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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0569**

State of Minnesota,
Respondent,

vs.

Brian Kenneth Moore,
Appellant.

**Filed November 27, 2017
Affirmed
Smith, Tracy M., Judge**

Sherburne County District Court
File No. 71-CR-11-1862

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

Kathleen A. Heaney, Sherburne County Attorney, Leah G. Emmans, Assistant County Attorney, Elk River, Minnesota (for respondent)

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

Considered and decided by Smith, Tracy M., Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Brian Moore challenges the district court's revocation of his probation based on five probation violations. Moore argues that (1) the district court failed to make

two of the three required *Austin* findings, (2) four of the probation violations cannot sustain revocation because they are either unsupported by the record or because Moore lacked required notice, and (3) his counsel was ineffective. We affirm.

FACTS

In 2013, Moore was found guilty of third-degree criminal sexual conduct. Moore's 48-month sentence was stayed, and he was placed on probation for 15 years. Moore was ordered to register as a predatory offender, successfully complete sex-offender treatment, and follow the standard conditions of probation. In his third year of probation, Moore was charged with misdemeanor driving while intoxicated and driving after revocation of his license in Minnesota. Five months later, Moore was charged in Wisconsin with failure to register as a sex offender, disorderly conduct, and two counts of misdemeanor battery.

Moore's probation officer filed a probation-violation report alleging Moore had violated the conditions of his probation by (1) not obtaining permission from his agent before leaving the state of Minnesota and (2) not reporting to, cooperating with, and being truthful to his agent in all matters. At the beginning of the revocation hearing, the state asked to add two new violations: (3) using or possessing alcohol or any controlled substance, and (4) accessing pornography. Moore's counsel stated that he was prepared to go forward with the hearing despite having received only oral notice of the two new allegations only the day before.

During the two-day contested revocation hearing, the court heard testimony from Sherburne County probation agent Brent Schmidt, Moore's former girlfriend, and Moore's supervising probation agent Amy Furey. Much of the hearing focused on Moore's internet

activity and the sexual content he had accessed online. Moore's ex-girlfriend testified that, during their eight month relationship, she and Moore had viewed pornography together and engaged in sexual activity with other people using a website called Couples Next Door. In addition, she stated that Moore had posted "pornographic" pictures of himself on a website called FetLife and participated in a "local swingers" Facebook group. According to Agent Furey, Moore's FetLife profile dated back "months and months" and showed him "checking into going to fetish-style events and pictures" including "a rape fantasy" event. Moore maintained that he was not a member of the Facebook group and did not have an active account from which he could post pictures or comment on Couples Next Door. He denied accessing "pornography" while on probation but admitted watching people engage in sexual intercourse on the internet.

The court also heard testimony about Moore's alcohol and drug use. Moore testified that his probation agent had given him permission to drink alcohol as long as he was "responsible." Agent Furey said that Moore did not have permission to consume alcohol.

Finally, the state offered evidence that Moore had been traveling out of the state without appropriate permission. Moore's ex-girlfriend testified that he had traveled with her to California and Wisconsin. Agent Furey denied that she gave Moore permission to travel to California. Moore explained that he had permission to work in Wisconsin but agreed that he was not at work when he was arrested there for disorderly conduct and battery. Agent Furey clarified that Moore's permission to be in Wisconsin would "just be going to work and then coming back;" his work permit did not include any "leisurely activities" before or after work. Moore had an unregistered residential lease in Wisconsin

that was not approved by his supervising agent. Moore testified that he used this rented home solely for temporary storage. Moore had also been operating a motorized boat that he had failed to register, although he was required to do so as a predatory offender.

The district court found that Moore violated his probation by (1) leaving the state without permission, (2) not being truthful with his agent in a number of matters, (3) using alcohol, and (4) accessing pornography on the internet. In addition, the district court found that Moore violated probation by (5) having sexual activity on the internet. After finding the violations and hearing arguments from the prosecutor and defense counsel, the district court commented:

If [Moore] had questions about what constituted appropriate sexual activity, he should have talked to his probation officer about that, but that would have required being truthful with her and telling her what he was doing, and that's what you haven't done, Mr. Moore. You have lied to your probation officer throughout. I'm seriously concerned about whether you even realize that you're lying. You're pretty good at it. You were pretty convincing [sic] the stuff that you told me on the stand about your probation officer giving you all these permissions that she didn't give you, and so in order to protect the public I have to commit you to the Commissioner of Corrections. I can't possibly conclude at this point that you're amenable to probation.

The district court revoked Moore's probation and committed him to the Commissioner of Corrections for 48 months.

Moore appeals.

DECISION

I. The district court made the necessary *Austin* findings.

Moore argues that the district court failed to make all of the required *Austin* findings before revoking his probation. The district court's analysis of the *Austin* factors is reviewed for an abuse of discretion. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). However, whether the district court made each of the required findings presents a question of law, which is reviewed de novo. *Id.*

When a probationer violates a condition of probation, the district court may continue probation, revoke probation and impose the stayed sentence, or order intermediate sanctions. Minn. Stat. § 609.14, subd. 3 (2014). A district court may revoke probation only if the court (1) designates the specific condition that was violated, (2) finds that the violation was intentional or inexcusable, and (3) finds that the need for confinement outweighs the policies favoring probation. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). Failure to address all three *Austin* factors requires reversal and remand, even where the evidence was sufficient to support the revocation. *Modtland*, 695 N.W.2d at 606-08. The state has the burden of proving by clear and convincing evidence that a probation violation exists and that probation should be revoked. *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004).

The parties agree that the court properly made the first finding required by *Austin*, that a specific condition of Moore's probation was violated. Moore argues, however, that the district court failed to make the second and third required *Austin* findings. He argues that the district court merely found that it could not conclude that he was "amenable to

probation,” shifting the burden to Moore to prove his amenability, rather than specifically addressing whether Moore’s probation violations were intentional or inexcusable and whether the need for confinement outweighed the policies favoring probation.

The second *Austin* factor requires that the district court find that the violations were “intentional or inexcusable.” *Austin*, 295 N.W.2d at 250. As part of the decision to revoke Moore’s probation, the district court stated:

You have lied to your probation officer throughout. I’m seriously concerned about whether you even realize that you’re lying. You’re pretty good at it. You were pretty convincing [sic] the stuff that you told me on the stand about your probation officer giving you all these permissions that she didn’t give you

We can infer from the district court’s statements addressing Moore’s dishonesty about his conduct throughout the relevant time period that it found Moore’s violations to be intentional. Thus, the second *Austin* factor was implicitly addressed. The district court’s statements regarding Moore’s lying are not the type of general, nonspecific, or reflexive findings prohibited by *Modtland*. 695 N.W.2d at 608.

The third *Austin* factor requires the district court to find that the need for confinement outweighs the policies favoring probation. *Austin*, 295 N.W.2d at 250. A district court may find this third factor satisfied where any one of the following three subfactors is present: (1) confinement is necessary to protect the public from further criminal activity by the offender; (2) the offender is in need of correctional treatment that can be most effectively provided by confinement; or (3) it would unduly depreciate the seriousness of the violation if probation were not revoked. *Id.* at 251. Here, the district

court explained its decision to revoke Moore’s probation as follows: “[T]o protect the public I have to commit you to the Commissioner of Corrections. I can’t possibly conclude at this point that you’re amenable to probation.” Thus, the court specifically found that the first subfactor (confinement is necessary to protect public safety) was present. The district court therefore made the required finding on the third *Austin* factor.

Moore argues that the amenable-to-probation language used by the district court implies that the court was improperly shifting the burden of proof to him to prove that probation should continue. We disagree. From context, it is clear that the district court, rather than improperly shifting the burden of proof as Moore suggests, was instead weighing the policies favoring continued probation against the need for confinement, as required by *Austin*.

In sum, the district court made adequate *Austin* findings.

II. The district court did not abuse its discretion in relying on all five violations.

Moore concedes that the court was correct in finding that he used alcohol in violation of his probation. However, he challenges the court’s findings of four other violations for several reasons.

A. The record supports the findings that Moore exceeded the bounds of his permission to travel outside of Minnesota and accessed pornography.

Moore argues that two violations were not supported by the record. The district court’s factual findings are subject to a clearly erroneous standard of review. *State v. Critt*, 554 N.W.2d 93, 95 (Minn. App. 1996), *review denied* (Minn. Nov. 20, 1996).

1. Traveling outside the state without permission

Moore first challenges the district court's finding that he left Minnesota without permission. The district court found that Moore "violated the provision that required permission before leaving the state because he significantly overstepped the bounds of the permission that was given to him, which was to go there, to go to work, and to come back."

Moore argues that this finding was inconsistent with the testimony given by Agent Furey. When Agent Furey corroborated Moore's testimony that she gave him permission to travel to Wisconsin for work, she clarified that the extent of this permission was limited to "going to work and then coming back." She specifically stated that her permission did not include any "leisurely activities" before or after work. Moore agreed that he was not at work when he was arrested in Wisconsin for disorderly conduct.

In addition, the district court heard evidence that Moore was renting a house in Wisconsin. Moore claimed he used the house only for storage. The district court, however, did not believe Moore was renting the out-of-state home solely for storage and suspected he was staying there overnight without the requisite permission from his probation officer. We defer to the district court's credibility determinations. *See State v. Olson*, 884 N.W.2d 906, 911 (Minn. App. 2016), *review denied* (Nov. 15, 2016). Agent Furey's testimony and the evidence regarding Moore's home in Wisconsin amply support the district court's finding that Moore violated the condition of probation that he not leave the state without permission.

Finally, Agent Furey testified that she did not give Moore permission to travel to California, yet Moore's ex-girlfriend testified that she and Moore traveled there together

during their relationship. Moore did not contest this trip. Thus, this evidence also supports the finding that Moore traveled outside of Minnesota without permission.

2. Accessing pornography

Moore argues that there is no evidence in the record to support the finding that he used or accessed “pornography.” He bases this argument on the fact that the only statutory definition of pornography in Minnesota relates to depictions of minors. *See* Minn. Stat. § 617.246 (2016) (defining “pornographic work” as involving sexual depiction of minors).

However, the Minnesota Rules of Criminal Procedure do not require a statutory definition to be included in a condition of probation. Rather, when sentencing a defendant, a court “[must] state precisely the terms of the sentence.” Minn. R. Crim. P. 27.03, subd. 4(A). If imposing a probationary sentence in which “noncriminal conduct could result in revocation, the trial court should advise the defendant so that the defendant can be reasonably able to tell what lawful acts are prohibited.” *State v. Ornelas*, 675 N.W.2d at 80 (“When the acts prohibited by the probation conditions are not criminal, due process mandates that the petitioner cannot be subjected to a forfeiture of his liberty for those acts unless he is given prior fair warning.”) (internal quotation omitted).

Here, the term “pornography” provided a reasonably clear description of what Moore was prohibited from accessing as a term of his probation. Pornography is generally understood to include “[p]ictures, writing, or other material that is sexually explicit.” *The American Heritage Dictionary of the English Language* 1410 (3d ed. 1992). A reasonable probationer would have understood that pornography included images beyond those involving minors, based on a common understanding of the word.

Moreover, Moore’s ex-girlfriend testified that Moore viewed “pornography” with her twice and posted “pornographic” pictures of himself on FetLife.¹ Agent Furey also testified that Moore accessed “sexually explicit websites.” Moore himself admitted to having an active FetLife profile and viewing other user profiles, as well as watching people have sexual intercourse on the internet. Thus, evidence in the record supports the finding that Moore accessed pornography under a common understanding of the word.

B. Moore had sufficient notice that a condition of his probation was being honest with his probation officer and had sufficient notice of this violation.

The district court found that Moore “was not truthful with his agent in a number of matters—his internet activity, his alcohol use, what he was doing in Wisconsin.” Moore argues that he was not informed that honesty with his agent was a condition of his probation and did not receive written or oral notice of this alleged violation prior to the revocation hearing.

Moore did not preserve this issue for appellate review by making an objection in the district court. Thus, we review for plain error. *State v. Beaulieu*, 859 N.W.2d 275, 281 (Minn. 2015); *see also* Minn. R. Crim. P. 31.02. Under the plain-error test, an appellant is not entitled to appellate relief on an issue to which no objection was made unless (1) there is an error, (2) the error is plain, and (3) the error affects the appellant’s substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If the first three requirements of the plain-error test are satisfied, we must consider the fourth requirement, whether the error

¹ Agent Schmidt testified that FetLife is a website with sexual content, including images and videos depicting sexual penetration.

“seriously affects the fairness, integrity or public reputation of judicial proceedings.” *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted). If we conclude that any requirement of the plain-error test is not satisfied, we need not consider the other requirements. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

To satisfy the requirements for due process, a probationer must “be given fair warning of those acts which may lead to a loss of liberty.” *Ornelas*, 675 N.W.2d at 80 (internal citation omitted). Before a probation violation can occur, the condition alleged to have been violated must have been a condition actually imposed by the court and the probationer must have had notice of this condition. *Id.* Therefore, a court “[must] state precisely the terms of the sentence” when sentencing a defendant. Minn. R. Crim. P. 27.03, subd. 4(A). In addition, notice is also required prior to revoking probation. Probation revocation proceedings “must be initiated by a summons or warrant based on a written report” and include “a description of . . . the probationary terms allegedly violated.” Minn. R. Crim. P. 27.04, subd. 1(1)(a), (2)(b).

With regard to honesty being a condition of Moore’s probation, we conclude there was no error in the notice Moore received. The warrant of commitment stated that it was a condition of Moore’s probation to “report to agent as directed and cooperate and be truthful with agent in all matters.” Moreover, at sentencing, the court reminded Moore that he was “required to follow all the general rules of probation,” which included honesty with his agent. Moore was thus given notice of this condition of probation consistent with Minn. R. Crim. P. 27.03, subd. 4(A), and due process requirements.

With regard to notice of the alleged probation violation, we conclude there was also no error. Failing to be honest with his agent was particularly noted on the written probation-violation report. Violation number three on the report included “cooperate and be truthful with agent in all matters.” Moore thus received notice of the violation consistent with Minn. R. Crim. P. 27.04, subd. 1(2)(b).

C. Lack of notice of the sexual-activity-on-the-internet violation did not constitute reversible plain error.

Moore argues that the district court committed reversible error by finding that he violated the no-sexual-activity-on-the-internet probation condition because he was not given notice of this alleged violation.

As discussed above, notice of alleged violations is required prior to the beginning of a probation-revocation proceeding. Minn. R. Crim. P. 27.04, subd. 1(2)(b). Because Moore did not raise this issue below, we review the district court’s actions for plain error. *Beaulieu*, 859 N.W.2d at 281. The violation report did not include violation of the condition that Moore not engage in sexual activity on the internet. Therefore, there was no written notice of this violation. Additionally, when the state orally amended its alleged violations at the beginning of the revocation hearing, it mentioned only “use of alcohol” and “accessing pornography.” It did not request to add the violation of “having sexual activity on the internet.” As Moore observes, the pornography allegation appears to have “morphed to include the ‘sexual activity’ allegation as the hearing went on.” Because the rule requires notice and the required notice appears wholly absent, there was error and it

was plain. *See State v. Wren*, 738 N.W.2d 378, 393 (Minn. 2007) (quotation omitted) (explaining that error is plain if it “contravenes case law, a rule, or a standard of conduct”).

We turn to the third prong of the plain-error test to consider whether the error affected Moore’s substantial rights. *See Griller*, 583 N.W.2d at 740. The notices Moore did receive included identified violations of the no-access-to-pornography and truthfulness-with-probation-officer conditions. The facts underlying both of those violations largely overlapped with the facts underlying violation of the no-sexual-activity-on-the-internet condition. The state’s witnesses were the same for all of these violations and were known to Moore—they were his probation officers and his former girlfriend. In addition, Moore testified extensively about his activities on the internet. Although violation of the no-sexual-activity-on-the-internet condition was discussed in testimony and in closing arguments, Moore never claimed surprise or asked for additional time to prepare a defense, and on appeal he has not argued that he would have presented his defense differently had he had more specific notice. Therefore, Moore has “failed to meet his heavy burden of showing the error was prejudicial and affected the outcome of the proceedings” and that it therefore affected his substantial rights. *Beaulieu*, 859 N.W.2d at 282. Moore is thus not entitled to appellate relief for the failure to provide notice of the sexual-activity-on-the-internet violation prior to the revocation hearing.²

² Without citing to any caselaw, Moore asserts violation of his due process rights. A violation of rule 27.04 may implicate constitutional requirements. *See Beaulieu*, 859 N.W.2d at 280 (discussing *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S. Ct. 1756, 1759-60 (1983), which holds that probationers are entitled to minimum requirements of procedural due process). However, “[a]n assignment of error in a brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is

III. Moore was not prejudiced by his defense counsel's representation at the revocation hearing.

Moore claims that he received ineffective assistance of counsel at his probation-revocation hearing because his attorney failed to make an argument that the district court should continue Moore on probation after the district court made its findings of violations. Because ineffective-assistance-of-counsel claims involve mixed questions of law and fact, they are reviewed de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (citing *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 2070 (1984)).

To prevail on a claim of ineffective assistance of counsel, an appellant must “demonstrate that (1) counsel’s performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for his counsel’s unprofessional error, the outcome would have been different.” *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (citing *Strickland*, 466 U.S. at 687-88, 104 S. Ct. at 2064-65). Both prongs need not be analyzed if one is determinative. *Id.* Under the prejudice prong of the *Strickland* test, a defendant must show by a preponderance of the evidence that his counsel’s error, whether or not professionally unreasonable, so prejudiced the defendant at trial that a different outcome would have resulted but for the error. *Strickland*, 466 U.S. at 687, 691, 104 S. Ct. at 2064, 2066.

Here, a lack of prejudice is determinative. The record establishes that Moore, a convicted sex-offender, violated his probation numerous times: he consumed alcohol; he

obvious on mere inspection.” *State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006) (quotation omitted), *aff’d*, 728 N.W.2d 243 (Minn. Mar. 8, 2017). On these facts, we do not discern an error based on mere inspection.

left the state outside the bounds of his permission; he accessed pornography; he was repeatedly dishonest with his probation officer; and he used internet websites to discuss, post, and observe sexually explicit content. Based on these facts, there is not a reasonable probability that the district court would have been persuaded to continue Moore's probation regardless of any additional arguments his defense counsel might have made. Because Moore cannot show how the outcome of the hearing would have been different but for his counsel's performance in making closing comments to the district court, his claim fails.

Affirmed.