

DIVISION IV

JOSEPHINE LINKER HART, Judge
ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION

CACR06-384

November 15, 2006

KENNETH RAY MARSHALL
APPELLANT

APPEAL FROM THE COLUMBIA
COUNTY CIRCUIT COURT
[NO. CR-2005-64A, CR-2005-104A]

HONORABLE LARRY CHANDLER,
CIRCUIT JUDGE

V.

STATE OF ARKANSAS
APPELLEE

AFFIRMED

Appellant, Kenneth Ray Marshall, appeals from the circuit court's revocation of his probation. Specifically, he argues that the court erred in finding that he violated the terms and conditions of his probation. We affirm.

According to the amended judgment and disposition order filed October 12, 2005, appellant pleaded guilty on October 7, 2005, to two felony counts of theft of property and one felony count of breaking or entering and was placed on probation for two consecutive five-year periods. As part of the conditions of appellant's probation, which he received on October 7, 2005, he agreed to not use any controlled substance and not commit a criminal offense punishable by imprisonment. Also on October 12, 2005, the State filed an amended petition to revoke appellant's probation, alleging that he used cocaine on October 10, 2005-

October 11, 2005, and committed the crimes of commercial burglary and theft of property on October 11, 2005.

On October 14, 2005, the circuit court conducted a hearing on the State's petition to revoke. At the hearing, appellant's probation officer, Burt Errington, testified that that on October 7, 2005, he read and explained to appellant the conditions of his probation. Errington further testified that appellant admitted on October 12, 2005, that he had used cocaine "the night of October the 10th, 11th." In his own testimony at the hearing, appellant admitted that he had told Errington that he had used cocaine that night.

The State then presented testimony regarding its allegation that appellant committed a commercial burglary and theft. Josh Bolton of the Magnolia Police Department testified that at 3:52 a.m., on October 11, 2005, he responded to a burglary alarm at a Rentway store. While investigating, he was contacted by Christopher Wilson, who told him that a man had just left the store pushing a big-screen television. Wilson described the man as a black male wearing blue jeans and a long, baggy, light-blue tee shirt. Bolton testified that appellant was then taken into custody, and when Wilson was asked, he was able to identify appellant as the person he saw pushing the television. Bolton testified that Wilson stated that he could identify appellant by the clothes appellant was wearing. Bolton also testified that Wilson's description of the clothing matched the clothing worn by appellant.

Christopher Wilson testified that he saw appellant pushing the television. Wilson testified that he told an officer that the person was wearing a long, light-blue tee shirt and

blue jeans. Wilson further testified that the officer asked him to identify the person and that there was “[n]o doubt” that the person in the officer’s custody was the person he had seen pushing the television. Wilson then made an in-court identification of appellant as the person he had seen pushing the television. On cross-examination, Wilson testified that when he made his identification for the police, he recognized the person by his clothing and his facial hair and that he never had a good look at his face.

Also testifying for the State was Penny Robertson, who testified that she observed a man pushing a big-screen television into the road. She reported it to the Magnolia Police Department and described the man as wearing a dark shirt and dark pants. Robertson then made an in-court identification of appellant as the person she had seen pushing the television. Robertson further testified, “I don’t believe he had on a light shirt, but he may have. I don’t know.” She further testified that she saw appellant for “[t]hree or four minutes” and saw his face for “[a] couple of minutes.”

The court revoked appellant’s probation. On appeal, appellant argues that his statement to Errington was insufficient to establish that he used a controlled substance, and he suggests that the State should have had either a drug analysis showing his usage of a controlled substance or proof that a controlled substance was found in his possession. He also argues that the evidence was insufficient to show he committed a commercial burglary and theft, because Wilson’s identification “was based upon the clothing of [appellant] in the back of the patrol car,” and because Robertson’s “description of the clothes worn by the

perpetrator is contradictory to the clothes worn by [appellant] at the time of arrest.”

To revoke probation, the State must prove a violation of a condition of probation by a preponderance of the evidence, and on appeal, the circuit court’s findings will be affirmed unless they are clearly against the preponderance of the evidence. *Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004). Because the determination of a preponderance of the evidence turns on questions of the credibility of the witnesses and the weight to be given to their testimony, we defer to the circuit court’s superior position. *Id.*

Here, one of appellant’s probation conditions was that he not use a controlled substance, and appellant admitted to his probation officer that he used cocaine. Appellant’s uncorroborated confession was sufficient to establish that he violated a condition of his probation. *See Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978) (holding that the defendant’s “virtual confession” afforded a sufficient basis for revocation). As for appellant’s assertions that Wilson’s identification was based on appellant’s clothes and that Robertson’s description of the clothes was inconsistent with what appellant was wearing at the time of his arrest, these are challenges to the credibility of the witnesses and the weight to be given to their testimony, and as stated above, we defer to the superior position of the circuit court on these matters.

Affirmed.

VAUGHT and BAKER, JJ., agree.