STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0524

State of Minnesota,
Respondent,

vs.

David Edward Cardinale,
Appellant.

Filed November 30, 2020
Affirmed in part and remanded
Frisch, Judge

Scott County District Court
File No. 70-CR-16-11611

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

Ronald Hocevar, Scott County Attorney, John Patrick Monnens, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Frisch, Judge; and Kalitowski, Judge.*

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

U N P U B L I S H E D O P I N I O N

FRISCH, Judge

Appellant challenges the revocation of his probation, arguing that the state did not present clear and convincing evidence of a probation violation, the need for confinement did not outweigh the policies favoring probation, and the district court exhibited bias against appellant. Appellant alternatively challenges the calculation of his criminal-history score. We affirm the revocation of probation and remand to the district court for development of the record regarding appellant's criminal-history score.

FACTS

In February 2018, appellant David Edward Cardinale entered a straight plea of guilty to four counts of possession of child pornography in violation of Minn. Stat. § 617.247, subd. 4(a) (2014). On May 14, 2018, the district court imposed 15-month, 20-month, 25-month, and 30-month sentences, stayed execution, and placed Cardinale on probation. In pertinent part, the probation conditions included:

> Participate in individual therapy with a therapist competent in treating psychosexual issues and follow all recommendations. Therapist must be approved by supervising agent.
> . . . .
> Not Possess/Use any Pornographic/Sexually Explicit Material.
> . . . .
> No use of Social Network Sites
> . . . .
> No Access to or Use of Internet Without Approval. Comply with monitoring software on all internet capable devices.
> . . . .
> Sign releases of information as directed.

On June 27, 2018, Cardinale first met with his probation officer. On August 28, 2018, he installed software on one home computer to allow his probation officer to monitor computer activity on that device.

On March 5, 2019, the district court received a probation-violation report alleging multiple, repeated violations of probation by Cardinale. The district court held a probation-revocation hearing and found Cardinale in violation of four probationary conditions. The district court then revoked Cardinale's probation and executed the 30-month sentence, with the other sentences to run concurrently.

This appeal follows.

D E C I S I O N

I. The district court judge was an impartial fact-finder.

Cardinale argues that the district court judge was not an impartial fact-finder because the judge investigated facts outside the record and because his conduct during the proceedings exhibited impermissible bias. A probationer facing revocation has a constitutional "right to a revocation hearing being held before a neutral and detached hearing body." *State v. Cleary*, 882 N.W.2d 899, 904 (Minn. App. 2016) (quotation omitted). Our review of the record shows that Cardinale's right to a neutral hearing body was vindicated.

A. The district court judge did not pursue or consider evidence outside the record.

Cardinale contends that the district court judge conducted independent investigation outside the record about a failed polygraph test and a therapist discharge opinion that the

state had not offered into evidence. To be impartial, the fact-finder must base its conclusions on "the facts in evidence" and must not reach conclusions "based on evidence sought or obtained beyond that adduced in court." *State v. Dorsey*, 701 N.W.2d 238, 249-50 (Minn. 2005); *see also* Minn. Code Jud. Conduct Rule 2.9(C) ("A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed."). "[W]hen a defendant has been deprived of an impartial judge, automatic reversal is required." *Dorsey*, 701 N.W.2d at 253. We review de novo whether a district court deprived a probationer of this right. *Id.* at 249.

The record contained evidence of the failed polygraph test. The probation-violation report specifically referenced Cardinale's failed polygraph test and his discharge from treatment and attached the discharge opinion. During the probation-revocation hearing, the judge asked Cardinale's attorney, "[W]hat's your thought on the probation reports, addendums and the documents to support? Would you like to have me just receive all of those? Would you like those marked separately? What would you like?" The attorney replied, "No. You can receive all of them." Although Cardinale now argues that this exchange was limited only to an internet-use agreement, the record shows that the district court inquired about the totality of the "probation reports, addendums and the documents to support." The district court did not independently investigate, pursue, or consider evidence outside the record.[1]

[1] In addition to arguing that he was denied impartial proceedings, Cardinale also claims that the district court actually relied on the failed polygraph test result as a basis for

B. The district court judge did not exhibit disqualifying bias.

Cardinale next argues that the district court judge exhibited impermissible bias by extensively questioning one of the state's witnesses during the revocation hearing and in characterizing Cardinale's attempts to mitigate the severity of his violations during the dispositional hearing. We discern no disqualifying bias in either circumstance.

"A judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct." Minn. R. Crim. P. 26.03, subd. 14(3). "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ." Minn. Code Jud. Conduct Rule 2.11(A). A judge's impartiality is reasonably questioned when a "reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality." *State v. Finch*, 865 N.W.2d 696, 703 (Minn. 2015). A reasonable examiner is "an objective, unbiased layperson." *In re Jacobs*, 802 N.W.2d 748, 753 (Minn. 2011).

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revoking his probation. We review unobjected-to evidentiary errors for plain error, which requires proof of an "(1) error, (2) that was plain, and (3) that affected the defendant's substantial rights." *State v. Guzman*, 892 N.W.2d 801, 814 (Minn. 2017). "With respect to the substantial-rights requirement, [the defendant] bears the burden of establishing that there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted). Here, even if the admission of the failed polygraph test amounted to plain error, the admission of such evidence did not affect Cardinale's substantial rights and was not otherwise prejudicial because the district court merely cited the failed polygraph test to corroborate other overwhelming evidence of probation violations in the record, including credited witness testimony and forensic reports. *See State v. Nowacki*, 880 N.W.2d 396, 401 (Minn. App. 2016) (concluding that admission of polygraph test results in revocation hearing was harmless error where record did not show that the district court based its revocation decision on the polygraph results).

The district court judge did not exhibit bias by questioning the state's witness during the revocation hearing. The Minnesota Rules of Evidence authorize the examination of witnesses by the trial court. Minn. R. Evid. 614(b). Although courts ordinarily should exercise that authority "with great caution, particularly when the credibility of [a] key witness[] is at issue," *State ex rel. Hastings v. Denny*, 296 N.W.2d 378, 379 (Minn. 1980), the Minnesota Supreme Court has recognized that the risk of unfair prejudice significantly diminishes when the court is the fact-finder. *State v. Burrell*, 772 N.W.2d 459, 467 (Minn. 2009) (explaining that the "risk of unfair prejudice . . . is reduced because there is comparatively less risk that the district court judge, as compared to a jury of laypersons, would use the evidence for an improper purpose or have his [or her] sense of reason overcome by emotion").

Even so, we have no concerns with the inquiry by the district court. Here, the judge questioned Cardinale's probation officer to clarify several details of the officer's testimony under direct examination. Cardinale does not explain how such questioning amounts to impermissible bias, and we see nothing improper about such efforts to clarify the record. Cardinale complains that the judge did not similarly "assist the defense," but because Cardinale presented no witnesses of his own, there was no need or opportunity for the district court to clarify any testimony.

We likewise find nothing improper about the statements at the dispositional hearing, which lasted over an hour. The district court judge patiently attempted to describe the purpose of the hearing, encouraged Cardinale not to repeat the same points in explaining mitigating circumstances, and explained the decision to continue the hearing to a second

day. The district court permitted Cardinale to provide a fulsome explanation for his actions and received and reviewed all documents submitted by Cardinale. We see no bias by the district court.

II. The district court did not abuse its discretion by revoking Cardinale's probation.

Cardinale contends that the district court abused its discretion in revoking probation because the state failed to prove any probation violation by clear and convincing evidence and that the need for confinement does not outweigh the policies favoring continued probation. We see no abuse of discretion by the district court.

The state must prove probation violations by clear and convincing evidence. Minn. R. Crim. P. 27.04, subds. 2(1)(c)(b), 3(1). A district court is the fact-finder at a probation-revocation hearing and is charged with weighing the credibility of the evidence including witness testimony. *State v. Losh*, 694 N.W.2d 98, 102 (Minn. App. 2005), *aff'd on other grounds*, 721 N.W.2d 886 (Minn. 2006).

To revoke probation, a district court must "1) designate the specific condition or conditions that were violated; 2) find that the violation was intentional or inexcusable; and 3) find that the need for confinement outweighs the policies favoring probation." *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). The district court must support its conclusion with "thorough, fact-specific records" and "seek to convey [its] substantive reasons for revocation and the evidence relied upon." *State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005). "[A district] court has broad discretion in determining if there is sufficient evidence

to revoke probation and should be reversed only if there is a clear abuse of that discretion." *Austin*, 295 N.W.2d at 249-50.

A. The state presented clear and convincing evidence that Cardinale violated probationary conditions.

The district court found that Cardinale intentionally and inexcusably violated certain conditions of his probation including that he (1) participate in individual therapy, follow all recommendations, and sign releases of information as directed, (2) not use or possess pornography or sexually explicit materials, (3) not access any social media, and (4) install monitoring software on all internet-capable devices and have no access to or use of the internet without approval. We address the sufficiency of the evidence in support of each violation.

Therapy

Cardinale argues that he proactively pursued therapy and that the district court clearly erred in certain characterizations regarding his therapeutic history. Our review of the record shows that the state presented evidence that between October 2018 and March 2019, Cardinale moved between four therapists, that his therapy was twice suspended because he sought to see multiple therapists simultaneously in violation of recommended treatment protocol, that he pursued treatment with a therapist not approved by probation, that he affirmatively rescinded his release of information to probation for a time, that he was not engaged with any therapist during part of his probation period, and that Cardinale devoted much of certain treatment sessions to questioning or complaining about recommended treatment and probationary conditions instead of engaging in substantive

treatment as required.[2] Although the district court acknowledged that Cardinale had successfully remained in a single treatment program in the months preceding the hearing, the district court credited evidence that Cardinale's pattern of behavior was "erratic, inconsistent, and uncooperative" and credited evidence demonstrating that Cardinale intentionally disobeyed the probationary requirement to follow recommendations and engage in treatment. We see no abuse of discretion by the district court.

Access to Sexually Explicit Website

Cardinale argues that he did not intentionally access a prohibited website showing sexually explicit images. The state presented evidence that Cardinale twice accessed the same sexually explicit website within two weeks. Cardinale argues that he did not act intentionally because he typed in the address of a benign website and was automatically rerouted to the prohibited website. But the state presented evidence that Cardinale accessed the prohibited website *twice*, and the district court found that the second access was intentional. Cardinale argues that the state did not prove that he actually viewed any sexually explicit images, but the district court credited testimony presented by the probation officer and a detective that the website's home page contained sexually explicit material. We see no abuse of discretion by the district court in concluding that the state

[2] Cardinale argues that the district court's characterization of "intractable personal differences" leading to a terminated therapeutic relationship was not supported by the record. We see no clear error in this characterization, as Cardinale's therapist noted that she would be removing herself as his therapist because she could not maintain an objective or effective therapeutic relationship with Cardinale. Likewise, we see no abuse of discretion by the district court in crediting testimony from Cardinale's probation officer regarding his unsuccessful discharge from treatment.

proved by clear and convincing evidence that Cardinale intentionally accessed pornography in violation of his probationary conditions.

Social Media

Cardinale argues that the record lacks clear and convincing evidence that he accessed social media. The district court credited unrebutted evidence that probation received seven alerts from monitoring software installed on Cardinale's computer of access to social-media websites. Cardinale asserts that these alerts could have occurred by mere keystrokes on his keyboard and do not necessarily show that he accessed the social-media sites.[3] But the district court did not credit this assertion and instead credited undisputed record evidence showing that Cardinale repeatedly complained about restrictions on his access to social media and that he accessed multiple social-media sites several times. The district court also credited evidence that Cardinale is computer-savvy, noting among other things that he possessed multiple devices and had programs and documents typically used for forensic examination and imaging. We see no abuse of discretion by the district court.

Unauthorized Device

Cardinale claims that he was unaware that he was required to install monitoring software on all internet-capable devices. Here, too, the state presented unrebutted evidence

[3] Cardinale complains for the first time on appeal that the alerts from the computer-monitoring company were unreliable and inadmissible hearsay. Generally, "when the defendant has had ample opportunity to present evidence in a probation revocation proceeding, the rules of evidence do not preclude admission of hearsay evidence." *State v. Johnson*, 679 N.W.2d 169, 174 (Minn. App. 2004). We also decline to consider this argument because it was not raised below or considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

that Cardinale possessed an unmonitored, undisclosed laptop and that Cardinale's probation agent only discovered the unauthorized device during a surprise home visit. A forensic investigation of the laptop showed access to the internet on August 25, 2018, three months after the district court imposed the computer-monitoring and internet-use conditions. Although Cardinale asserts that a previous probation officer directed Cardinale to install monitoring software on one device, the district court received testimony from Cardinale's then-current probation officer of repeated conversations with Cardinale about the requirement that all internet-capable devices be monitored. Also, the original sentencing order unequivocally required all internet-capable devices to contain monitoring software. We again see no abuse of discretion by the district court.

B. The district court did not abuse its discretion in determining that the need for confinement outweighed the policies favoring probation.

Cardinale contends that the district court abused its discretion by concluding that confinement was necessary, by failing to consider the policies favoring probation, and because the violations were not serious enough to warrant revocation and confinement.

Once a district court finds an intentional or inexcusable violation of a specific probationary condition, it must "determine whether the need for confinement outweighs the policies favoring probation." *Modtland*, 695 N.W.2d at 606; *see also Austin*, 295 N.W.2d at 250. Although the district court may revoke probation for any violation, "[t]he decision to revoke 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."[4] *Austin*, 295 N.W.2d at 251 (quotations omitted). The district court may revoke probation if it specifically finds at least one of the following: (1) "confinement is necessary to protect the public from further criminal activity by the offender," or (2) "the offender is in need of correctional treatment which can most effectively be provided if he is confined," or (3) "it would unduly depreciate the seriousness of the violation if probation were not revoked." *Modtland*, 695 N.W.2d at 607.

Here, the district court found that failure to revoke Cardinale's probation would unduly depreciate the seriousness of the violations. The district court considered mitigating circumstances presented by Cardinale, including his current enrollment in therapy and letters of support from his employer, therapists, probation officer, and sister. But the district court found that the violations were not minor or technical. The district court found that Cardinale was not amenable to probation, noting that although he was then-enrolled in treatment, he sought to accomplish treatment "the way you want to do treatment," by picking "the providers you want to pick." The district court determined that Cardinale was not forthcoming to the district court, that he had an unauthorized home computer, that he accessed prohibited websites including social media, and that he violated other conditions of probation.[5] The district court ultimately concluded that the seriousness of these

[4] Technical violations are "any violation of a court order of probation, except an allegation of a subsequent criminal act that is alleged in a formal complaint, citation, or petition." Minn. Stat. § 244.196, subd. 6 (2014).

[5] Cardinale complains that the district court clearly erred in also stating that "it's clear to me that you are out violating the law and violating probation." But the district court's statement was not made as a basis to revoke probation. In any event, we cannot conclude that such a conclusion is unsupported by reasonable inferences from the record evidence.

violations outweighed the claimed mitigating circumstances. On this record, we cannot conclude that the court's decision to revoke probation was an abuse of discretion.

III. Remand is necessary to allow the district court to develop a factual record regarding the offenses and consideration of the assigned criminal-history score.

Cardinale argues that the offenses underlying counts one through three arose from the same behavioral incident, namely the download of one package of contraband files on the same date. Cardinale therefore argues that the district court should have assigned a criminal-history score of two rather than three when calculating his sentence for count four. The state argues that the assigned criminal-history score was correct because counts one through three arose from different behavioral incidents. The state argues alternatively that the district court should on remand develop the record and make findings as to whether counts one through three arose from the same behavioral incident. We agree that the current record is insufficient.

A sentence based on an incorrect criminal-history score may be challenged on appeal, regardless of whether the defendant raised the issue in district court. *See State v. Maurstad*, 733 N.W.2d 141, 148 (Minn. 2007) ("[A] defendant cannot forfeit review of [their] criminal history score calculation."). The Minnesota Sentencing Guidelines provide, "Multiple offenses sentenced at the same time before the same court must be sentenced in the order in which they occurred. As each offense is sentenced, include it in

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Along with the multiple violations of probation, the record shows that Cardinale accessed impermissible pornography, possessed an unmonitored internet-capable device, the unmonitored device contained software that could change the basic code of computer files including internet browsing history, and the internet search history of the unmonitored device showed Cardinale's interest in accessing his internet search history.

the criminal history on the next offense to be sentenced," except "[w]hen multiple current offenses arise out of a single course of conduct in which there were multiple victims, weights are given only to the two offenses at the highest severity levels." Minn. Sent. Guidelines 2.B.1.e & 2.B.1.e(2) (2015). The determination of whether offenses arise out of a single course of conduct "involves an examination of all the facts and circumstances." *State v. O'Meara*, 755 N.W.2d 29, 37 (Minn. App. 2008). "[T]he factors to be considered in determining whether multiple offenses constitute a single behavioral act are time, place, and whether the offenses were motivated by a desire to obtain a single criminal objective." *State v. Gould*, 562 N.W.2d 518, 521 (Minn. 1997). We review for an abuse of discretion the district court's determination of a defendant's criminal-history score. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

The record is insufficient for us to review whether the offenses in counts one through three were committed as part of a single course of conduct. And the district court has not had an opportunity to make appropriate findings given that Cardinale raised this issue for the first time on appeal. We therefore remand this issue to the district court to fully develop this record, reconsider the criminal-history score and related sentencing issues, and make appropriate findings.

Affirmed in part and remanded.