

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2012).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0550**

State of Minnesota,
Respondent,

vs.

Alexander Richards,
Appellant.

**Filed December 30, 2013
Affirmed
Ross, Judge**

Olmsted County District Court
File No. 55-CR-11-6033

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

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Halbrooks, Judge; and Ross, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Alexander Richards, intoxicated, repeatedly stabbed a man with a fork. The district court sentenced him to a stayed prison term, subject to probationary conditions,

including requirements to complete treatment for substance abuse and to avoid new assaults. Richards committed three additional assaults while he was intoxicated during his probationary period, and he missed numerous treatment sessions. The district court revoked his probation, and Richards now challenges the revocation. Because the evidence supports the district court's finding that Richards violated the terms of his probation and the relevant factors justify its decision to execute his sentence, we affirm.

FACTS

Alexander Richards was intoxicated when he stabbed a man numerous times with a fork in August 2011. Richards entered an Alford plea to a charge of second-degree assault with a deadly weapon in exchange for the state dismissing other charges. The district court sentenced him to a stayed term in prison subject to numerous probationary conditions, including avoiding assaultive or threatening behavior, living by the rules of his halfway house, and following the recommendations of his treatment program. Richards moved into Silver Creek Corners, a "wet" halfway house that allows residents to consume alcohol. He became intoxicated and assaultive at least three times in 2012 while living at Silver Creek. On the third occasion he punched another resident, and his probation officer, Niquita Niles, reported the violation. She also reported that Richards had missed 28 sessions of his treatment program over a four-month span. The state sought to revoke his probation, alleging three probation violations: engaging in assaultive behavior, not complying with Silver Creek's rules, and not complying with the treatment program.

The district court conducted a hearing at which the state presented evidence from Niles and Ray Dunfee, a case manager in charge of admissions and discharge at Silver Creek. Dunfee testified that he knew about Richards's conduct because he had read a report prepared by staff members. The staff members were not present during the alleged assault, and the report was based on interviews with the residents involved. Their stories independently corroborated one another, but the residents wanted to remain anonymous. Dunfee testified that he had interviewed the witnesses separately and that he routinely relied on similar reports. He also testified that Richards had received a copy of Silver Creek's house rules. Niles testified that Richards missed 28 treatment sessions. Richards testified that he had taken a double dose of his diabetes medicine on the day of the incident and that the drug, combined with his alcohol, caused him to black out.

The district court found that Richards committed all three alleged violations. Niles recommended that his sentence be executed because he had exhausted all other options. She opined that Richards could not remain sober and that he was ineligible for area sober-living facilities. The district court revoked Richards's probation, citing his inability to remain sober, his history of violent behavior while intoxicated, and his repeated failures at treatment. Richards appeals.

DECISION

I

Richards challenges his probation revocation, arguing that the evidence does not support the result. The district court has broad discretion to revoke probation and we will reverse the court only when it clearly abuses that discretion. *State v. Ornelas*, 675

N.W.2d 74, 79 (Minn. 2004). The district court must find “clear and convincing evidence of a probation violation” before revoking probation. Minn. R. Crim. P. 27.04, subd. 2(1)(c)b. Richards contends that the district court erred because the alleged assaults and violations of Silver Creek rules are supported only by hearsay evidence and because he lacked notice that he could not miss treatment sessions.

The state’s case against Richards relied heavily, but not exclusively, on hearsay. Hearsay is admissible in probation revocation hearings to prove a violation, provided that the defendant has an opportunity to present evidence. *State v. Johnson*, 679 N.W.2d 169, 174 (Minn. App. 2004); *see also* Minn. R. Evid. 1101(b)(3). The district court avoids overreliance on hearsay by weighing it against the other evidence presented. *Id.* We are not persuaded by Richards’s argument that the hearsay evidence is unreliable. Dunfee gave the primary evidence regarding the assault, and his testimony relied on a staff report based on statements from residents. Dunfee testified that the witnesses’ stories were consistent and that he regularly relied on similar reports. Richards did not contradict the reports of his alleged assault. He testified instead that he had blacked out after drinking and taking an overdose of his medication. The district court properly admitted the hearsay evidence, allowed Richards to present any contrary evidence, and concluded that, “based on the testimony that was presented,” Richards had violated his probation. That the district court credited Dunfee’s testimony does not reflect an abuse of discretion.

Richards next argues that he lacked notice that missing treatment sessions could constitute a violation because the district court did not impose an attendance requirement. Due process mandates that a defendant have notice of probation conditions where

noncriminal conduct could lead to revocation. *Ornelas*, 675 N.W.2d at 80; Minn. R. Crim. P. 27.03, subd. 4(E)(4). Richards was on notice that he must complete a treatment program and abide by its terms and conditions. The requirement to complete a treatment program necessarily includes attending the program's sessions, and extensive absences from a program where attendance is expected prevents completion. Notice of the treatment requirement was therefore sufficient notice of an attendance requirement. As best we can surmise from the record, Richards missed approximately 28 out of 48 possible sessions, or roughly 58%, during a sixteen-week period. Richards had sufficient notice of the condition, and we hold that the district court did not abuse its discretion by finding that he violated it.

II

Richards also argues that the district court abused its discretion by executing his sentence. The district court has discretion to revoke probation if it finds that the defendant violated a condition of probation, the violation was intentional or inexcusable, and the need for confinement outweighs the policy favoring probation. *State v. Austin*, 295 N.W.2d 246, 249–50 (Minn. 1980). The district court found that Richards committed three probation violations that were either intentional or inexcusable, or both. The third *Austin* factor requires the district court considering revoking probation to find

on the basis of the original offense and the intervening conduct of the offender that:

- (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

Id. at 251 (emphasis added) (quotation omitted).

Richards argues that because he is a threat to the public only while he is intoxicated, the district court abused its discretion by not giving him an opportunity to attempt sober living before revoking his probation. The state never required him to live sober during probation, but Niles testified that Richards was incapable of sobriety and was barred from the local “dry” halfway houses. Treatment during probation gave him a reasonable opportunity to avoid intoxicated, assaultive behavior. His willful unexcused absences from treatment persuaded the district court that Richards could best be treated only while incarcerated. The district court considered the nature of Richards’s recent conduct in light of his originating offense. His probation stemmed from a charge of second-degree assault with a deadly weapon, and his violative conduct was similar to that offense. The district court recognized that Richards is not a threat while sober, but it concluded reasonably that his chronic insobriety makes him a threat. We conclude that the district court did not abuse its discretion by finding that incarceration outweighed the policy favoring probation under *Austin*, and we affirm.

Affirmed.