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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR 12-64

	Opinion Delivered SEPTEMBER 12, 2012
BUTCH LEE WALCHLI APPELLANT	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, GREENWOOD DISTRICT
V.	[NO. CR-08-68-D-G]
STATE OF ARKANSAS APPELLEE	HONORABLE STEPHEN TABOR, JUDGE
	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Butch Lee Walchli appeals the revocation of his suspended imposition of sentence entered by the Sebastian County Circuit Court. Appellant entered a plea of guilty to first-degree criminal mischief[1] in March 2009, for which he was given a three-year term within which he was required to abide by certain conditions. The conditions included that he pay over $18,000 in aggregate for restitution, fines, costs, and fees, and that he not violate any federal, state, or municipal law. In August 2011, the State petitioned to revoke, accusing appellant of violating his agreed terms by failing to pay as required and by committing aggravated assault, residential burglary, and interference with emergency communications.

[1]Appellant and three other codefendants were charged in 2008 with damages related to Ben Geren Golf Course.

The criminal charges resulted from a domestic incident on August 4, 2011, with his estranged wife, Elizabeth Walchli.

After a hearing on November 2, 2011, the trial judge found that the State proved by a preponderance of the evidence that appellant committed misdemeanor, but not felony, assault. The trial judge sentenced appellant to two years of imprisonment to be followed by eight years of suspended imposition of sentence. This appeal followed. Appellant argues on appeal that the revocation must be reversed because the State failed to prove the *felony* assault alleged in the petition. We disagree and affirm the revocation.

A circuit court may revoke a suspension or probation if it finds that the State proved by a preponderance of the evidence that the appellant inexcusably failed to comply with a condition of that suspension or probation. Ark. Code Ann. § 5-4-309(d) (Repl. 2006). Because the burdens are different, evidence that is insufficient for a criminal conviction may be sufficient for revocation of probation or suspended imposition of sentence. *Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004). On appeal, the appellant bears the burden to demonstrate that the trial court's findings are clearly against the preponderance of the evidence. *Blakes v. State*, 2009 Ark. App. 451, 320 S.W.3d 651. The trial court's findings are given deference because determinations of the preponderance of the evidence turn heavily on questions of credibility and the weight of the evidence. *Williams v. State*, 351 Ark. 229, 91 S.W.3d 68 (2002). Revocations are limited to the bases alleged in the State's petition. *Harris v. State*, 98 Ark. App. 264, 254 S.W.3d 789 (2007).

The evidence at the hearing included the testimony of Elizabeth, the alleged victim of the criminal acts. She testified that she and appellant had been married for three years but separated in May 2011, after which she filed for divorce. Elizabeth testified that on August 4, 2011, appellant came to her apartment, knocked on her door, and used a spare key to enter without her consent. She said she was wearing only a towel because she had just taken a shower. Elizabeth said she reached for her iPhone to call for help, but appellant pulled it out of her hand, pushed her, and then held her against the wall. She said they were arguing about custody and personal property, "hollering at each other," when she yelled in an effort to make him leave. She said appellant then turned her around so that he was up against her back, used his hands to cover her nose and mouth, and pulled back so that she could not breathe. She said she "started seeing black spots" and "honestly thought I was going to pass out." After she dropped to the floor, appellant left, and she was able to run next door.

A teenager in another apartment, Sequoiah Lively, testified that on that day, Elizabeth came to the apartment, knocked, and asked Sequoiah to call 911. She described Elizabeth as wearing a towel, having wet hair, and seeming "scared and shaky." She said she saw appellant standing out in the driveway.

Lavaca City Police Officer Charles Toon testified that he responded to the call, remarking that Elizabeth "seemed to be in a state of panic . . . crying . . . upset . . . traumatized." Officer Toon recounted the events that Elizabeth reported to him, although Toon did not observe any physical marks on her throat or face. Toon spoke with appellant at his home. Appellant said he only went to Elizabeth's apartment to retrieve his tools; he

denied any physical contact with her. Toon arrested appellant for assault on a family member.

Deputy Sonja Cooper, with the Sebastian County Sheriff's Department, transported appellant to the county detention facility in Fort Smith. Deputy Cooper said that during the short ride, she did not ask appellant anything, but he was rambling on about various topics when he "blurted out" that he did put his hands around her neck. Deputy Cooper believed he was referring to Elizabeth.

Appellant testified that, over that summer, he and Elizabeth were having some disagreements over their two-year-old son, but he had a key to her apartment and stayed overnight approximately twelve nights since they had separated. On this day, he said he went to her apartment, albeit unannounced, to retrieve some personal items he was certain she had taken. He saw what he was looking for in her apartment, which led to an argument, but he denied ever getting physical with her. He said that weeks later, Elizabeth expressed a desire to drop the charges after they had been in a custody hearing.

Closing arguments were offered by both sides. Defense counsel urged the judge to find Elizabeth untruthful, only wanting to gain an advantage in the custody and divorce proceeding. The judge determined that the State presented a preponderance of evidence that appellant committed misdemeanor, but not felony, assault. The judge recited in particular the testimony of the disinterested witnesses (the teenage neighbor and the deputy who transported appellant) as supporting evidence of a misdemeanor assault.

Appellant contends that because the trial court did not determine that an *aggravated* assault was committed, the revocation petition cannot stand. Appellant also notes that

the other bases for revocation (residential burglary and interference with emergency communications) were not proved to the trial court. We agree that the trial judge did not find sufficient evidence of the other two alleged criminal violations, but we disagree that revocation could not be sustained on a lesser-included offense of aggravated assault. Revocations may be based upon lesser-included offenses of crimes alleged in the petition to revoke. *Davis v. State*, 308 Ark. 481, 825 S.W.2d 584 (1992); *Pratt v. State*, 2011 Ark. App. 185; *Willis v. State*, 76 Ark. App. 81, 62 S.W.3d 3 (2001). For this reason, we affirm the revocation in this instance.

Affirmed.

WYNNE and GLOVER, JJ., agree.

Milligan Law Offices, by: *Phillip J. Milligan*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Ashley Argo Priest*, Ass't Att'y Gen., for appellee.