

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1336**

State of Minnesota,
Respondent,

vs.

Ashley Rose Askvig,
Appellant.

**Filed September 7, 2021
Reversed
Rodenberg, Judge***

Olmsted County District Court
File No. 55-CR-18-5356

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

Mark A. Ostrem, Olmsted County Attorney, James E. Haase, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Abigail H. Rankin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Slieter, Judge; and Rodenberg, Judge.

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

NONPRECEDENTIAL OPINION

RODENBERG, Judge

Appellant Ashley Rose Askvig challenges the district court's determination that she violated the conditions of probation imposed following an agreed-upon stay of adjudication. Because the district court erred by concluding that appellant violated her probation based solely upon an incident that preceded the stay of adjudication, we reverse.

FACTS

In December 2018, appellant pleaded guilty to misdemeanor domestic assault. The district court withheld adjudication on the matter and released appellant subject to presentence-supervision conditions. Among other conditions, appellant was required to remain law abiding and commit no same or similar offenses. Sentencing was scheduled for June 2019.

In May 2019, appellant's daughter called 911 and reported that appellant struck her on the right side of her face. A police officer responded to the call and met appellant's daughter in a public location. Appellant's daughter told the officer that appellant struck her in the face while she was driving appellant home. The state charged appellant with malicious punishment of a child and two counts of domestic assault.

In June 2019, appellant appeared for sentencing on the 2018 domestic-assault charge. Her counsel requested a continuance, with the hope of resolving both cases. The district court set a hearing to address both cases in August 2019, but appellant failed to appear at the August hearing.

Appellant appeared before the district court in September 2019 for a sentencing hearing on the 2018 domestic-assault charge. Appellant's counsel informed the district court that the parties had not been able to resolve both files and requested that the district court stay adjudication on the 2018 domestic-assault charge. The prosecutor supported defense counsel's request for a stay of adjudication. The district court stayed adjudication for two years and placed appellant on probation with the same terms and conditions as her presentence supervision. The May 2019 charges were set for trial in January 2020.

Appellant's daughter failed to appear for trial in January 2020. The state ultimately dismissed the charges from the May 2019 incident because of appellant's daughter's nonappearance. In February 2020, the state alleged that appellant had violated her probation on the 2018 domestic-assault charge by striking her daughter in May 2019. Appellant requested a contested probation-violation hearing.

The parties appeared for a contested probation-violation hearing in September 2020. At the hearing, the state called the police officer who responded to appellant's daughter's report in May 2019 to testify. Appellant's counsel objected to the officer's testimony concerning the daughter's statements, arguing that admission of those statements would violate appellant's constitutional right to confront witnesses against her. The district court overruled the objection. The officer testified that he spoke with appellant's daughter and recorded the interview with a body-worn camera. The state played the video of the interview. The officer testified that appellant's daughter said that appellant hit her "[o]n the right side of her face."

The prosecutor requested that the district court “find that [appellant] was not law-abiding during her period of probation, specifically on May 1, 2019, when she assaulted her daughter.” The prosecutor reiterated that appellant’s daughter failed to appear despite a subpoena for a trial concerning the May 2019 alleged assault. The prosecutor requested that the district court find that appellant violated the terms of the probation after stay of adjudication, revoke the stay, and sentence appellant on the 2018 domestic-assault charge. The district court found “that there has been a failure to remain law-abiding by Ms. Askvig during her probationary period.” The district court revoked appellant’s stay of adjudication, stayed imposition of sentence, and placed appellant back on probation with additional terms.

This appeal follows.

DECISION

Appellant argues that the district court erred by concluding that she had violated the terms on which the district court had stayed adjudication based on a violation that occurred before she was placed on probation. She also argues that the district court abused its discretion at the probation-violation hearing by admitting her daughter’s statements to the police officer over her objection. We do not reach appellant’s second argument because our decision on the first resolves this appeal in whole.

Appellant did not argue to the district court at the probation-revocation hearing that the alleged violation occurred before she was placed on probation. The state argues that we should therefore decline to consider the argument on appeal.

We generally do not consider issues not presented to the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). But, under Minnesota Rule of Criminal Procedure 31.02, a “[p]lain error affecting a substantial right can be considered by the court . . . on appeal even if it was not brought to the trial court’s attention.”

Because appellant did not raise this argument before the district court, we review for plain error. *State v. Beaulieu*, 859 N.W.2d 275, 279 (Minn. 2015). To prevail on such review, appellant must establish (1) an error, (2) that is plain, and (3) that affected her substantial rights. *State v. Garland*, 942 N.W.2d 732, 750 (Minn. 2020). “An error is plain when it is clear or obvious.” *State v. Harlin*, 771 N.W.2d 46, 52 (Minn. App. 2009) (quotation omitted), *rev. denied* (Minn. Nov. 17, 2009). To show that the error affected her substantial rights, appellant must show that the error was prejudicial and influenced the outcome of the case. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). If appellant establishes all three elements, we will then consider whether we “should address the error to ensure fairness and the integrity of the judicial proceedings.” *Garland*, 942 N.W.2d at 750 (quotation omitted).

“[B]efore a probation violation can occur, the condition alleged to have been violated must have been a condition actually imposed by the court.” *State v. Ornelas*, 675 N.W.2d 74, 80 (Minn. 2004); *see also* 9 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice—Criminal Law & Procedure* § 36-60 (4th ed. 2020) (explaining that if “a condition was not actually and properly imposed, no violation can result even if the defendant believes and admits that it was a condition of probation”).

The state argues that, because the conditions of both appellant's presentence release and her probation after the stay of adjudication included a requirement that appellant remain law-abiding, we should refrain from considering appellant's timing argument.

First, as discussed above, a probation violation can only be found when the violation is of a condition actually imposed. The district court stayed adjudication in September 2019 on conditions then identified. It is axiomatic that a probation violation cannot be found based on conduct that precedes the imposition of the condition. That both appellant's presentence release and the terms of her stay of adjudication included a remain-law-abiding condition is both common and irrelevant to the argument appellant makes on appeal. If the state's position were accepted, any probationer subject to pretrial- or presentence-release conditions who violates those conditions and is later sentenced would be subject to having her probationary sentence later revoked for conduct that preceded the sentencing. The proper mechanism for addressing pretrial- or presentence-release violations is to bring the defendant before the district court for resolution of the alleged release-condition violation. *See* Minn. R. Crim. P. 6.03 (2020) (providing procedures for arrest, hearing, and modification of release conditions in the event of a violation of pretrial-release conditions).

Second, and perhaps even more fundamentally, it is clear from the record that the state and the district court were aware at the time of appellant's September 2019 sentencing that appellant was alleged by her daughter to have committed criminal offenses in May 2019. The state charged appellant with multiple crimes based on that incident. Nevertheless, and fully aware of the May 2019 conduct, the state agreed in September 2019 to a stay of adjudication in this case and the May charges were set for trial several months

later. If, as the state now argues, the May 2019 incident should have been considered as disqualifying appellant from a stay of adjudication, the state could and should have made that argument then and not agreed to the stay of adjudication.

Here, the district court erred by finding that appellant's conduct in May 2019 violated the conditions of a probation that incepted in September 2019. That error is plain.

Appellant argues that this error affected her substantial rights because the May 2019 incident was the "sole alleged violation," but for which "the court would not have revoked [her] stay of adjudication and entered a conviction." "An error affects substantial rights if the error is prejudicial—that is, if there is a reasonable likelihood that the error substantially affected the verdict." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002).

Appellant easily meets this burden. The sole basis upon which the district court revoked appellant's stay of adjudication was the alleged May 2019 assault. The error was obviously prejudicial to appellant and affected her substantial rights.

Appellant finally argues that we must address and correct this error because allowing her to be convicted of an offense based solely on conduct that occurred before she was placed on probation "would undermine the judicial branch's commitment to due process and would erode its integrity and reputation." We agree. A probation revocation that rests solely upon a probationer's conduct that precedes the imposition of the probationary sentence must be addressed to protect the "integrity or public reputation of judicial proceedings." *Beaulieu*, 859 N.W.2d at 279 (quotation omitted). A probationer cannot violate the terms of her probation for an incident that occurred before she was put on probation. Allowing appellant's conviction to stand on this basis would violate her right

to due process of law. *See Ornelas*, 675 N.W.2d at 80 (concluding probationers cannot be subjected to forfeiture of liberty without being given fair warning). Accordingly, we conclude that reversal of the district court's erroneous imposition of a criminal conviction is necessary to ensure the fairness and integrity of the judicial proceedings.¹

Reversed.

¹ Because we reverse appellant's conviction, appellant's stay of adjudication is reinstated. *See Ornelas*, 675 N.W.2d at 81 (reversing determination that appellant violated probation and returning appellant to previous probationary status).