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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 61A01-1101-CR-23
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff.	)	

APPEAL FROM THE PARKE CIRCUIT COURT
The Honorable Sam A. Swaim, Judge
Cause No. 61C01-0003-CF-62

AUGUST 9, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Michael Johnson appeals the revocation of his probation. We affirm.

ISSUES

Johnson presents two issues for our review, which we expand and restate as:

I. Whether the trial court erred by admitting Exhibit 4 at Johnson's probation revocation hearing.

II. Whether Johnson's counsel provided ineffective assistance.

III. Whether there was sufficient evidence to prove Johnson violated his probation.

FACTS AND PROCEDURAL HISTORY

After pleading guilty to two counts of Class B felony burglary, Johnson was sentenced on March 22, 2001, to twenty years with ten years suspended, on each count, to be served concurrently. Subsequently, on November 6, 2006, the State filed a petition to revoke Johnson's probation and alleged that he had committed the offense of intimidation.

The trial court held a hearing on the State's petition to revoke probation in August 2010, and presented evidence that Johnson had sent a threatening letter to the judge who had sentenced him. John Asbury, a local attorney, was serving as judge pro tempore in March 2001, and he sentenced Johnson. In August or September of 2006, Asbury received a threatening letter from Johnson. Asbury contacted the prosecutor's office about the letter, and he eventually talked with Detective Sager of the Indiana State Police

regarding the letter. After speaking with Asbury, Detective Sager contacted Carl Lemons, an investigative correctional officer at Wabash Valley Correctional Facility, to interview Johnson regarding the letter. He did so and then reported back to Detective Sager, who documented in a written case report the information obtained from the interview.

Following the hearing on the petition to revoke, the trial court took the matter under advisement and later determined that Johnson had violated his probation. The trial court then reinstated six years of Johnson's ten year suspended sentence. Johnson now appeals.

DISCUSSION AND DECISION

I. ADMISSION OF EVIDENCE

Johnson contends the trial court erred by admitting Exhibit 4, Detective Sager's case report, into evidence at the revocation hearing. He argues that Exhibit 4 should not have been admitted because it is inadmissible hearsay, and it violates his Fifth Amendment rights.

The State observes, and Johnson concedes, that he did not object to this exhibit at the hearing. Johnson's failure to object to the evidence results in waiver of the issue on appeal. *See Marsh v. State*, 818 N.E.2d 143, 145 (Ind. Ct. App. 2004) (noting that failure to object to hearsay evidence at probation revocation hearing waives issue for appeal). Seeking to avoid procedural default, Johnson claims that the trial court's admission of the exhibit constitutes fundamental error. The fundamental error doctrine is extremely

narrow and applies only when the error amounts to a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. *Lehman v. State*, 926 N.E.2d 35, 38 (Ind. Ct. App. 2010), *trans. denied*.

Indiana Evidence Rule 101(c)(2) allows for the admission of evidence during probation revocation hearings that would not be permitted in a full-blown criminal trial. Yet, "[t]his does not mean that hearsay evidence may be admitted willy-nilly in a probation revocation hearing." *Reyes v. State*, 868 N.E.2d 438, 440 (Ind. 2007). In *Reyes*, our Supreme Court adopted the substantial trustworthiness test as the means for determining whether hearsay evidence should be admitted at a probation revocation hearing. In applying the substantial trustworthiness test, "'ideally [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*. at 442 (quoting *United States v. Kelley*, 446 F.3d 688, 693 (7th Cir. 2006)).

In the instant case, Johnson's failure to object deprived the trial court of the opportunity to make a substantial trustworthiness determination. Nevertheless, the transcript of the revocation hearing discloses that the evidence would support a determination that Exhibit 4, Detective Sager's report, was substantially trustworthy. Both Lemons and Detective Sager testified at the probation revocation hearing. Lemons testified that, at the time of the hearing almost four years later, he did not have independent recollection of the information he obtained during his interview of Johnson,

but he recalled Detective Sager's request for him to conduct the interview. Detective Sager testified that he called and requested Lemons to interview Johnson. Detective Sager further testified that, following the interview, Lemons informed him that Johnson had stated that another inmate had written the letters for him because his handwriting was not very good. Lemons also reported that Johnson had said that he had told the other inmate what to write, he gave food to the inmate in exchange for writing the letter, and he intended to follow through with the threats contained in the letter. In addition, Detective Sager testified that at the time of the interview in September 2006, he documented in the case report the information obtained by and conveyed to him by Lemons.

The case report indicates that Lemons conveyed the information to Detective Sager on September 21, 2006, and that Detective Sager prepared the case report on September 25, 2006. The temporal proximity of the acquisition of the information and the preparation of the report decreases the possibility of inaccuracies in the information contained in the report. Moreover, both Lemons and Detective Sager testified under oath and were subject to cross examination at the probation revocation hearing. Lemons, the person who personally interviewed Johnson, testified, and Detective Sager testified to the information as relayed to him by Lemons and which he memorialized in writing in the case report.

Furthermore, Johnson did not object to the testimony of either Lemons or Detective Sager at the hearing. All of the information contained in the case report is cumulative of their testimony at the hearing. *See Newbill v. State*, 884 N.E.2d 383, 397

(Ind. Ct. App. 2008), *trans. denied* (stating that admission of hearsay is not necessarily grounds for reversal, especially where it is merely cumulative of other admitted evidence). Therefore, we find no fundamental error.

We now turn to Johnson's assertion of a violation of his Fifth Amendment rights based upon the admission of Exhibit 4. As we stated previously, Johnson failed to object to the admission of Exhibit 4, and, in order to avoid waiver, he makes his claim under the fundamental error doctrine.

Johnson alleges that his Fifth Amendment privilege against self-incrimination was violated in this case when Exhibit 4 was admitted into evidence at the probation revocation hearing because Lemons did not read him his *Miranda* rights prior to questioning him, even though he was in custody. The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In order to protect the privilege against self-incrimination, the United States Supreme Court held in *Miranda v. Arizona* that incriminating statements made while the defendant is in custody and subject to interrogation may not be admitted into evidence unless the defendant waives his Fifth Amendment privilege after being warned of his right to remain silent and the consequences of his failure to do so. 384 U.S. 436, 467-69, 475-77, 86 S.Ct. 1602, 1624-25, 1628-29, 16 L.Ed.2d 694 (1966).

In *Grubb v. State*, 734 N.E.2d 589, 593 (Ind. Ct. App. 2000), *trans. denied*, a panel of this Court determined that a defendant's statements obtained in violation of *Miranda* were properly admitted at his probation revocation hearing. The Court reasoned that the protection against self-incrimination found in the Fifth Amendment applies only to criminal cases, and a probation revocation proceeding is in the nature of a civil action in which probationers are not entitled to the full panoply of rights that they enjoy prior to their conviction. Moreover, the court determined that the cost/benefit analysis reveals that in probation revocation proceedings, unlike criminal proceedings, the cost of excluding reliable, probative evidence is high while the deterrent effect is minimal.

Here, we have a probation revocation proceeding such that Johnson is not entitled to all the rights he enjoyed prior to this conviction. In addition, the cost of excluding reliable evidence (in this case, Exhibit 4 containing Johnson's statements during his interview by Lemons) is high because Johnson would be able to avoid the consequences of his non-compliance with his probationary rules. At the same time, exclusion of the evidence would have only a minimal deterrent effect on any police misconduct given that Johnson's statement cannot be admitted against him, due to its custodial nature, at a future trial for intimidation.

In his brief, Johnson states that the information obtained during the interview by Lemons was "obtained in a particularly offensive manner." Appellant's Br. p. 23. *Grubb* suggests that if there is evidence that the probationer's un*Mirandized* statement is untrustworthy because it was coerced or otherwise the product of overborne will, the

statement should not be admitted at the revocation hearing. *See Grubb*, 734 N.E.2d at 593.

In the present case, there is no evidence that Johnson's will was overborne or that his statement was coerced. Johnson testified that Lemons told him who he was and why he was there, and he showed Johnson a copy of the letter that was sent to Asbury. Johnson stated that he was in the prison infirmary when Lemons interviewed him because he had tried to commit suicide the day before. Although in his brief Johnson refers to his "mental instability," he does not claim that his mental health issues rendered him incapable of understanding the nature of the interview or of forming responses to Lemons' questions. Appellant's Br. p. 21. In addition, he testified that he was on medication at the time of the interview and that the medication caused him to be irritable; Johnson makes no claim that the medication impaired his mental functioning. Additionally, Lemons testified the interview lasted no more than 15 minutes. Based upon this evidence, we cannot say that Johnson's statement was coerced. Thus, Johnson's statements obtained in violation of *Miranda* were properly admitted at his probation revocation hearing. We find no error, fundamental or otherwise.

II. ASSISTANCE OF COUNSEL

Johnson next avers that he received ineffective assistance of counsel due to counsel's failure to object to Exhibit 4 and to the testimony regarding Johnson's statements to Lemons at the probation revocation hearing.

In general, claims of ineffective assistance of counsel are reviewed under a two-part test: (1) a demonstration that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) a showing that the deficient performance resulted in prejudice. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (*citing Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). Prejudice occurs when the defendant demonstrates that there is a reasonable probability that, if not for counsel's unprofessional errors, the result of the proceeding would have been different. *Grinstead*, 845 N.E.2d at 1031. A reasonable probability occurs when there is a probability sufficient to undermine confidence in the outcome. *Id*. In addition, when an ineffective assistance of counsel claim is based upon a failure to object, the defendant must first prove that an objection would have been sustained by the trial court had defense counsel objected at trial and, second, that he was prejudiced by the failure. *Mays v. State*, 719 N.E.2d 1263, 1265-66 (Ind. Ct. App. 1999), *trans. denied*.

As our discussion to this point demonstrates, neither a hearsay nor a Fifth Amendment objection would likely have been sustained in this case. Hearsay evidence is admissible in probation proceedings if the evidence is substantially trustworthy. Based upon the evidence in the present case regarding the substantial trustworthiness of both Exhibit 4 and the testimony based upon Exhibit 4, the trial court could have overruled an objection to this evidence. Thus, Johnson cannot demonstrate that a timely hearsay objection to this evidence would have been sustained. Moreover, an objection based

upon a violation of Johnson's Fifth Amendment privileges would have been equally unavailing. Pursuant to *Grubb*, statements taken in violation of *Miranda* are admissible in probation revocation proceedings absent a showing of coercion. The evidence in this case showed no coercion. Therefore, defense counsel cannot be shown to be ineffective for failing to raise a meritless objection. Johnson's claim of ineffective assistance of counsel premised upon the failure of counsel to interpose hearsay and Fifth Amendment violation objections must fail.

III. SUFFICIENCY OF THE EVIDENCE

For his final claim of error, Johnson contends that the State failed to present evidence sufficient to support the revocation of his probation. A revocation hearing is in the nature of a civil proceeding, and the State must prove an alleged violation only by a preponderance of the evidence. Ind. Code § 35-38-2-3(e) (2008); *Kincaid v. State*, 736 N.E.2d 1257, 1259 (Ind. Ct. App. 2000). As with other sufficiency questions, we neither reweigh the evidence nor judge the credibility of witnesses when reviewing a probation revocation. *Baxter v. State*, 774 N.E.2d 1037, 1044 (Ind. Ct. App. 2002), *trans. denied*. We look only to the evidence that supports the judgment and any reasonable inferences flowing therefrom. *Id.* If there is substantial evidence of probative value to support the trial court's determination that the probationer committed a violation, revocation of probation is appropriate. *Id*. The decision to revoke a defendant's probation is a matter within the sound discretion of the trial court. *Woods v. State*, 892 N.E.2d 637, 639 (Ind.

2008). Thus, on appeal, we review the trial court's decision for an abuse of that discretion. *Id*.

Johnson claims that the trial court erred by finding a violation based upon his commission of an additional criminal offense because there was not sufficient evidence to prove one of the elements of that offense. The petition to revoke alleged that Johnson committed the offense of intimidation. Indiana Code section 35-45-2-1 (2006) provides:

> (a) A person who communicates a threat to another person, with the intent:
> (1) ******
> (2) that the other person be placed in fear of retaliation for a prior lawful act; or
> *******
> commits intimidation, a Class A misdemeanor.
>
> (b) However, the offense is a:
> (1) Class D felony if:
> (A) *******;
> (B) the person to whom the threat is communicated:
> (i) *******;
> (ii) is a judge or bailiff of any court;
> *******
> (c) "Threat" means an expression, by words or action, of an intention to:
> (1) unlawfully injure the person threatened or another person, or damage property;
> (2) unlawfully subject a person to physical confinement or restraint;
> (3) commit a crime;
> *******

Johnson challenges the State's evidence as to the communication element because the record establishes that he did not write the letter to Asbury.

Although Johnson did not physically put pen to paper, the evidence establishes that he authored the letter. During his interview by Lemons, Johnson explained that he

told another inmate what to write and that the other inmate wrote the letter for Johnson because his writing was not very good. In exchange, Johnson gave food to the other inmate. When asked if he intended to follow through with the threats, Johnson responded affirmatively and indicated that he was making the threats against Asbury because Asbury had sent him to prison. The only evidence contrary to this is Johnson's self-serving testimony. At the probation revocation hearing, Johnson denied everything. He testified that another inmate had offered to help him with a sentence modification. To that end, the other inmate purportedly prepared a letter to the judge asking for a sentence modification for Johnson and mailed it out before Johnson saw the contents of the letter. We are to look only to the evidence supporting the judgment, and we are not to reweigh the evidence or judge the credibility of the witnesses. *See Baxter*, 774 N.E.2d at 1044. Here, the evidence supporting the judgment establishes that Johnson directed what was written in the letter, thereby authoring the threats to Asbury.

Moreover, it is of no moment that Johnson was not charged with or convicted of intimidation concerning the letter to Asbury. Where probation revocation proceedings are based upon commission of a new criminal offense, conviction of the new offense is not necessary. Rather, proof that the defendant engaged in the alleged criminal conduct is sufficient to support the revocation of probation. *Cooper v. State*, 917 N.E.2d 667, 674 (Ind. 2009).

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that the trial court's admission of Exhibit 4 did not constitute fundamental error based upon either inadmissible hearsay or a violation of Johnson's Fifth Amendment privilege. Additionally, Johnson received effective assistance of counsel, and the State presented evidence sufficient to support the revocation of Johnson's probation.

Affirmed.

BAILEY, J., and BARNES, J., concur.