl* is thus inapposite and does not bar consideration of hearsay statements at sentencing.

Turning to the final issue in the case, we discern no abuse of discretion by the district court in its denial of Bastyr's motion for a downward durational departure. As noted above, we apply an abuse-of-discretion standard of review and "[o]nly in a rare case will a reviewing court reverse the imposition of a presumptive sentence." *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011). Even when there may be mitigating factors to support a departure, "the mere existence of such factors [does] not obligate the sentencing court to depart from the presumptive sentence." *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *rev. denied* (Minn. Aug. 22, 2001).

The crux of Bastyr's argument in support of her request for a downward durational departure was that her conduct was less serious based on her remorse[8] and level of

[8] Minnesota courts "have consistently treated remorse as a factor that may support a downward *dispositional* departure" because "a defendant's remorse bears on his or her

intoxication. *See Mattson*, 376 N.W.2d at 415 (stating that a downward durational departure may be appropriate when the defendant's conduct is significantly less serious than the typical offense). The district court considered these arguments, but observed that it had to balance Bastyr's claimed remorse with indications from the complaint and presentence investigation (PSI) report "that the victim[] kind of got hers for [her] behavior."

In addition to B.W.'s claim that Bastyr told him that she killed C.G. because she was afraid that C.G. was going to turn her in and get her kicked out of their apartment, the PSI indicates that when asked for her version of the offense Bastyr stated that she became "rageful and fearful" at the prospect of being homeless. The PSI states that Bastyr said she felt she "was being threatened to have someone take [her] son away" and she found the thought of being homeless "troubling." These statements support the district court's observation that, while Bastyr seemed genuinely remorseful, her statements demonstrated an attempt to shift the responsibility for her conduct to C.G. because C.G. allegedly told Bastyr that she would turn Bastyr in for drinking and that Bastyr would not get her son back. Moreover, the district court considered additional factors including the "brutal" nature of the crime and vulnerability of the victim. On this record, we discern no abuse of

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ability to be rehabilitated." *State v. Solberg*, 882 N.W.2d 618, 625 (Minn. 2016). But unlike dispositional departures, "[d]urational departures must be based on the nature of the *offense*, not the individual characteristics of the offender" and therefore "a defendant's remorse generally does not bear on a decision to reduce the length of a sentence." *Id.* Instead, "unless a defendant can show that his [or her] demonstrated remorse is directly related to the criminal conduct at issue and made that conduct significantly less serious than the typical conduct underlying the offense of conviction, remorse cannot justify a downward *durational* departure." *Id.* at 626.

discretion by the district court in denying the motion for a downward durational departure and imposing a guidelines sentence.

**Affirmed.**