DIVISION IV

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
Karen R. Baker, Judge

CACR06-442

NOVEMBER 29, 2006

NATHAN H. MEJIA

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT
[CR2003-1179]

HONORABLE JAMES ROGER MARSCHEWSKI, JUDGE

AFFIRMED

Appellant Nathan Mejia pled guilty to second-degree battery in Sebastian County. The imposition of his sentence was suspended for five years, and beginning June 1, 2004, he was ordered to pay a $25-per-month probation fee and $900 in fines and costs at the rate of $50 per month. An amended petition to revoke appellant's suspended sentence was filed on September 10, 2005, alleging that he committed theft by receiving on June 4, 2004, and failed to report to his probation officer, to attend sex-offender counseling, and to appear in court. After a hearing, the trial court revoked appellant's suspended sentence and sentenced him to three years in prison.

On appeal, appellant argues that the State failed to establish by the preponderance of the evidence that he violated the terms of his suspended sentence. For the reasons below, appellant's argument is without merit, and the trial court is affirmed.

To revoke probation or a suspension, the trial court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. Ark. Code Ann. § 5-4-309(d) (Supp. 2003). The State bears the burden of proof, but need only prove that

the defendant committed one violation of the conditions. *Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004). Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. *Id*. Failure to pay fines and costs will support a revocation, *see Palmer v. State*, 60 Ark. App. 97, 959 S.W.2d 420 (1998), as will a failure to report to probation and ordered treatment, *see Stinnett v. State*, 63 Ark. App. 72, 973 S.W.2d 826 (1998). When appealing a revocation, the appellant has the burden of showing that the trial court's findings are clearly against the preponderance of the evidence. *Richardson, supra.*

In the case before us, the trial court revoked appellant's suspended sentence finding that appellant committed theft by receiving and failed to pay assessed fines and fees in violation of the conditions of his suspended sentence. The trial court ruled that appellant had made no payments since the beginning of his suspended sentence, that he appeared able to work, and that there was no excuse for his failure to pay. Appellant admits that he failed to pay the fines and costs as required by the conditions of the suspension; however, he asserts that the State failed to prove that his failure to pay was inexcusable. Despite appellant's contention, once the State established the nonpayment pursuant to the conditions of the suspension, the burden shifted to appellant to provide a reasonable excuse for the violation. *See Palmer, supra*.

To excuse his violation, appellant testified that he had been arrested and jailed in Arizona, as well as being confined to a psychiatric facility in Nevada for three months. He offered no excuse for failing to make payments for June and July of 2004 while in the State of Arkansas and not confined in a psychiatric or penal institution. We agree with the general premise cited by appellant that appellant cannot be punished by imprisonment solely because of failure to pay restitution, absent a determination that failure to pay was willful. *See Jordan v. State*, 327 Ark. 177, 939 S.W.2d 255 (1997). We also agree with his statement that appellant's failure to make bona fide

efforts to seek employment or to borrow money to pay restitution may justify imprisonment. *See id*. However, appellant does not explain his statement that the State failed to meet its burden to prove by a preponderance of the evidence that the failure to pay was inexcusable because it presented no evidence to show that the failure to pay was inexcusable. *See Reese v. State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988). Appellant not only admits that he was imprisoned in another jurisdiction to pay out fines in that State, but attempts to justify his failure to pay in this State based upon his incarceration. He cites no cases for the proposition that the imprisonment of an accused in another jurisdiction precludes a finding that his failure to pay in this jurisdiction was willful, and we decline to adopt the premise.

Appellant also argues that the evidence against appellant regarding the theft-by-receiving charge was circumstantial and that the trial court had to resort to speculation to find that appellant was in fact committing a crime. Appellant was hired to install carpet in a Howard Johnson's motel in Ft. Smith. On June 4, 2004, appellant was found to be in possession of carpet belonging to the motel without the permission of the project manager, Tony Elkins. Carpeting was discovered in his van and inside a separate Ft. Smith business, the BurnZee Bar. Appellant's possession of the goods not belonging to him is sufficient to establish theft by receiving, *e.g.*, *Ricks v. State*, 316 Ark. 601, 873 S.W.2d 808 (1994), and sufficient to support the revocation of his suspended sentence. *Lamb v. State*, 74 Ark. App. 245, 45 S.W3d 869 (2001).

Appellant testified at trial that it was standard practice to keep the carpet in his van and that he left the carpet at the bar for the owners of the bar to determine whether they liked it for replacing their carpet at a future date. At one point he testified that he did not discuss with Mr. Elkins keeping the carpet in the van, but at another point he claimed that he did tell Mr. Elkins that he was going to keep the carpet there. The trial court specifically found appellant's testimony to be not credible.

On appeal, appellant cites no authority that contradicts the well-established rule that an appellate court defers to the trial court on questions of witness credibility and conflicting testimony. *E.g. Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002).

Accordingly, we reject appellant's arguments and affirm.

HART and VAUGHT, JJ., agree.