IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

EDWARD REYNOLDS,

Appellant,

v. Case No. 5D17-3820

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed October 30, 2019

Appeal from the Circuit Court
for Brevard County,
Nancy Maloney, Judge.

W. Charles Fletcher, of Law Office of W. Charles Fletcher, P.A., Jacksonville, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Deborah A. Chance, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

We affirm the order finding Appellant, Edward Reynolds, in violation of his probation for committing the new law violations of domestic battery based upon our supreme court's decision in *Russell v. State*, 982 So. 2d 642, 646–48 (Fla. 2008), and for resisting an officer without violence, *e.g.*, *N.H. v. State*, 890 So. 2d 514, 516–17 (Fla. 3d

DCA 2005) (juvenile's conduct toward police officers during investigatory stop, including refusing to identify himself, refusing to sit and thus comport himself so that officers could investigate, and physically threatening officers, was sufficient to support finding that juvenile committed offense of resisting officer without violence).[1]

However, we write to observe three points in response to the dissent. First, some of the arguments relied on by the dissent were either not preserved or were not raised on appeal. For instance, Appellant did not argue below that the officer's observation of the victim's wound was insufficient corroboration because of the temporal break between the battery and observation by law enforcement. Likewise, Appellant did not argue below or in his initial brief that the State was required to present non-hearsay evidence to directly establish the identity of the batterer. Rather, Appellant argued below that there was no direct evidence that a battery occurred at all, implying that the victim might have received the laceration from some conduct other than a battery.

Second, while the officers in this case did not arrive at the scene in temporal proximity to the battery, in our view, this goes to the weight of the evidence, not to its sufficiency to corroborate the hearsay evidence presented at a violation of probation hearing. To that end, we observe that the trial court made specific findings regarding

[1] "[Section 843.02] is intended to apply to any situation where a person willfully interferes with the lawful activities of the police. Nothing indicates that it applies only when police are arresting a suspect[.]" *N.H.*, 890 So. 2d at 516 (citations omitted); *cf. J.M. v. State*, 960 So. 2d 813, 815 (Fla. 3d DCA 2007) ("[I]naction can constitute interference under section 843.02." (citation omitted)); *Francis v. State*, 736 So. 2d 97, 99 (Fla. 4th DCA 1999) ("The test under section 843.02 is not whether [the officer] ultimately was able to carry out the execution of his legal duties, but rather, whether [defendant] resisted his efforts in doing so."; holding that defendant violated section 843.02 as he told police, who came to defendant's home in response to 911 call regarding defendant's stepson, that "everything was fine" and physically blocked officer's path when he went over to investigate condition of stepson).

credibility, and thoroughly explained why, given the totality of the evidence, it believed Appellant committed the battery. While the dissent seems to disagree with the trial court's factual and credibility findings, and we acknowledge that Appellant argued many reasons why the trial court should disbelieve the victim, we will not reweigh the evidence from the appellate bench.

Third, in our view, the dissent casts the evidence in a light most favorable to the Appellant. The evidence and permissible inferences in our record demonstrate that officers arrived at Appellant's residence, parked on the street, and entered the property through an open gate. The victim told them that she had not called 911 that day, but eventually admitted that Appellant previously struck her, telling officers on one occasion that the battery was a week earlier and at another time indicating that it was two weeks earlier.

The victim showed the officers a laceration along her gumline, which did not appear fresh. She also showed them pictures of the cut that she had taken right after the battery occurred. The officer testified that he observed the victim's demeanor change when she admitted Appellant hit her, and that she was almost crying.[2]

Appellant then returned to the residence while officers were still on the scene. Appellant admitted that he saw the police car parked along the road near his property. Appellant then drove into his driveway and stopped to allow his girlfriend to get out and lock the gate while the officers were still on the property. The arresting officer testified that Appellant's headlights were directly illuminating him and his partner when Appellant

[2] The officer's interview with the victim was recorded and played for the trial court. The trial court also heard a recording of the victim's daughter, who told officers that Appellant hit the victim two weeks earlier.

pulled into the driveway and stopped. Appellant then continued down the driveway, rolled down his window, and started speaking to the officers—all the while driving his truck "uncomfortably close" to the officers.

Appellant put the truck in park, but when the officers instructed him to get out of his vehicle, he initially refused, telling the officers, "I'm not going to step over there." Rather than promptly comply with the officers' instructions, Appellant continued asking why the officers were there, and ordered them to get off his property.

When Appellant finally stepped out of his vehicle, the officers placed Appellant under arrest. After adjusting Appellant's handcuffs for his comfort, the officers walked Appellant down the driveway and toward the locked gate. Appellant said "this is my house. If you start with me, I'm going to start something." On the way there, Appellant became increasingly belligerent and confrontational, and threatened to "kick [the officers'] asses."

Thereafter, Appellant's girlfriend informed the officers that they could not leave without a key to unlock the gate. However, the officers had to "ask several questions" before they located the key in Appellant's left side pocket and were able to unlock the gate in order to exit the property.

Finally, and notably, after Appellant was in the patrol car, he began yelling, screaming, and kicking the back of the front passenger seat.

At the conclusion of the hearing, and after receiving live testimony, a partial recording of the actual arrest, and the recorded interviews with the victim and her daughter, the trial court found, in part, that:

> [T]he totality of the circumstances, and I include . . . the kicking and the screaming and all of that, and the manner in which all the threatening activity took place beforehand.
>
> . . . .
>
> [Appellant's] actions were aggressive and confrontational. And that, . . . combined with not responding immediately to law enforcement's commands makes all four points of what the State has to prove in the resisting arrest.
>
> . . . .
>
> And I do find obstruction, not with violence, without violence . . . .

Based on our record, we simply cannot say that the trial court abused its discretion in finding that Appellant violated his probation by committing two new law violations.

AFFIRMED.

EISNAUGLE and SASSO, JJ., concur.
EDWARDS, J., dissents with opinion.

EDWARDS, J., dissenting.

Appellant, Edward Reynolds, was found to have violated his probation by committing two new law violations, namely domestic battery and resisting arrest without violence.[3] The trial court revoked Appellant's probation and sentenced him to serve five years in prison. I disagree with my colleagues' decision to affirm and submit that the violation of probation order and resulting sentence should be reversed and remanded for a second revocation hearing for two reasons. First, the trial court erred when it relied completely and only upon stale hearsay evidence to solve the "whodunit" mystery in the domestic battery portion of the underlying violation of probation proceeding. Second, the trial court also erred in finding that Appellant resisted arrest without violence, as there was no evidence that Appellant did anything other than exit his vehicle slowly, cuss at the arresting officers, loudly beg for relief regarding the extreme discomfort a secured handcuff caused to his surgically repaired wrist, and thrash around a bit in the patrol car after being arrested. For the reasons which are explained in further detail below, I respectfully dissent.

Background Facts

In 2013, Appellant pled no contest to two counts of aggravated battery upon a law enforcement officer and one count of leaving the scene of a crash with property damage, resulting in a sentence that included thirteen years of probation, which he was serving at the time of the incident described below. He had purposefully plowed his car into two police vehicles, making him unpopular with local law enforcement.

[3] Both charges were ultimately nolle prossed by the State.

Jessica Reynolds is Appellant's biological, adult daughter who spent a couple of nights at Appellant's home in May 2017. According to evidence adduced at the violation of probation hearing, Jessica was upset with Appellant because she believed that his complaints to Jessica's probation officer led to the revocation of her own probation and a 90-day stint in jail. According to Appellant's proffered but excluded testimony, he did not want Jessica staying at his house because she was dealing drugs.

911 Call: Somebody Hit Jessica

On May 28, 2017, Brevard County Deputy Sheriff Daugirda and his field training officer responded to a 911 call advising that Jessica had been elbowed in the mouth, not by Appellant, but by her husband, Robert Reynolds. That 911 call resulted in dispatching the deputies to respond to an address on Pine Street in Merritt Island; however, the deputies were unable to locate the dispatched address. By cross-referencing Jessica's name in one or more databases, the deputies identified a different address and drove more than ten miles to Appellant's house on North Road in Cocoa, Florida. They hoped their search would lead them to the supposed victim, Jessica.

The deputies parked their marked patrol vehicle near the road, between Appellant's and his next-door neighbor's property. The deputies entered Appellant's property on foot without either a search or arrest warrant.[4] After passing through a gated entrance, the deputies approached Appellant's house where they encountered Jessica. She denied calling 911 and also denied that a battery, the underlying reason for the 911 call, had occurred. Jessica told the deputies that perhaps her probation officer had placed

[4] Surprisingly, the trial court in the instant case announced that police do not need warrants or the owner's consent to enter property as long as they are investigating a crime.

the 911 call regarding an earlier incident during which her father yelled and spit at her.[5] When she went inside to locate her identification card, she allowed the deputies to enter her father's house. In this initial portion of the encounter, Jessica was calm as she spoke with the deputies. Her attitude or demeanor changed only after she relayed that her father turned her in to her probation officer.

During their discussion, Jessica showed Deputy Daugirda a small, healing laceration inside her mouth. The deputy testified that it did not appear to be a fresh injury. Jessica told him that it was one week old and showed him a photograph on her phone that she said was taken days earlier of the same laceration. Deputy Daugirda took photographs of her current injury and a photograph of the older photo on her phone. He concluded and subsequently testified that they were photos of the same injury on Jessica, but taken on different dates.

It quickly became apparent that the deputies were no longer responding to nor investigating the subject matter of an emergency 911 call. According to admittedly hearsay evidence, Jessica told the deputies that her father, Appellant, had hit her in the mouth a week earlier, causing the photographed laceration. Jessica advised the deputies that she told her probation officer *two* weeks earlier that her father had yelled at her, but she did not say anything about him striking her. Additional hearsay evidence was offered and attributed to Jessica's daughter who told the deputies that Appellant had hit Jessica in the mouth *two* weeks earlier, rather than one week as Jessica claimed. Neither Jessica

[5] Appellant proffered that Jessica was on drug offender probation; however, the State's objection—that it was improper character evidence—was sustained. The fact that she was on drug offender probation was independently relevant based on Appellant's testimony that he told her she could not stay in his house because she was dealing drugs.

nor her daughter testified at the hearing.[6] Their out-of-court statements were relayed to the trial court via Deputy Daugirda's testimony and tape recordings he made of their statements.

One could certainly conclude that the hearsay statements were inherently not trustworthy given: (1) the 911 call and dispatch identified Jessica's husband, Robert, rather than Appellant, as the one who elbowed her in the mouth, (2) Jessica's possible revenge motivation based on her father contributing to her probation being revoked, (3) Jessica's anger at being thrown out of Appellant's house for dealing drugs, (4) the internal and external discrepancies of Jessica's and her daughter's statements regarding when Appellant supposedly struck Jessica, (5) Jessica is a convicted felon, and (6) the uncertainty of whether the daughter had independent, rather than coached, recollection of various events.[7]

Whodunit?

With regard to the domestic battery of Jessica, there was no dispute that somebody had hit her in the mouth a week or two before the deputies interviewed her. The only mystery to be solved here was, "whodunit?" Was it her husband, as reported to the 911 dispatcher? Or was it her father, Appellant, as Jessica asserted? Each man was accused only in hearsay statements, and the trial court relied purely on hearsay to

[6] Remarkably, when announcing its ruling, the trial court stated that it placed great weight on Jessica's "testimony," despite the fact that she never testified in court or by deposition.

[7] Appellant also proffered that Jessica was further motivated to have him jailed so that she could steal and sell equipment located in his garage. According to counsels' comments, made during the sentencing phase, while Appellant was in jail awaiting his violation of probation hearing, Jessica was arrested and convicted of doing exactly that.

determine that it was Appellant who battered Jessica. Appellant testified during the hearing and denied that he hit, struck, pushed, or even touched his daughter on May 28, 2017, or during the preceding two weeks, and further testified that he had never struck his daughter.

Appellant Identified as Assailant Based Solely on Hearsay

To establish a violation of probation, "the [S]tate must prove by a preponderance of the evidence that a probationer willfully violated a substantial condition of probation." *Johnson v. State*, 880 So. 2d 749, 750 (Fla. 5th DCA 2004) (citing *Van Wagner v. State*, 677 So. 2d 314, 316 (Fla. 1st DCA 1996)). A reviewing court must determine "whether the trial court's finding of a willful and substantial violation of probation is supported by competent[,] substantial evidence." *Knight v. State*, 187 So. 3d 307, 310 (Fla. 5th DCA 2016) (citing *Savage v. State*, 120 So. 3d 619, 621 (Fla. 2d DCA 2013)). If it is thusly supported, then the standard of review is whether the trial court abused its discretion in finding that a defendant violated probation; however, it is error to revoke a defendant's probation absent competent, substantial evidence. *Gauthier v. State*, 949 So. 2d 326, 326-27 (Fla. 5th DCA 2007).

The Florida Supreme Court has defined competent, substantial evidence as "such evidence as will establish a substantial basis of fact from which the fact at issue [here, who struck Jessica] can be reasonably inferred." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). "Competency of evidence refers to its admissibility under legal rules of evidence." *Lonergan v. Estate of Budahazi*, 669 So. 2d 1062, 1064 (Fla. 5th DCA 1996) (quoting *Dunn v. State*, 454 So. 2d 641, 649 n.11 (Fla. 5th DCA 1984) (Cowart, J., concurring specially)). "Whether evidence is competent, nonhearsay evidence is a legal

question subject to de novo review." *State v. Queior*, 191 So. 3d 388, 390 n.3 (Fla. 2016) (citing *Thomas v. State*, 125 So. 3d 928, 929 (Fla. 4th DCA 2013)).

It is well settled that violation of probation hearings are conducted with relaxed evidentiary standards in which hearsay evidence is admissible. *E.g.*, *id.* at 390. However, it is equally well settled that a conviction for violation of probation cannot be based solely upon hearsay. *J.F. v. State*, 889 So. 2d 130, 131-32 (Fla. 4th DCA 2004). While hearsay evidence may be considered, Florida law requires admissible evidence to support or corroborate a finding that a defendant violated probation. *Reddix v. State*, 12 So. 3d 327, 328 (Fla. 4th DCA 2009).

There was absolutely no competent (non-hearsay) evidence to prove that Appellant struck Jessica, nor could such a conclusion be reasonably inferred from the non-hearsay evidence. The photograph of Jessica's injured mouth was no more proof that Appellant hit her than the photo of a dinner plate was proof that "a ghost had been seen in the story of the man who said, 'My friend saw a ghost eating off a plate at his house last night, and if you don't believe it, here is the plate he says he saw the ghost eating from.'" *Panci v. United States*, 256 F.2d 308, 312 (5th Cir. 1958). Given the absence of any competent, substantial evidence directly or inferentially identifying Appellant as the person who struck Jessica, the trial court erred in finding that Appellant committed domestic violence and in revoking his probation for that reason.

The majority relies upon *Russell v. State*, 982 So. 2d 642, 646–48 (Fla. 2008), for the proposition that the State does not need to offer non-hearsay evidence to independently establish that the probationer committed the battery for the purpose of

revoking probation, and indeed that is part of what the supreme court said in that case. However, the supreme court went on to state that

> [T]he trial court must examine the facts and circumstances of each individual case to determine whether a particular violation is willful and is supported by [the] greater weight of the evidence. Thus, whether non-hearsay evidence, including direct testimony of an observation of victim injury, is sufficient to support a hearsay allegation of battery is dependent upon the unique facts and circumstances of each case.

Id. at 647. It is the duty of the appellate court, not to reweigh the evidence, but to ensure that the trial court gave proper consideration to "the reliability of the available evidence, and the totality of the evidence under the circumstances." *Id.*

In *Russell*, the victim, the defendant's girlfriend, called police and told them when they arrived ten minutes later, that she was pregnant, and that Russell had hit her on the neck. *Id.* at 644. The responding deputy testified that upon his arrival at the gas station where the battery occurred, the girlfriend appeared to be nervous and scared. *Id.* He saw a red mark on the back of the girlfriend's neck consistent with her story. *Id.* After being read his *Miranda* rights, Russell admitted that he knew his girlfriend was pregnant, but denied the baby was his. "Russell also told the detective that he does not hit the victim, 'he just roughs her up.'" *Id.* At his revocation hearing, Russell testified about his failure to make reports or payments, but invoked his Fifth Amendment right and refused to testify at all about the battery. *Id.* Given the totality of those facts, the conclusion that Russell committed the battery is easily and reliably reached even though there was no non-hearsay evidence on that point because the victim did not testify.

Another case factually similar to *Russell* in which the victim promptly called police, was visibly upset when police arrived on the crime scene, had visible fresh injuries, and

the defendant's behavior was a telltale sign that he had done something to the victim is *Morris v. State*, 727 So. 2d 975 (Fla. 5th DCA 1999). The deputies, who responded to a 911 call, were told on arrival by the terrified, crying victim that Morris had twisted her arm and bit her. *Id.* at 976. They observed a bruise on one of her arms and a bite mark on the other, along with "broken glass and shelves on the floor of the trailer, evidencing the struggle." *Id.* Morris was present, hostile towards the deputies, and wrestled with them. *Id.* This Court concluded that the "evidence and reasonable inferences from it are sufficient to establish by a preponderance of the evidence that Morris committed battery." *Id.* at 976-77. Again, common sense and fresh evidence support the conclusion that the victim had just been battered and the defendant was probably her assailant.

What is common to *Russell* and *Morris* is what is missing from this case: the reliability of temporal proximity between the crime and the accusatory, hearsay statements.[8] In *Russell* and *Morris*, the police were called immediately following the battery, the police went immediately to the scene of the crime, the victims' freshly-inflicted injuries consistent with the only story told were observed and described by police, and there was no suggestion that any of the victims were motivated to fabricate their statements. Here, there was no prompt call to authorities and no prompt observations of Jessica's demeanor following her being battered. The testifying deputy did not say that

[8] Consider the importance of temporal proximity to the following hearsay exceptions found in the noted subsections of section 90.803, Florida Statutes (2017): "(1) Spontaneous statement" (must have been made while the declarant was perceiving the event or condition, or immediately thereafter), "(2) Excited utterance (must have been made while the declarant was under the stress of excitement caused by the event or condition)," and "(3) [Statements about the declarant's] [t]hen-existing mental, emotional, or physical condition." While neither *Russell* nor *Morris* explicitly rely upon any of these exceptions, it is obvious that the victims' hearsay statements in those cases do fit nicely, if not precisely, into one or more of those exceptions.

Jessica was upset, crying, terrified, or otherwise emotional when they arrived; she was calm. Here, there were two stories: the first, which was relayed by the 911 caller who claimed that Jessica's husband elbowed her in the mouth, and the second, in which she told deputies that Appellant hit her one or two weeks earlier. Here, the deputies did not respond to the scene of a crime and the injuries observed were neither fresh nor descriptive by themselves of who had hit her. Unlike the victims in *Russell* and *Morris*, Jessica had multiple reasons to falsely accuse Appellant: as revenge for turning her in to her probation officer, for forcing her to leave his home based on his belief that she was dealing drugs, and to get him out of the way so that she could steal from him to raise money for herself. The non-hearsay evidence here does not corroborate the hearsay statements of Jessica and her daughter. The healing injury and Jessica's later display of emotion do not point any more to Appellant than to her husband. Contrary to what the majority might say, a trial judge cannot assess the credibility of witnesses who have not testified in court; thus, victim credibility cannot be the basis upon which to affirm.

If my colleagues are correct that *Russell* and *Morris* require affirmance here, despite there being no non-hearsay, corroborative evidence that Appellant, rather than her husband, battered Jessica, then perhaps it is time for our supreme court to reconsider whether it needs to more clearly define what unique factual circumstances are sufficient to allow the batterer to be identified only by hearsay statements.

Resisting Arrest Without Violence

Appellant's probation revocation was based in part upon the trial court's finding that Appellant resisted, without violence, the warrantless arrest carried out by the Brevard County deputies during their equally warrantless entry into his home. Appellant argues

that the State failed to offer sufficient evidence that he violated section 843.02, Florida Statutes (2017).[9]

The facts adduced below failed to prove by a preponderance of the evidence that Appellant had indeed resisted arrest. The following facts are undisputed. When the deputies told Appellant to place his car in park, he did so. When they told him to exit his car, he did so, but perhaps not as quickly as the deputies wished. Appellant told the deputies that he was disabled and had trouble with his legs.[10] When told to place his hands behind his back to be handcuffed, he did so. Once cuffed, Appellant complained that the handcuffs were too tight and were bothering his surgically repaired wrist. The deputies later adjusted them for his comfort by using two or three sets of handcuffs looped together, rather than one. When deputies asked for the key to unlock the driveway gate, Appellant turned away slightly from the fence so that his girlfriend or a deputy could retrieve it from Appellant's pocket.[11] The trial court specifically stated that Appellant turning or pulling away from the fence to provide the gate key did not constitute resisting arrest. When ordered to sit in the patrol car, Appellant did so. The testimony revealed that Appellant cursed at the deputies, specifically in response to one deputy's threat that

[9] Below, Appellant argued that because the warrantless search and arrest were themselves unlawful, he could not be found to have resisted arrest because the deputies were not engaged in carrying out their lawful duties. *See Nieves v. State*, 77 So. 3d 745, 748 (Fla. 2d DCA 2019). However, because Appellant did not brief that issue on appeal, it is deemed to have been abandoned.

[10] At the hearing, Appellant testified that he is one hundred percent disabled and has had eight back surgeries, three knee surgeries, and seven hand surgeries.

[11] Appellant's girlfriend testified that she locked the gate out of habit; they did not immediately realize deputies were on the property as the squad car was parked near the neighbor's lot.

she was going to cut the lock on his gate with bolt cutters. The trial court specifically found that Appellant cussing obscenely at the deputies did not constitute resisting arrest. In fact, none of what has been described thus far amounts to resisting arrest. It is likewise undisputed that after Appellant was arrested and placed in the back of the patrol car he cursed and banged on or kicked interior portions of the car; however, no additional charges were lodged for that activity.

Remand for Second Revocation Hearing

If only hearsay evidence is used to prove that a defendant violated probation, it must be overturned and the case should be remanded for a second revocation hearing. *See Boyd v. State*, 1 So. 3d 1186, 1188 (Fla. 2d DCA 2009) (reversing violation of probation where only evidence of violation was in form of hearsay testimony and noting "that double jeopardy does not preclude a second revocation hearing based on the filing of a new affidavit alleging the same violation"); *Purvis v. State*, 420 So. 2d 389, 389 (Fla. 5th DCA 1982) ("A reversal of a probation revocation hearing because only hearsay evidence has been presented does not present constitutional double jeopardy problems.") Likewise, if insufficient evidence is offered to prove a "new law" violation of probation, the State may have a second chance. *See Scott v. State*, 937 So. 2d 746, 749 (Fla. 4th DCA 2006) ("Unlike the reversal of a criminal conviction for insufficient evidence, the reversal of a violation of probation conviction for insufficient evidence does not 'bar a second revocation hearing based on the filing of a new affidavit alleging the same violations.'" (quoting *Reeves v. State*, 366 So. 2d 1229, 1230 n.2 (Fla. 2d DCA 1979))).

Accordingly, I would reverse and remand the order of revocation and the related sentence. Should the State so desire, it may seek a second revocation hearing by following the procedures outlined above.