DIVISION ONE
FILED: 01/27/2011
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 10-0249
	)	DEPARTMENT A
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
LARRY DALE BRANUM, Appellant.	)	Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR20021119

The Honorable William T. Kiger, Retired Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

DeRienzo & Williams, P.L.L.C. — Prescott Valley
By Craig Williams
Attorneys for Appellant

W I N T H R O P, Judge

¶1 Larry Dale Branum ("Appellant") appeals the trial court's decision to revoke his probation and sentence him to

incarceration in the Arizona Department of Corrections ("ADOC"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 In 2003, Appellant, who was already on lifetime probation for attempted sexual conduct with a minor, entered a plea agreement in which he pled guilty to attempted sexual exploitation of another minor under the age of fifteen years, a class three and dangerous crime against children in the second degree, in violation of Arizona Revised Statutes ("A.R.S.") sections 13-1001 (2010) and 13-3553 (2010).[2] The trial court suspended sentencing and placed him on lifetime intensive probation, requiring *inter alia*, that as a condition of his probation he participate and remain in sex offender treatment at the direction of his probation officer. He was further advised that, if he did not follow the conditions of his probation, a revocation petition could be filed and, if his probation were revoked, he could be sentenced to prison.[3]

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[1] We view the facts in the light most favorable to sustaining the trial court's determination, and resolve all reasonable inferences against Appellant. *See State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

[2] We cite the current version of the applicable statutes if no revisions material to our analysis have since occurred.

[3] Pursuant to subsequent petitions to modify filed by his probation officer, Appellant's level of supervision was modified from Level I to Level II to Level III of intensive probation, and then to standard probation. *See* A.R.S. § 13-917(A) (2010).

¶3 In 2007, Appellant stopped attending counseling without first obtaining the permission of his probation officer, and he informed her that he had forfeited his driver's license for medical reasons. On May 18, 2007, his probation officer submitted a memorandum to the trial court, in which she stated:

> [Appellant] was sentenced to lifetime probation on 09-30-02. He has been involved in counseling since 08-04-03. In this time [Appellant] has been resistant to treatment, contentious, and in various states of denial. On 08-30-04 [Appellant] had heart surgery which consisted of an implanted automatic defibrillator. On 11-08-04 [Appellant's] physician provided a letter stating that [Appellant] should not submit to polygraph testing due to the presence of an implanted automatic defibrillator. On 04-14-07 [Appellant] provided a note from his physician stating that he was advised not to drive due to multiple medical problems. For the past year [Appellant] has been contemplating giving up his driver's license. He was also reporting that if he were to do so, he would not be able to make it to his sex offender treatment. Thus far, he has missed two sex offender group meetings since cancellation of his [driver's license] and obtaining an AZ ID on 04-26-0[7]. His counselor at West Winds counseling has expressed her desire to negatively discharge him from the program.
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> [Appellant] states that he is too ill to attend [sex offender] counseling and submit to testing, operate a motor vehicle and is unable to arrange transportation to attend sex offender counseling. It is this officer's recommendation that [Appellant] be placed on a home curfew and provide this officer with a weekly schedule that will require approval for movement about the community.

On May 21, 2007, the trial court signed the memorandum, ostensibly approving the probation officer's recommendation.[4]

¶4 Also on May 21, Appellant was negatively discharged from the counseling center at which he was receiving treatment. His discharge summary noted that, although his initial progress in treatment had been "adequate," at the time he stopped attending counseling he was not progressing as he should have been, in part because his level of motivation and accountability was "[p]oor to variable," he "demonstrated inconsistency in his level of culpability by the use of victim blaming," he had "poor boundaries" with other group members, and he continued to be "at a high risk for sexual recidivism." The discharge summary concluded, "It is still recommended that he complete a sex offender specific treatment program."

¶5 On November 30, 2009, Appellant filed a motion to terminate or at least modify his probation "to exclude counseling sessions." The Yavapai County Attorney's Office, representing the State, objected and filed a petition to revoke Appellant's probation on three bases, including the alleged violation of the condition that he actively participate and remain in sex offender treatment. In part, the State alleged that, on October 2, 2009, Appellant had "agreed to and signed

[4] The memorandum was signed by the same trial judge who presided over Appellant's probation violation and disposition hearings that are the subject of this appeal.

implementation of probation to re-enroll in sex offender counseling," but that he had nonetheless "failed to enroll in said program."

¶6 On January 4, 2010, the trial court held a hearing on the pending motions. At the hearing, Appellant's counsel explained that Appellant did not believe he could continue to comply with the conditions of his probation, which he viewed as unnecessarily restrictive. Counsel further explained Appellant had been through many classes, it was difficult for him to continue to participate in the work and meet with his probation officer, and he had obtained a letter from his doctor stating that he was unable to drive. Appellant stated he would no longer participate in sex offender treatment because he was "not a sex offender" and was "tired of lying." He further stated that, despite not being guilty, he entered the plea agreements to avoid lengthy prison terms, and if he now had to go to prison, "so be it." Counsel for the State argued Appellant "has made it clear that he is not going to participate in treatment" and requested that the court hold an evidentiary hearing regarding the State's petition. After Appellant denied the allegations of the petition, the court scheduled a probation violation hearing.

¶7 At the February 12, 2010 probation violation hearing, Appellant's probation officer testified that Appellant was

required to participate and remain in sex offender treatment as a condition of his probation. He had been referred to West Winds Counseling for treatment, but did not do well there because he "was in denial," "was contentious in treatment," and "just wasn't progressing as they thought he should be." On April 26, 2007, Appellant forfeited his driver's license, and he "dropped out of counseling because he stated that he was no longer able to drive nor was he able to find transportation to his sex offender therapy." In May 2007, his probation officer "memoed the court and requested that [Appellant] remain at his place of residence," unless he was "scheduled to be elsewhere or unless there was an emergency situation," but she did not give him permission to stop attending counseling.[5] Shortly thereafter, Appellant was "negatively discharged" from the program for noncompliance because he was "not appearing for treatment." Further, although he had recently been directed by his probation officer to return to counseling, he had not done so. Additionally, he had not indicated that he lacked the ability to pay for his counseling, and financial assistance was available through the probation department for probationers who lacked the financial wherewithal to pay for counseling.

[5] The probation officer's May 18, 2007 memorandum was not admitted into evidence or even introduced as an exhibit at the hearing, but was attached to the dispositional report considered by the court at Appellant's March 8, 2010 disposition hearing.

¶8 After the State rested, the court indicated it had considered the testimony presented and fully and carefully reviewed Appellant's entire file, and after doing so, determined that the State could not meet its burden to prove two of the three alleged bases for revocation. The basis that Appellant had failed to actively participate and remain in sex offender treatment still remained, however.

¶9 Appellant testified that, at the time of the hearing, he was 71 years old and had decided to stop attending the counseling mandated as a term of his probation due to his diabetes and related physical ailments, including diminished focus, hearing, and eyesight, which had caused him to give up his driver's license upon his physician's recommendation. He stated that he had explained his problems to his probation officer, who told him to stay at home, and he "assumed that that was the end of counseling." He claimed he had stayed at home "to the best of [his] ability," although he admitted making occasional trips outside, such as to Walmart. He also claimed his financial situation limited his ability to attend counseling. He admitted that no one at the counseling center had informed him that he had completed treatment, however, and stated that if he were still able to drive, he "would still be attending." He also conceded that he had no problem riding in a vehicle for "short distances," such as to the counseling center,

and acknowledged that his wife had a vehicle and could provide him with transportation if necessary.

¶10 At the close of the hearing, the court found "no dispute" existed "that the required program therapy that was part of the original grant of probation continues to be one of the written terms and conditions of probation." Further, the court found "no indication" the term had been modified by the court or that Appellant had signed any paperwork acknowledging such a modification. The court also found it clear that "there is no dispute that he has not continued with [his treatment]." Finally, the court concluded that Appellant had failed to provide a "sufficient legal explanation for the violation," and had therefore violated the terms of his probation.

¶11 At the March 8, 2010 disposition hearing, the court granted the State's petition to revoke Appellant's probation and sentenced him to a mitigated term of five years' imprisonment in ADOC. Appellant filed a timely notice of appeal. We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010).

ANALYSIS

¶12 On appeal, Appellant maintains that the court erred in revoking his probation given his "physical inability to comply with the assigned counseling." He further maintains that the

May 18 memorandum (1) provided the trial court with "actual notice" as of May 2007 that his probation officer had changed the terms of his probation, (2) constitutes documentation that the court itself "had agreed to [a] change of probation rules," or (3) "at the very least tacitly gave [him] permission to . . . not attend counseling," especially given his "undisputed and serious medical concerns." He contends that because the memorandum "was in the Court's file, and signed by the Court, it was unnecessary to mark [it] as an exhibit and move for admission"; nonetheless, he appears to concede that our review should be for fundamental error,[6] and he asserts that the failure to introduce (and the court's apparent failure to consider) the May 18 memorandum at his probation violation hearing constitutes fundamental error.[7]

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[6] Appellant's argument appears to be internally inconsistent. On the one hand, he argues that the May 18 memorandum "was in the Court's file" and, at his probation violation hearing, the trial judge "demonstrated that he had reviewed the Court File for modifications." On the other hand, he presumes that the trial court did not consider the May 18 memorandum at the probation violation hearing because it was not introduced or admitted at the hearing and was never specifically referenced by the court. Certainly, the court *could* appropriately have considered the May 18 memorandum had it chosen to do so. *See State v. Camino*, 118 Ariz. 89, 90, 574 P.2d 1308, 1309 (App. 1977) (recognizing that the superior court *may* take judicial notice of its own records (citation omitted)).

[7] To the extent Appellant asks this court to treat as fundamental error his own counsel's failure to submit the memorandum for admission into evidence, Appellant's argument is really a claim of ineffective assistance of counsel, a claim

¶13 In general, we review for an abuse of discretion a trial court's determinations with respect to the revocation of an appellant's probation. *See State v. Portis*, 187 Ariz. 336, 338, 929 P.2d 687, 689 (App. 1996). To revoke an appellant's probation, the State need only establish a probation violation by a preponderance of the evidence. *State v. Moore*, 125 Ariz. 305, 306, 609 P.2d 575, 576 (1980) (citation omitted). We will uphold the court's finding of a probation violation unless that finding is arbitrary or unsupported by any theory of the substantial evidence. *Id*. Evidence is not insufficient merely because conflicts exist in the evidence. *See State v. Thomas*, 196 Ariz. 312, 313, ¶ 3, 996 P.2d 113, 114 (App. 1999). "It is for the trial court to resolve such conflicts and to assess the credibility of witnesses in doing so." *Id*. (citation omitted).

¶14 To preserve an issue for appeal, a defendant must clearly raise that specific issue before the trial court. *See State v. Thomas*, 130 Ariz. 432, 435, 636 P.2d 1214, 1217 (1981). If a defendant fails to raise an issue below, the matter is waived absent fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To prevail under fundamental error review, an appellant must prove that the trial court erred, the error was fundamental, and the error

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that is not appropriate for review on direct appeal and must instead be raised in a petition for post-conviction relief. *See State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

caused him prejudice. *See id*. at 567-68, ¶¶ 19-26, 115 P.3d at 607-08; *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991) (recognizing that before the reviewing court engages in fundamental error review, it must first conclude that the trial court committed some error). A defendant bears the burden to demonstrate prejudice and may not rely on mere speculation to carry that burden. *See State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006).

¶15 After thoroughly reviewing the record, we find no abuse of discretion. Appellant incorrectly assumes that, once he was placed on probation, he could not be removed from that probation merely because he could not satisfy a precondition to his probation, such as his ability to attend counseling. *See State v. Bradley*, 175 Ariz. 504, 505, 858 P.2d 649, 650 (1993) (concluding that a probationer could be sentenced to prison after ADOC discovered he was ineligible for a program that was a condition of his probation). When a probationer's failure to obtain treatment frustrates the purpose of his probation, the failure to obtain treatment violates the condition, regardless whether the probationer is "at fault." *See, e.g., State v. Williams*, 993 P.2d 1, 5, ¶ 21 (Mont. 1999) (concluding that the trial court did not abuse its discretion in revoking a sex offender's suspended sentence after a treatment program refused to accept him, because "a condition of suspension would not be

met and continued suspension of the defendant's sentence would frustrate the purposes of suspension, namely, the defendant's rehabilitation" (citing *State v. Kochvi*, 671 A.2d 115, 117-18 (N.H. 1996) (recognizing that numerous "jurisdictions permit revocation when a defendant fails to complete a required sex offender treatment program for reasons beyond his control"))).[8]

¶16 Further, evidence presented at the probation violation hearing, including Appellant's testimony, supports the court's finding that Appellant had violated his probation and its decision to revoke that probation and sentence him to incarceration in ADOC despite his apparent physical infirmities. Before he ceased attending the counseling sessions required as a condition of his probation, Appellant was performing poorly

[8] As support for his argument that the trial court abused its discretion by failing to fully consider his ability to attend and complete the counseling mandated as a condition of his probation, Appellant relies on *Bearden v. Georgia*, 461 U.S. 660 (1983), in which the United States Supreme Court concluded that automatic revocation of a defendant's probation for failure to pay a fine and restitution he had made efforts to pay but could not afford was "fundamentally unfair." *Id.* at 668-69. We find Appellant's reliance on *Bearden* unavailing. In *Bearden*, the Court went on to recognize that, "in other contexts, the probationer's lack of fault in violating a term of probation [might not] necessarily prevent a court from revoking probation," especially if the condition at issue poses a "threat to the safety or welfare of society." *Id*. at 668 n.9. The New Hampshire Supreme Court recognized this distinction in *Kochvi*: "Applied here, *Bearden* suggests that even if the defendant was not at fault in failing to secure treatment, his probation could still be revoked because, as an untreated sexual offender, he failed to carry out the conditions of his probation and represents a threat to society." 671 A.2d at 118.

because he “was in denial,” “was contentious in treatment,” and “just wasn’t progressing as [his counselors] thought he should be.” He acknowledged that, without first obtaining permission from his probation officer, he stopped attending counseling, leading to his eventual “negative discharge.” After he informed his probation officer that he was no longer attending counseling, and represented to her that he was too ill to travel to attend counseling and/or could not obtain alternate transportation, she told him to stay home. She did not, however, tell him that he no longer had to comply with the conditions of his probation; instead, he simply “assumed” that the condition requiring that he participate and remain in counseling had been eliminated, and he had failed to return to counseling even after he had been directed to do so. His testimony at the hearing also belies his argument that he demonstrated that he was physically incapable of attending and participating in counseling or that he had made reasonable efforts to find alternate transportation. In fact, he testified that he had continued to make occasional trips outside the home; stated that if he were still able to drive, he “would still be attending” counseling; conceded that he had no problem riding in a vehicle for “short distances,” such as to the counseling center; and acknowledged that his wife had a vehicle and could provide him with transportation if necessary.

¶17 Further, even if we assume *arguendo* that, because the May 18 memorandum was not introduced before or specifically referenced by the trial court at the probation violation hearing, the court therefore did not consider the memorandum and erred in failing to do so, its presence does not support finding that the court abused its discretion, much less committed fundamental error, in finding a probation violation and revoking Appellant's probation.

¶18 The memorandum reflects that, in May 2007, the court approved a written request by Appellant's probation officer to place him on "home curfew and provide this officer with a weekly schedule that will require approval for movement about the community." Within the memorandum - and consistent with the testimony presented at the probation violation hearing - the probation officer informed the court that Appellant "ha[d] been resistant to treatment, contentious, and in various states of denial"; he had missed two sex offender group meetings since cancelling his driver's license after being informed by his physician that he was advised not to drive due to medical problems; and his sex offender counselor had expressed her desire to negatively discharge him from the program. Additionally, the officer noted that Appellant "states that he is too ill to attend [sex offender] counseling and submit to testing, operate a motor vehicle and is unable to arrange

transportation to attend sex offender counseling." Although Appellant contends that the court's approval of the probation officer's request to place him on "home curfew" constituted termination of the court-ordered treatment condition, neither the memorandum nor the court's approval of the request states anything about dispensing with the counseling requirement.

¶19 In addition to the plain language of the memorandum, the probation officer's testimony that she did not "violate [Appellant] in 2007" because she "wanted to work with him and felt like [] he would turn himself around" supports the conclusion that, although Appellant himself had temporarily suspended his treatment, counseling continued to remain a condition of his probation. The probation officer explained that, although she did not allege a violation at that time, she did inform Appellant that if he was "not well enough to do treatment, then [he was] not well enough to run around at Walmart and the swap meet and et cetera, et cetera." Accordingly, she recommended and the court approved an additional probation restriction – that Appellant stay at home absent approval otherwise. Neither the probation department nor the court ever informed Appellant that the counseling requirement of his probation had been terminated, and we find it noteworthy that, at his probation violation hearing, Appellant made no mention that he had relied in any way on the May 18

memorandum.[9] We find no abuse of discretion, much less fundamental error, in the trial court's finding that Appellant violated his probation for failing to attend sex offender counseling and its decision to revoke his probation and impose sentence.

CONCLUSION

¶20 We affirm the trial court's decision to revoke Appellant's probation and sentence him to incarceration in ADOC.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
PHILIP HALL, Presiding Judge

_____/S/_____
JON W. THOMPSON, Judge

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[9] Appellant also suggests that, because an extended period of time had passed from the time he ceased attending counseling until the State filed its petition to revoke his probation, the State was somehow precluded from asserting he had violated the terms of his probation. He provides no support for such suggestion, and we find none. We further disagree with his insinuation that only his probation officer had the authority to file a petition to revoke his probation. Rule 27.6(a), Ariz. R. Crim. P., provides that when reasonable cause exists to believe a probationer has violated a condition of probation, either "the probation officer *or the prosecutor* may petition the court to revoke probation." (Emphasis added.)