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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0629**

State of Minnesota,
Respondent,

vs.

Kirk Edward Wolhart,
Appellant.

**Filed November 6, 2017
Affirmed
Kalitowski, Judge***

Ramsey County District Court
File No. 62-CR-14-1492

Lori Swanson, Attorney General; and

John J. Choi, Ramsey County Attorney; and Adam E. Petras, Assistant County Attorney,
St. Paul, Minnesota (for respondent); and

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Schellhas, Judge; and
Kalitowski, Judge.

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

UNPUBLISHED OPINION

KALITOWSKI, Judge

On appeal from the order revoking his probation, appellant Kirk Edward Wolhart argues that the district court erred in considering his amenability to probation as part of its analysis of the *Austin-Modtland* factors. Alternatively, appellant argues that the district court erred in its analysis by failing to explicitly address the second *Austin-Modtland* factor before revoking his probation. We affirm.

DECISION

District courts have “broad discretion in determining if there is sufficient evidence to revoke probation”; we reverse only if the district court commits a clear abuse of that discretion. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005) (citing *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980)). But whether a district court ‘has made the [appropriate] findings required under *Austin* presents a question of law, which is subject to de novo review”. *Id.*

I.

Appellant argues that the district court created a new standard for revoking his probation based on his amenability to probation, rather than the *Austin-Modtland* factors. Appellate courts generally do not consider issues not raised in the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). During appellant’s disposition hearing following his third probation violation his counsel explicitly argued *in favor of* the district court’s consideration of appellant’s amenability to probation: “[T]he issue is whether or not [Wolhart] is actually or [...] amenable to probation...” Appellant failed to object to or

challenge the district court's consideration of his amenability to probation. Therefore, we determine that appellant has forfeited this issue.

Although appellant failed to object to the district court's consideration of his amenability to probation, the plain-error rule provides this court with discretion to review an unobjected-to error. Minn. R. Crim. P. 31.02 ("Plain error affecting a substantial right can be considered by the court . . . on appeal even if it was not brought to the [district] court's attention."). Applying the plain-error standard, appellant's argument fails.

The plain-error standard requires a showing of: (1) error; (2) that was plain; and (3) that affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). The appellant bears the burden of proof on the third factor. *Id.* at 741. "An error is plain if it is clear and obvious; usually this means an error that violates or contradicts case law, a rule, or an applicable standard of conduct." *State v. Matthews*, 779 N.W.2d 543, 549 (Minn. 2010).

Appellant cites to no authority holding that a district court's consideration of amenability to probation constitutes plain error. Further, the district court routinely considers a defendant's amenability to probation as part of its analysis of the third *Austin* factor. See *State v. Fleming*, 869 N.W.2d 319, 331 (Minn. App. 2015) (upholding a probation revocation where the district court found that the defendant "was not amenable to probation" in reference to the third *Austin* factor) SM 2.11(C.) *aff'd*, 883 N.W.2d 790 (Minn. 2016). Therefore, the district court's consideration of appellant's amenability to probation did not constitute a plain error.

If a reviewing court finds that any one of the requirements of the plain-error rule is not satisfied, it need not address any of the others. *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011). Because the district court’s consideration of appellant’s amenability to probation did not constitute a plain error, we need not address whether it affected appellant’s substantial rights.

II.

Appellant next argues that the district court erred by not expressly finding under the second *Austin-Modtland* factor: that his termination from sex-offender treatment was intentional or inexcusable before revoking his probation. Prior to revoking probation, a district court must: (1) specifically identify the probation condition violated; (2) “find that the violation was intentional or inexcusable”; and (3) find that public policy favoring probation does not outweigh the need for confinement. *Austin*, 295 N.W.2d at 250.

District courts cannot satisfy the *Austin Modtland* factors by merely reciting the factors and offering general, non-specific reasons for a revocation; and “it is not the role of [this court] to scour the record to determine if sufficient evidence exists to support the district court’s revocation”. *Modtland*, 695 N.W.2d at 608. Rather the district court must convey its substantive reasons for revocation and the evidence it relies on. *Id*; see also Minn. R. Crim. P. 27.04, subd. 3(3) (“[A] verbatim record must be made of the probation revocation hearing. . . .”). In *Modtland*, the Minnesota Supreme Court reversed the district court’s probation revocation decision and remanded for reconsideration because the district court failed to consider the second and third *Austin* factors before it revoked the defendant’s probation. *Modtland*, 695 N.W.2d at 608.

Here, we conclude that the record indicates that the district court made specific findings that appellant's actions were intentional and inexcusable. The district court commented on appellant's understanding of and competency to make the choices that led to three probation violations. The district court also noted that appellant's dismissal from sex-offender treatment—his third probation violation—stemmed from appellant's continued pattern of intentionally refusing to accept responsibility for his actions. Although the district court did not explicitly use the words “intentional” and “inexcusable,” the substance of its reasoning and the evidence it reviewed in making the decision to revoke appellant's probation support the court's finding that appellant's violation was intentional and inexcusable.

Although it is preferable that the district courts make explicit findings for each *Austin-Modtland* factor, this court's de novo review of the record reveals that the findings made by the district court here appropriately addressed the requirements of *Austin-Modtland*. Therefore, the district court did not clearly abuse its discretion by revoking appellant's probation.

Affirmed.