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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-133**

State of Minnesota,
Respondent,

vs.

Lee Gill,
Appellant.

**Filed September 6, 2011
Affirmed
Hudson, Judge**

Hennepin County District Court
File No. 27-CR-94-109271

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Appellant challenges the district court's revocation of his probation, arguing that the district court impermissibly exceeded the scope of this court's direction on remand,

clearly erred by finding that he violated a probation condition of no arrest supported by probable cause, and improperly based its finding that he violated the condition of failure to remain law-abiding on testimony that was later recanted. We affirm.

FACTS

In 1994, appellant Lee Gill, a juvenile who had been certified for adult prosecution, pleaded guilty to second-degree intentional murder in violation of Minn. Stat. § 609.19, subd. 1 (1994). The district court sentenced appellant to 306 months, but stayed execution for 30 years, subject to conditions of probation, including that appellant have no arrests supported by probable cause and that he obey all local, state, and national laws. In 2001 and 2006, appellant was convicted of felony-level domestic-assault-related charges and served executed sentences for those offenses, but the district court did not revoke his probation on the 1994 offense.

In August 2008, an amended arrest-and-detention order alleged that appellant had violated probation by “[f]ailure to remain law abiding: Minneapolis Police Department report of July 1[9], 2008 alleges ASSAULT, and a New Brighton Police Department report of July 31, 2008 alleges KIDNAPPING and MOTOR VEHICLE THEFT.”¹ The state sought to revoke probation based on the alleged July 19 incident, but did not elect to proceed on allegations relating to the July 31 incident.

At a *Morrissey* hearing, appellant’s former girlfriend, P.M., appearing as a result of a subpoena, testified that the police were called to her home because of an argument

¹ Although the arrest-and-detention order alleged that the incident of assault took place on July 18, police reports indicate that it occurred on July 19.

she had with appellant on July 19. P.M. testified that she was trying to leave the apartment, but she testified that appellant pushed her on the couch and restrained her. She also testified that she took a pen and poked him in the eye to attempt to free herself. She further testified that appellant pushed her into the bedroom and held her arms down. She testified that appellant had a pillow in his hand and told her not to get up, and she believed that he was going to smother her, but he did not place the pillow over her face. She testified that appellant had a closed fist as if he were going to deliver a punch.

A police officer testified that P.M. told him that appellant had placed a pillow over her face and that she believed he was going to kill her. He observed no indication that P.M. had been drinking.

Appellant also testified on his own behalf and stated that P.M. was “getting wild” and had accused him of cheating with another woman. He testified that he attempted to calm her and would not let her go outside, but she then stabbed him with the pen. He testified that he grabbed the pillow to put on his own eye and tried to call 911, but she took the phone from him, and he left. He testified that P.M. had been drinking, he never touched her, and he only restrained her from leaving so that she would not fight anyone.

The district court found “a probation violation to have taken place by clear and convincing evidence,” but it made no findings on the second and third factors required by *State v. Austin*, 295 N.W.2d 246 (Minn. 1980). Appellant appealed the revocation, and this court remanded for additional findings to address whether the violation was intentional or inexcusable and whether the need for appellant’s confinement outweighed

the policies favoring his probation. *State v. Gill*, A08-2282 (Minn. App. Mar. 27, 2009) (order op.).

At the remand hearing, the district court stated:

The specific condition that you've violated was no arrest supported by probable cause. You were arrested, validly, for an assault on an offense date of July 1[9], 2008. That violation was inexcusable. As I said to you the last time when you were here sentenced . . . on this particular revocation, when you get angry you respond with threats and violence and intimidation and you hurt people. And that's what you did this time and . . . several times before.

After noting that appellant had failed to take advantage of several opportunities to show that he could be successful on probation, the district court found that the need for appellant's confinement outweighed the policies favoring his probation, and again revoked appellant's probation.

Appellant appealed again, this time challenging only the district court's findings on the first *Austin* factor: that he violated a condition of probation. This court again remanded. *State v. Gill*, A09-1515 (Minn. App. Mar. 11, 2010) (order op.). We stated that appellant was alleged to have violated probation by failing to remain law abiding, and the district court heard testimony about the alleged assault. *Id.* at 4. But we noted that, although the district court likely concluded that appellant violated the condition of failure to remain law abiding,

the transcript from the post-remand hearing raises the question of whether the district court erroneously assumed that [appellant] was either arrested for or charged with the alleged assault, and whether, had it known that [appellant] was neither arrested nor charged, the district court would have found that [appellant] violated his probation.

Id.

At a hearing on the second remand, appellant's counsel informed the district court that he had recently learned of P.M.'s previously undisclosed statement to police, in which she partially recanted her earlier version of the July 19 incident. In that statement, taken on July 30, P.M. told police that appellant would not let her leave the house and held her down on the couch, but he did not place his hands on her neck. Appellant's counsel indicated that this statement had not been timely disclosed to the defense because the incident remained uncharged and alleged that the failure to disclose prejudiced appellant's ability to challenge his revocation. The district court scheduled an additional hearing to consider the statement, but stated its belief that the remand required addressing whether probable cause existed to arrest appellant for the July 31 incident.

At the next hearing, the district court accepted the state's additional written evidence, which included P.M.'s statement of partial recantation. The district court observed that there had been no arrest based on that incident. Attorneys for both parties expressed their belief that the scope of the second remand only involved clarifying the district court's previous findings arising from consideration of the July 19 incident. The prosecutor argued that the issuance of an arrest-and-detention warrant as a result of that incident provided evidence by which a factfinder could convict appellant of misdemeanor assault. Appellant's attorney argued that the issuance of a warrant, by itself, could not provide proof of a probation violation, and that the incident produced no arrest supported by probable cause.

The district court issued its order revoking appellant's probation. The district court found that the amended arrest-and-detention warrant alleged violations resulting from both the July 19 and the July 31 incidents. The district court made findings relating to the testimony at the *Morrissey* hearing, as well as P.M.'s recantation of her allegation, that appellant had attempted to strangle her during the July 19 altercation. The district court also found that probable cause existed to arrest appellant for the alleged car theft and kidnapping of July 31 when he was arrested for those offenses. The district court found:

With the testimony from the September 28, 2010 *Morrissey* hearing and the evidence in the record, clear and convincing evidence exists that [d]efendant violated the conditions of his parole requiring that he remain law abiding with the incidents of July 2008 discussed above: the alleged assault of July 19 and the alleged car theft and kidnapping of July 31.

Revocation is appropriate because [d]efendant violated the conditions of his probation requiring no arrests for probable cause and that he remain law abiding, because this violation was intentional and inexcusable, and because the need for confinement outweighs the policies favoring probation.

After sentencing, appellant, acting pro se, moved for a new hearing based on the state's failure to disclose P.M.'s recantation. The district court denied the motion, finding that it had previously addressed that issue and found that, despite the recantation, probable cause existed to arrest appellant. This appeal follows.

DECISION

The district court has broad discretion to determine whether there is sufficient evidence to revoke a defendant's probation and should be reversed only if it clearly

abused that discretion. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). To revoke probation, the district court must (1) identify the specific condition or conditions that were violated; (2) find that the violation was intentional or inexcusable; and (3) find that the need for confinement outweighs the policies favoring probation. *State v. Austin*, 295 N.W.2d 246, 250–51 (Minn. 1980).

On a challenge to the sufficiency of the evidence, this court reviews the district court’s findings of fact for clear error. *State v. Ray*, 659 N.W.2d 736, 742 (Minn. 2003). In revocation proceedings, the state has the burden of proof and must present clear and convincing evidence that a probation violation has occurred. *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004); *see* Minn. R. Crim. P. 27.04, subd. 2(1)(a)b. (noting that a probationer must be notified of his right to “a revocation hearing to determine whether clear and convincing evidence of a probation violation exists and whether probation should be revoked”).

Appellant first argues that the district court exceeded the scope of this court’s second remand by revoking probation based on its finding that he violated the probation condition of having no arrest supported by probable cause. A district court must follow the directions of an appellate court on remand and may not issue findings that exceed the scope of the instruction on remand. *State v. Roman Nose*, 667 N.W.2d 386, 395 (Minn. 2003). This principle is supported by policy considerations. “If we were to consider additional evidence presented beyond the issue to be determined on remand, the parties might consider the remand proceedings to be a ‘second bite at the apple’ and attempt to further litigate all issues in the case.” *Id.* Moreover, if one party introduces new

evidence on a different issue on remand, opposing parties may not be adequately prepared to address that issue. *Id.*

In ordering the second remand, this court attempted to seek clarification of the district court's earlier order, stating that the district court had indicated that appellant had violated conditions of probation for which no evidence existed in the record, including no arrest supported by probable cause, and the district court may have erroneously assumed that appellant was arrested following the July 19 incident. The district court's order following the second remand, however, did not address this concern and again stated that a violation of the no-arrest-supported-by-probable-cause condition had occurred.

Here, both parties agree that the second remand did not permit consideration of whether appellant violated his probation by being arrested based on probable cause. The record at the *Morrissey* hearing contained no evidence that appellant was arrested for his conduct based on the July 19 incident.² And although appellant was arrested following the July 31 theft-and-kidnapping incident, the state never pursued a violation related to that incident. Therefore, we conclude that the district court exceeded the scope of this court's second remand order when it found that appellant intentionally violated the probation condition of having no arrests supported by probable cause, and to the extent

² Because we conclude that the district court exceeded the scope of this court's order on remand, we do not address the related issue of whether an arrest-and-detention warrant based on appellant's conduct during the July 19 incident could support a violation of the no-arrest-based-on-probable-cause condition, when appellant was not arrested until after the July 31 incident, and he was arrested on the arrest-and-detention order, not for the July 19 incident specifically.

that the district court based appellant's probation revocation on its finding of that violation, the district court erred by doing so.

We also agree with appellant that the district court clearly erred by finding that appellant violated the probation condition of remaining law-abiding based on the July 31 incident. Our holding is based on the fact that the state did not pursue a violation based on that incident, that the record at the *Morrissey* hearing contained no evidence relating to the incident, and that appellant had no opportunity to present evidence or cross-examine witnesses relating to such a violation. See Minn. R. Crim. P. 27.04, subd. 2(1)d. (stating that at revocation hearing, probationer must be notified of his right to submit evidence and present and cross-examine witnesses).

We conclude, however, that clear and convincing evidence supports the district court's additional finding that appellant violated the probation condition of remaining law-abiding by his conduct with respect to the July 19 incident. The supreme court has defined clear and convincing evidence as "more than a preponderance of the evidence but less than proof beyond a reasonable doubt," and that standard is established "when the truth of the facts asserted is 'highly probable.'" *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978). Appellant argues that, in view of P.M.'s partial recantation, the record lacks clear and convincing evidence that his conduct violated the condition that he remain law-abiding. P.M. testified at the initial *Morrissey* hearing that appellant restrained her on the couch, and held his hand in a closed fist as if he were going to punch her. A responding officer testified that P.M. told him that appellant had placed a pillow over her face, she was "losing breath," and she believed he was going to kill her. But in her later

statement to police, P.M. stated that appellant held her down on the couch only to calm her down and indicated that she had previously lied to police.

The court gives substantial deference to the factfinder's credibility determinations. *See State v. Spanyard*, 358 N.W.2d 125, 127 (Minn. App. 1984) (stating that "the function of the fact-finder is to weigh the credibility of witnesses"), *review denied* (Minn. Feb. 27, 1985). Appellant argues that P.M.'s recantation is consistent only with appellant's own testimony, in which he denied that he threatened P.M. But the district court found that P.M.'s testimony at the *Morrissey* hearing was consistent with the initial police report relating to the incident, in which P.M. expressed fear that appellant was going to harm her. The district court was entitled to find credible P.M.'s original testimony that appellant restrained and threatened her. The evidence taken as a whole supports a determination that appellant violated his condition of remaining law-abiding by committing a misdemeanor assault. *See* Minn. Stat. § 609.224, subd. 1 (2006) (stating that a person commits fifth-degree assault if that person "commits an act with intent to cause fear in another of immediate bodily harm"). Therefore, the district court's finding that appellant violated that condition of probation is not clearly erroneous.

Appellant argues alternatively that principles of fundamental fairness require reversal of the district court's order revoking probation because he was not provided with P.M.'s recantation before the initial *Morrissey* hearing. *See* Minn. R. Crim. P. 27.04, subd. 2(1)(c) (stating that defendant in probation revocation proceeding must be notified of right to disclosure of "official records relevant to revocation"). He argues that the failure to allow confrontation and cross-examination of P.M. relating to the recantation

equates to a violation of the principles expressed in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). Under *Brady*, the state's failure to disclose favorable and material evidence violates due process. *Id.* at 87, 83 S. Ct. at 1196–97. To constitute a *Brady* violation, the evidence at issue must be favorable to the accused because it is either exculpatory or impeaching; the state must have suppressed the evidence, either willfully or inadvertently; and prejudice to the accused must have resulted. *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005) (citation omitted). A defendant must show that the evidence in question was material—that there is a reasonable probability that the result of the proceeding would have been different had the evidence not been suppressed. *See Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010).

We agree that P.M.'s statement of recantation, which was inadvertently suppressed by the prosecution, provided evidence favorable to appellant because it tended to negate P.M.'s initial allegation of abuse. But we cannot conclude that a reasonable probability exists that, had the evidence been disclosed earlier, the result of the proceeding would have been different. The district court ultimately considered all of the police reports from the July 19 incident, including the recantation statement and P.M.'s contemporaneous statement to police in which she expressed fear that appellant was going to harm her. The district court expressly noted the recantation statement but found, based on additional evidence, that appellant had violated the condition that he remain law abiding. Therefore, we conclude that the district court did not commit a due-process error by failing to provide appellant with an additional opportunity to address the recantation evidence and did not abuse its discretion by revoking appellant's probation.

Appellant has also submitted a pro se brief, reiterating some arguments made by appellate counsel and alleging that the record does not establish that he had a probation condition of remaining law-abiding. But the district court’s order imposing probation specified the condition that appellant “[o]bey all local, state, and national laws.” We conclude that this argument lacks merit.

Affirmed.

Dated: _____

Judge Natalie E. Hudson