

ARKANSAS COURT OF APPEALS

DIVISION III

No. CACR11-127

AMBER J. WESTBROOK

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered October 12, 2011APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT, FORT
SMITH DISTRICT

[NO. CR-2008-260; CR-2009-288-A]

HONORABLE JAMES O. COX,
JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Amber Westbrook appeals the revocation of her suspended imposition of sentence for two felony convictions, contending that the State failed to prove by a preponderance of the evidence that she violated terms and conditions of the suspended impositions of sentence. We disagree and affirm.

In CR-2008-260 Westbrook pled guilty to possession of methamphetamine, for which she received a sixty months' suspended imposition of sentence as well as fines, court costs, and fees that totaled \$1056. The conditions of suspended imposition required, in part, that she avoid violating the law and that she pay \$55 a month toward the total amount. In January 2009 the State filed a petition to revoke the suspended imposition of sentence based upon violations of terms and conditions. The State alleged that Westbrook had committed the offense of possessing a counterfeit substance with intent to deliver, for which charges were

pending, and had failed to pay as ordered.

On June 10, 2009, Westbrook pled guilty to the counterfeit-substance charge, CR-2009-288, and the State withdrew its revocation petition in CR-2008-260. She was sentenced in CR-2009-288 to forty-eight months' imprisonment and seventy-two months' suspended imposition of sentence, again with a condition that she not violate any law. She was sent to the Arkansas Department of Correction and in May 2010 was released.

In October 2010 the State filed a petition to revoke in both CR-2008-260 and CR-2009-288. The petition alleged that Westbrook had committed the offense of third-degree domestic battering, for which charges were pending, and had failed to pay as ordered in CR-2008-260. At a November 19, 2010 revocation hearing, the circuit court found that Westbrook had committed the offense of domestic battering in the third degree and had failed to pay. The court granted the State's petition to revoke the suspended imposition of sentence in both cases and imposed a term of three years' imprisonment with an additional thirteen years' suspended imposition of sentence. Westbrook appeals the court's judgment and commitment order, contending that the State failed to prove the elements of third-degree domestic battering and failed to prove that her failure to pay was willful.

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). Evidence that is insufficient for a criminal conviction may be sufficient for revocation of probation or suspended sentence. *Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004). The State bears the burden of proof but need prove

only 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. *Anderson v. State*, 2011 Ark. App. 350.

Westbrook first contends that the State failed to prove that she committed domestic battering in the third degree. Our criminal code states, in pertinent part, that a person commits the offense if, (1) with the purpose of causing physical injury to a family or household member, the person causes physical injury to a family or household member; or (2) the person recklessly causes physical injury to a family or household member. Ark. Code Ann. § 5-26-305(a) (Supp. 2011). "Physical injury" is the impairment of physical condition; *infliction of substantial pain*; or infliction of bruising, swelling, or a visible mark associated with physical trauma. Ark. Code Ann. § 5-1-102(14) (A), (B), (C) (Supp. 2011).

Here, Officer Doug Brooks of the Fort Smith Police Department testified that he was assisting in a search on October 13, 2010, when he heard screams coming from about a block away. He could see Westbrook bringing her hand above her head "as if to strike somebody down." She was standing over her three-year-old nephew, who lay cowering on the ground, "upset and crying, . . . curled up like in a fetal position, just trying to protect himself." The nephew, "so small and at her feet," appeared to weigh about thirty pounds. It was not as if she were spanking a child, but as if two adults were fighting in "a beat-down," one on the

ground. She brought her hand down with a full-fledged strike or swing at least four or five times, saying either “try it again” or “do it again.”

Officer Darrell Craghead was half a block closer to the scene. He heard a female screaming, looked, and saw Westbrook grab the shoulder of a child running away from her on a sidewalk. She “struck him several times hard and fast,” he “went down to the ground,” and she “reared back as hard as she could and just struck him,” screaming in his face and hitting him again. Craghead counted about ten times that she struck the child. Westbrook finally looked at the officers, who were yelling at her to stop, then picked up the child and held him. The child was crying and “really upset” when officers reached him. Craghead commented to Westbrook, “I think that was a bit excessive, don’t you think?” She replied that she was scared because the child had been running and she thought he was going to get hit by a car; she said that she spanked him because he had almost run out into traffic. Craghead did not see any traffic in the area.

The officers took the child home, where he played and “went about his business” until his mother, Westbrook’s sister, arrived and officers turned the child over to her. The officers observed no marks or bruises on the child, and the mother testified that there were none.

Westbrook testified in her own defense. She explained that she was babysitting the child, he ran out of the house and down the block, and she caught him and spanked him three or four times with an open hand, each time on his bottom.

Westbrook asserts on appeal that she did not have the purpose of causing physical injury and that her actions did not recklessly cause physical injury. She points to her

testimony that, rather than try to harm her nephew, she attempted to protect him from running into the street. She also asserts that there was no physical injury, noting her sister's testimony that the child had no bruises and noting a lack of evidence that the strikes were dealt anywhere other than the child's bottom.

Officers who heard and witnessed the incident, however, testified that Westbrook reared her hand back and struck the three-year-old "hard and fast" several times, even while he cowered on the ground at her feet, not as if she were spanking a child but like "a beat-down" between adults, and that he was visibly upset and crying. This testimony is sufficient to prove that, either purposefully or recklessly, she struck her nephew and caused him physical injury in the form of substantial pain. *See* Ark. Code Ann. §§ 5-26-305(a), 5-1-102(14). The circuit court's finding that Westbrook committed third-degree domestic battering, and thus violated the condition that she break no laws, is not clearly against the preponderance of the evidence.

Westbrook also contends that the State failed to prove by a preponderance of the evidence that her failure to pay was willful. A trial court may revoke a suspended sentence for failure to pay fines or restitution when the failure to pay is willful. *See, e.g., Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997). Factors to be considered in determining whether to revoke probation for failure to pay are the defendant's employment status, earning ability, and financial resources; the willfulness of the defendant's failure to pay; and other special circumstances. Ark. Code Ann. § 5-4-205(f)(3) (Supp. 2011).

The State's evidence of nonpayment included the prosecutor's ledger of Westbrook's

finances and costs in CR-2008-260, which showed a \$60 payment on July 15, 2008, and no other payments. Westbrook testified that she held one job after being ordered to pay in March 2008, made the single payment, went to prison in June 2009, and was currently looking for a job. Her explanation for not paying as ordered was that she had been too busy with parole and going to class after her release from prison, and because she had been released just the past Wednesday from a thirty-day jail term. The circuit court ruled that it was “abundantly clear” that she had not paid as agreed.

We need not address Westbrook’s contention on appeal that the State failed to prove by a preponderance of the evidence that her failure to pay was willful. We have affirmed the circuit court’s finding that she violated the condition that she break no law, and one violation is all that is required to affirm.

Affirmed.

GLADWIN and WYNNE, JJ., agree.