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IN THE
COURT OF APPEALS OF INDIANA

PERRY CROWE, JR.,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 46A05-0712-CR-752

APPEAL FROM THE LAPORTE CIRCUIT COURT
The Honorable Thomas J. Alevizos, Judge
Cause No. 46C01-0408-FC-372

August 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Perry Crowe, Jr., appeals the revocation of his probation. Specifically, he contends that the State failed to show by a preponderance of the evidence that improper contact occurred between him and any minor children. Concluding that the conditions of probation lacked sufficient clarity to provide Crowe with fair notice that "shooing" away children would constitute a violation of probation, we reverse and remand.

Facts and Procedural History

In 2005, Crowe pled guilty to and was convicted of child molesting as a Class C felony. The trial court sentenced Crowe to five years with three years suspended to probation. While on probation, Crowe was required to abide by specific sex offender rules. Rule 14 stated:

> You shall have no contact with minor children (under the age of 18) without the authorization of your probation officer. Contact includes face-to-face, telephonic, written, electronic, or any indirect contact via third parties. You must report any incidental contact with persons under age 18 to your probation officer within 24 hours of the contact.

Appellant's App. p. 30.

On July 18, 2007, the State filed a petition requesting revocation of Crowe's probation. The petition alleged that Crowe had violated Rule 14 by having contact with his seventeen-year-old nephew and twelve-year-old niece and contact with "neighbor children at his residence" and for providing deceptive answers during a polygraph test when asked about physical-sexual contact with minors. *Id*. at 33. At the revocation hearing, Crowe admitted to telling other members in attendance at his court-sponsored treatment program that he had periodic contact with his niece and nephew. However,

Crowe testified that he, in fact, did not have any contact with his niece or nephew but told others that he did because he was trying "to fit in with the group." *Id*. at 67. Crowe's nephew testified that he had no contact with Crowe other than seeing him in church "on the other side of the room." *Id*. at 59. Crowe's niece testified, "The only contact I had with [Crowe] is during church and it was only . . . visible contact. And when he didn't go to church it was only still visible contact, cause I was in the car and he was outside . . . ." *Id*. at 61. Additionally, Crowe admitted to "shooing" children away from his house. Specifically, he stated

> I got a Chihuahua and . . . she's a very aggressive dog. The kids kept goin' . . . in front of my house . . . all the time. My dog . . . took off after the kids and I seen the kid kick my dog in her side. And I said, "Would you please stay down there where you belong at your house. You got the whole block on the side of you to keep going up and down all you want to." I said, "Would you please stay down there where you belong?"

Id. No sexual comments were made during this encounter nor did any physical contact occur between Crowe and the children. Nevertheless, Crowe's probation officer concluded that the act of "shooing" the children away from his home equated to having contact with the children in violation of his probation.

At the conclusion of the revocation hearing, the court determined

> that said Defendant has violated the terms of probation established herein in that: The Defendant disclosed to the SOAR group on June 11, 2007, that he has engaged in weekly contact with his 17-year-old nephew . . . since being released from the Indiana Department of Correction and being supervised on probation. Furthermore, at the same SOAR group, he disclosed that he has been having weekly contact with his twelve-year-old niece . . . for approximately the last several months. On or about June 20, 2007, he had contact with several neighbor children at his residence. The Defendant did not have permission by his probation officer or the SOAR Program to have contact with these children on any of the above instances. On or about June 19, 2007, the Defendant underwent a polygraph examination . . . resulting

> in findings that he was "deceptive" in regards to his answers involving "physical-sexual contact with anyone under the age of 18."

Id. at 47. Crowe now appeals.

Discussion and Decision

Crowe raises two issues on appeal, one of which we find dispositive: whether the State presented sufficient evidence to support the revocation of his probation.[1] A probation revocation hearing is civil in nature, and the State need only prove the alleged violations by a preponderance of the evidence. *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999), *reh'g denied*. When we review the determination that a probation violation has occurred, we will consider all the evidence most favorable to the judgment without reweighing the evidence or judging the credibility of witnesses. *Id*. If there is substantial evidence of probative value to support the trial court's conclusion that a defendant has violated any terms of probation, we will affirm its decision to revoke probation. *Id*.

Crowe contends that "shooing children away from the sidewalk in front of his house[] was not a violation of the probation rule against having contact with children under 18." Appellant's Br. p. 7. As such, Crowe maintains that the State failed to show by a preponderance of the evidence that improper contact occurred between him and any minor children. We agree.

In support of his argument, Crowe relies on *Hunter v. State*, 883 N.E.2d 1161 (Ind. 2008). *Hunter* involved a sex offender (Theron Hunter) on probation following a term of imprisonment. As a condition of probation, Hunter was required to have no contact with

[1] Crowe additionally contends, "[A]dmissions made during compelled probation programs are inadmissible in a subsequent probation revocation proceeding." Appellant's Br. p. 5. Because of our resolution of the other issue, we need not reach this issue.

any persons under the age of eighteen. After Hunter's probation officer learned that he was present on multiple occasions at his half-sister's mobile home when her children arrived home from school, the probation department sought to revoke his probation. The specific condition alleged to have been violated is as follows:

> The defendant must never be alone with or have contact with any person under the age of 18. Contact includes face-to-face, telephonic, written, electronic, or any indirect contact via third parties. You must report any incidental contact with persons under age 18 to your probation officer within 24 hours of the contact.

Id. at 1162. After an evidentiary hearing, the trial court revoked Hunter's probation. Thereafter, a panel of this Court affirmed, after which our Supreme Court granted transfer and reversed. In deciding the issue, the Supreme Court stated:

> Whether the evidence was sufficient to establish that the defendant violated the terms of his probation or not hinges, in large part, on the definition of the word "contact." Conditions of probation delineate conduct that must be avoided by the probationer. Like statutes defining penal offenses, the language must be such that it describes with clarity and particularity the mis-conduct that will result in penal consequences. . . . The conditions of probation stated "Contact includes face-to-face, telephonic, written, electronic, or any indirect contact via third parties," but this definition is ambiguous. If literally read, "Contact includes face-to-face . . . contact via third parties," does not apply to the facts of this case. And even if we extract the fragment "Contact includes face-to-face," this isolated phrase does not reasonably communicate to a probationer that the plain meaning of "contact" is altered to include mere presence. If the trial court intended a condition of probation to prohibit the defendant from the behavior shown by the evidence in this case, effective deterrence and fair advance notice necessitate that the choice of language must clearly describe the prohibited conduct. The probation condition in this case lacked sufficient clarity to provide the defendant with fair notice that the conduct at issue would constitute a violation of probation.

Id. at 1164. As a result, the Supreme Court concluded that the evidence was insufficient to establish that Hunter's conduct constituted a violation of his probation.

Here, just as in *Hunter*, the probation condition lacks "sufficient clarity to provide the defendant with fair notice that the conduct at issue would constitute a violation of probation." *Hunter*, 883 N.E.2d at 1164. The conduct at issue here involves Crowe "shooing" away children who were playing in front of his home in an apparent effort to protect them from his dog and vice versa. He presumably did so to avoid contact rather than to invite contact. Here, the conditions of probation do not reasonably communicate to a probationer that the plain meaning of "contact" includes "shooing" away children.

We likewise hold that Crowe's alleged "contact" with his niece and nephew does not constitute a probation violation. Crowe only generally admitted having contact with his niece and nephew, but did not indicate the circumstances of the contact. The only evidence in the record specifying the nature of this contact is the testimony of the niece and nephew linking the contact to "visible contact" at church and through the window of a car. This contact is insufficient to sustain the probation violation.[2] We therefore reverse the judgment of the trial court and remand with instructions for the trial court to reinstate Crowe's probation and for further proceedings consistent with this opinion.

Reversed.

MAY, J., and MATHIAS, J., concur.

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[2] The State concedes that the trial court did not revoke Crowe's probation based upon the results of the polygraph. *See* Appellee's Br. p. 4 n.1. This concession is undoubtedly a result of Crowe having a non-malignant brain tumor that may have affected the accuracy of the polygraph results. *See* Appellant's App. p. 56.