

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION II

CACR 06-427

November 1, 2006

JOE MCKINNEY JONES, JR.
APPELLANT

AN APPEAL FROM
SEBASTIAN COUNTY CIRCUIT
COURT
[CR-95-1090, CR-02-1140]

V.

HON. JAMES MARSCHEWSKI,
JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

Joe Jones, Jr. appeals from the revocation of his suspended sentences. He argues that the evidence does not support that he violated the terms of his suspended sentences by committing residential burglary and terroristic threatening. We affirm the trial court's order.

Jones was serving suspended sentences for drug-related offenses in two separate cases, CR 95-1090 and CR 2002-1140.¹ The conditions of his suspended sentences prohibited him from violating any federal, state, or municipal law. On May 9, 2005, the State filed a petition to revoke Jones's suspended sentences, alleging that he had committed burglary and terroristic

¹In May 1996, he was ordered to serve twenty years with sixteen and one-half years suspended in CR 95-1090. In March 2003, in CR 2002-1140, he was ordered to serve six years plus fourteen years suspended.

threatening on May 3, 2005.

The evidence adduced at the hearing on the State's petition was as follows. Jones and his wife, Latasha Jones, were separated; during the separation, Latasha had an affair with Kwincii Stewart. Latasha testified that Jones told her and her mother the week before the burglary that he was going to "get" them; in addition, Stewart was made aware by his child's mother that Jones had threatened him.

The State alleged that the burglary that was the basis for the petition to revoke occurred in the early morning hours of May 3, 2005. Stewart testified that earlier that evening, Latasha phoned him and asked him to come over. Latasha and Stewart were asleep in the bedroom of Latasha's apartment. Latasha was awakened by the doorbell. Then, the window in the front of the apartment was broken, followed shortly thereafter by the breaking of her bedroom window, which was beside her bed.

Latasha screamed, "Oh, my God, it's Joe." Stewart grabbed a gun that was stored near the bed in a clothes-basket. He and Latasha went into the living room, where Jones entered the apartment through the front window. According to Latasha, Stewart asked Jones to leave but Jones said that he was going to "get them" and that "I've got you all right where I want you." Jones "charged" toward Stewart with an unidentified object in his hand; Stewart shot Jones in the leg; and Jones left. Stewart maintained that he shot Jones only once. Latasha testified that Jones did not have permission to be at her apartment. She denied that she had called Jones and asked him to come over; she insisted that she did not have a telephone.

The investigating officer, David Joplin, was called to the scene at approximately 4:45 a.m. He observed that the front window, a single pane, “double-hung window” was broken, and that shattered glass was lying on the exterior of the apartment as well as the interior. According to the photos admitted into evidence, the top window was broken, but the bottom window was intact. Joplin said a person could enter the residence by opening the window and then crawling through it. He also observed that the bedroom window was broken. Joplin personally saw “a couple of” bullet holes in the wall and “a couple of” spent casings in the apartment, but he testified that another investigating officer found four spent casings.

Jones did not testify, but presented witnesses on his behalf. His sister, Karen Jones, testified that Jones lived with her and that on the morning of May 3rd, while she was preparing to go to work at 5:00 a.m., she heard him talking to someone but no one was in his bedroom. She said that Jones had her cell phone and home phone in his room, and that it sounded like he was talking on the phone. Shortly thereafter, she heard her security system “chime,” indicating that someone had left; she looked for Jones but did not see him. Approximately thirty to forty-five minutes later, Jones returned and told his sister that he had been shot.

Doris Berrier, who lives across the street from Latasha, testified that Latasha told her two weeks prior to the shooting that she had purchased a gun in case “Joe got crazy.” She also said that Latasha told her that Jones had their children and then asked Berrier if she knew how Latasha could get her children back. When Berrier, in essence, told Latasha that Jones had a right to see his children, Latasha allegedly responded, “Well, either way, he’s going down.

He's going down. He's going to prison. He's already going to prison." Berrier characterized Latasha as "kind of crazy" and said that Latasha harassed Jones by going to his house. Berrier admitted that she took Latasha to the courthouse on one occasion, so that Latasha could check on an order of protection. However, Berrier believed that Latasha was "lying" and that she "set him [Jones] up because she asked how she could get the kids and she ensured something happened so she could."

After hearing the testimony, the court orally ruled as follows:

The Court finds by a preponderance of the evidence that the State has proven its case. I believe that on the night in question, you approached the house early in the morning. You could not gain entry into it in a normal way; you broke the windows and as a result intended to either confront this individual who was seeing your wife, or otherwise, and that you did not have permission to be there, and that's a violation of the terms and conditions of your suspended sentence[s].

The court sentenced Jones to serve five years in the Arkansas Department of Correction in case CR 95-1090, with no suspended time. In case CR 02-1140, the court ordered Jones to serve twenty years, with thirteen years suspended. These sentences are to run concurrently.

Jones's sole argument is that the trial court erred in revoking his suspended sentences because the State failed to prove that he violated the terms or conditions of his suspended sentences. In a revocation hearing, the State has the burden of proving the defendant violated a term or condition of his suspended sentence by a preponderance of the evidence. *Mashburn v. State*, 87 Ark. App. 89, 189 S.W.3d 73 (2004). 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 resolve questions of credibility and to determine the weight to

be given to testimony. *Id.* The State need only prove a single violation to support the revocation. *Thompson v. State*, 342 Ark. 365, 28 S.W.3d 290 (2000).

In this case, the State sought to prove that Jones violated the terms of his suspended sentences by committing residential burglary and terroristic threatening. However, the trial judge's remarks make clear that he relied solely on the evidence establishing that Jones committed residential burglary, which we hold was sufficient to revoke Jones's suspended sentences. A person commits residential burglary if he enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing in the residential occupiable structure any offense punishable by imprisonment. Ark. Code Ann. § 5-39-201(a)(1) (Repl. 2006). To "enter or remain unlawfully" means to enter or remain in or upon premises when not licensed or privileged to enter or remain in or upon the premises. Ark. Code Ann. § 5-39-101(2)(A) (Repl. 2006).

Thus, in order to prove that Jones committed residential burglary, the State was required to prove that he unlawfully entered or occupied Latasha's apartment with the intent to commit therein an offense punishable by imprisonment. Jones maintains that the evidence was not sufficient to support the trial court's decision to revoke his suspended sentences because the State's witnesses were not "completely truthful." He points to inconsistencies in the evidence and attempts to attack the credibility of Latasha and Stewart. For example, he notes Stewart testified that he shot Jones only once, yet the investigating officer found four spent shell casings. He further notes Latasha said that she could not have phoned Jones and invited him

over because she had no telephone; yet, Stewart testified that Latasha phoned him and invited him over. Jones also asserts that Berrier's testimony supports that his wife took steps to "set him up" and that his sister's testimony supports that he received a telephone call early that morning, before 5:00 a.m.

The problem for Jones is, in order for us to reverse, we would be required to overturn the trial court's credibility findings. It is well settled that we defer to the trial court's superior position to resolve inconsistencies in the evidence and to determine the credibility of the witnesses. *Mashburn, supra*. In this instance, the trial court was entitled to believe Latasha's and Stewart's *uncontradicted* and *consistent* testimony that Jones previously threatened Latasha and Stewart; that Jones did not have permission to be in Latasha's apartment; that he broke into her apartment; that he again threatened Latasha and Stewart; and that, with something in his hand, he "charged" toward Stewart.

Thus, the preponderance of the evidence, if believed by the trier-of-fact, established that Jones unlawfully entered and unlawfully occupied Latasha's apartment with the intent to commit at least third-degree battery against Stewart, which is a Class A misdemeanor punishable by up to one year in prison. *See Ark. Code Ann. § 5-13-203(a)(1) (Repl. 2006)* (defining third-degree battery to include purposefully causing physical injury to another person); *Ark Code Ann. § 5-4-401(b)(1) (Repl. 2006)* (setting the punishment for a Class A misdemeanor).

Affirmed.

PITTMAN, C.J., and GLOVER, J., agree.