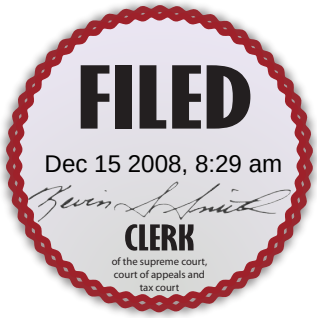

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IN THE
COURT OF APPEALS OF INDIANA

NATHANIEL LEE BASTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0804-CR-326
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0606-FC-186

December 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Nathaniel Baston appeals the revocation of his suspended sentence. He raises one issue on appeal: whether he received ineffective assistance of counsel at his probation revocation hearing. Concluding that his counsel was not ineffective, we affirm.

Facts and Procedural History

Baston pleaded guilty to one count of Class C felony battery, one count of Class A misdemeanor resisting law enforcement, and one count of Class B misdemeanor public intoxication on October 2, 2006. The trial court sentenced Baston to concurrent terms of eight years for felony battery, one year for resisting law enforcement, and six months for public intoxication. The trial court ordered that two years be served at the Department of Correction and that the remainder of the sentence be suspended. Baston was also placed on probation for six years.

On January 11, 2008, Baston and his girlfriend Cynthia Ponder were living at Melissa and Michael Seastrand's residence. Baston, Ponder, and Michael were drinking beer when an altercation broke out between Baston and Ponder. Baston choked Ponder, leaving marks on her neck and bruises above her left breast and on her inner thigh. Ponder was able to get away from Baston and called the police on Melissa's cell phone. Believing that Michael had called the police on him, Baston assaulted Michael while Michael was in the bathroom.

When Officers Bertram and Jarrett of the Elwood Police Department arrived at the Seastrand residence, Ponder came running out of the house yelling, "They're in the bathroom, they're in the bathroom." Transcript at 12. Upon entering the residence,

Officer Bertram found Baston and Michael "entangled" in the bathroom. Id. Officer Bertram asked Michael what happened, and Michael responded that Baston had "[come] in [the bathroom] and started beating [me] up." Id. at 13.

At the probation revocation hearing on February 19, 2008, Officers Bertram and Jarrett appeared as the only witnesses, although Ponder and Michael also had been subpoenaed to appear. Officer Bertram testified to Ponder's yelling upon his arrival, and to Michael's statements that Baston had beat him up. Officer Jarrett testified "a female subject, which I'm not sure of her name, at the time advised me that she had been battered by Mr. Baston." Id. at 21. Baston's counsel objected to the testimony, arguing that the officers' testimony was hearsay and was not substantially reliable.[1] The trial court noted that "we don't have a basis for deciding whether or not this is substantially reliable hearsay or not. We don't have that basis today, so this may be subject to striking." Id. at 11. The trial court nonetheless allowed the officers to testify for convenience reasons.

On March 3, 2008, the trial court reconvened for a continuation of the probation revocation hearing and heard testimony by Ponder, Michael, and Melissa. Ponder testified that Baston had choked her and left marks on her neck. Michael testified that while he was in the bathroom, Baston entered, pushed him up against the wall, and started hitting him with his fist, giving him a black eye. Melissa testified that she saw Baston "grip" Ponder and hit her a couple of times, leaving bruises on her chest. Id. at

[1] We assume that Baston is using the term "substantially reliable" interchangeably with the term "substantially trustworthy," a term we will discuss below.

57. She also testified that she saw Baston hit Michael from behind while he was in the bathroom before she ran outside with Ponder.

At no time during the second hearing did Baston's counsel ask the trial court for a ruling on his initial objection regarding the admission of the officers' hearsay testimony. The trial court found that Baston had violated his probation by using alcohol and committing battery on Ponder and Michael. The trial court ordered Baston to serve his previously suspended sentence.

Discussion and Decision

I. Standard of Review

Baston argues the failure by his counsel to ask for a ruling on the admissibility of the hearsay evidence fell below an objective standard of reasonableness, prejudicing him and depriving him of the effective assistance of counsel. The standard for evaluating a claim for ineffective assistance of counsel was clearly explained by this court in Williams v. State:

> When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Second, the defendant must show that the deficient performance resulted in prejudice. To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Finally, if a claim of ineffective assistance of counsel can be disposed of by analyzing the prejudice prong alone, we will do so.

883 N.E.2d 192, 196 (Ind. Ct. App. 2008) (some citations omitted).

II. Ineffective Assistance of Counsel

The procedures for revocation hearings are set forth in Indiana Code section 35-38-2-3(e): "[t]he state must prove the violation by a preponderance of the evidence. The evidence shall be presented in open court. The person is entitled to confrontation, cross-examination, and representation by counsel." Probation revocation hearings permit "procedures that are more flexible than in a criminal prosecution." Reyes v. State, 868 N.E.2d 438, 440 (Ind. 2007) (citing Morrisey v. Brewer, 408 U.S. 471, 489 (1972)); see also Ind. Evidence Rule 101(c)(2) (stating that the rules of evidence, including rules regarding hearsay, do not apply to probation proceedings). In pursuit of this flexibility, our supreme court has held that the admission of hearsay evidence in probation revocation hearings that would not be permitted in a criminal trial as a violation of the right to confrontation is permissible as long as the hearsay evidence is "substantially trustworthy." Reyes, 868 N.E.2d at 442.

"The substantial trustworthiness test requires that the trial court evaluate the reliability of the hearsay evidence." Id. If the test of substantial trustworthiness is met, a finding of good cause for not producing a witness for confrontation is implicitly made. Id. "[I]deally [the trial court should explain] on the record why the hearsay [is] reliable and why that reliability [is] substantial enough to supply good cause for not producing . . . live witnesses." Id. (citing United States v. Kelly, 446 F.3d 668, 693 (7th Cir. 2006)) (alteration in original).

In Reyes, the defendant's suspended sentence was revoked because he failed to pass a drug test. Id. at 439. At the probation revocation hearing, the State admitted into evidence an affidavit by a toxicology expert. Id. Defendant's counsel objected to the admission of the evidence as hearsay and argued its admission violated the defendant's due process right of confrontation. Id. Although the court acknowledged that the trial court's explanation for its decision to admit the hearsay was not "as detailed as we prefer," it held that the trial court's reference to the expert's curriculum vitae adequately supported a finding that the affidavit was substantially trustworthy and therefore admissible hearsay evidence. Id. at 442.

In the present case, the testimony offered by Officers Bertram and Jarrett was substantially trustworthy. Unlike Reyes, where the hearsay evidence was found to be substantially trustworthy despite the fact that the toxicology expert never testified, in the present case, the officers testified under oath and were subject to cross-examination. Further, Ponder, Melissa, and Michael testified at the second hearing and corroborated the officers' earlier testimony. See Tr. at 35-36 (Ponder testifying that Baston choked her); 46-48 (Michael testifying that Baston assaulted him in the bathroom); and 57-58 (Melissa testifying that she witnessed Baston hit Ponder and Michael, and that she ran outside and told the officers they needed to get in the house). The fact that the officers and the declarants testified as witnesses allowing Baston's counsel the opportunity to cross-examine, combined with the fact that the officers' testimony was later corroborated by the declarants, demonstrates the substantial trustworthiness of the hearsay testimony. Therefore, the failure by Baston's counsel to reassert his objection to the admissibility of

the hearsay testimony did not prejudice Baston because the trial court would not have sustained it. See Ritchie v. State, 875 N.E.2d 706, 717 (Ind. 2007) ("In order to prevail on a claim of ineffective assistance due to the failure to object, the defendant must show a reasonable probability that the objection would have been sustained if made.").

In addition, the testimony by Ponder, Michael, and Melissa rendered the officers' hearsay testimony cumulative. Testimony by Ponder, Michael, and Melissa alone would have been sufficient to prove that Baston had committed battery, making revocation of his suspended sentence proper.[2] The standard for a claim of ineffective assistance of counsel requires the proponent to demonstrate that but for counsel's unprofessional errors, the result of the proceeding would have been different. See Williams, 883 N.E.2d at 196. The fact that the hearsay testimony is cumulative means that even if the officers' testimony was barred, the result would have been the same. Thus, Baston's ineffective assistance of counsel claim fails.

Conclusion

The officers' hearsay testimony was properly admitted as substantially trustworthy evidence. Moreover, the testimony was cumulative. Baston has therefore failed to demonstrate that he received ineffective assistance of counsel when his counsel failed to obtain a specific ruling on the admissibility of the testimony. The judgment of the trial court is therefore affirmed.

Affirmed.

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[2] "A revocation hearing is in the nature of a civil proceeding, so the alleged violation need be proven only by a preponderance of the evidence. If there is substantial evidence of probative value to support the trial court's decision that the probationer is guilty of any violation, revocation of probation is appropriate." Lightcap v. State, 863 N.E.2d 907, 911 (Ind. Ct. App. 2007) (citations omitted).

NAJAM, J., and MAY, J., concur.