STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0291

State of Minnesota,
Respondent,

vs.

M.N.M,
Appellant.

Filed November 22, 2021
Affirmed; motion denied
Reilly, Judge

Hennepin County District Court
File Nos. 27-JV-20-1315, 27-CR-21-1167

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

Michael O. Freeman, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Ross, Presiding Judge; Reilly, Judge; and Jesson, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

Appellant argues that the district court abused its discretion by revoking her extended jurisdiction juvenile status and executing her stayed sentence for first-degree aggravated robbery. Appellant also argues that the district court violated her equal-protection rights. Because the district court did not abuse its discretion when it revoked

her extended jurisdiction juvenile status and executed the stayed sentence, and because appellant failed to support her equal-protection argument, we affirm. Based on this ruling, we deny respondent's motion to strike portions of appellant's reply brief as moot.

FACTS

In March 2020, the victim gave his friend, appellant M.N.M., a ride to her home. Upon arriving at appellant's home, at least three people confronted the victim and took his belongings, including his car keys. One person held an axe to the victim's neck, and another pointed a gun at him. Appellant and two other people took the victim's car. The victim later identified appellant as one of the people who robbed him.

Respondent State of Minnesota filed a juvenile delinquency petition against appellant. The petition alleged that appellant committed first-degree aggravated robbery by conspiring with others to take personal property from the victim by threatening the use of force. Appellant was 17 years old at the time of the offense, and the state filed a motion for adult certification and a notice of intent to prosecute. Appellant agreed to admit to committing the crime, and the state agreed that appellant could be designated as an extended jurisdiction juvenile (EJJ).[1] Appellant waived her right to a certification hearing and admitted facts showing that she committed the offense.

[1] "An EJJ prosecution is a blending of juvenile and adult criminal dispositions that extends jurisdiction over a young person to age twenty-one and permits the court to impose both a juvenile disposition and a criminal sentence." *State v. J.E.S.*, 763 N.W.2d 64, 67 (Minn. App. 2009) (quotation omitted). In an EJJ case, the district court imposes an adult sentence but stays the sentence "so long as the offender does not violate the provisions of the juvenile disposition and does not commit a new offense." *Id.*

The district court adjudicated appellant delinquent and placed her on supervised EJJ probation until September 2023. The district court placed appellant at Woodland Hills for inpatient treatment and imposed a stayed sentence of 58 months. The district court advised appellant that she was considered an adult because she was over 18 at the time of the hearing, and that the "prison sentence is going to be hanging out there." The district court told appellant that "if [she] couldn't make this probation work, [she was] going to Shakopee [prison] for 58 months."[2]

Appellant began her treatment at Woodland Hills in September 2020. Two months later, Woodland Hills terminated appellant's placement for failing to complete the program. The termination report reflected that there were 13 "serious incidents" in October and November 2020. In November 2020, the department of community corrections and rehabilitation filed a probation violation report alleging that appellant violated the conditions of her probation. Following a contested probation-revocation hearing, the district court issued a determination in January 2021 finding that appellant violated the terms of her probation. The district court revoked appellant's EJJ status, executed her stayed sentence, and committed her to the commissioner of corrections for 58 months.

This appeal follows.

[2] The Minnesota Correctional Facility in Shakopee (Shakopee) is a secure facility for female offenders.

DECISION

I. The district court did not abuse its discretion by revoking appellant's EJJ status and executing her stayed prison sentence.

Before revoking probation, the district court must "1) designate the specific condition or conditions that were violated; 2) find that the violation was intentional or inexcusable; and 3) find that need for confinement outweighs the policies favoring probation." *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). The *Austin* factors apply to the revocation of EJJ status. *State v. B.Y.*, 659 N.W.2d 763, 768-69 (Minn. 2003); *see also* Minn. R. Juv. Delinq. P. 19.11, subd. 3(C)(1), (2). "The [district] court has broad discretion in determining if there is sufficient evidence to revoke probation." *Austin*, 295 N.W.2d at 249-50. Without a clear abuse of that discretion, we will affirm a probation revocation order and disposition in a juvenile-delinquency case. *In re Welfare of R.V.*, 702 N.W.2d 294, 298 (Minn. App. 2005). Whether the district court made the required findings to revoke probation is a question of law, which we review de novo. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

Appellant does not challenge the district court's findings on the first *Austin* factor. But appellant argues that her violations were not intentional or inexcusable, and that the need for confinement does not outweigh the policies favoring probation.

a. Appellant's probation violations were intentional or inexcusable.

Appellant argues that the record does not support the district court's determination that her probation violations were intentional or inexcusable under the second *Austin* factor. To support revocation under this factor, the district court need only find that the violation

was intentional *or* inexcusable. *Austin*, 295 N.W.2d at 250. Here, the district court found that appellant "failed to successfully complete placement," and that this violation "was both intentional and inexcusable." The district court found that appellant "regularly exhibited concerning, disruptive and sometimes volatile behaviors which hindered her progress and success." The district court also found that Woodland Hills terminated appellant from the program over "concerns regarding the safety of both [appellant] and the other Hills clients."

These findings are amply supported by the record. At her initial intake meeting, appellant met with her probation officer and Woodland Hills staff to discuss her treatment goals and expectations. The Woodland Hills unit manager testified that appellant did well in a one-on-one setting but displayed troubling behavior and interactions with other residents. The manager described appellant as "very antagonistic" toward her peers and noted that "by the end of her stay [at Woodland Hills], she had made herself a target from the clients on the unit here for both verbal and physical assault." The manager stated that "[a]nytime [appellant] was on the unit, she needed one-to-one staffing . . . to keep both her and the others safe." Appellant spent the last 10 days of her stay separated from the rest of her peers.

The termination report also revealed that appellant did not follow the rules; ignored, attacked, and berated the staff; incited violence among her peers; and destroyed property. One time, appellant ran around the entire facility, "banging on doors of other units . . . pretty late at night" and causing a disruption. This incident required Woodland Hills staff to call the police to place appellant in restraints and return her to her own unit. Appellant

had 13 "serious incidents" in a 10-week period. These incidents included physical and verbal attacks against peers and staff, absence from required activities, disruptive behavior in the facilities, and inappropriate sexual behavior with a younger peer. The Woodland Hills program director testified that Woodland Hills ultimately terminated appellant from treatment following the last issue of inappropriate sexual contact.

Appellant argues that the district court's findings were erroneous because she was terminated from the program for factors outside her control. Specifically, appellant argues that she was terminated based on unsubstantiated allegations of sexual assault, and that she "has no control over allegations made by others."[3] We are not persuaded. Appellant's termination was not based solely on the sexual-assault allegation. The Woodland Hills manager testified that appellant's "progression through the program was, at best, slow." Appellant succeeded in only 27 of her 69 days in treatment, and she completed none of the goals on her treatment plan. The manager testified that appellant "burned her bridges with her peers to such a degree on the unit that it was no longer safe for her to be here." The manager testified that, in his opinion, appellant was terminated from the program "due to a need for safety and [her] being unamenable to the program after her length of stay."

[3] At the hearing, appellant's counsel objected to testimony about the sexual assault on hearsay grounds. "[W]hen the defendant has had ample opportunity to present evidence in a probation revocation proceeding, the rules of evidence do not preclude admission of hearsay evidence." *State v. Johnson*, 679 N.W.2d 169, 174 (Minn. App. 2004); *see also* Minn. R. Evid. 1101(b)(3). Here, appellant had the chance to present evidence and cross-examine the state's witnesses. Thus, the district court did not err by considering such testimony.

Similarly, the Woodland Hills director testified that the sexual-assault allegations may have been "the tipping point for [her]," but stated that "[d]efinitely there were other incidents that occurred that were concerning." The director testified about appellant running through the facility at night and characterized this behavior as "a pretty major incident." Appellant's counsel specifically asked the director whether appellant would still be at Woodland Hills if the sexual-assault allegations were unproven. The director responded:

> It's kind of hard to say, to be honest with you. She did have some out-of-bounds behaviors that could have resulted in termination but did not; like, for instance, when she and two other clients were running around here and we had to call for the police to help assist to get her back into her room. That could have definitely been the grounds for termination, but it wasn't at that point in time. So if those behaviors, those types of behaviors, would have continued, then no, we would not be; but if they did not, then yeah, we would be.

During redirect examination, the prosecutor again asked the director if appellant would have been terminated from the program if the sexual-assault allegations had not been made. The witness responded, "If the behaviors—the negative behaviors continued, we would have still terminated her, yes."

The district court acknowledged appellant's argument that she was discharged based only on the sexual-assault allegations. But the district court found that appellant "had exhibited behaviors which could have resulted in termination if they had continued, therefore [appellant's] hypothetical status at Woodland Hills absent the grievance regarding sexual conduct is speculative." We agree with the district court's reasoning and

reject appellant's argument that she was only terminated from the program for the sexual-assault allegation.

There is substantial evidence that appellant failed to make progress on her treatment plan, exhibited abusive behavior toward peers and staff, and created dangerous conditions for herself and others. And we have repeatedly affirmed district court decisions concluding that an individual intentionally or inexcusably violates probation by failing to complete a required treatment program. *See, e.g.*, *State v. Moot*, 398 N.W.2d 21, 24 (Minn. App. 1986) (affirming probation revocation when defendant refused to comply with treatment program and participate in recovery), *rev. denied* (Minn. Feb. 13, 1987); *State v. Rock*, 380 N.W.2d 211, 212-13 (Minn. App. 1986) (affirming revocation when probationer failed to complete treatment), *rev. denied* (Minn. Mar. 27, 1986); *State v. Hemmings*, 371 N.W.2d 44, 47 (Minn. App. 1985) (affirming revocation when probationer failed to complete treatment and could not get accepted into another facility). The district court carefully weighed the testimony presented by the witnesses and found the state's witnesses credible. We defer to these credibility determinations. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (recognizing that "credibility of witnesses and the weight to be given their testimony are determinations to be made by the factfinder" and district court's credibility determinations are "accord[ed] great deference" (quotation omitted)). We therefore conclude that the district court did not abuse its discretion by determining that appellant's probation violations were intentional or inexcusable under the second *Austin* factor.

b. The need for confinement outweighs the policies favoring probation.

The district court determined that the need for confinement outweighed the policies favoring probation under the third *Austin* factor. When evaluating this factor, a district court must "balance the probationer's interest in freedom and the state's interest in insuring [the probationer's] rehabilitation and the public safety." *Modtland*, 695 N.W.2d at 607 (quotation omitted). The district court considers whether "(i) confinement is necessary to protect the public from further criminal activity by the offender; or (ii) the offender is in need of correctional treatment which can most effectively be provided if [the probationer] is confined; or (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked." *Id*. (quotation omitted). Only one subfactor is necessary to support revocation. *Austin*, 295 N.W.2d at 251.

Here, the district court determined that the first *Modtland* subfactor supported revocation. The district court stated:

> [Appellant] has a lengthy criminal history. The offense for which [she] is currently on EJJ probation is such that adult certification is presumptive, and the certification study strongly supported adult certification. However, [she] was given a final chance at rehabilitation when the State agreed to an EJJ designation. [Appellant] allegedly engaged in predatory behavior demonstrating a lack of amenability to probation such that there are no longer any placements willing or able to accept [her]. Further, [her] alleged sexual misconduct and negative instigation of rule breaking at The Hills combined with the Aggravated Robbery charge for which she is on probation indicates a substantial risk to public safety.

The record supports these findings. Because appellant was 17 years old when she committed the robbery offense, the crime carried a presumptive adult certification and

prison sentence for first-degree aggravated robbery. *See* Minn. Stat. § 260B.125, subd. 3 (2020) (stating that certification as an adult is presumed for a 17-year-old individual who allegedly commits a crime that involves a "presumptive commitment to prison under the Sentencing Guidelines"); *see also* Minn. R. Juv. Delinq. P. 18.06, subd. 1 (discussing presumption of certification).

Additionally, the certification study shows that appellant has a long criminal history and has not been successful in other treatment programs. Appellant's case history shows that she had over 20 other delinquency cases between 2016 and 2019 for theft, damage to property, fleeing police, receiving stolen property, multiple assault charges, and trespassing. Appellant has been on supervised probation since 2017. Appellant has been referred to both community-based and residential interventions and programs at Hennepin County Juvenile Probation, Northpoint Health and Wellness Clinic, The Link, Hennepin County Home School, the YMCA, Oak Park, and Better Together. Appellant was terminated from previous programs for failing to complete them. Appellant has been placed on electronic home monitoring eight times but failed five out of those eight times. The probation officer noted that appellant "has struggled to complete many of her court orders, both in the community and in residential settings." At the time of her most recent offense, appellant also had six other cases pending for theft, financial transaction card fraud, and trespassing, among others. This record shows that previous efforts at intervention have been unsuccessful and appellant's record is persistent, continues to escalate in severity of her offenses, and threatens public safety.

The probation officer tried to find another out-of-home placement for appellant, but there were no providers who were willing or able to take her. One provider declined to take any out-of-county clients, and the second provider declined to accept appellant "[d]ue to her behaviors as well as the need for one-on-one programing, which they cannot offer." The probation officer testified that probation "felt that [appellant] needed a higher level of care than community-based programing could provide." Counsel asked the probation officer whether, in her experience, appellant would be amenable to probation in the juvenile system. The probation officer responded, "I think her actions thus far have proven not to be, given her time on probation before and what has happened since she's been placed on EJJ." The probation officer also agreed that appellant had "exhausted her options in the juvenile system." The record supports the district court's finding that confinement is necessary to protect the public under the first *Modtland* subfactor. Thus, we discern no abuse of discretion in the district court's decision to revoke appellant's EJJ status based on this subfactor.

Appellant argues that the district court could have imposed another alternative to executing the sentence, such as inpatient programming, to address her mental-health issues. But a district court need not provide a defendant with additional opportunities to seek treatment before revoking probation. *See, e.g.*, *State v. Osborne*, 732 N.W.2d 249, 255-56 (Minn. 2007) (concluding that district court did not abuse its discretion by revoking

probation without allowing defendant to seek additional probationary resources).[4] And in this case, appellant had many opportunities for treatment, as discussed above. Thus, we reject this argument.

The district court determined that the need for confinement outweighed the policies favoring probation under the third *Austin* factor. Because sufficient evidence in the record supports the district court's factual findings, we determine that the district court did not abuse its discretion by revoking appellant's EJJ status and executing her stayed sentence.

II. We do not reach appellant's equal-protection argument.

Appellant argues that her sentence must be reversed because the state violated her right to equal protection under the United States and Minnesota Constitutions. Appellant argues that she is being treated differently than a male EJJ offender because a male would have "one last chance" to avoid an adult sentence by seeking placement at the Minnesota Correctional Facility in Red Wing (MCF-Red Wing). MCF-Red Wing is a secure facility operated by the department of corrections. MCF-Red Wing accepts juvenile male offenders into the facility, provided they meet the admission criteria, but it does not accept juvenile female offenders. The district court agreed with appellant. The district court stated in the probation-revocation order that "Counsel for [appellant] argued an equal protection issue exists, given the disparity in state correctional juvenile placement options between males and females." The district court issued an order following the disposition

[4] Appellant also argues that the third *Austin* factor is not satisfied because the state does not provide the same level of programming for female EJJ probationers as it does for male EJJ probationers. We address this argument below.

hearing and found that "[a]n equal protection issue continues to exist as to correctional placement options for female juveniles."

We acknowledge the district court's concern and frustration about the varying levels of programming available to juvenile females and juvenile males. But appellant's counsel did not develop the record to support an equal-protection argument. For example, appellant's counsel did not elicit any testimony or present any evidence related to the admissions criteria at MCF-Red Wing, the number of juvenile males rejected for admission to MCF-Red Wing, the varying levels of programming offered at MCF-Red Wing and Shakopee, whether MCF-Red Wing offered one-on-one programming, the number of juvenile males who have had their EJJ status revoked while at MCF-Red Wing, and most importantly, whether MCF-Red Wing would have accepted appellant if she had been a male. The transcript of the hearing does not contain a single reference to "equal protection," and only briefly mentions "fairness" in the closing argument.

Appellant bears the burden of establishing an equal-protection violation. The record does not contain any factual support for appellant's equal-protection argument. Reviewing appellant's equal-protection argument would require this court to make findings of fact on appeal, and it is not the role of this court to do so. *See In re Welfare of M.D.O.*, 462 N.W.2d 370, 374-75 (Minn. 1990) (recognizing that role of appellate courts is to correct errors, not to find facts); *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them."). Because the record does not contain any factual support for appellant's equal-protection claim, we cannot reach it.

III. The state's motion to strike is moot.

The state moved to strike a portion of appellant's reply brief for referencing a document outside the record. Because we affirm the district court's decision, we deny the state's motion to strike as moot.

Affirmed; motion denied.