

*This opinion is nonprecedential except as provided by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
A23-0037**

State of Minnesota,
Respondent,

vs.

Aaron Morris Swenson,
Appellant.

**Filed July 31, 2023
Affirmed
Slieter, Judge**

Redwood County District Court
File No. 64-CR-20-591

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

Jenna M. Peterson, Redwood County Attorney, Redwood Falls, Minnesota; and

Travis J. Smith, William C. Lundy, Special Assistant County Attorneys, Slayton,
Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Larkin, Judge; and Slieter,
Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

Appellant challenges his sentence because the district court imposed it in his
absence and because the sentence imposed was at the top of the presumptive guidelines

range. Because the district court's error in imposing a sentence in appellant's absence is harmless beyond a reasonable doubt and imposition of the presumptive sentence was within its discretion, we affirm.

FACTS

On March 12, 2021, a jury found appellant Aaron Morris Swenson guilty of first-, second-, third-, and fifth-degree assault. The district court convicted Swenson of first-degree assault and imposed a sentence of 161 months' imprisonment, which is in the middle of the presumptive range applicable to that offense. Swenson directly appealed, and our court reversed his conviction for first-degree assault due to insufficient evidence and remanded for further proceedings on the remaining counts. *State v. Swenson*, No. A21-0848, 2022 WL 2195532, at *6 (Minn. App. June 20, 2022), *rev. denied* (Minn. Aug. 23, 2022).

On remand, the district court held a remote sentencing hearing. The state argued for a 71-month, top-of-the-box sentence on the second-degree assault count. Swenson argued for a 60-month, middle-of-the-box sentence because the district court had previously imposed a middle-of-the-box sentence for first-degree assault. At the end of the hearing, the district court "want[ed] to verify a couple of things" and "think about sentencing for just a . . . moment," and stated that it would "issue a sentencing order following the hearing here today." Later that day and without reconvening the sentencing hearing, the district court issued a sentencing order and warrant of commitment sentencing Swenson to 71 months' imprisonment.

Swenson appeals.

DECISION

I. The district court's error in sentencing Swenson *in absentia* was harmless beyond a reasonable doubt.

“A defendant’s constitutional right to be present [at trial] is grounded in the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.” *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005); *State v. Gillam*, 629 N.W.2d 440, 450 (Minn. 2001). The Sixth Amendment’s Confrontation Clause guarantees defendants the right to confront the witnesses against them, and the Fourteenth Amendment Due Process Clause guarantees defendants “the right to be present at all critical stages of trial,” when their “presence has a relation, reasonably substantial, to the fullness of [their] opportunity to defend against the charge.” *Ford*, 690 N.W.2d at 712 (quotation omitted). The Minnesota Rules of Criminal Procedure provide a similar but broader right to be present “for every stage of the trial.” Minn. R. Crim. P. 26.03, subd. 1(1); *Ford*, 690 N.W.2d at 712 (recognizing that the rule is broader than the constitutional right); *State v. Ware*, 498 N.W.2d 454, 457 (Minn. 1993) (same).

The Minnesota Rules of Criminal Procedure provide that a “defendant must be present at the sentencing hearing and sentencing, unless excused under Rule 26.03, subd. 1(3).” Minn. R. Crim. P. 27.03, subd. 2(A). Rule 26.03 also states that a defendant “must be present at arraignment, plea, and for every stage of the trial including . . . sentencing.” Minn. R. Crim. P. 26.03, subd. 1(1)(h). Exceptions to the presence requirement do not include sentencing in felony cases. *See* Minn. R. Crim. P. 26.03, subd. 1(3) (providing exceptions for corporations; misdemeanor cases; gross misdemeanor cases; and felony

cases, when the court may, “on defendant’s motion, excuse the defendant’s presence except at arraignment, plea, trial, and sentencing”), subd. 1(2) (allowing trials to “proceed to verdict” if “[t]he defendant is absent without justification after the trial starts” or if “[t]he defendant, after warning, engages in conduct that justifies expulsion from the courtroom”). Instead, the defendant in a felony case has the right to be present at the imposition of a sentence of imprisonment. *State ex rel. Shetsky v. Utecht*, 36 N.W.2d 126, 131 (Minn. 1949). Generally, we review a district court’s decision to proceed with a stage of trial in the defendant’s absence for an abuse of discretion. *See Gillam*, 629 N.W.2d at 450.

As a preliminary matter, the state argues that we should review for plain error because Swenson did not object to being sentenced *in absentia*. Plain error allows appellate review of unobjected-to, and therefore forfeited, errors that are plain, affect substantial rights, and seriously affect the fairness, integrity, or public reputation of judicial proceedings. *State v. Lilienthal*, 889 N.W.2d 780, 784-85 (Minn. 2017); *see also* Minn. R. Crim. P. 31.01 (“Any error that does not affect substantial rights must be disregarded.”). The state concedes that the district court erred but argues that the error did not affect Swenson’s substantial rights. Swenson asserts, based on *State v. Wair*, a nonprecedential opinion from this court, that the standard we must apply is whether the error was harmless beyond a reasonable doubt. No. A20-0470, 2021 WL 1082347, at *5 (Minn. App. Mar. 22, 2021), *rev. denied* (Minn. June 15, 2021); Minn. R. Civ. App. P. 136.01, subd. 1(c) (stating that nonprecedential opinions are nonbinding but may be cited as persuasive authority).

An error affected substantial rights if it “affected the outcome of the case” and “there is a reasonable likelihood that the error had a significant impact on the proceeding.” *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014) (quotation omitted). In contrast, an error is harmless beyond a reasonable doubt if the outcome of the proceeding is “surely unattributable to the error.” *State v. McInnis*, 962 N.W.2d 874, 886 (Minn. 2021) (quotation omitted). The harmless-beyond-a-reasonable-doubt standard applies to objected-to errors that implicate a constitutional right. *State v. Davis*, 820 N.W.2d 525, 533 (Minn. 2012); *State v. Beaulieu*, 859 N.W.2d 275, 278-80 (Minn. 2015) (applying plain error to unobjected-to alleged constitutional error). Because the district court ended the remote hearing immediately after indicating that it would issue a sentencing order after the hearing, it is difficult to discern if Swenson had an opportunity to object such that we should apply plain error review. However, we need not determine which standard to apply because Swenson would not be entitled to relief even if we apply the more favorable harmless-beyond-a-reasonable-doubt standard. *Little*, 851 N.W.2d at 884 (declining to resolve dispute over the standard of review which did not impact the outcome of the appeal).

Swenson argues that being sentenced *in absentia* was not harmless beyond a reasonable doubt because, unlike *Wair*, in which our court concluded the same error was harmless beyond a reasonable doubt, his sentence was not part of a plea agreement. *See* 2021 WL 1082347, at *5 (concluding that defendant’s absence at sentencing was harmless “because appellant was sentenced to [an] agreed-upon 94-month sentence”). We are not persuaded.

Swenson was present at his sentencing hearing and had the opportunity to present arguments for his preferred sentence, through counsel and his allocution. The only portion of sentencing during which Swenson was not present was the actual imposition of the sentence, during which he would not have been allowed to speak even if he were present. On this record, the nature of Swenson's sentence is "surely unattributable" to his absence. *McInnis*, 962 N.W.2d at 886. Therefore, Swenson is not entitled to relief.

II. The district court acted within its discretion by imposing a presumptive sentence.

Swenson argues that his top-of-the-box sentence of 71 months' imprisonment should be modified to a middle-of-the-box sentence of 60 months' imprisonment. According to Swenson, because his previous sentence of 161 months' imprisonment for the since-reversed first-degree assault conviction was a middle-of-the-box sentence, imposing a top-of-the-box sentence now is unreasonable. Legal precedent compels our disagreement.

"This court will not generally review a district court's exercise of its discretion to sentence a defendant when the sentence imposed is within the presumptive guidelines range." *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *rev. denied* (Minn. July 20, 2010); *see also State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981) (noting that only in a "rare case" will a reviewing court overturn a presumptive sentence); *State v. Freyer*, 328 N.W.2d 140, 142 (Minn. 1982) (noting that a presumptive sentence will generally not be modified "absent compelling circumstances").

In *Delk*, the defendant was initially convicted and sentenced on the most severe count of which he was found guilty and received a sentence 12 months longer than the middle-of-the-box sentence. 781 N.W.2d at 429. When the conviction underlying the sentence was reversed and the case was remanded for proceedings on the remaining counts, the defendant was convicted and sentenced on the next most severe count and received a sentence 30 months longer than the middle-of-the-box sentence. *Id.* Our court rejected the defendant’s request to “equalize” his sentence so it was in the same relative position within the presumptive range as his sentence for the more severe offense had been. *Id.* Swenson makes the same argument and, following *Delk*, we reject it.

Swenson was initially sentenced to 161 months’ imprisonment, which was in the middle of the presumptive range of 138 months to 192 months for first-degree assault.¹ After our court reversed his conviction and remanded, he was sentenced to 71 months’ imprisonment, which is at the top of the presumptive range of 52 months to 71 months for second-degree assault. Like in *Delk*, Swenson’s second sentence is not a departure, it is for a different crime, and it is significantly shorter than the sentence initially imposed. *Id.*

¹ Swenson’s presumptive sentence is increased by a three-month custody enhancement, which the parties do not dispute.

at 428. Moreover, we have reviewed the record, and this is not the rare case in which the imposition of a presumptive sentence is outside the district court's broad discretion.² *Id.*

Affirmed.

² Swenson also contends that the sentence was based on the prosecutor's statement that she "adamantly disagree[d]" with our reversal of Swenson's first-degree assault conviction and that our opinion did not "reflect the state of the law and certainly d[id] not reflect the state of the crime." Though we too are concerned with the prosecutor's comments, there is no indication they influenced the district court's sentencing decision, and they do not present the "compelling circumstances" in which we will modify a presumptive sentence. *Freyer*, 328 N.W.2d at 142. As we noted about a similar argument in *Delk*, parties are free to criticize our decisions, but prosecutors must keep in mind their responsibility "to seek justice, not merely to convict." 781 N.W.2d at 430 (quoting *Young v. United States*, 481 U.S. 787, 803 (1987)); see also Minn. R. Prof. Conduct 3.8 cmt. 1.