

Kimberly Beward appeals the revocation of her probation, contending that the trial court violated her due process rights by revoking probation without permitting her to present certain potentially mitigating evidence indicating that complete revocation was not warranted.

We affirm.

The facts are that on April 13, 2005, Beward was convicted of stalking as a class C felony and sentenced to eight years imprisonment, with two years executed and six years suspended to probation. On July 29, 2005, the court approved Beward's application to serve her probation in the State of Washington. On September 29, 2005, Beward began serving probation in Washington. On June 11, 2007, the Marion County Probation Department filed a notice of probation violation alleging Beward: (1) failed to report to her probation supervisor as directed and (2) failed to comply with conditions set by officials in Washington.¹ Specifically, the notice alleged:

On 1/23/2007 Probation received a Violation Report indicating that Ms. Beward had been involved in a domestic incident with her partner, Shari Schecter. Ms. Beward also admitted to consuming prescribed medication that was not prescribed to her on the date of that incident. Ms. Beward was also out of the county of residence, against the conditions put forth by Washington. Probation requested that Washington State continue supervision and apply any appropriate sanctions. Washington State at that time advised Ms. Beward that she was not to have contact with Shari Schecter.

On 4/9/2007, Probation received a Violation Report from Washington indicating that Ms. Beward continued to have contact with Shari Schecter and

¹ The notice of probation violation also alleged that she failed to make a good-faith effort to satisfy certain court-ordered monetary obligations. By the time the matter came to a hearing, however, the State indicated that she was "paid in full." *Transcript* at 13.

continued to be out of her county of residence. A hearing was held in Washington on 3/29/2007 and Ms. Beward was ordered to serve 8 days incarceration, and to continue to have no contact with Ms. Schecter and to continue to maintain in-county geographical boundaries. Probation responded to the violation notice requesting that Washington continue supervision as Ms. Beward had recently entered Mental Health Treatment. Probation also recommended that Ms. Beward not have contact with Ms. Schecter unless in appointments with the Mental Health Provider and that Ms. Beward remain in her county of residence unless for employment reasons.

On 6/8/2007, Probation received a third violation report from Washington indicating that Ms. Beward failed to report on 5/29/2007, she has failed to comply with the No Contact Order with Ms. Schecter, and was also found to be out of the county of residence at Ms. Schecter's home. Washington also advised that they had received notice from Ms. Beward's Mental Health Provider that Ms. Beward "acted out, making verbal threats of harm to Shari Schecter and herself, on or about 5/22/2007."

Washington has indicated that they believe Ms. Beward to be a threat to herself and the community and have requested that Marion County retake Ms. Beward.

Appellant's Appendix at 65-66. At an August 13, 2008 evidentiary hearing, Beward admitted the violations set out above. During the hearing, Beward's attorney asked the trial court to permit Beward's daughter to address the court. The court denied the request. At the conclusion of the hearing, the court revoked probation and executed four years of Beward's sentence. The court explained:

Ms. Beward has written the Court many times and in her letters to Judge Gifford she has extold [sic] her own virtues, assured the Court that she is a productive member of society. We are familiar with Ms. Beward's efforts at Liberty Hall as well as her many good and valuable contributions to the community as they are subjectively told to us but as with any story no matter how happy or colorful the retelling often diminishes the impact and that is the case here, Ms. Beward. I have no doubt that you have made positive contributions to the various communities in which you have lived but you have also demonstrated to this Court that you are not willing to abide by the rules set forth. The argument that you successfully completed the daily reporting program is not overly persuasive because successful completion of that

program would by definition mean you would not show up in this court on a new violation. Your behavior has not been rehabilitated through the least restrictive means we have in Marion County or in the State of Washington. You have continued to set your own rules and disregard those of the Court. I am going to revoke your probation, Ms. Beward.

Transcript at 20-21. After the court made the foregoing comments, Beward interjected, “May I say something –”. *Id.* at 22. The court responded, “I would not say anything at this point.” *Id.*

Beward challenges the revocation on due process grounds, arguing that the trial court “violated Beward’s due process rights by refusing to hear potentially mitigating evidence from Beward and Beward’s daughter.” *Appellant’s Brief* at 3. The revocation of probation is a two-step process. *Woods v. State*, 892 N.E.2d 637 (Ind. 2008). The first step requires the revocation court to make a factual determination that the defendant violated a condition of probation. *Id.* If it determines that a violation has been proven, the court must then determine if the violation warrants revocation. *Id.* In this context, Indiana’s due process requirements are codified at Ind. Code Ann. § 35-38-2-3 (West, PREMISE through 2008 2nd Regular Sess.), which provides that an evidentiary hearing must be held at which the probationer is permitted to confront and cross-examine witnesses and is entitled to representation by counsel. When, as here, the probationer admits the violations, the procedural due process safeguards and an evidentiary hearing are not necessary. *Woods v. State*, 892 N.E.2d 637. “Instead, the court can proceed to the second step of the inquiry and determine whether the violation warrants revocation.” *Id.* at 640. In making the determination of whether the violation warrants revocation, the probationer must be given an

opportunity to present evidence that explains and mitigates her violation. *Woods v. State*, 892 N.E.2d 637.

Reversal is not warranted when the trial court has wrongfully excluded evidence in this context unless the error affected the probationer's substantial rights, which means that it must have resulted in prejudice to the probationer. Moreover, the probationer "must have made an offer of proof or the evidence must have been clear from the context." *Stroud v. State*, 809 N.E.2d 274, 283 (Ind. 2004). "This offer to prove is necessary to enable both the trial court and the appellate court to determine the admissibility of the testimony and the prejudice which might result if the evidence is excluded." *Woods v. State*, 892 N.E.2d at 641-42 (quoting *Wiseheart v. State*, 491 N.E.2d 985, 991 (Ind. 1986)). An offer of proof preserves an issue for review by the appellate court. *Woods v. State*, 892 N.E.2d 637.

In the instant case, Beward contends her due process rights were violated when the trial court did not permit her daughter to testify and when the court did not permit Beward to make additional comments at the end of the hearing. With respect to the trial court's refusal to allow Beward to speak, we note that this occurred at the end of the revocation hearing. Beward had already presented her arguments in favor of leniency and her attorney had already concluded his case after presenting a summation on Beward's behalf. In fact, Beward's request to speak came after the court had announced its decision. We note also that not only did Beward not object when the trial court refused her request to speak, but she also failed to submit an offer to prove. Thus, even assuming for the sake of argument that due process required that Beward be allowed to continue arguing after the decision had been

announced – a dubious proposition to be sure – the argument was waived. *See id.*

We turn now to the trial court’s refusal to allow Beward’s daughter to speak at the hearing. We note in this instance that defense counsel did preserve the issue by asking permission to summarize what Beward’s daughter would say. The court permitted counsel to do so. Counsel explained that the daughter would testify about the charitable trust that she and her mother² had set up in Washington to benefit “disabled people out in Washington who feel it necessary to go and interact with nature.” *Transcript* at 18. We agree that the trial court should have permitted Beward’s daughter to testify. Even if the trial court erred in refusing to allow the daughter to speak, however, we conclude the error is harmless. *Cf. Woods v. State*, 892 N.E.2d at 42 (citing *Neff v. State*, 696 S.W.2d 736 (Ark. 1985) for the proposition that “[w]here the right of allocution is completely ignored by the court, a defendant must affirmatively prove prejudice after a proper objection in the trial court”). At best, this was merely cumulative of other evidence and argument presented by Beward at the hearing.

Although she admitted the violations, Beward offered in mitigation the following contentions: (1) She had violated the no-contact order primarily because the subject of the order was not only her domestic partner, but her business partner as well. According to counsel,

the reason why she quote end quote freaked out and left (the area to which she was geographically restricted) was because she was going to be unable to actually work with her business partner who also happened to be her partner.

² Presumably, Beward and her daughter are the antecedents of “they” in counsel’s statement, “the charitable trust that they set up” *Transcript* at 18.

Probation put on her a condition that she felt was impossible because this was a partner and this was a business partner that would have caused her business to fail[,]

id. at 18-19; (2) she would miss her daughter's college graduation ceremony if she was incarcerated; (3) she accepted responsibility for her actions, sought and obtained counseling, and "shows a great deal of rehabilitation," *id.* at 16; and (4) through various charitable and volunteer endeavors, "[s]he has constantly sought to try to help other people and to benefit this society." *Id.* Based upon counsel's statements at the hearing, we presume the daughter would have concentrated her remarks on (4) above, and possibly (2) as well.

Would Beward's daughter have said something that would have affected the trial court's decision? If the court had been inclined to grant probation upon this basis (i.e., charitable and volunteer activities), there was ample other evidence that would have motivated the court to do so. In the final analysis, the trial court revoked probation upon its conclusion that Beward's history indicated she would not adhere to the conditions of probation in the future, notwithstanding her positive contributions to society. Moreover, the court ultimately appeared to be unmoved by Beward's claims that she had been rehabilitated, and that her incarceration would cause a hardship on her, her daughter, and the community in which she lived. Thus, even had the trial court permitted Beward's daughter to testify, no new or more compelling bases for continued probation would have been established and the outcome would undoubtedly have been the same. Beward suffered no prejudice as a result of the decision to disallow her daughter's testimony, and therefore her due process rights were not violated.

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.