

*This opinion is nonprecedential except as provided by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
A20-1420**

State of Minnesota,
Respondent,

vs.

Joseph Harold Specht,
Appellant.

**Filed August 23, 2021
Affirmed; motion granted
Johnson, Judge**

Lac Qui Parle County District Court
File No. 37-CR-17-153

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

Richard G. Stulz, Lac Qui Parle County Attorney, Madison, Minnesota; and

Travis J. Smith, Special Assistant County Attorney, Slayton, Minnesota (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Worke, Judge; and Gäitas,
Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

In 2017, Joseph Harold Specht was convicted of second-degree criminal sexual
conduct. The district court imposed a prison sentence but stayed execution of the sentence

and placed Specht on probation. In 2020, Specht's probation agent alleged that he had violated conditions of his probation. After a hearing, the district court found that Specht committed four violations and, as a consequence, revoked his probation and executed his sentence. We affirm.

FACTS

In July 2017, the state charged Specht with second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(a) (2016). The complaint alleged that Specht touched the genital area of a 10-year-old friend of his daughter during a sleepover at Specht's home. In November 2017, Specht pleaded guilty pursuant to *State ex rel. Norgaard v. Tahash*, 110 N.W.2d 867 (Minn. 1961), based on his statement that he was intoxicated at the time of the incident. The district court imposed a sentence of 36 months of imprisonment but stayed execution of the sentence for 20 years, ordered Specht to serve 120 days in jail, and placed him on probation, with conditions.

In July 2020, Specht's probation agent alleged that Specht had committed three violations of the conditions of his probation. Specifically, the probation agent alleged that Specht failed to complete a sex-offender treatment program, accessed and possessed pornography, and failed to disclose all of his internet-accessible electronic devices. Using monitoring software installed on Specht's cell phone, the agent found more than 80 photographs of Specht's genitalia, chest, and a sex toy, as well as sex-related text messages from Specht to his wife. The agent also found two photographs of Specht's daughter that were pointed toward her groin area, which was clothed. The agent also found several photographs and a video-recording of his three minor children and two minor nieces at a

public pool, with other children in the background, which indicated that Specht had had unsupervised contact with minors.

That same month, Specht was terminated from an outpatient sex-offender treatment program. Specht's treatment provider terminated his treatment because he had been "engaging in hypersexual, high-risk behavior, which he has been withholding from treatment," and because his "unhealthy behavior, secret-keeping and 'double life' parallel his pattern of sexual offending, and place him at an increased risk to the community." Specht's treatment provider stated that Specht "does not seem to possess the internal motivation to change at the present time" but could resume treatment after receiving "behavioral consequences."

The district court conducted a revocation hearing in late July 2020. The probation agent testified about each of the alleged violations. Specht admitted that he had not completed sex-offender treatment but denied the other alleged violations. After the hearing, the district court filed an order in which it found that Specht intentionally and inexcusably violated the conditions of his probation in four ways: "[1] by failing to complete the sex-offender treatment program, [2] by possessing pornographic material on his phone, [3] by having unsupervised contact with juvenile females, and [4] by using his daughter's smart phone to access the internet."

The district court conducted a dispositional hearing in August 2020. The district court orally found that "the need for confinement outweighs the policies favoring probation." The district court revoked Specht's probation and executed his sentence. Specht appeals.

DECISION

Specht argues that the district court erred by revoking his probation. His argument has two main parts. He first challenges two of the district court's four findings of violations of probation conditions. He then challenges the district court's decision to revoke his probation based on the premise that only two of the violations are valid.

If a probationer violates one or more conditions of probation, a district court may either continue the probationer on probation or revoke probation and execute the underlying sentence. Minn. R. Crim. P. 27.04, subd. 3(2)(b)(iv)-(v). The supreme court has prescribed a three-step analysis for deciding whether to revoke probation. A revocation is proper only if a district court (1) designates the specific conditions of probation that have been violated, (2) finds that the violations were "intentional or inexcusable," and (3) finds "that need for confinement outweighs the policies favoring probation." *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980); *see also State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005). In making these findings, district courts "must seek to convey their substantive reasons for revocation and the evidence relied upon." *Modtland*, 695 N.W.2d at 608. "The trial court 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. Findings of Violations

Specht first argues that the district court erred by finding that he committed two of the four probation violations identified by the district court. Specifically, he challenges the second and third violations. He does not challenge the first and fourth violations.

1. Second Violation: Possession of Pornography

The district court imposed a condition that Specht “not access or possess pornography.” The district court found that Specht violated that condition “by possessing pornographic material on his phone.” Specht argues that the condition is unconstitutional as applied to his sharing photographs of himself with his wife.

In response, the state argues that Specht did not preserve this argument by presenting it to the district court at the revocation hearing. The state is correct. Specht did not make a constitutional argument to the district court. Instead, Specht argued simply that the photographs of himself did not constitute pornography. “It is an elementary principle of appellate procedure that a party may not raise an issue or argument for the first time on appeal and thereby seek appellate relief on an issue that was not litigated in the district court.” *Doe 175 ex. rel. Doe 175 v. Columbia Heights Sch. Dist. No. 13*, 842 N.W.2d 38, 42 (Minn. App. 2014) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)). “[I]f an appellant fails to preserve an argument or issue in district court proceedings, the issue or argument is forfeited and may not be asserted in an appellate court.” *Id.* at 43. The preservation-or-forfeiture rule applies at a probation-revocation proceeding. *State v. Beaulieu*, 859 N.W.2d 275, 278-79 (Minn. 2015). Specht forfeited his constitutional challenge to the probation condition that prohibited him from possessing the photographs that were found on his cell phone.

In his reply brief, Specht argues in the alternative that this court should apply the plain-error rule to his constitutional arguments. See Minn. R. Crim. P. 31.02. The plain-error rule may apply to a probation-revocation proceeding. *Beaulieu*, 859 N.W.2d at 279.

But the state moved to strike the part of Specht’s reply brief that argues for plain-error review. The state contends that Specht’s plain-error argument should not be considered because it was raised for the first time in a reply brief, which effectively prevents the state from responding to Specht’s constitutional arguments.

Under the rules of appellate procedure, a reply brief must be confined to new matters raised in the respondent’s brief. Minn. R. Civ. App. P. 128.02, subd. 3. If an argument is not raised in an appellant’s principal brief and is raised for the first time in the reply brief, appellate courts will not consider the issue. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 887 (Minn. 2010); *State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009); *Hunter v. Anchor Bank, N.A.*, 842 N.W.2d 10, 17 (Minn. App. 2013), *review denied* (Minn. Mar. 18, 2014). In this case, Specht could have raised the plain-error rule in his principal brief. Doing so would have given the state an opportunity to present responsive arguments on Specht’s various constitutional theories and on each of the four requirements of the plain-error test. In the absence of any mention of plain-error review, the state reasonably refrained from arguing the merits of Specht’s constitutional arguments in its responsive brief. For this court to apply the plain-error test to Specht’s constitutional arguments would be unfair to the state because the state has not been heard on those issues, either in the district court or in this court. Accordingly, we grant the state’s motion to strike Specht’s plain-error argument from his reply brief.

Specht argues further in the alternative in his reply brief that, if this court does not analyze his constitutional arguments under the plain-error rule, the court should “construe them as a challenge to the sufficiency of the evidence and conclude that the evidence fails

to establish a probation violation.” This argument is contrary to the principle that an appellant may not make an argument for reversal in a reply brief that was not included in the principal brief. *See Hunter*, 842 N.W.2d at 17. Specht could have made a sufficiency-of-the-evidence argument in his principal brief, but he did not do so. To construe Specht’s principal brief to have raised a challenge to the sufficiency of the evidence would be unfair to the state, which justifiably did not perceive such an argument in Specht’s principal brief and, thus, did not respond to such an argument. Furthermore, the construction urged by Specht is not a reasonable construction of the first part of Specht’s principal brief. Accordingly, we decline Specht’s request to construe his principal brief in that manner.

Thus, because all of Specht’s arguments are not properly raised, we conclude that the district court did not err by finding that Specht violated a condition of his probation by possessing pornography on his cell phone.

2. Third Violation: Unsupervised Contact with Minors

The district court imposed a condition that Specht have “no unsupervised contact with unrelated female minors.” The district court found that Specht violated that condition “by having unsupervised contact with juvenile females.” The district court’s finding is based on Specht’s statements; the photographs on Specht’s cell phone indicating that he was at a public pool with his children, his sister’s children, and other children; and on the probation agent’s testimony about the photographs and the restrictions that were imposed on Specht.

Specht argues that he did not violate the condition because his nieces are not “unrelated” to him. Specht’s probation agent testified that, based on her review of the

photographs found on Specht's cell phone, Specht was at a public pool with his own children and his nieces as well as other children who are not related to him. The photographs were introduced into evidence as exhibits, and they are consistent with the probation agent's testimony. Specht's argument ignores the evidence that children other than his own children and his sister's children were present at the public pool when he was present there.

Thus, the district court did not err by finding that Specht violated a condition of his probation by having unsupervised contact with unrelated female minors at a public pool.

B. Revocation of Probation

Specht next argues that the district court erred by revoking his probation as a sanction for his violations of probation conditions.

Specht challenges the district court's determination at the third step of the *Austin* analysis that the need for confinement outweighs the policies favoring probation. See *Austin*, 295 N.W.2d at 250. A district court may find that the third *Austin* factor is satisfied if it finds that any of three sub-factors are present: (1) confinement is needed to "protect the public from further criminal activity by the offender," (2) confinement is necessary to provide treatment, or (3) a further stay of the sentence "would unduly depreciate the seriousness of the violation." *Id.* at 251 (quoting A.B.A. Standards for Criminal Justice, Probation § 5.1(a) (Approved Draft 1970)). This court applies an abuse-of-discretion standard of review to a district court's decision to revoke probation. *Id.* at 249-50.

The district court found that all three sub-factors support revocation. With respect to the first sub-factor, the district court found that confinement is necessary to protect the

public. The district court determined that, after Specht's first sex offense, he was given multiple opportunities for sex-offender treatment but did not complete the treatment program. The district court noted that Specht was given another chance to complete sex-offender treatment after his second offense but did not make progress. The record supports the district court's analysis. Specht's sex-offender therapist terminated Specht's treatment because he had engaged in "hypersexual high risk behavior" by taking graphic photographs of himself, which the therapist described as "a secret double life that parallels his sex offending behavior." The district court also stated that Specht's confinement is necessary to protect his family in light of the photographs he took of his daughter's groin area, which the district court described as "very disturbing." The photographic exhibits support the district court's concerns.

With respect to the second sub-factor, the district court found that Specht needs treatment that can be provided most effectively in prison. The district court found that Specht demonstrated "either an unwillingness or an inability to complete a program on the outside." The record supports the district court's finding. As noted, Specht was given multiple opportunities to complete a sex-offender treatment program but was unable to do so. Specht received outpatient sex-offender treatment for two years but still was in the primary portion of treatment. Specht's probation agent testified that she was concerned about Specht's behavior because it was recent, despite his familiarity with treatment. Specht's treatment provider testified that Specht "does not seem to possess the internal motivation to change at the present time, and he would benefit from an external motivator, such as behavioral consequences."

With respect to the third sub-factor, the district court found that it would unduly depreciate the seriousness of the violations if Specht's probation were not revoked. The district court described Specht's violations as "very serious." Specht's treatment provider described his behavior as "hypersexual" and "high risk." Specht's probation agent similarly described his behavior as "escalating" and stated that his lack of treatment places him at "an increased risk to the community." The facts in the record support the conclusion by the district court that continued probation would unduly depreciate the seriousness of the violation.

In sum, the district court did not err by revoking Specht's probation and executing his prison sentence in response to his four violations of the probation conditions.

Affirmed; motion granted.