Cite as 2011 Ark. App. 328

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR10-1256

DALE NELSON JR. APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** MAY 4, 2011 APPEAL FROM THE PHILLIPS COUNTY CIRCUIT COURT [CR2006-243] HONORABLE RICHARD LEE PROCTOR, JUDGE AFFIRMED

RITA W. GRUBER, Judge

Dale Nelson, Jr., appeals the circuit court's revocation of his probation for residential burglary and theft of property. He was sentenced on the convictions to concurrent sentences of twenty years' imprisonment in the Arkansas Department of Correction. He raises two points on appeal, contending that there was not sufficient evidence to revoke and that the trial court violated his right to confrontation by admitting into evidence the out-of-court statements of his accomplice. We disagree and affirm.

A judgment and commitment order of January 26, 2007, reflects that the circuit court accepted Mr. Nelson's negotiated pleas of guilty to residential burglary and theft of property, and sentenced him on each count to sixty months' probation, subject to certain conditions. The State subsequently filed a petition to revoke, alleging that Mr. Nelson had inexcusably failed to comply with probation conditions by committing the felony offenses of residential

burglary and theft of property, and by possessing a firearm. The petition alleged that these violations occurred on May 12, 2010, when Mr. Nelson unlawfully entered a residence and, with the purpose of depriving the owner of her property, took unauthorized control of a .380-caliber handgun.

After conducting a revocation hearing, the circuit court revoked Mr. Nelson's probation based upon a finding that he had inexcusably failed to comply with two conditions on May 12, 2010. Regarding the condition that he not commit an offense punishable by imprisonment, the court found that he had unlawfully entered a residence and knowingly, with the purpose of depriving the owner of her property, had taken unauthorized control over a .380-caliber handgun, offenses that were the subject of a pending case in circuit court. Regarding the condition that he not possess any firearm, the court found that he possessed the handgun.

In order to revoke probation, the trial court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (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). We do not reverse a trial court's findings on appeal unless they are clearly against the preponderance of the evidence. *Sisk v. State*, 81 Ark. App. 276, 101 S.W.3d 248 (2003). Because a determination of a preponderance of the evidence turns on questions of credibility and weight to be given to the testimony, we defer

to the trial judge's superior position. *Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004).

Under these standards, the evidence is as follows. According to the testimony of Doris Hinson, she discovered that her gun was missing the night after Nelson's second visit to her home in May 2010. He first had come on Mother's Day with her granddaughter Athena, a man named Frank Norton, and another girl. They stayed a few minutes to say "Happy Mother's Day" and to have her fix flowers for someone's grave, and Mr. Norton told her that he and Athena were in a relationship. The two men came again on May 12 and wanted to mow the grass. Ms. Hinson gave them work mowing and filling in holes her dogs had dug in the fenced backyard.

Ms. Hinson testified that Mr. Norton mowed the front yard, Mr. Nelson filled the holes in the back, and she fixed their lunch and fed their dogs. Later, neglecting to lock her back door, she "went around in the front yard" and talked to Mr. Norton there. She heard the back door slam as she was returning by the carport. Mr. Nelson was still filling holes when she reached the back door and went into the house. The men came in when they finished, and she paid them. The gun, which she had handled in the two days between their visits, was not in her bedside drawer when she looked for it that night after dark.

Ms. Hinson testified that no one else had been in her house for the two days between the men's visits, and the only chance for the men to get the gun was when she was in the front yard with Mr. Norton. Ms. Hinson thought that Athena, who knew exactly where the gun was kept, probably had told them where it was "and put them up to getting it." Athena

had "stolen everything" from her before, they did not "get along," and Ms. Hinson had fixed her windows to prevent grandchildren from "slipping through" her windows, which they had done in the past.

Ms. Hinson testified that Mr. Nelson "didn't have over ten or fifteen minutes" while she was in the front yard. She said, "It takes me an hour to find something in there myself, you know. I know he had to have went straight to my bedroom, got the gun and was back in the fence when I got back." She said Mr. Nelson had to walk from the kitchen through several rooms, a hall, and a bathroom before the bedroom, and "had to have known" where the gun was in order to go straight to it in her "great big" house. She did not see Mr. Nelson take the gun but was sure that Mr. Norton, who had been only in the front yard, could not have taken it, and that no neighbor or anyone else could have been there when the door slammed. She also testified, "I had a weed eater that left the same day, but [the two men] didn't get it because they were walking."

Investigator Brian Holloway of the Phillips County Sheriff's Department testified that he investigated the burglary and theft at Ms. Hinson's house, that he recovered her gun from Mr. Norton, and that Mr. Norton stated he had received it from Mr. Nelson, who had gone into the house and taken it. Mr. Norton's written statement was admitted into evidence through Officer Holloway's testimony.

Sufficiency of Evidence

In his first point on appeal, Mr. Nelson asserts that evidence was insufficient to show

that he committed residential burglary and theft of property because Ms. Hinson's testimony against him was speculative. He notes her testimony that she did not see him; that he could not have had time to find the handgun without knowing its location; that he and Mr. Norton were not responsible for the disappearance of her weed eater; that her granddaughter had stolen from her and was in a relationship with Mr. Norton, in whose possession the gun was found; and that her grandchildren had slipped in through the windows before. Mr. Nelson also asserts that the evidence was insufficient to show that he possessed a firearm because it was based only upon Mr. Norton's self-serving, uncorroborated statement.

Mr. Nelson's arguments go to the weight and credibility of the testimony, which were matters for the trial court to decide. The court's findings that he violated probation conditions, by committing crimes punishable by imprisonment and by possessing a firearm, turned upon Ms. Hinson's testimony that he was the only person who could have entered her home and taken the gun. The trial court's findings are not clearly against a preponderance of the evidence.

Right to Confrontation

Mr. Nelson contends in his second point on appeal that his right to confrontation was violated when the trial court allowed Investigator Holloway's testimony that Mr. Norton said Mr. Nelson went into the house and took the gun, and allowed the introduction of the statement that Mr. Norton gave and signed.[1] He argues on appeal, as he did in his objection

[1]Nelson refers in his brief to the statement that Norton "allegedly" gave and signed. He does not support this allegation, nor did he make it below; thus, we do not address it.

below, that the statement was self-serving and that he had no opportunity to confront and cross-examine his accuser.

The defendant in a revocation hearing "has the right to confront and cross-examine . . . adverse witnesses unless the court specifically finds good cause for not allowing confrontation," Ark. Code Ann. § 5-4-310(c)(1) (Repl. 2006), and the trial court must balance that right against grounds the State asserts for not requiring confrontation. *Goforth v. State*, 27 Ark. App. 150, 767 S.W.2d 537 (1989) (citing *United States v. Bell*, 785 F.2d 640 (8th Cir. 1986)). But in the absence of any prejudice, this court will not reverse a trial court's admission of adverse testimony without a finding of good cause. *Fitzpatrick v. State*, 7 Ark. App. 246, 249, 647 S.W.2d 480, 482 (1983).

The State did not explain Mr. Norton's absence from the revocation hearing, nor did the trial court make a good-cause finding when allowing the written statement and testimony about it into evidence. This was not, however, reversible error. At the hearing's conclusion, the trial court reviewed Ms. Hinson's testimony and found it "more likely than not" that Mr. Nelson entered her house and took the handgun. The court further found that the State would have met its burden of proof even without the statement of Mr. Norton taken by Officer Holloway, and that the statement "only strengthens the case." Because the revocation of probation was supported by evidence other than the out-of-court statement, no prejudice occurred as a result of admitting it.

Affirmed.

MARTIN, J., agrees.

HART, J., concurs.