

**ARKANSAS COURT OF APPEALS**DIVISION I  
No. CACR12-38

KENDRICK GRAYDON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

**Opinion Delivered** October 24, 2012APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT, FIRST  
DIVISION

[NOS. CR2007-1173, CR2009-1480]

HONORABLE JAMES LEON  
JOHNSON, JUDGE

AFFIRMED

**ROBIN F. WYNNE, Judge**

Kendrick Graydon appeals from two judgment and commitment orders<sup>1</sup> entered on June 21, 2011: one entered in case number 2007-1173 upon the revocation of his probation; the other entered in case number 2009-1480 upon his conviction in a bench trial for possession of a controlled substance (PCP). He was sentenced to four years' imprisonment in both cases, to be served concurrently. On appeal, Graydon argues that (1) the circuit court erred in revoking his probation because the State failed to prove that he inexcusably violated a condition of his probation, and (2) the State "failed to introduce substantial evidence that [he] possessed the controlled substance at issue." We affirm.

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<sup>1</sup>Graydon filed a motion to file a consolidated brief, which was granted on July 25, 2012.

In June 2007, Graydon pled guilty to possession of a controlled substance (Xanax), second offense, and was sentenced to three years' probation for that offense. On February 6, 2008, the State filed a petition for revocation, alleging that Graydon violated the conditions of his probation by failing to report to his probation officer, failing to pay probation fees, and failing to enter and complete anger-management classes. Graydon pled guilty, and a judgment and commitment order filed on May 12, 2008, reflects that he was sentenced to four years' probation. He signed a written list of the conditions of his probation. On March 3, 2009, the State filed a second petition for revocation, alleging that Graydon violated the conditions of his probation by failing to report to his probation officer, failing to pay probation fees (delinquency of \$375), failing to enter and complete anger-management classes and mandatory drug treatment, and being charged with rape.

At the revocation hearing, Graydon's probation officer, Annette Gilbert, testified that after his first revocation, Graydon again failed to report to her, failed to pay his probation fees, and failed to complete anger-management and drug-treatment classes as required. She stated that when the revocation petition was filed in March 2009, Graydon had not reported to her since September 14, 2008. Gilbert testified regarding the reporting procedures in her office. She further testified that Graydon was delinquent on his probation fees in the amount of \$375. As for the anger-management classes, she stated that Graydon's conditions of probation included that he complete anger-management classes and he had not, to her knowledge, completed them.

Graydon did not offer any testimony or other evidence. The circuit court found that Graydon violated the conditions of his probation by failing to report to his probation officer, failing to make required payments, and failing to attend required classes. Accordingly, the court revoked his probation and sentenced him to four years' imprisonment. On appeal, Graydon argues that the State failed to prove that he inexcusably violated any condition of his probation. He concedes that the State proved that he violated four conditions of his probation, but he contends that "the State failed to introduce any evidence that [his] probation violations had no excuse or justification."

"If a court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his or her suspension or probation, the court may revoke the suspension or probation at any time prior to the expiration of the period of suspension or probation." Ark. Code Ann. § 5-4-309(d) (Supp. 2009). On appellate review, the trial court's findings will be upheld unless they are clearly against a preponderance of the evidence. *Bradley v. State*, 347 Ark. 518, 521, 65 S.W.3d 874, 876 (2002).

Where the alleged violation is a failure to make payments as ordered, the State has the burden of proving by a preponderance of the evidence that the failure to pay was inexcusable. *Phillips v. State*, 101 Ark. App. 190, 192, 272 S.W.3d 123, 125 (2008). Once the State has introduced evidence of nonpayment, the burden of going forward shifts to the defendant to offer some reasonable excuse for his failure to pay.<sup>2</sup> *Reese v. State*, 26 Ark. App.

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<sup>2</sup>The rationale for the shifting of the burden of going forward to the defendant has been explained as follows: "To hold otherwise would place a burden upon the State which it could never meet—it would require the State, as part of its case in chief, to negate any possible excuses for non-payment." *Reese v. State*, 26 Ark. App. 42, 44, 759 S.W.2d 576, 577 (1988).

42, 44, 759 S.W.2d 576, 577 (1988). Where the State presented evidence that an appellant was delinquent on his payments, and the appellant did not testify or offer any evidence that his failure to pay was excusable, this court has affirmed. *E.g.*, *Forrest v. State*, 2010 Ark. App. 288, at 4; *Tyson v. State*, 2009 Ark. App. 856, at 5.

In the present case, the circuit court's finding that Graydon inexcusably failed to make payments as ordered is not clearly against the preponderance of the evidence. Because the State need only prove that the defendant committed one violation of the conditions, *Harris v. State*, 98 Ark. App. 264, 267–68, 254 S.W.3d 789, 792 (2007), we affirm without addressing the other grounds for revocation.

*Case No. CR2009-1480*

In case number CR2009-1480, Graydon was found guilty of possession of a controlled substance (PCP) and sentenced as a habitual offender to four years' imprisonment. The bench trial in this case took place on February 28, 2011, the same day as the revocation hearing. Officer Gregory Quiller of the Little Rock Police Department testified that he was on patrol on June 1, 2008, when he encountered stopped traffic. When he went to investigate the cause, he found Graydon sitting in the driver's seat of a vehicle in the middle of an intersection with the engine turned off. Officer Quiller asked if Graydon was having car problems, and he responded in a confusing way, without answering the question. Graydon made statements about trying to go home and needing Quiller to take him "away from all this." According to Officer Quiller, Graydon was acting "very peculiar," sweating profusely, and unable to focus. Based on Graydon's behavior, Officer Quiller believed he might be under the influence of drugs, possibly PCP. Officer Quiller called for back-up, but

before anyone arrived Graydon began taking off articles of clothing and became increasingly agitated. Officer Haley Hughes arrived on the scene next, and she used pepper spray on Graydon when he came toward her and refused commands to back away. After he was taken into custody, Officer Quiller saw a foil wrapper on the driver's side floorboard; it contained a cigarette dipped in PCP (a "sherm cigarette").

Officer Hughes also testified at trial. She stated that when she arrived on the scene to assist Officer Quiller, Graydon approached as she was getting out of her vehicle. He placed his hand on the door as if to enter the patrol car, and she sprayed him with pepper spray.

Nick Dawson, a chemist at the Arkansas State Crime Lab, testified that he performed various tests on the exhibit and determined that it was PCP mixed with tobacco. At the close of the State's case, the defense made a motion for dismissal; one of its arguments was that the State failed to prove Graydon had actually or constructively possessed the PCP. After the defense recalled a witness, the motion for dismissal was renewed. The court denied the motion and found Graydon guilty of possession of PCP.<sup>3</sup>

On appeal, Graydon argues that the State failed to prove that he possessed PCP. After reciting the requirements for finding constructive possession, he cites case law for the proposition that "a person's exercising control over a container in which contraband is found does not necessarily prove that the person knew that the contents of the container were contraband." *E.g., Ewings v. State*, 85 Ark. App. 411, 155 S.W.3d 715 (2004). He contends

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<sup>3</sup>Misdemeanor charges of resisting arrest, public intoxication, and disorderly conduct were nolle prossed.

that the State failed to prove that he knew that the contents of the foil wrapper were PCP cigarettes.

Graydon's argument is not preserved for appellate review. In order to preserve a sufficiency-of-the-evidence challenge on appeal, a timely, clear, and specific motion for directed verdict must be made to the trial court. *Williamson v. State*, 2009 Ark. 568, at 4, 350 S.W.3d 787, 789 (citing Ark. R. Crim. P. 33.1(c); *Foster v. State*, 2009 Ark. 454). Here, the majority of the motion for dismissal was directed toward a chain-of-custody challenge and issues regarding a change in the weight of the drug during lab testing. Counsel concluded with the following:

I'm going to make an argument that the State hasn't shown that Mr. Graydon either actually possessed or constructively possessed the substance that was not [sic] introduced in—into this case. So I'll move for a directed verdict and a dismissal.

There was no specific mention of the present argument—that the State failed to prove that Graydon knew that the foil wrapper contained PCP. Therefore, we affirm for failure to preserve the sufficiency-of-the-evidence argument.

Affirmed.

VAUGHT, C.J., and BROWN, J., agree.

*Dan Hancock*, Deputy Public Defender, by: *Clint Miller*, Deputy Public Defender,  
for appellant.

*Dustin McDaniel*, Att'y Gen., by: *Kathryn Henry*, Ass't Att'y Gen., for appellee.