



Jeffrey Arthur appeals from the trial court's order revoking his probation and ordering execution of the balance of his original sentence.

We affirm.

On April 11, 2003, the State charged Arthur with one count of burglary as a class B felony and one count of theft as a class D felony. Pursuant to a written plea agreement, Arthur pleaded guilty to burglary as a class B felony and the State dismissed the theft charge. The plea agreement set Arthur's sentence at ten years, with nine years and sixty-nine days suspended to probation. On April 28, 2004, the trial court sentenced Arthur according to the terms of the plea agreement.

On March 6, 2006, the State filed a notice of probation violation, alleging that Arthur violated his probation by committing several new criminal offenses. On March 23, 2006, Arthur admitted the violations. Thereafter, the trial court revoked Arthur's probation and ordered that he serve five years of his previously suspended sentence after which he was to return to probation for the remaining four years and sixty-nine days of his original sentence. Arthur appealed the trial court's decision, but this court affirmed. A request for transfer to the Indiana Supreme Court was denied. Arthur was released from incarceration for this probation violation on October 5, 2007.

On the evening of July 14, 2008, Arthur's mother, Tami, invited her nineteen-year-old nephew Adam Haley to spend the night at her home and promised to take him to the zoo the following morning. Adam suffers from post-traumatic stress disorder, chronic anxiety, and has a mental age of a twelve-year-old. Before Adam agreed to spend the night, Tami assured

him that Arthur would not be home that night. While at Tami's house, Tami provided Adam with alcoholic beverages, including beer and brandy. Adam became so intoxicated that he urinated in his pants and had difficulty moving and controlling his body.

After Arthur came home, he, Tami, and his brother, Dan, recorded videos of Adam lying on the deck intoxicated as they used Adam, in the court's words, as "an object of amusement." *Transcript* at 230. Around midnight, Tami called Adam's father, Grant, and asked him to come pick Adam up. When Grant arrived approximately thirty minutes later, he found Adam unconscious in a pool of blood on the floor. Arthur came out of his bedroom and was "running his mouth." *Id.* at 57. Grant told him to get away, and Arthur responded by yelling at him, "I'm going to beat the grey off your head." *Id.* Grant was unable to wake Adam, so he had to drag him to the car. Arthur and his brother watched from the driveway and made no offer to help. No one at the house explained what had happened to Adam or offered to call for help. Once Grant got Adam home and showered him off to discover the extent of his injuries, the paramedics were called.

Adam's eyes and face were swollen. He had an orbital fracture to one of his eyes that doctors believed could only be caused by something small, like a fist, striking him inside his eye socket. Adam also had several teeth knocked loose that had to be removed. Doctors who treated Adam stated that his injuries were likely inflicted during an assault and were not consistent with a fall down stairs as claimed by Arthur, Tami, and Dan.

Adam recalled that while at Tami's he had two beers and a cup of brandy. Adam testified that he became dizzy while watching television and the next thing he knew, Arthur

was hitting him in the face. The next thing Adam remembered was waking up in the hospital in a lot of pain. His face was swollen and painful for approximately three weeks. Photographs taken of Arthur's hands shortly after the incident showed markings consistent with striking a person.

Following this incident, on August 11, 2008, the State filed a second request for a probation violation, alleging that Arthur violated his probation by committing the new offense of battery causing serious bodily injury, a class C felony. A fact-finding hearing was held on June 10 and 11, 2009. At the conclusion of the hearing, the trial court found that Arthur had violated his probation as alleged. The trial court revoked Arthur's probation and ordered execution of the balance of his original sentence (i.e., four years and sixty-nine days). Arthur now appeals.

Arthur does not challenge the trial court's finding that he violated his probation, but rather, argues that the trial court abused its discretion in ordering that he serve the balance of his original sentence. Specifically, Arthur contends that the trial court failed to consider significant mitigating evidence and improperly considered evidence outside the record. We review a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion. *Berry v. State*, 904 N.E.2d 365 (Ind. Ct. App. 2009). An abuse of discretion occurs if the trial court's decision is against the logic and effect of the facts and circumstances before it. *Id.*

In explaining its reasons for revoking the balance of Arthur's probation, the trial court cited the following: (1) Arthur's significant juvenile history and adult criminal history; (2)

the fact that this is Arthur's second violation of probation; (3) a recent citation for possession of marijuana; and (4) the seriousness of the allegations contained in the probation violation. Arthur maintains that the trial court failed to recognize what he claims was credible evidence that Adam was the initial aggressor and that he only retaliated against Adam after Adam became physically aggressive toward Tami. Arthur further asserts that the trial court failed to consider as mitigating his initiative to attend post-secondary schooling, his efforts to become involved in his child's life, his successful drug test while on probation, and the assistance he provides his mother since his father's recent death.

The record reveals that the trial court rejected Arthur's claim that his attack on his cousin was necessitated by Adam's aggression toward Tami. In its findings, the trial court found the explanations of the evening's events offered by Arthur, his mother, and his brother, were not credible. The court specifically noted evidence demonstrating that Arthur and his family used Adam as "an object of amusement on the date in question" and that they showed no regard for his well-being. *Transcript* at 230. The court further noted evidence demonstrating that Adam's extremely intoxicated condition rendered him incapable of being a threat to anyone.

The record also demonstrates that the trial court considered Arthur's claims that he had turned his life around, but found them unpersuasive. In addition to the evidence supporting the probation violation and his past juvenile and adult criminal history, the trial court cited evidence that Arthur had recently been charged with possession of marijuana. The trial court explained:

I heard evidence yesterday on the State's request to revoke bond, I denied that request because of the requisite level of proof that is required for me to make that finding...being clear and convincing evidence. I am considering that evidence today though because it is inconsistent with what I've heard about the complete turn around and change of Mr. Arthur because I have received evidence that he...on the...on 5/29/09 was in possession of marijuana, and that is not consistent with what I've heard today regarding...with the amount of change in Mr. Arthur.

*Transcript* at 235. Arthur asserts that the trial court abused its discretion in considering the evidence of the recent possession of marijuana charge because it was not admitted as part of the probation violation hearing, but rather, was offered in support of the State's motion to revoke Arthur's bond.

Arthur was released on bond pending resolution of the alleged probation violation in this case. On the first day of the fact-finding hearing, the State filed a motion to revoke Arthur's bond alleging that while he was out on bond he committed the new offense of possession of marijuana. At the end of the first day of the fact-finding hearing on the alleged probation violation, the court continued the probation hearing and heard evidence on the State's motion to revoke bond. The State presented a written citation, which included a sworn statement by the issuing officer, that Arthur possessed less than 200 g. of marijuana in his left hand on May 29, 2009. Arthur objected to the State's evidence, asserting that he had not had time to review the matter. The trial court overruled Arthur's objection and admitted the State's evidence. The trial court, however, denied the State's motion to revoke bond because it found the citation alone was insufficient to prove Arthur committed the offense by clear and convincing evidence.

The following day, the trial court continued hearing evidence on the alleged probation violation. At the conclusion of the evidence, the trial court found Arthur had violated his probation and immediately moved forward with sentencing. The trial court did consider the State's evidence regarding Arthur's recent charge of possession of marijuana for the limited purpose of negating Arthur's claim that he was a changed person. Although Arthur objected to the State's evidence during the hearing on the motion to revoke bond, Arthur did not object to the trial court's consideration of such evidence during the sentencing hearing on Arthur's probation violation. Arthur has therefore waived the issue for review. *See Hulfachor v. State*, 813 N.E.2d 1204 (Ind. Ct. App. 2004). We have before cautioned trial courts against looking outside the record for evidence in a sentencing hearing, noting that such practice deprives the defendant of the opportunity to review the information and refute its accuracy. *Id.* Here, however, the evidence was not from another case, but rather, was directly related to the fact that Arthur was on bond for the probation violation at issue. Further, the recent possession charge was highly relevant to assessing Arthur's conduct while on probation and was certainly relevant in terms of refuting Arthur's claim that he was a changed person.

In any event, even if it was error for the trial court to consider the recent charge of possession of marijuana, any such error was harmless. We note that in addition to this recent possession charge, the court considered Arthur's criminal history, the fact that this was his second probation violation, and the circumstances of the offense underlying the probation violation in deciding to impose the balance of Arthur's sentence. It is clear from the record

that the trial court would have imposed the same sentence for the probation violation absent consideration of the recent charge of possession of marijuana.

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.