This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).

STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0452

State of Minnesota,
Respondent,

vs.

Amonte Dajon Pate,
Appellant.

Filed December 28, 2020
Affirmed
Hooten, Judge

Hennepin County District Court
File No. 27-CR-18-4065

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, T., Presiding Judge; Hooten, Judge; and Frisch, Judge.

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

HOOTEN, Judge

Appellant argues that the district court abused its discretion in revoking his probation because it erred by finding both that he intentionally and inexcusably violated

his probation and that the need for his confinement outweighed the policies in favor of continuing his probation. Appellant also argues that the district court plainly erred by allowing his therapist to testify at the probation revocation hearing in violation of the therapist-client privilege. We affirm.

FACTS

In 2015, Appellant Amonte Dajon Pate was charged with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(ii) (2014) after being accused of repeatedly sexually assaulting an underage family member. Appellant entered a plea of guilty to that charge on February 25, 2016. Appellant's plea was accepted, and on May 13, 2016, he received a sentence of 144 months of incarceration. Execution of the sentence was stayed for 10 years. As conditions of his probation, appellant was required to register as a predatory offender, complete sex offender treatment, and make no changes to his residence without the approval of his probation officer.

On November 7, 2017, a probation violation report was filed, and a warrant for appellant's arrest was issued based on seven alleged probation violations including failure to engage in sex-offender treatment and failure to register as a predatory offender. Appellant was taken into custody on June 9, 2018. On August 30, 2018, appellant admitted to violating his probation and was sentenced to a 365-day sanction at the Hennepin County Correctional Facility. The district court ordered that appellant be furloughed to Alpha Human Services (AHS), a residential sex offender treatment program, when a bed became available. The stay of execution for appellant's 144-month sentence was not revoked.

That same day, appellant entered a plea of guilty to a charge of knowingly violating his predatory offender registration requirement. Appellant received a sentence of 24 months of incarceration, the execution of which was stayed for three years. Appellant also received a 365-day sanction with a furlough to AHS for this offense. The district court ordered that sanction to run concurrently with the sanction for appellant's probation violation.

On November 1, 2018, appellant was furloughed from incarceration to AHS. Appellant absconded from AHS on March 30, 2019, and he was terminated from the treatment program as a result. Following his termination from AHS, a probation violation report was filed, and a warrant for appellant's arrest was issued on April 3, 2019. Appellant was eventually taken into custody on June 26, 2019.

The district court held a contested probation violation hearing concerning appellant's eight alleged probation violations. On November 19, 2019, the district court issued an order finding that appellant had violated six terms of his probation. The district court held a hearing concerning sanctions for those probation violations on December 27, 2019. On January 3, 2020, the district court issued an order revoking the stays of execution for appellant's 144-month and 24-month sentences. Pate appeals.

D E C I S I O N

Appellant argues that the district court abused its discretion by revoking his probation. Appellant also argues that it was plain error, requiring reversal, for the district court to allow testimony by his therapist at the probation revocation hearing. For the reasons that follow, both of appellant's arguments fail.

I. The district court did not abuse its discretion by revoking appellant's probation.

First, appellant argues that the district court abused its discretion by revoking his probation. Specifically, appellant contends that the district court erred both in finding that his probation violations were intentional and inexcusable and that the need for his confinement outweighed the policies favoring probation.

A defendant must be afforded procedural due process before his probation is revoked. *Gagnon v. Scarpelli*, 411 U.S. 778, 781–82, 93 S. Ct. 1756, 1759 (1973). Before a district court may revoke a defendant's probation and execute a stayed sentence, "the [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 need for confinement outweighs the policies favoring probation." *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). As to the third factor, the district court should only revoke the defendant's probation if it finds, "on the basis of the original offense and the intervening conduct of the offender," either 1) that "confinement is necessary to protect the public from further criminal activity by the offender," 2) that "the offender is in need of correctional treatment which can most effectively be provided if he is confined," or 3) that "it would unduly depreciate the seriousness of the violation if probation were not revoked." *State v. Modtland*, 695 N.W.2d 602, 607 (Minn. 2005).

The district court nevertheless "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 district court abuses its discretion

when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017).

In this case, the district court found, and appellant concedes, that appellant violated six conditions of his probation, namely those requiring him to (1) not use any non-prescribed mood-altering drugs; (2) complete sex offender treatment; (3) comply with registration requirements as a predatory offender; (4) tell probation within 72 hours of any change of address; (5) follow all state and federal laws; and (6) stay in touch with his probation officer. The district court found that those violations were intentional and inexcusable. Finally, the district court found that the need for appellant's confinement outweighed the policies favoring probation, both because confinement was necessary to protect the public from further criminal activity and because appellant was in need of correctional treatment that could most effectively be provided if he were confined. For the reasons that follow, the district court did not abuse its discretion in concluding that there was sufficient evidence to revoke appellant's probation.

First, the district court found that appellant intentionally and inexcusably violated six terms of his probation. Specifically, the district court found that appellant intentionally and inexcusably violated the term of his probation requiring him not to use any non-prescribed mood-altering drugs when he intentionally obtained and ingested a controlled substance while at AHS. The district court found that the remaining five conditions "were simultaneously violated upon Mr. Pate absconding from his treatment facility," and that these violations were intentional and inexcusable. The district court explained that the evidence supporting its findings was that the "reason [appellant] cite[d] for leaving the

treatment facility was taken care of within 24 hours," appellant was capable of contacting his probation officer but chose not to, and appellant's whereabouts were unknown for months.

These findings are supported by the record. Appellant argues that his use of a controlled substance, and his absconding from treatment, is excusable because of the sexual harassment he suffered while at AHS. Appellant further contends that his failure to turn himself in after absconding is excusable because he feared that he would be forced to return to AHS, where he did not feel safe. As the district court points out and appellant admits, however, the party who sexually harassed appellant was removed from AHS within 24 hours of the harassment. Appellant's probation officer also testified that appellant admitted that, after the offending party was removed, he felt safe at AHS. Moreover, appellant did not offer to the district court—and does not offer in his briefing to this court—any rationale for failing to maintain contact with his probation officer in the months after absconding from AHS.

Next, the district court found that the need for appellant's confinement outweighed the policies favoring the continuation of his probation. Specifically, the district court concluded that confinement is "necessary to protect the public from future criminal activity," because "an untreated sex offender who has repeatedly demonstrated an inability to comply with requirements of community-based treatment puts the general public at risk." The district court also appears to have found that appellant is in need of correctional treatment which can most effectively be provided if he is confined. This finding appears to have been based on a determination that the alternative to incarceration that appellant

proposed—outpatient treatment—had a lower chance of success than treatment administered while appellant was incarcerated, given that appellant was unable to complete treatment even in a controlled, in-patient setting and "demonstrates an aversion to comply with authority."

Appellant argues that confinement is not necessary to protect the public from further criminal activity because, "[d]espite the fact that [he] was convicted of failing to register as a predatory offender, he had no other convictions that would suggest the public needed to be protected from him," and he "was otherwise complying with probation and was participating in treatment." But appellant fails to offer any explanation for his repeated failure to comply with the requirements of his probation. Appellant also fails to explain why his non-compliance should not be viewed as an indication of his willingness to break the law. Given those failures, and given the severity of his original offense, the district court's finding that appellant's confinement is necessary to protect the public from further criminal activity is supported by the record.

The district court's finding that appellant is in need of correctional treatment that can most effectively be provided if he is confined is also supported by the record. Although appellant contends that he would succeed in outpatient treatment, the fact that he was unable to complete treatment even in a controlled setting undercuts this argument. Appellant relies on a psychosexual evaluation report completed by Project Pathfinders as evidence that he would succeed in in-patient treatment. That report states that appellant "presents with the capacity to meet the expectations of outpatient programming and would be an appropriate candidate for treatment at Project Pathfinder, Inc." But the report also

cautions that appellant "might experience substantial cognitive difficulty participating in a talk-based outpatient therapy program and especially in understanding and applying the concepts covered therein," and that appellant would need to address certain "life stabilization needs" before he would even be considered for admission to outpatient treatment at Project Pathfinder. Given that evidence, and considering the record as a whole, the district court's finding that appellant is in need of correctional treatment which can most effectively be provided if he is confined is supported by the record.

In sum, the district court did not abuse its discretion in concluding that there was sufficient evidence to revoke appellant's probation.

II. The district court did not commit plain error by permitting appellant's therapist to testify.

Second, appellant argues that the district court erred by allowing the therapist who treated him at AHS to testify at the probation revocation hearing in violation of the therapist-client privilege. Appellant admits that he did not object to his therapist's testimony at the time of the hearing, but he nevertheless contends that this court should reverse the order revoking his probation because the admission of his therapist's testimony was plain error.

Minnesota law recognizes a therapist-client evidentiary privilege. Minn. Stat. § 595.02, subd. 1(g) (2018); *State v. Expose*, 872 N.W.2d 252, 257 (Minn. 2015). Under this privilege, a therapist may not testify to information or opinions based on treatment of a client without the client's consent, except in limited circumstances that are inapplicable here. *See Expose*, 872 N.W.2d at 257. A defendant who fails to object to the violation of

an evidentiary privilege before the district court forfeits that issue for purposes of appeal. *State v. Penkaty*, 708 N.W.2d 185, 203–04 (Minn. 2006).

We nevertheless have discretion to consider the violation of an evidentiary privilege not raised before the district court if that violation constitutes plain error. *Id*. at 204. The United States Supreme Court has established a three-prong test for plain error. *Johnson v. United States*, 520 U.S. 461, 466–67, 117 S. Ct. 1544, 1549 (1997). Under this test, before we may correct an error that was not objected to there must be (1) error, (2) that is plain, and (3) the error must affect substantial rights. *Id*. If these three prongs are met, we must then assesses whether we should address the error to ensure the fairness and integrity of judicial proceedings. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Appellant argues that it was plain error to allow testimony by his therapist in violation of his therapist-client privilege and that, because that error was not harmless, this court should reverse the order revoking his probation. The state replies that, even assuming the district court erred by permitting appellant's therapist to testify, that error was harmless. Specifically, the state contends that this alleged error was harmless because the state could have presented the same evidence through the testimony of appellant's probation officer, who had spoken to appellant's therapist about appellant's performance in treatment and could present hearsay evidence based on their conversations.

The state is correct; any error the district court may have made in admitting the therapist's testimony did not affect appellant's substantial rights. The substantial rights analysis under the third prong of the plain error test is equivalent to harmless error analysis. *State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011). Accordingly, a plain error affects

an appellant's substantial rights when there is a reasonable likelihood that the error affected the outcome of the proceeding. *See id*. In this case, it is not reasonably likely that the therapist's testimony affected the outcome of appellant's probation revocation proceeding.

Appellant relies on *Expose* as support for the proposition that admission of his therapist's testimony affected his substantial rights. In *Expose*, the Minnesota Supreme Court held that the district court's erroneous admission of testimony by the defendant's therapist was not harmless error, even though that testimony was corroborated by the testimony of other witnesses, because the therapist "was the [s]tate's first and primary witness and the only witness with first-hand knowledge" of the conduct at issue. 872 N.W.2d at 261. In so holding, the *Expose* court concluded that allowing the therapist to testify substantially influenced the verdict. *Id*. at 260.

This case is distinguishable from *Expose* in several key respects. First, *Expose* dealt with a criminal trial, while this case deals with a probation revocation hearing. The rules of evidence are more relaxed in a probation revocation hearing than they are at trial, perhaps most importantly in that hearsay evidence is admissible in a revocation hearing. *State v. Johnson*, 679 N.W.2d 169, 174 (Minn. App. 2004). Appellant's probation officer could thus have given testimony relating to hearsay statements that appellant's therapist made to her about appellant's performance at AHS. Crucially, those statements would not have been excluded by appellant's therapist-client privilege. *Expose*, 872 N.W.2d at 260.

The importance of the testimony in determining the outcomes of the two proceedings is also different. In *Expose*, the therapist's testimony was the only first-hand account of the conduct at issue. Here, appellant's probation officer gave testimony that

could have served as an independent basis for finding several probation violations—appellant's having absconded from AHS and his failure to provide his probation officer with his current address after doing so.

Appellant correctly points out that his therapist was the state's first and primary witness at the revocation hearing. It was also appellant's therapist alone who provided a first-hand account of appellant's performance in treatment. Appellant also emphasizes that the district court appears to have relied on findings that appellant "was unable to thrive in a controlled, in-patient setting," and "may be better treated in a secured and confined prison facility," in revoking appellant's probation—findings that would likely have been based, at least in part, on his therapist's testimony.

Those findings, however, were likely also based on the fact that appellant absconded from AHS. The therapist's testimony was not required to establish that fact, because appellant's probation officer also testified at the revocation hearing. The probation officer's testimony covered much of the same ground as the therapist's, especially by relating statements the therapist made to the probation officer concerning a second incident when appellant absconded from AHS prior to March 30, 2019, appellant's rule-breaking at AHS, and various interactions between appellant and therapists and other participants at AHS. And the probation officer's testimony could itself have served as evidence of several probation violations—most importantly appellant's having absconded from AHS on March 30, 2019. That violation alone could have led the district court to revoke appellant's probation.

On balance, it is not reasonably likely that the district court's admission of the therapist's testimony affected appellant's substantial rights by impacting the outcome of his probation revocation hearing. Because the admission of the therapist's testimony did not affect appellant's substantial rights, the admission was not plain error, *see Johnson*, 520 U.S. at 466–67, and we need not reverse.

Affirmed.