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IN THE
COURT OF APPEALS OF INDIANA

NICHOLAS N. HARLESS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-1001-CR-163
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable David A. Happe, Judge
Cause Nos. 48D04-0911-FD-478 and 479

November 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Nicholas Harless appeals the revocation of his probation.

We affirm.

ISSUES

1. Whether the trial court improperly admitted evidence during the probation revocation hearing.

2. Whether the evidence was sufficient to support the revocation of Harless's probation.

3. Whether the trial court abused its discretion by ordering Harless to serve his suspended sentences.

FACTS

On May 4, 2009, Harless pleaded guilty under Cause Number 48D04-0911-FD-479[1] ("Cause No. 479") to Count I, class D felony theft; Count II, class B misdemeanor disorderly conduct; and Count III, class C misdemeanor illegal possession of an alcoholic beverage. The trial court sentenced Harless to a suspended sentence of eighteen months on Count I, ninety days on Count II, and thirty days on Count III. The trial court ordered that the sentences be served concurrently and placed Harless on formal probation.

On May 12, 2009, the State charged Harless with class D felony theft under Cause Number 48D04-0911-FD-478[2] ("Cause No. 478"). The State subsequently amended the charge to class A misdemeanor conversion.

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[1] Previously docketed as Cause Number 48C01-0901-FD-4.

[2] Previously docketed as Cause Number 48C01-0905-FD-247.

On May 18, 2009, the State filed a notice of probation violation in Cause No. 479, following Harless's arrest under Cause No. 478. Following a hearing on June 29, 2009, the trial court found that Harless had violated the terms of his probation but entered "no sanctions . . . ." (App. 3).

On June 29, 2009, Harless pleaded guilty to the conversion in Cause No. 478. On September 14, 2009, the trial court sentenced Harless to a suspended sentence of one year; placed Harless on formal probation; and ordered that his sentence run consecutive to his sentence under Cause No. 479.

On December 3, 2009, the State filed a notice of probation violation under Cause No. 479. The State filed an amended notice on December 30, 2009. Also on December 30, 2009, the State filed a notice of probation violation under Cause No. 478. Under both cause numbers, the State alleged that Harless had violated his probation by committing class A misdemeanor criminal conversion on May 5, 2009; and class A misdemeanor criminal mischief and class B misdemeanor false informing on December 1, 2009.

The trial court consolidated the two cases and held a probation revocation hearing on January 19, 2010. During the hearing, Anderson Police Officer Scott Sanderson testified that on May 4, 2009, he responded to a report of "three male subjects" taking items from a store. (Tr. 43). Shortly thereafter, he located two of the suspects in a parking lot. He identified one of the suspects as Harless. During a pat-down of Harless, officers discovered "a couple of bottles of . . . cough syrup," in addition to other items.

(Tr. 44). Harless admitted to taking the items from the store. He also admitted that the bicycle he was riding had been stolen.

Detective Trent Chamberlain testified that he was at the scene when Harless was apprehended. He further testified that the arrest occurred at 5:17 p.m. on May 4, 2009. Thus, officers arrested Harless after the sentencing hearing in Cause No. 479.

Anderson Police Officer John Branson also testified to the following facts. On December 1, 2009, he responded to a report of a burglary in progress at an apartment complex. At the scene, Officer Branson observed at least two broken windows and "a lot of blood in front of the residence and in the residence." (Tr. 29).

Jeremy Robertson informed Officer Branson that he had interrupted a burglary at his apartment. Robertson described the perpetrators as two white men, who ran away from the building on foot. Officer Branson, however, noticed "a blood trail leading out to the parking lot," indicating that someone had "got[ten] into a car right there in front of the apartment." (Tr. 31).

Upon further questioning, Robertson admitted that Harless was the perpetrator. According to Robertson, Harless "got angry and started punching out windows" when he could not find his gaming device. (Tr. 33).

Given the amount of the blood at the scene, Officer Branson went to a local hospital, where he found Harless. Harless told Officer Branson that "he accidentally broke the windows out during a struggle with some people" at the apartment. (Tr. 34).

Harless initially gave Officer Branson a false address but later admitted that he lived with Robertson. Harless, however, stated that he was in the process of moving.

During Officer Branson's testimony, Harless's counsel objected to the admission of his testimony regarding Robertson's statements as to the alleged perpetrators. Harless's counsel argued that there was "no foundation laid for it being credible[.]" (Tr. 31). He did not object to Officer Branson's testimony regarding Robertson's statement that Harless had punched out the windows.

Harless testified that he committed conversion the day before the trial court placed him on probation in Cause No. 479. As to giving Officer Branson the wrong address, Harless testified that he only lived with Robertson temporarily, but his father's address was his permanent residence. He also testified that he put his arm through the windows when someone pushed him.

Following the hearing, the trial court found that Harless had violated his probation by committing criminal mischief and conversion. Accordingly, the trial court imposed the previously suspended 528-day sentence under Cause No. 479 and the previously suspended 265-day sentence under Cause No. 478. The trial court further ordered that the sentences be served consecutively.

DECISION

1. Admission of Evidence

Harless asserts that the trial court improperly admitted Robertson's statements through Officer Branson's testimony. We disagree.

> A probation revocation hearing "is not to be equated with an adversarial criminal proceeding." Because probation revocation procedures "are to be flexible, strict rules of evidence do not apply." The trial court may consider hearsay "bearing some substantial indicia of reliability." Hearsay is admissible in this context if it "has a substantial guarantee of trustworthiness." A trial court "possesses broad discretion in ruling on the admissibility of evidence, and we will not disturb its decision absent a showing of an abuse of that discretion."

Peterson v. State, 909 N.E.2d 494, 499 (Ind. Ct. App. 2009) (internal citations omitted).

We note that Harless failed to object to Officer Branson's testimony regarding Robertson's statement that Harless had punched the windows. Accordingly, Harless has waived this issue for appeal. *See March v. State*, 818 N.E.2d 143, 145 (Ind. Ct. App. 2004) (noting that at a probation revocation hearing, the failure to object to the admission of hearsay evidence waives the issue for appeal). Waiver notwithstanding, we find no abuse of discretion in the trial court's admission of the hearsay evidence.

Here, the record reveals that Officer Branson observed that the windows of Robertson's apartment had been broken. Another officer testified that "the apartment windows had been all busted out." (Tr. 41). Although Robertson initially reported that two unknown suspects had burglarized his apartment, he later admitted that Harless had punched out the windows after becoming angry. In the hospital, Harless admitted to Officer Branson that he had broken the windows. Given the evidence presented, we find that Robertson's testimony bore sufficient indicia of reliability. We therefore find no abuse of discretion in admitting and considering Officer Branson's testimony.

2. Sufficiency of the Evidence

Although Harless does not make a separate argument in his brief, he asserts that insufficient evidence exists to support the trial court's finding of a probation violation based on criminal mischief, where he has consistently "maintain[ed] that he broke windows out inadvertently during and while being attacked . . . ." Harless's Br. at 14. We disagree.

Whether to revoke probation is within the trial court's discretion. *Hubbard v. State*, 683 N.E.2d 618, 620 (Ind. Ct. App. 1997). When reviewing a revocation, we will neither weigh the evidence nor assess witness credibility. *Id.* We will affirm revocation if, considering only the probative evidence and reasonable inferences therefrom, there is sufficient evidence supporting the conclusion that the probationer is guilty of violating any condition of his probation. Ind. Code § 35-38-2-3; *Hubbard*, 683 N.E.2d at 620.

Indiana Code section 35-43-1-2(a) provides that a person who "recklessly, knowingly, or intentionally damages or defaces property of another person without the other person's consent" commits criminal mischief. Here, the evidence shows that at least two of Robertson's windows had been broken. Harless admitted to the officers that he had broken the windows during an altercation. As to Harless's testimony that he broke the windows after someone pushed him, causing him to put one arm through two windows, the trial court did not find it credible.[3]

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[3] The trial court stated:

> Mr. Harless came into court with an explanation that really just doesn't make a lot of sense and I'm not sure as I watched him testify about that he really believes what he was

The evidence supports the finding that Harless committed criminal mischief. Accordingly, we find that the trial court acted within its discretion when it revoked Harless's probation.

3. Sentence

Harless asserts that the trial court abused its discretion in imposing the suspended sentences. He argues that the trial court "should have only considered the criminal conversion in determining his sanctions . . . ." Harless's Br. at 16.

Indiana Code section 35-38-2-3(g) provides as follows:

> If the court finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may:
>
> (1) continue the person on probation, with or without modifying or enlarging the conditions;
> (2) extend the person's probationary period for not more than one (1) year beyond the original probationary period; or
> (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing.

We review a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion. *Podlusky v. State*, 839 N.E.2d 198, 200 (Ind. Ct. App. 2005). "[A] defendant may not collaterally challenge his sentence on an appeal from his

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> saying in court. And it probably doesn't make sense because it wasn't true. The story about getting spun around by someone and putting your arm through a window. Well, maybe that would work if there was one window broken but there's [sic] two windows broken, and your stories don't cover that. I find, based on your statements and your testimony, that what really happened was you got mad, there was a dispute about property about who had whose stuff and you got mad and you put your hand through a window.

(Tr. 66).

probation revocation. *Sanders v. State*, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005) (citing *Stephens v. State*, 818 N.E.2d 936, 939 (Ind. 2004)), *trans. denied*. Furthermore, "the standard of review used when reviewing whether a defendant's probation revocation sentence is unreasonable is an abuse of discretion." *Id.* at 957 (emphasis added).

The evidence shows that Harless violated his probation by committing conversion and criminal mischief. Thus, we find no abuse of discretion in ordering Harless to serve his suspended sentence.

Affirmed.

BRADFORD, J., and BROWN, J., concur.