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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-796**

State of Minnesota,
Respondent,

vs.

Ricky Francis Wright,
Appellant.

**Filed December 12, 2011
Affirmed
Connolly, Judge**

Dakota County District Court
File No. 19-K7-02-002040

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Nicole E. Nee, Assistant County Attorney, Hastings, Minnesota (for respondent)

Richard P. Ohlenberg, Ohlenberg Law Office, Richfield, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the district court's decision to revoke his probation and execute his sentence for first-degree criminal sexual conduct, arguing that the district

court committed plain error by allowing the state to question appellant regarding the offense at his probation-revocation hearing and that insufficient evidence supports the district court's finding that the need for his confinement outweighs the policies favoring probation. Because there was no error and the district court did not abuse its discretion in revoking appellant's probation, we affirm.

FACTS

In July 2002, appellant was charged with three counts of first-degree criminal sexual conduct. Each count alleged that, between 1995 and 2001, appellant had sexually penetrated his stepdaughter, C.M., born in 1986 and described as "mentally challenged."

Under a plea agreement, in 2003, the district court sentenced appellant on two counts of first-degree criminal sexual conduct. On one count, appellant received an 86-month executed prison sentence and a five-year conditional release term. On the other count, the district court departed dispositionally, staying execution of the presumptive 144-month prison sentence and placing appellant on probation for up to 20 years on the condition that he enter and complete sex-offender treatment. The sentences were concurrent. In his Pre-Sentence Investigation, appellant admitted to penile-vaginal penetration, but during his plea hearing, he admitted only to digital-vaginal penetration.¹

While in prison, appellant filed a postconviction petition asserting his innocence and seeking to withdraw his plea, which was denied by the district court. That decision was affirmed in *Wright v. State*, No. A06-0755, 2008 WL 2446318 (Minn. App. May 20,

¹ The factual basis was initially established through an *Alford* plea, but appellant also admitted to a sufficient factual basis for first-degree criminal sexual conduct at the plea hearing.

2008), *review denied* (Minn. Aug. 5, 2008). When appellant was released from prison in January 2008, he had not completed sex-offender treatment. He was referred to Project Pathfinder for treatment, but was not accepted initially due to his denial of his offense behavior.

In November 2008, appellant was accepted as a marginal candidate to Project Pathfinder. He attended weekly group meetings, bimonthly case-management meetings with his therapist, and quarterly staffing meetings with his probation officer and therapist. Project Pathfinder's treatment program generally takes approximately one-and-a-half years to complete.

Originally, appellant was assigned to therapist D.D. D.D. came to believe that appellant could not advance in treatment due to his failure to admit his offense behavior, his minimization of responsibility for that behavior, and his angry outburst towards a therapist. In March 2009, D.D. requested that another therapist, W.M., take over as appellant's therapist and assess his progress and whether he was amenable to treatment.

Appellant made minimal progress with W.M. To encourage appellant, W.M. made several concessions in regard to meeting the program's goals, giving him a "technical pass" on a goal when he had not met all the requirements. Near the time of his discharge from treatment, appellant was working on the goal of improving his communication skills. Some progress was made, but when W.M. informed appellant that another patient found appellant intimidating, appellant convinced that patient to say he found W.M. even more intimidating. This manipulation was, in the words of W.M., the "straw that broke the camel's back."

W.M., concerned about appellant's progress due to his lack of insight, unwillingness to act as a patient, ambiguity regarding accountability for his offenses, and lack of achievement on therapeutic goals, presented appellant's case to Project Pathfinder's treatment team to decide if appellant should be terminated from the program. The team ultimately agreed that appellant's lack of progress was due to his own behavior and that he was not amenable to treatment. On March 2, 2011, appellant was discharged from Project Pathfinder.

A contested probation-revocation hearing was held. Appellant's probation officer recommended revoking his probation. The state argued that appellant was not amenable to treatment, in part, because he refused to fully admit to his offense. Appellant testified that he was willing to actively participate in treatment. During cross-examination, the state asked appellant to explain the behavior surrounding his offense. Although appellant's counsel objected to the initial question, after the district court overruled the objection, his counsel did not object to additional questions along the same line. The district court found that appellant violated a condition of his probation by not completing treatment, revoked his probation, and executed his 144-month prison sentence.

D E C I S I O N

I. Questions about the offense

Appellant challenges the revocation, arguing that the district court abused its discretion by allowing questioning about appellant's offense and by revoking probation when the evidence did not establish that the need for confinement outweighed the

policies favoring probation.² “Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

Appellant argues that the line of questioning about the facts surrounding his offense was improper at a probation-revocation hearing. He contends that, because the sentencing court allowed appellant to plead guilty on an *Alford* plea basis, this questioning is not relevant. We disagree.

Appellant is correct in asserting that the purpose of a probation-revocation hearing is to determine whether probation should be revoked. But one condition of appellant’s probation was to complete sex-offender treatment. Appellant was allegedly not amenable to treatment, in part, because he refused to fully admit to his offense behavior, and full admission of such behavior is an integral aspect of Project Pathfinders’ treatment. The prosecutor’s questioning was directed at determining whether appellant would fully admit to behavior so he could complete treatment. During his testimony, appellant said he should not have “allowed” his mentally challenged nine-year-old step-daughter to seduce him and he minimized his offense behavior by admitting only to digital-vaginal penetration. Because this line of questioning was relevant to the determination of

² Appellant actually argues that the district court committed plain error by allowing questioning about his offense. But review is under the plain-error standard only when a defendant fails to object to the admission of evidence. See Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Here, however, appellant’s counsel objected to the initial line of questioning so plain-error analysis is not required.

whether appellant was amenable to treatment, the district court's admission of the testimony was not an abuse of discretion.

II. Probation revocation

The district court has broad discretion in determining whether there is sufficient evidence to revoke probation and we will not reverse the district court's decision absent an abuse of discretion. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). But whether the district court has made the required findings to revoke probation is a question of law this court reviews de novo. *Id.*

The supreme court has adopted a three-step analysis that a district court must follow before revoking probation. *Id.* at 250. Under *Austin*, the district court must (1) designate the specific condition of probation that has been violated; (2) determine the violation was intentional or inexcusable; and (3) conclude the need for confinement outweighs the policies favoring probation. *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005) (citing *Austin*, 295 N.W.2d at 250).

On appeal, appellant challenges the district court's findings only as to the third *Austin* factor. The third *Austin* factor is satisfied if one of the following is met:

- (i) confinement is necessary to protect the public from further criminal activity by the offender; or
- (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
- (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

Austin, 295 N.W.2d at 251 (quotation omitted). The decision to revoke probation cannot be "a reflexive reaction to an accumulation of technical violations but requires a showing

that the offender's behavior demonstrates that he or she cannot be counted on to avoid antisocial activity." *Id.* (quotations omitted). A district court "must bear in mind that . . . the purpose of probation is rehabilitation and revocation should be used only as a last resort when treatment has failed." *Modtland*, 695 N.W.2d at 606 (quotation omitted).

The district court made findings regarding the necessity of protecting the public. The district court found that "[w]ithout successful sex offender treatment, the need for confinement of [appellant] clearly outweighs the policies favoring probation. If [appellant] remains an untreated sex offender, there is no reasonable alternative other than incarceration to protect the public." Appellant argues there is insufficient evidence to support the district court's finding that confinement is necessary to protect the public. He contends (1) the victim no longer lives with appellant; (2) Project Pathfinder may readmit appellant; and (3) alternative programming should have been explored. We conclude that there was sufficient evidence to support the district court's decision.

First, with respect to appellant's access-to-the-victim argument, the district court found that confinement is necessary to protect the public because appellant remains *untreated*. The district court was concerned with appellant's lack of rehabilitation and his seeming inability to be rehabilitated despite at least two years of treatment. This finding is supported by the record, including the testimony of appellant's probation officer that "[he] is not amenable to sex-offender treatment. In order to be amenable to community supervision you need to be amenable to treatment, and an unamenability to treatment indicates a heightened risk for public safety." Because appellant did not complete treatment despite the efforts and numerous concessions of his therapist, and because of

appellant's ongoing denial of his offense behavior and propensity to blame the victim, treatment has failed.

Second, appellant's contention that he could possibly be readmitted to Project Pathfinder does not accurately reflect the record. It is true that W.M. explained what appellant would need to do in order to be accepted back into treatment. One requirement was that "[he is] going to have to convince an evaluator from our program that children don't seduce adults, which I don't think . . . he has actually got yet." The district court determined that appellant continued to blame the victim. This finding is fully supported by the record, including the appellant's own statement in response to the state's questioning:

PROSECUTOR: Tell the court what you did to her that makes you guilty of these offenses.

APPELLANT: I fondled her. There was digital penetration.

PROSECUTOR: You understand [the victim] reports full vaginal penile penetration?

APPELLANT: Yes, I know she did.

PROSECUTOR: And why did this happen, [appellant]?

APPELLANT: Why did this happen?

PROSECUTOR: Yes.

APPELLANT: Because I was ignorant and allowed it.

PROSECUTOR: You allowed it. Can you tell me how you allowed this to happen?

APPELLANT: I didn't say go away, I didn't stop the act. I didn't –

PROSECUTOR: *And so a mentally challenged little girl came on to you, is that what you're telling this judge?*

APPELLANT: *Somewhat.*

(Emphasis added). In addition, when asked by appellant's counsel if it was possible that any other therapist at Project Pathfinder would be better suited for appellant, W.M.

asserted that it was not. Therefore, appellant's contention that he could possibly be readmitted to Project Pathfinder is not supported by the record.

Finally, as to his argument regarding alternative programming, appellant offered no evidence that any other program would admit him. In addition, the record reflects that alternatives were at least discussed at the probation-revocation hearing. When asked about alternative programs that might be available to appellant in light of his current issues, W.M. stated,

Our program has always been philosophically a little different than most programs in that we will take people in the state of denial into our program and work with that state of denial. If [appellant] were to present to [another program] currently, . . . he would have to say . . . I initiated it and I was . . . the perpetrator[,]

adding that he questioned whether appellant would be accepted by or succeed in an alternative program. Since alternative programs require potential patients not only to admit offense behavior but also to acknowledge fault, the conclusion that an alternative program would not be available to appellant is supported by the record.

The purpose of probation is rehabilitation. Completion of sex-offender treatment is necessary to protect the public. In this case, rehabilitation and treatment have failed. Therefore, the district court did not abuse its discretion when it revoked appellant's probation.

Affirmed.