This opinion is nonprecedential except as provided by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
A22-0352

State of Minnesota,
Respondent,

vs.

Suavay Pierre Sidney,
Appellant.

Filed December 5, 2022
Affirmed
Bratvold, Judge

Ramsey County District Court
File No. 62-CR-20-4116

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

John Choi, Ramsey County Attorney, Alexandra Meyer, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Bratvold, Presiding Judge; Cochran, Judge; and Hooten, Judge.[*]

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

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this direct appeal from a judgment of conviction for second-degree assault, appellant challenges the district court's denial of his motion for a downward dispositional departure from the presumptive sentence. Appellant raises one issue: whether the district court violated due process by considering unreliable hearsay in the presentence-investigation (PSI) report[1] before imposing a presumptive prison sentence of 60 months. We affirm.

FACTS

In June 2020, appellant Suavay Pierre Sidney pulled out a firearm and fired one shot during an argument with his ex-girlfriend. On the first day of his scheduled jury trial, Sidney pleaded guilty to second-degree assault with a dangerous weapon under Minn. Stat. § 609.222, subd. 1 (2018). In the plea agreement, the state agreed to dismiss three other counts and that Sidney could move for a downward dispositional departure. The district court deferred acceptance of Sidney's guilty plea, ordered a PSI report, and set a sentencing date.[2]

[1] This opinion uses the term "PSI report" to refer to the presentence-investigation report described in both Minn. Stat. § 609.115 and Fed. R. Crim. P. 32(d). For purposes of this opinion, they are equivalent.

[2] Shortly after the plea hearing, Sidney moved to withdraw his guilty plea. After a hearing, the district court determined that "it would not be fair and just to allow Sidney to withdraw his guilty plea" and denied the motion.

The PSI report summarized the "official version" of ten prior convictions, including six domestic-violence-related offenses. The PSI report discussed mitigating factors including the victim's statement that Sidney "made a mistake," and she "would not like to see him go to jail," and his probation officer's recommendation that he be continued on probation. The PSI report noted that Sidney's presumptive sentence under the Minnesota Sentencing Guidelines (guidelines) was 60 months, with a range of 52 to 71 months. The PSI report recommended an executed guidelines sentence of 60 months.

Before the sentencing hearing, Sidney moved for a downward dispositional departure, arguing that he was "particularly amenable to treatment" under "probationary supervision." Sidney cited his probation officer's statement that he was "very much" supportive of a dispositional departure; Sidney's ongoing participation in a domestic-violence program; the support of a former girlfriend (the mother of his youngest son); and Sidney's desire "to change" and "to learn healthier, more respectful, and respectable relational skills." Sidney attached a letter from his therapist stating that individual therapy would "be more conducive to lasting prosocial changes in [Sidney's] life than a correctional response" and a letter from his former girlfriend stating that it would "change a lot in [Sidney's] children's lives to not have him around like they do now."

At the sentencing hearing, the district court began by asking the parties if they had "additions or corrections" to the PSI report—they had none. The prosecuting attorney opposed Sidney's motion, relying on Sidney's seven prior felony convictions, of which six involved domestic violence, the escalation of Sidney's violent behavior as shown by his use of a gun in the current offense, and Sidney's past failures on probation. The prosecuting

attorney argued that Sidney's "ongoing pattern of violence and harassment," despite being given "a number of chances . . . to better himself," proves "he's not particularly amenable to probation." Arguing for a dispositional departure, Sidney's attorney contended that the probation officer's and therapist's statements show Sidney "is amenable to probation" and asked the district court to recognize "that he is trying to change."

The district court denied Sidney's motion for a downward dispositional departure, accepted the guilty plea, and imposed a sentence of 60 months in prison. When discussing Sidney's motion, the district court determined that Sidney failed to show he was "particularly amenable to probation" and cited three reasons. First, the district court identified Sidney's history of felony domestic-violence-related offenses, some of which, "including this case," involved repeat victims. Although the district court acknowledged the victim's request that Sidney be released on probation, the district court stated its public-safety concern that if Sidney was put on probation, "there will be somebody else that becomes a victim."

Second, the district court referred to Sidney's "past performance on probation" involving "at least two or more probation violations" and noted that Sidney was "on probation at the time that [he] committed this offense." Third, the district court stated that, along with Sidney's criminal history, it was persuaded "probably more than anything else" by the "circumstances of this offense," which showed an "escalation in [Sidney's] behavior." The district court observed that this offense, "for the first time in [Sidney's] history, involved a firearm," the "actual discharge of a firearm," and that Sidney's conduct endangered the victim and other bystanders.

Sidney appeals.

DECISION

The Minnesota Sentencing Guidelines establish presumptive sentences for felony offenses. Minn. Sent'g Guidelines 2.C.1 (Supp. 2019). The district court must impose the presumptive sentence unless "there exist identifiable, substantial, and compelling circumstances to support a departure." Minn. Sent'g Guidelines 2.D.1 (Supp. 2019). Under such circumstances, the district court "may depart from the presumptive disposition or duration." *Id.* "A dispositional departure places the offender in a different setting than that called for by the presumptive guidelines sentence," *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016)—in most cases, probation instead of prison. A downward dispositional departure may be warranted if the defendant is "particularly amenable to probation." Minn. Sent'g Guidelines 2.D.3.a.(7) (Supp. 2019). When determining a defendant's particular amenability to probation, the district court may consider the defendant's age, prior record, remorse, cooperation, attitude in court, and the support of friends and family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

The district court has "great discretion in the imposition of sentences." *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014). Even if there are grounds that would justify departure, appellate courts will "not ordinarily interfere" with a presumptive sentence.[3]

[3] Although the PSI report, the district court, and the parties refer to Sidney's presumptive sentence under the guidelines, we note that Minn. Stat. § 609.11 (2018) applies to Sidney's sentence. *See* Minn. Sent'g Guidelines 2.E.2.b (Supp. 2019). Section 609.11 provides a mandatory minimum sentence for defendants convicted of second-degree assault who "had in possession or used . . . a firearm." Minn. Stat. § 609.11, subd. 5(a) (referring to the offenses listed in subdivision 9, which include second-degree assault). Even if an offender

State v. Bertsch, 707 N.W.2d 660, 668 (Minn. 2006). Only "a rare case" will warrant reversal of the district court's refusal to depart. *Id.*

Sidney argues that the district court erred by denying his departure motion based on hearsay in the PSI report. Sidney claims the descriptions of his past convictions in the PSI report are "inflammatory blurbs" consisting of unreliable hearsay. Sidney also contends that the Due Process Clause limits the district court's consideration of unreliable hearsay at sentencing. The state responds that "there is no rule, statute, or case restricting the PSI writer's recitation of a defendant's criminal history to direct quotations from prior court proceedings or other nonhearsay information."

We begin by addressing our standard of review. In his brief to this court, Sidney contends that "both abuse-of-discretion and plain-error standards apply to this appeal." We generally review a district court's sentencing decision for abuse of discretion. *Soto*, 855 N.W.2d at 307-08. But we review an unobjected-to error under the plain-error standard. *Moore v. State*, 945 N.W.2d 421, 433 (Minn. App. 2020) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)), *rev. denied* (Minn. Aug. 11, 2020). In his brief, Sidney concedes that during the district court proceedings, he did not object to the hearsay included in the PSI report and argues for reversal only under the plain-error standard. Because Sidney's brief articulates no claim that the district court abused its discretion by

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would receive a stayed sentence under the guidelines, the presumptive disposition is prison commitment, absent a motion by the prosecutor or the court's own motion to disregard the mandatory minimum and substantial and compelling reasons to do so. Minn. Sent'g Guidelines 2.E.2.b; *see also* Minn. Stat. § 609.11, subd. 8.

denying his departure motion, we review Sidney's appeal solely under the plain-error standard.

The plain-error standard requires four steps: (a) there must be an error; (b) the error must be plain; (c) the error must affect substantial rights; and (d) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. *State v. Huber*, 877 N.W.2d 519, 522-23 (Minn. 2016). If the appellate court determines that any one of the plain-error steps is not satisfied, it need not address the others. *State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017). Sidney argues each of these four steps, which we discuss in turn.

A. The district court did not err by denying Sidney's departure motion based on a PSI report that included hearsay.

Under Minn. Stat. § 609.115, subd. 1(a) (2020), the district court must order a PSI report before sentencing a defendant who is convicted of a felony. "[A] presentence investigation (PSI) can include facts and details that neither the prosecution nor the defense would even consider attempting to enter as evidence at trial. Such facts may include hearsay, second-hand information, opinion, etc., always, of course, subject to the sentencing judge's evaluation of weight and credibility." *State v. McCoy*, 631 N.W.2d 446, 452 (Minn. App. 2001); *see* Minn. Stat. § 609.115, subd. 4 (2020) (stating that the PSI report may not disclose "confidential sources of information unless the court otherwise directs"). Before the sentencing hearing, the district court must provide the parties' counsel with the PSI report. Minn. Stat. § 609.115, subd. 4. After receiving the PSI report, any

party may move for a sentencing hearing to challenge or supplement the PSI report. Minn. R. Crim. P. 27.03, subd. 1(B)(6), (7)(c).

Here, it is not disputed that Sidney's PSI report included hearsay and was provided to Sidney before the sentencing hearing, and Sidney neither objected to nor rebutted the hearsay in the PSI report. Still, Sidney claims the district court erred by relying on the PSI report in denying his departure motion because the district court stated, just before it imposed Sidney's sentence, that it "adopt[ed] all the statements in the presentence report."

The Minnesota Rules of Evidence limit the admissibility of hearsay evidence, but Sidney acknowledges that these rules do not apply to ordinary sentencing hearings. *See* Minn. R. Evid. 1101(b)(3). Rather, the Minnesota Rules of Evidence apply to *Blakely* sentencing trials, in which the court or a jury considers whether aggravating sentencing factors support an upward sentencing departure. *State v. Sanchez-Sanchez*, 879 N.W.2d 324, 329-30 (Minn. 2016) (describing sentencing trials required under *Blakely v. Washington*, 542 U.S. 296 (2004)); *State v. Rodriguez*, 754 N.W.2d 672, 683-84 (Minn. 2008). Because Sidney's sentencing did not involve an upward durational departure, the Minnesota Rules of Evidence did not apply.

In *State v. Adams*, the Minnesota Supreme Court held that the introduction of hearsay evidence at a sentencing hearing did not violate Adams's due-process rights. 295 N.W.2d 527, 536 (Minn. 1980). The supreme court reasoned that due process is satisfied when the defendant receives "notice, an opportunity to be heard, confrontation and cross-examination of witnesses." *Id.* at 535 (citing *Specht v. Patterson*, 386 U.S. 605 (1967)). Because Adams had received notice of the hearsay evidence before the sentencing

hearing and cross-examined witnesses and offered evidence at the sentencing hearing, the supreme court concluded that the introduction of hearsay evidence did not violate due process. Though *Adams* involved a sentencing hearing under a now-repealed statute, *Adams* has not been overruled. *See Rodriguez*, 754 N.W.2d at 680-81 (discussing *Adams* as "instructive" and as suggesting that confrontation rights apply at jury sentencing trials). We see no reason not to follow *Adams*, and Sidney does not discuss *Adams* in his brief to this court.

Sidney relies on two cases in which the Ninth Circuit determined the district court violated an appellant's due-process rights by imposing a sentence based on unreliable hearsay in a PSI report, *U.S. v. Corral*, 172 F.3d 714, 716 (9th Cir. 1999), and *U.S. v. Huckins*, 53 F.3d 276, 280 (9th Cir. 1995). The Ninth Circuit has held that due process requires that "some minimal indicia of reliability accompany a hearsay statement" because a defendant has a "due process right not to be sentenced on the basis of materially incorrect information."[4] *Huckins*, 53 F.3d at 279 (quotation omitted). Sidney argues that "here, the

[4] Several other federal appellate courts take a different approach and have concluded that adequate due-process protections exist when a defendant has the opportunity to object and respond to the PSI report, whether or not the hearsay in the PSI report contains sufficient indicia of reliability. *See U.S. v. McDonald*, 43 F.4th 1090, 1097 (10th Cir. 2022) (concluding that the district court did not err by relying on the PSI report when the defendant only objected to the "credibility or reliability of a source or information" in the PSI report and not the facts themselves); *U.S. v. Sheridan*, 859 F.3d 579, 583 (8th Cir. 2017) ("A district court is permitted to rely on . . . uncorroborated hearsay if the defendant has the opportunity to respond to and rebut the testimony."); *U.S. v. Beckles*, 565 F.3d 832, 844 (11th Cir. 2009) ("Facts contained in a PSI are undisputed and deemed to have been admitted unless a party objects to them before the sentencing court with specificity and clarity." (quotation omitted)).

error is the same as in *Corral* and *Huckins* [because] the district court based its decision to deny [his] departure motion . . . on unreliable hearsay."

We disagree. *Corral* and *Huckins* are not analogous to Sidney's case, and even if they were, the caselaw is not persuasive. In *Corral*, the PSI report included a codefendant's statement that Corral was the "right hand man" of the conspiracy leader. 172 F.3d at 715. At sentencing, Corral objected to the codefendant's statement as unreliable hearsay, but the district court overruled the objection, denied Corral's downward-departure motion, noted that Corral was "quite active" in the conspiracy, and followed the sentencing recommendation in the PSI report. *Id.* On appeal, the government conceded that the codefendant's statement was unreliable hearsay and argued the district court did not rely on the hearsay when imposing Corral's sentence. *Id.*

In *Huckins*, both the government and Huckins objected, at sentencing, to the PSI report, which included an accomplice's uncorroborated statements that Huckins was armed and a similar statement from a witness who "believed" Huckins was armed. 53 F.3d at 278. Despite the government's concession that its investigation produced no firearms that Huckins allegedly possessed, the district court relied on the PSI report in determining that Huckins probably had a gun and then departed upwards from the guidelines sentencing range. *Id.* at 278-79. After concluding that the district courts relied on unreliable hearsay when sentencing Corral and Huckins, the Ninth Circuit vacated both sentences. *Corral*, 172 F.3d at 716-17; *Huckins*, 53 F.3d at 280.

We do not find this caselaw helpful, however, because Sidney's case materially differs from *Corral* and *Huckins* in at least two ways. First, Sidney did not object to the

hearsay in the PSI report, as did Corral and both parties in *Huckins*. Second, the state does not concede the unreliability of the hearsay in Sidney's PSI report, as the government did in *Corral* and *Huckins*. Nor has Sidney established that the hearsay was unreliable or incorrect. Because the Ninth Circuit's rule focuses on whether the hearsay is "materially incorrect," and this record does not show the hearsay in Sidney's PSI report was incorrect, we are not persuaded by *Corral* or *Huckins*.[5]

Sidney claims that "Minnesota Courts adopted" the Ninth Circuit's requirement that some minimal indicia of reliability accompany a hearsay statement in a PSI report, based on this court's decision in *State v. Rodriguez*, 738 N.W.2d 422, 430 (Minn. App. 2007), *aff'd on other grounds*, 754 N.W.2d 672 (Minn. 2008). We disagree. In *Rodriguez*, this court cited the Ninth Circuit rule about hearsay in PSI reports when deciding whether to extend a defendant's right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004), to jury sentencing trials. *Rodriguez*, 738 N.W.2d at 429-31. We did not cite the Ninth Circuit caselaw in the context of admitting hearsay evidence at ordinary sentencing hearings. Moreover, the Minnesota Supreme Court granted review in *Rodriguez* and did not cite to or rely on Ninth Circuit caselaw. *See Rodriguez*, 754 N.W.2d 672. Thus, we decline to conclude that Minnesota has adopted the Ninth Circuit's minimal-indica-of-reliability standard.

[5] Finally, as discussed below in more detail under the third step of the plain-error test, the district court did not base Sidney's sentence on hearsay included in the PSI report, unlike the district courts in *Corral* and *Huckins*.

Following *Adams*, 295 N.W.2d at 535, we conclude that no due-process violation occurred. Sidney received the PSI report and did not object to the hearsay included or request to supplement the report. Under similar circumstances, this court has held that a "failure to contest hearsay information in the presentence investigation at sentencing results in forfeiture of consideration of the issue on appeal." *State v. Barber*, 372 N.W.2d 783, 785 (Minn. App. 1985), *rev. denied* (Minn. Sept. 19, 1985). But even if we assume this issue was not forfeited, we conclude that no due-process violation occurred because Sidney had notice of the hearsay in the PSI report, an opportunity to challenge or supplement the PSI report, and an opportunity to be heard at the sentencing hearing.

B. The district court did not plainly err by denying Sidney's departure motion after considering hearsay in the PSI report.

Because we have rejected Sidney's argument that a due-process violation occurred, Sidney has failed to satisfy the first step of plain-error review, and we could end our analysis. *See Lilienthal*, 889 N.W.2d at 785. Even if we assume error, however, Sidney must establish that the error is plain. An error is plain if "it is clear or obvious; usually this means an error that violates or contradicts caselaw, a rule, or an applicable standard of conduct." *State v. Vang*, 847 N.W.2d 248, 261 (Minn. 2014).

Above, we have explained that Minnesota caselaw does not support Sidney's claim of plain error. Sidney nevertheless argues that the district court plainly erred. First, Sidney cites to *State v. Nowacki*, 880 N.W.2d 396 (Minn. App. 2016), to argue that we "extended the protections against unreliable hearsay to probation-revocation proceedings," which are "analogous to sentencing proceedings." But *Nowacki* involved polygraph tests, which are

distinct from hearsay evidence in a PSI report. Polygraph testing "has not been proven reliable," and in *Nowacki*, we extended "longstanding" exclusions on the use of polygraph results at trial to probation-revocation proceedings. 880 N.W.2d at 400-01. By contrast, the general prohibition on hearsay evidence at trial is subject to many exceptions. Minn. R. Evid. 803, 804(b). Also, the permissibility of hearsay in the PSI report is well-established under Minnesota law. *See* Minn. Stat. § 609.115, subd. 4; *McCoy*, 631 N.W.2d at 452 ("[A] presentence investigation (PSI) can include facts and details that neither the prosecution nor the defense would even consider attempting to enter as evidence at trial."). We therefore are unpersuaded by Sidney's argument that *Nowacki* is analogous.

Second, Sidney argues that the unreliability of the PSI report's descriptions of his past convictions "should have been obvious" because the descriptions did not identify a source other than "the official version." We disagree. According to statute, the PSI report may include the defendant's "criminal record and social history, the circumstances of the offense and the harm caused by it to others and to the community" as well as "confidential sources of information" that must not be disclosed without a court order. Minn. Stat. § 609.115, subds. 1, 4; *see also McCoy*, 631 N.W.2d at 452 (stating that the PSI report may include hearsay). Thus, an unidentified source in the PSI report is not an "obvious" indicator of unreliability.

We conclude that Sidney fails to show that the district court plainly erred by denying his departure motion after considering hearsay in the PSI report.

C. Sidney's substantial rights were not affected.

Even if we assume the district court plainly erred by denying Sidney's departure motion after considering hearsay in the PSI report, the error did not affect Sidney's substantial rights. An error affecting a defendant's substantial rights is one that "was prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741.

Sidney argues that the district court's decision to deny his departure motion was based on Sidney's criminal history, which is "inseverable" from the unreliable hearsay evidence in the PSI report. We disagree for two reasons. First, the district court may consider a defendant's "prior record" in deciding whether to grant a downward dispositional departure. *Trog*, 323 N.W.2d at 31. Here, the district court referred to Sidney's "criminal history" in concluding that Sidney was not particularly amenable to probation but did not mention what Sidney identifies as the "inflammatory blurbs" in the PSI report. The district court cited only very few, undisputed facts of Sidney's criminal history: Sidney's "seven prior felonies"—three of which were domestic assaults, Sidney's repeat victims, and Sidney's "two or more" probation violations.

Second, "more than anything else," the district court's denial of Sidney's departure motion was based on Sidney's use of a firearm in this offense. The district court concluded that this offense showed an "escalation in [Sidney's] behavior" because "for the first time" Sidney's criminal conduct "involved a firearm." The district court reasoned that public safety would be "better served" with Sidney in prison for "the period of time that the guidelines recommend." *See Soto*, 855 N.W.2d at 313 (stating that public safety "can be

relevant to determining whether a decision to stay a presumptively executed sentence was an abuse of discretion").

The district court's consideration of hearsay in the PSI report did not affect the sentencing outcome, and thus, Sidney's substantial rights were not affected. Because Sidney fails to establish three of the steps in plain-error review, we do not consider the fourth step.

Affirmed.