NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR08-877

	Opinion Delivered February 25, 2009
MICHAEL GATES APPELLANT	APPEAL FROM THE CRAIGHEAD COUNTY CIRCUIT COURT [NOS. CR-2002-28; 2002-376; 2002-655; 2005-40; 2005-949; 2005-1004]
V.	HONORABLE VICTOR HILL, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN MAUZY PITTMAN, Judge

Michael Gates appeals from an order revoking his suspended impositions of sentence in six separate cases. He argues that the evidence was insufficient because the State failed to introduce a video on which several witnesses had based their identification of him, and because the State failed to produce a taped recording of a police interrogation. We affirm.

Appellant pled guilty in 2004 and 2005 to at least twenty-nine felony offenses in six criminal cases. The crimes included residential burglary, violation of the Arkansas Hot Check Law, failure to appear, three counts of forgery, nine counts of theft of property, and fourteen counts of committing a fraudulent insurance act. Appellant was fined and ordered to pay costs and restitution. Imposition of any sentence to imprisonment was suspended in each case on various conditions, including the requirements that appellant not commit any offense punishable by imprisonment and that he pay the ordered funds. Within the periods of

suspension, the State filed petitions to revoke, alleging that appellant violated the conditions of his suspensions by committing the criminal offenses of theft of property, commercial burglary, and violation of the Arkansas Hot Check Law; and by failing to pay fines, costs, and restitution as ordered. After a hearing, the trial court found that appellant violated the conditions of his suspensions; granted the petitions to revoke; sentenced appellant to consecutive twenty-year and ten-year terms in the Arkansas Department of Correction for one theft and one fraudulent insurance act; and suspended imposition of sentence for the remaining twenty-seven counts for various periods, up to twenty years.

In a revocation hearing, the State has the burden of proving a violation of a condition of probation or the suspended sentence by a preponderance of the evidence. *Williams v. State*, 351 Ark. 229, 91 S.W.3d 68 (2002). On appeal, we will uphold the trial court's findings unless they are clearly against the preponderance of the evidence. *Id.* We defer to the trial court's superior position to determine questions of credibility and the weight to be given to testimony. *Id.*

Appellant's first sufficiency argument concerns a video recording obtained from a security camera that showed an individual cut the lock on a fence and steal a large trailer. Two witnesses testified at the hearing that they had met appellant at the victim's shop one day before the theft. They testified that they recognized appellant as the person seen in the video cutting the lock and committing the theft, and that they recognized appellant's truck as the one used to haul away the trailer. The State did not show the video at the hearing because the necessary playback equipment was not available. Appellant moved for dismissal on the

grounds that the video had not been shown at the hearing. The trial court denied the motion because there was no suggestion that the video contained anything exculpatory and the testimony of the State's witnesses was sufficient to make a *prima facie* showing of the allegations against appellant.

Appellant asserts that the evidence was insufficient to support the revocation because the State failed to show the video. We do not agree. Two witnesses who saw the video identified appellant as the person who committed the theft, a police officer testified that he Mirandized appellant and that appellant confessed to stealing the trailer, and there was evidence that a search of appellant's truck revealed two pairs of bolt cutters and a particularly large hitch ball of the sort needed to haul the victim's trailer. While appellant denied the allegations at the hearing, we cannot conclude that the trial court clearly erred in finding that appellant committed the theft.

Appellant also argues that the evidence was insufficient because the State's failure to introduce the crime scene video was a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). He did not clearly raise this argument below, and an appellant cannot make an argument for the first time on appeal. *See Anderson v. State*, 357 Ark. 180, 209, 163 S.W.3d 333, 349-50 (2004). In any event, *Brady* does not mandate that the State introduce all possible evidence at trial, but instead holds that due process requires the State to disclose all favorable evidence material to the guilt or punishment of an individual. Our supreme court has summarized *Brady* and its progeny as follows:

> In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon

> request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. In *Strickler v. Greene*, 527 U.S. 263, 280 (1999), the Court revisited Brady and declared that evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." In *Strickler*, the Court also set out the three elements of a true Brady violation: (1) that the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) that the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) that prejudice must have ensued.

Cook v. State, 361 Ark. 91, 105, 204 S.W.3d 532, 540 (2005). Here, even were we to assume that *Brady* applies to revocation proceedings—a question that has not been settled—and that a *Brady* violation required dismissal rather than retrial, as appellant seems to assert, we would not reverse in this case because there is nothing to show that the video was not made known and available to appellant before trial, or that the video contained anything exculpatory.

Appellant next argues that the evidence is insufficient because the State failed to make an audio or video recording of his interrogation in which, according to testimony, appellant made incriminating statements. However, it has been expressly held that the State has no duty to make such a recording of criminal interrogations, *Clark v. State*, 374 Ark. 292, ___ S.W.3d ___ (2008), and consequently we find no error.

Affirmed.

GRUBER and BAKER, JJ., agree.