

Michael J. Deloney appeals the revocation of his probation and the execution of a portion of his previously-suspended sentences. He presents the following restated issues for review:

1. Did the State present sufficient evidence to support the trial court's finding that Deloney committed a new crime while on probation, thereby violating the terms of his release?
2. Did the trial court abuse its discretion in sanctioning Deloney?

We affirm.

In 1999, the State charged Deloney under cause number 48C01-9910-CF-249 (Cause 249) with five counts of forgery, one count of burglary, and one count of theft. While out on bond, Deloney committed burglary in Florida. He was convicted by a Florida court in June 2001 and sentenced to one and one-half years in prison and three years and seven months on probation. Deloney's Florida probation was eventually transferred to Madison County, Indiana, where he secured employment at a Wal-Mart store. Within about a month of working for Wal-Mart, Deloney was caught stealing merchandise from his employer. Accordingly, the State charged him with theft on September 30, 2002, under cause number 48C01-0209-FD-281 (Cause 281).

Deloney pleaded guilty as charged in Cause 281 and guilty to one count each of forgery, burglary, and theft in Cause 249. Pursuant to a plea agreement, the State dismissed the remaining counts and agreed to a fully suspended aggregate sentence of eight years in Cause 249. Sentencing was left open in Cause 281. On January 8, 2003, the trial court sentenced Deloney in Cause 249 to eight years, all suspended to probation, and a consecutive three-year term in Cause 281, with eighteen months suspended to probation. Deloney was

also ordered to pay several thousand dollars in fines and restitution.

The State filed its first petition for violation of probation in September 2004, alleging Deloney had tested positive for drugs, failed to report to probation, and failed to pay restitution as ordered. On December 13, 2004, Deloney admitted the violations, and the court continued him on probation. In May 2007, Deloney was arrested and charged with dealing in marijuana and possession with intent to deal marijuana, which resulted in the State filing its second petition for violation of probation in Cause 249. Following this second violation, the court continued Deloney on probation.

On June 27, 2009, Deloney was arrested and charged in cause number 48C01-0906-FD-340 (Cause 340) with domestic battery of his girlfriend, Tiffany Cooper, with whom he has three children. He ultimately pleaded guilty to disorderly conduct and was sentenced to six months suspended to probation, to run consecutively with his sentence in Cause 249. Additionally, despite having violated probation in Cause 249 for the third time, Deloney was returned to probation on July 20, 2009.

On the afternoon of December 3, 2009, law enforcement was dispatched to the home of Billy Cooper, Tiffany's father, on a report of felony battery. The responding officers videotaped a statement by Billy at the scene. Billy reported that Deloney woke him from a nap in a confrontational manner, telling Billy he had to do something about his (Billy's) daughter. Numerous times during the confrontation, which moved from a bedroom into the living room, Billy asked Deloney to leave the residence to cool off. Things escalated when Deloney pushed Billy's wife. Billy reported to police that Deloney eventually struck him in the head with a four-foot-long stick or possibly his fist. Billy expressed a desire to cooperate

with police and prosecute Deloney to the fullest extent possible. Officers took into custody a wooden walking stick that had blood spatter on it. Further, Billy had an obvious laceration near his right eye with significant bleeding.

As a result of the altercation and arrest, the State filed petitions to revoke probation in Causes 249 and 340. The petitions alleged that Deloney had failed to behave well in society and had failed to pay court costs, restitution, and probation fees. At the February 17, 2010 probation revocation hearing, Deloney admitted that he had failed to pay the required costs and fees but disputed the remaining allegation. The video recording of Billy's on-scene interview was admitted into evidence without objection. Two of the responding officers also testified regarding their observations at the scene. In important respects, however, Billy testified inconsistently with his prior statement. While acknowledging that he had been awakened by Deloney and had argued with him, Billy indicated he was struck by the stick accidentally.¹ Further, Billy testified that he was intoxicated on the night of his injury and had little or no recollection of what he had reported to police.

At the conclusion of the revocation hearing, the trial court found by a preponderance of the evidence that Deloney had committed battery and trespass on the night in question and, therefore, violated probation by failing to behave well in society. The court revoked Deloney's probation in both causes and ordered him to serve four years of his previously-suspended eight-year sentence in Cause 249 and imposed the entire previously-suspended

¹ Specifically, Deloney testified as follows:

I guess we started arguing a little bit and then he left our room. I heard them in the living room arguing, so I walked up in there and I had a stick that I walk with sometimes. And I don't know if he thought I was coming in there to assault him, but you know he grabbed it and I was tugging on it and I got busted over the eye when he left [sic] go.

six-month sentence in Cause 340. Deloney now appeals.

1.

Probation is a matter of grace and is a conditional liberty that is a favor, not a right. *See Kincaid v. State*, 736 N.E.2d 1257 (Ind. Ct. App. 2000). The trial court determines the conditions of probation and may revoke probation if the probationer violates a condition of probation. *Id.* A trial court's order regarding revocation of probation is reviewed for an abuse of discretion. *Johnson v. State*, 692 N.E.2d 485 (Ind. Ct. App. 1998). Further, a probation hearing is civil in nature, and the State must prove the alleged violation of probation by a preponderance of the evidence. *Braxton v. State*, 651 N.E.2d 268 (Ind. 1995). On review, we neither reweigh the evidence nor judge the credibility of witnesses, and we look only to the evidence most favorable to the State. *Id.* We look to the evidence most favorable to the court's judgment and determine whether there is substantial evidence of probative value supporting revocation. *Marsh v. State*, 818 N.E.2d 143 (Ind. Ct. App. 2004). If so, we will affirm. *Id.*

In this case, the State alleged Deloney failed to behave well in society. Our courts have long held that this term or condition of probation is equivalent to "lawful conduct." *State v. Schlechty*, 926 N.E.2d 1 (Ind. 2010). *See also Justice v. State*, 550 N.E.2d 809, 810 (Ind. Ct. App. 1990) ("[i]n proving that a defendant has violated the condition of 'good behavior,' the State must prove by a preponderance of the evidence that the defendant has engaged in unlawful activity"). As set forth above, the trial court found by a preponderance of the evidence that Deloney had committed trespass and battery while on probation.

On appeal, Deloney relies exclusively on Billy's trial testimony to argue the State presented insufficient evidence that he engaged in unlawful conduct at Billy's home. Deloney argues that Billy's statement to police lacked substantial trustworthiness because it was given while Billy was intoxicated.

Deloney cites to *Reyes v. State*, 868 N.E.2d 438 (Ind. 2007), for the proposition that hearsay evidence may be considered at a probation revocation hearing only if the evidence satisfies the "substantial trustworthiness test" in determining whether substantial indicia of reliability are present. *Id.* at 441. We observe, however, that Deloney did not object to the admission of the recorded statement at the hearing. Accordingly, he waived this issue for appeal. *See Wilkerson v. State*, 918 N.E.2d 458 (Ind. Ct. App. 2009).

Moreover, in the instant case, Deloney was actually able to and did in fact confront and cross-examine all of the witnesses against him, including Billy. *Cf. Reyes v. State*, 868 N.E.2d at 441 (substantial trustworthiness test seeks to protect a probationer's "right to confront a witness against him or her"); *Figures v. State*, 920 N.E.2d 267, 271 (Ind. Ct. App. 2010) ("the general rule is that hearsay evidence may be admitted *without violating a probationer's right to confrontation* if the trial court finds the hearsay is 'substantially trustworthy'") (emphasis supplied). Further, much of Billy's videotaped statement, which was taken shortly after the incident, was corroborated by other evidence at the scene, such as a walking stick with blood spatter, the visible injury to Billy's face, and the blood on his face and clothing. Deloney has failed to establish error in the admission of the videotaped statement.

At the conclusion of the evidence, the trial court made the following statement:

Based upon the evidence here today and our experience shows that statements often given closer in time to [when] the incident happened are the accurate statements. You have a gentleman giving a video taped statement to police, talking about how the defendant came into his house. He specifically stated that Mr. Deloney was asked to leave numerous times by people there, that he didn't. There was some sort of altercation, argument going on. The stick found by police had blood spatter on it. They described a laceration that would be consistent with the blood spatter found on a stick that was used to hit him. I find it actually kind of incredible that there would be a tug of war going on a stick and the stick somehow would like an elastic band flip up and hit him on his head. It's more likely that Mr. Deloney grabbed it and hit him with it. That's what the evidence suggests by a preponderance of the evidence standard.... [T]here is evidence as to a trespass. The evidence shows he was asked to leave and he failed to leave and there was evidence of a battery.

Transcript at 53-54.² The trial court's finding of a probation violation is supported by the evidence, and we refuse Deloney's invitation to reweigh the evidence and reassess the credibility of Billy's testimony.

2.

Deloney argues further that the court abused its discretion by ordering him to serve a portion of his previously-suspended sentences in prison. He notes that he was attending

² The court questioned Billy's credibility also during his testimony:

In the statement we just watched on the DVD that you made, you don't mention anything about that, and so I'm finding it a bit incredible that you remember with such detail coming out with a stick, fighting over it, him letting go of the stick and it hitting you in the head, but yet not remember that you talked to police with a DVD camcorder in your face.

Id. at 50.

school to try and better himself and that there were nearly two and one-half years between when he was released following his first probation violation (December 2004) and when the second violation was filed (May 2007).

Indiana Code Ann. § 35-38-2-3(g) (West, Westlaw through 2010 2nd Regular Sess.) provides that upon finding a violation of probation, a trial court may “order execution of all or part of the sentence that was suspended at the time of initial sentencing.” We review the trial court’s decision for an abuse of discretion. *Goonen v. State*, 705 N.E.2d 209 (Ind. Ct. App. 1999).

Probation gives a defendant, such as Deloney, an opportunity to show that he is able to rehabilitate himself and become a useful member of society without serving his time in prison, as well as gives the sentencing court an opportunity to observe the defendant’s conduct during this period. *Hart v. State*, 889 N.E.2d 1266 (Ind. Ct. App. 2008). Here, despite committing additional felonies (in Florida and Indiana) while the charges were pending, Deloney received the benefit of a highly favorable plea agreement in Cause 249. Then in Cause 340, a crime which he committed while on probation and which resulted in his third violation under Cause 249, Deloney once again received a suspended sentence. Less than five months after being released to probation following his conviction in Cause 340, Deloney committed the instant offense against Billy.

The record reveals that Deloney has not taken advantage of the myriad of opportunities he has been granted over the last eight years. Further, we agree with the State that his ability to avoid additional probation violations from late 2004 to early 2007 carries little weight when compared to the three significant violations (i.e., new offenses) committed

from 2007 onward. In light of his refusal or inability to reform and comply with the law, the trial court acted within its discretion in revoking a portion of Deloney's suspended sentence in Cause 249 and his entire suspended sentence in Cause 340. In fact, it appears the trial court once again granted leniency to Deloney by not revoking his entire suspended sentence in Cause 249.

Judgment affirmed.

BARNES, J., and CRONE, J., concur.