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ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR09-574

	Opinion Delivered OCTOBER 28, 2009
BOBBY J. MAY APPELLANT	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, [NO. CR-1198-470]
V.	HONORABLE JAMES O. COX, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Bobby J. May appeals the revocation of his suspended imposition of sentence, for which he was sentenced to a term of imprisonment of three years in the Arkansas Department of Correction and an additional ten years suspended. On appeal, he challenges the sufficiency of the evidence. We affirm.

On October 12, 1998, appellant pleaded guilty to delivery of cocaine. He was sentenced, pursuant to a judgment and commitment order filed on October 20, 1998, to five years' imprisonment to be followed by fifteen years' suspended imposition of sentence. Conditions of his suspended sentence included that he not violate any federal, state, or municipal law, as well as that he pay $150 in court costs. Appellant was released on parole on or about January 27, 2005.

On December 15, 2008, the State filed a petition to revoke the suspended sentence on the basis that appellant had committed the offense of domestic battery in the third degree on December 6, 2008, as well as his failure to pay court costs in the amount of $150. A hearing was held on the petition to revoke on March 4, 2009.

At the hearing, the State initially introduced, without objection, appellant's fine and cost ledger, which provided evidence that he had never paid the $150 in ordered court costs. The State then presented testimony from a single witness, Officer Derek Harwood of the Fort Smith Police Department. Officer Harwood testified that on December 6, 2008, he responded to a domestic-disturbance call. At the residence, Officer Harwood spoke with both appellant and his wife. Mrs. May was not present at the hearing, and accordingly, Officer Harwood limited his testimony to those statements made by appellant at the scene. Officer Harwood testified that appellant readily admitted that he "slapped the hell out of her face," referring to Mrs. May. Officer Harwood presented information he gained from first-hand observations and from reviewing Mrs. May's driver's license, including, (1) Mrs. May was five-feet four-inches tall, (2) weighed approximately 140 pounds, (3) was thirty-four weeks pregnant, and (4) had a swollen knot on her cheek and a knot over her right eye from being hit.

The State rested at the conclusion of Officer Harwood's testimony, at which time appellant's counsel moved to dismiss the petition to revoke on the basis that the State had not

met its *corpus delicti* requirement of presenting evidence to corroborate appellant's extrajudicial confession. The circuit court denied appellant's motion to dismiss.

Appellant then testified on his own behalf, explaining that his public defender told him that his fines and costs would be satisfied by his prison time. He testified that was the reason he had not paid the $150 in costs and stated that he could pay it that day if so ordered by the circuit court.

Appellant then specifically acknowledged that he had slapped Mrs. May, but attempted to excuse his actions by stating that, prior to the slap, Mrs. May had attacked him during an argument and hit him in the face. Appellant also testified that Mrs. May told his parole officer that he did nothing to harm her and that the parole hold on him was then removed, permitting him to bond out of jail. Appellant denied telling Officer Harwood that he had "slapped the hell out of her face" and stated that there were no bruises or marks on Mrs. May's face. He acknowledged that he stands six-foot three-inches and that his wife was thirty-four weeks pregnant at the time of the incident.

After the defense rested, the circuit judge stated that he was not sold on appellant's answer regarding the $150 and directed him to forfeit that amount to the bailiff before leaving the hearing room. As to the only other charge, domestic battery in the third degree, the circuit court ruled that, based upon appellant's statement to Officer Harwood combined with Officer Harwood's personal observations of Mrs. May's injuries, appellant violated the terms and conditions of his suspended sentence. He revoked appellant's suspended sentence and

sentenced him pursuant to a judgment and commitment order entered on March 5, 2009. Appellant filed a timely notice of appeal on March 6, 2009, and an amended notice of appeal on March 10, 2009. This appeal followed.

Standard of Review and Applicable Statutory Law

In a hearing to revoke probation or a suspended imposition of sentence, the State must prove its case by a preponderance of the evidence. *Haley v. State*, 96 Ark. App. 256, 240 S.W.3d 615 (2006). To revoke probation or a suspension, the circuit 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 (Supp. 2009); *Haley*, *supra*. The State bears the burden of proof, but need only prove that the defendant committed one violation of the conditions. *Id*. 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. *Id.* Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. *Id*. Since the determination of a preponderance of the evidence turns on questions of credibility and the weight to be given testimony, we defer to the trial judge's superior position. *Id*.

Arkansas Code Annotated section 5-26-305(a)(1) (Supp. 2009) provides that a person commits third-degree domestic battery if, with the purpose of causing physical injury to a family member, the person causes physical injury to that family member. While normally a Class A misdemeanor, third-degree domestic battery becomes a Class D felony when

committed against a woman known to be pregnant. *See* Ark. Code Ann. § 5-26-305(b)(1), (b)(2)(A). Physical injury is defined, in relevant part, as "the infliction of bruising, swelling, or visible marks associated with physical trauma." Ark. Code Ann. § 5-1-102(14)(C) (Supp. 2009).

Discussion

We hold that appellant's admission that he slapped Mrs. May during the hearing on the State's petition to revoke, in conjunction with Officer Harwood's personal observation of the swollen knot on Mrs. May's cheek and knot over her right eye from being hit, supports the circuit court's finding that appellant inexcusably violated a condition of that probation or suspension. Ark. Code Ann. § 5-4-309 (Supp. 2009). *See Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978) (affirming a revocation where the appellant confessed to a burglary to his probation officer, and holding that this section is not applicable to revocation hearings).

Selph is factually similar to the instant case, in that appellant's suspended-sentence conditions included that he not violate any federal, state, or municipal law, which would include domestic battery in the third degree, and appellant admitted to Officer Harwood that he hit his pregnant wife. Pursuant to *Selph*, appellant's uncorroborated confession was sufficient to establish that he violated a condition of his suspended sentence. The rule of *corpus delicti* found in Arkansas Code Annotated section 16-89-111(d) (Repl. 2005) provides that a confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that the offense was committed. We hold that the rule

does not apply in the instant case because appellant admitted to the battery in open court during the hearing on the petition to revoke.

Despite appellant's attempted excuse for his actions, we defer to the circuit judge's superior position regarding questions of credibility and the weight to be given testimony. *Haley*, *supra*. As the trier of fact, the circuit court was free to believe all or part of any witness's testimony and to resolve questions of conflicting testimony and inconsistent evidence. *See Morgan v. State*, 2009 Ark. 257, __ S.W.3d __.

Affirmed.

VAUGHT, C.J., and MARSHALL, J., agree.