Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-099

DECEMBER TERM, 2018

State of Vermont v. Dakota Moretti*	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 876-9-15 Bncr
		Trial Judge: David A. Howard

In the above-entitled cause, the Clerk will enter:

Defendant appeals three of the probation conditions imposed on him as part of his sentence for his conviction of lewd and lascivious conduct. We affirm.

In September 2015, defendant was charged with one count of lewd and lascivious conduct based on allegations that he exposed himself to his ex-girlfriend's six-year-old daughter, touched his penis, and told her not to tell her mother. Defendant agreed to plead guilty in September 2017 in exchange for a one-to-three-year sentence, split to serve one year. At the plea defendant admitted that he touched his exposed penis in front of the minor child in a sexual manner with "a sexual intent to be aroused by doing it in her presence." There was no agreement as to conditions of probation.

The court ordered a presentence investigation report, which was filed in November 2017. A probation officer interviewed defendant in preparation for the report. Defendant stated that on the date in question, he was in his room and put a pornographic movie into the video-game console and began masturbating. He said that he looked up and the victim was just standing there. He claimed he stopped, apologized to her, and asked her not to say anything to her mother. The probation officer recommended a list of probation conditions based on her assessment of defendant's risk areas. Defendant did not contest any of the facts in the report. However, he indicated to the court that he objected to several of the proposed conditions.

In February 2018, the court held a contested sentencing hearing. Based on the facts, nature of the offense, and the presentence investigation report, the court imposed the agreed-upon sentence and most of the proposed conditions, including the following: "You shall not engage in any violent or threatening behavior"; "You may not possess any pornographic material"; and "You may not frequent adult book stores, sex shops, topless bars, etc." Defendant objected to the prohibition against possessing pornography, arguing that it was overbroad and pornography was otherwise legal. Defendant proposed the condition be amended to prohibit him from purchasing, possessing or using pornography or erotica when there were children in the house where he was staying and to require that any such materials be appropriately stored. Defendant also objected to the condition prohibiting violent or threatening behavior, arguing that the act to which he was

pleading guilty was not violent in nature. The court stated that it found the conditions to be "appropriate considering the facts of the underlying offense, need for supervision, and treatment."

Following the hearing, defendant asked the court to provide a written explanation of its reasoning for imposing the contested conditions. The court explained that the prohibition of violent or threatening behavior was appropriate because lewd and lascivious conduct with a child was "a violent act and certainly threatening to a child, even if not physically violent." It further explained that the condition prohibiting possession of pornography "lessens the chance [that d]efendant acts out on such material in a manner that exposes minors to a risk of being offended against." The court stated that it had modified the condition appropriately by striking the terms barring possession of "sexually stimulating or sexually oriented" material because these were too broad. Defendant appealed.

The trial court may impose conditions of probation "such as the court in its discretion deems reasonably necessary to ensure that the offender will lead a law-abiding life or to assist the offender to do so." 28 V.S.A. § 252(a). "While not without limitation, a trial court's discretion in this context is expansive, and will generally be upheld if the probation condition is reasonably related to the crime for which the defendant was convicted." State v. Campbell, 2015 VT 50, ¶ 9, 199 Vt. 78 (quotation omitted). If the defendant properly preserves his or her objection to a condition, we will review it for abuse of discretion; otherwise, we may only review for plain error. State v. Lumumba, 2018 VT 40, ¶ 9.

Defendant first argues that the condition prohibiting violent or threatening behavior is overly broad and is not reasonably related to the offense committed because he did not physically touch the victim and therefore did not commit a violent act. He argues that physical touching is required for sexual behavior to be considered violent. See State v. Bryan, 2016 VT 16, ¶ 25, 201 Vt. 298 (affirming order finding defendant in violation of probation condition prohibiting violent or threatening behavior based on probationer's act of sexually touching minor's breasts because such behavior was "violent"). But the question before us is whether the challenged condition is reasonably related to the offense, not whether the charged conduct would itself violate the condition. The court reasoned that defendant's act was at least threatening to the minor victim and the condition was necessary to prevent the same or worse behavior in the future. The court's decision had a reasonable basis and defendant has not shown that the condition was unduly restrictive.

Defendant also claims that the no-violent-or-threatening-behavior condition should be struck or remanded for the trial court to clarify it, because it did not provide him with adequate notice of what conduct was prohibited. Because defendant did not raise this specific objection below, we review it for plain error. See Lumumba, 2018 VT 40, ¶ 9 (explaining that this Court will not address arguments regarding probation conditions "that were not raised with specificity and clarity in the proceeding below" (quotation omitted)). Defendant does not argue, and we do not find, that the imposition of this condition amounted to plain error in this context. Notice is often an issue in probation-violation cases because "a defendant must have notice before the initiation of a probation revocation proceeding of what circumstances will constitute a violation of probation." State v. Sanville, 2011 VT 34, ¶ 8, 189 Vt. 626 (quotation omitted). However, defendant has failed to demonstrate that the condition is invalid on its face. Although we have addressed challenges to the scope of this same condition in probation-violation cases, "we have never specifically deemed a condition prohibiting violent and threatening behavior to be, in and of itself, unlawful." State v. Cornell, 2016 VT 47, ¶ 20, 202 Vt. 19. We therefore decline to strike or remand the condition.

Next, defendant challenges the condition prohibiting him from possessing pornography. "[W]hen a trial court imposes probation conditions related to the defendant's status as a sex offender, [28 V.S.A.] § 252(b)(18) 'requires more than the bare recitation that a defendant is a sex offender and that incursions onto his liberty are justifiable on that basis alone.' " Lumumba, 2018 VT 40, ¶ 33 (quoting Cornell, 2016 VT 47, ¶ 7). "[A] court cannot prohibit a probationer from engaging in lawful behavior unless the prohibition relates to the defendant's rehabilitation or public safety." Id. ¶ 32. In Lumumba, we struck a nearly identical condition to the one challenged by defendant here because the record did not show that the crime for which Lumumba was convicted—sexual assault of an adult—was related to pornography or that his individual history or behaviors supported the condition. Id. ¶¶ 36-37. Here, in contrast, the record shows that defendant's act was connected to his possession and use of pornography. His statements in the presentence investigation report support the court's justification for the condition—that a prohibition on the possession of pornography would lessen the chances of his acting out on that material—and its imposition on defendant. The condition in this case is not based on generalized assumptions or assertions about a relationship between possession of sexually explicit media and sex offenses, but flows from defendant's individualized circumstances. The condition is reasonably related to the crime and is not overly harsh or excessive. See Campbell, 2015 VT 50, ¶ 9.

Finally, defendant argues that the imposition of the condition prohibiting him from frequenting adult bookstores, sex shops, topless bars, and other similar establishments was plain error. Plain error exists only if "(1) there is error; (2) the error is obvious; (3) the error affects substantial rights and results in prejudice to the defendant; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." State v. Gauthier, 2016 VT 37, ¶ 10, 201 Vt. 543 (quotation omitted). Defendant does not argue that the condition was invalid on its face; rather, he argues that it is not reasonably related to his own rehabilitation. The preservation requirement is especially important when the validity of a condition depends on the presentation of specific evidence and findings by the trial court below. Defendant's failure to object to the proposed condition below deprived the State and trial court of the opportunity to address the objection by presenting evidence of the connection between the condition and defendant's rehabilitation; it also means that defendant did not present any evidence from which the court can conclude that the restriction was obvious error affecting his substantial rights and seriously affecting the fairness of the proceedings below. On the basis of this record, we cannot conclude that the condition is unduly restrictive or otherwise amounts to obvious error affecting his substantial rights and seriously affecting the fairness, integrity, or reputation of judicial proceedings.

Affirmed.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice