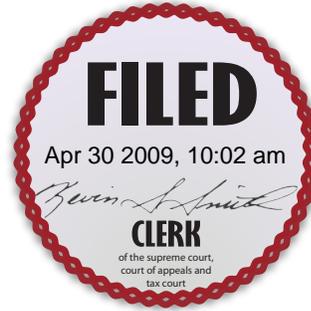


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM WALTON,)
)
Appellant-Defendant,)
)
vs.) No. 48A02-0810-CR-880
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0712-FB-384

April 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

William Walton appeals the trial court's revocation of his probation. On appeal, Walton raises two issues, which we restate as follows:

- I. Whether the trial court erred by admitting hearsay evidence at Walton's probation revocation hearing; and
- II. Whether the trial court denied Walton due process by preventing him from explaining why he violated the terms of his probation.

We affirm.

FACTS AND PROCEDURAL HISTORY

In December 2007, the State charged Walton with one count of burglary¹ as a Class B felony. Walton entered into a plea agreement whereby he pleaded guilty to the lesser included offense of theft² as a Class D felony. The trial court sentenced Walton to three years, gave him credit for time served, and suspended the remainder of the sentence to probation. Among the conditions of Walton's probation were that he obey all laws, abstain from the use of alcohol and illicit drugs, and submit to periodic drug screens as requested by the Probation Department.

On March 29, 2008, the State filed its first notice of probation violation against Walton. The State amended the notice three times, each time adding new allegations. The final amended notice alleged that Walton had violated his probation by testing positive for marijuana on April 23, 2008, testing positive for marijuana and oxycodone on June 13, 2008, failing to report for drug screens on two separate occasions, and committing a new criminal

¹ See Ind. Code § 35-43-2-1.

² See Ind. Code § 35-43-4-2.

offense, robbery³ as a Class B felony.

A revocation hearing was held on July 25, 2008. At the beginning of the hearing, Walton admitted to testing positive for marijuana and oxycodone and failing to report for drug tests as alleged. Walton stated that he had smoked marijuana, but that he had not taken oxycodone and that there must have been oxycodone in the marijuana he smoked. Additionally, Walton claimed that he had failed to report for drug screens because he did not have transportation. Walton denied the robbery allegation.

For the most part, the rest of the hearing was devoted to the robbery allegation. The State presented the testimony of Anderson Police Department Detective Trent Chamberlain, who investigated the robbery. Detective Chamberlain testified regarding several conversations he had during the course of his investigation. Namely, he testified to statements made by Jason Hendrickson, who flagged Detective Chamberlain down when he arrived at the scene of the robbery, provided him with physical descriptions of two men he had seen running away from the scene of the robbery, and indicated the direction in which the men had run. Detective Chamberlain also testified to statements made by Jessica McCarroll, Walton's girlfriend, and Aaron Berry, the second suspect in the robbery. Walton did not object to any of Detective Chamberlain's testimony.

At the conclusion of the hearing, the trial court found that the State had proven by a preponderance of the evidence that Walton had violated the conditions of his probation. The court then revoked Walton's probation and ordered him to serve his suspended sentence.

³ See Ind. Code § 35-42-5-1.

Walton now appeals.

DISCUSSION AND DECISION

“Probation is conditional liberty that is a privilege, not a right.” *Hubbard v. State*, 683 N.E.2d 618, 620 (Ind. Ct. App. 1997). A probation revocation hearing is civil in nature, and the State only needs to prove the alleged violation by a preponderance of the evidence. *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999). This court will consider the evidence most favorable to the judgment of the trial court without reweighing that evidence or judging the credibility of witnesses. *Id.* “If there is substantial evidence of probative value to support the trial court’s conclusion that a defendant has violated any terms of probation, we will affirm its decision to revoke probation.” *Id.* We review a trial court’s decision to revoke probation for an abuse of discretion. *Marsh v. State*, 818 N.E.2d 143, 144 (Ind. Ct. App. 2004). An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the trial court. *Id.* at 145.

I. Hearsay Evidence

Walton contends that the trial court erred in admitting hearsay evidence in revoking his probation. Specifically, Walton argues that the trial court improperly admitted Detective Chamberlain’s testimony regarding the statements made by Hendrickson, McCarroll, and Berry.⁴ We note that Walton failed to object to this testimony at the revocation hearing.

⁴ Walton also argues that the admission of hearsay evidence violated his Sixth Amendment right to confront and cross-examine witnesses. However, because probation violation hearings are not criminal trials, the Sixth Amendment confrontation right is not implicated here. *Reyes v. State*, 868 N.E.2d 438, 440 n.1 (Ind. 2007). Thus, we need not address this argument.

“Generally, the failure to object, and thereby properly preserve an issue for appeal, results in waiver.” *Id.* at 145. Therefore, Walton has waived this claim.

In an attempt to avoid waiver, Walton argues that the admission of Detective Chamberlain’s testimony constituted fundamental error. Walton admitted to violating his probation by using marijuana and by failing to report for scheduled drug screens. Violation of a single condition of probation is sufficient to revoke probation. *Hubbard*, 683 N.E.2d at 622. Here, Walton admitted to four separate violations. Even assuming that Detective Chamberlain’s testimony was improperly admitted, it would have been harmless error because the trial court could have properly revoked Walton’s probation based solely on his own admissions.

Moreover, we disagree. Walton has failed to show that the admission of the evidence rose to the level of fundamental error. The fundamental error exception to the waiver rule is extremely narrow. *Book v. State*, 880 N.E.2d 1240, 1248 (Ind. Ct. App. 2008), *trans. denied*. “To qualify as ‘fundamental error,’ the error must be a substantial blatant violation of basic principles rendering the trial unfair to the defendant.” *Townsend v. State*, 632 N.E.2d 727, 730 (Ind. 1994). The appellant bears the burden of proving that the trial court erred and that the error was fundamental in nature. *Id.* To determine whether the trial was fair, we must consider all that happened and decide whether the alleged error substantially influenced the outcome. *Id.*

The Indiana Rules of Evidence, including the rules against hearsay, do not apply to probation revocation hearings. *See* Ind. Evidence Rule 101(c)(2); *Cox*, 706 N.E.2d at 551.

Courts in probation hearings may consider “any relevant evidence bearing some substantial indicia of reliability. This includes reliable hearsay.” *Cox*, 706 N.E.2d at 551. In *Reyes v. State*, our Supreme Court adopted the “substantial trustworthiness” test for admitting hearsay evidence in probation revocation hearings. 868 N.E.2d 438, 441 (Ind. 2007). Under this test, “the trial court determines whether the evidence reaches a certain level of reliability, or if it has a substantial guarantee of trustworthiness.” *Id.*

Walton’s failure to object deprived the trial court of the opportunity to make a substantial trustworthiness determination. Further, had Walton made a timely objection to Detective Chamberlain’s testimony, the State would have had the opportunity to present the evidence through the testimony of the actual declarants.

II. Due Process

Walton also contends that the trial court violated his due process rights by denying him the opportunity to present evidence that would explain or mitigate his probation violations. “It is well settled that although a probationer is not entitled to the full array of rights afforded at trial, certain due process rights inure to a probationer at a revocation hearing.” *Id.* at 622. At a minimum, due process requires:

(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a ‘neutral and detached’ hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Cooper v. State, 894 N.E.2d 993, 996 (Ind. Ct. App. 2008) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)).⁵

Probation revocation is a two-step process. First, the trial court must make a factual determination that the probationer actually violated a condition of probation. *Woods v. State*, 892 N.E.2d 637, 640 (Ind. 2008). If the violation is proven, the trial court must then determine whether the violation warrants revocation. *Id.* When a probationer admits to the violations, the procedural safeguards and evidentiary hearing are unnecessary, and the court may proceed directly to the second step of the inquiry. *Id.* Even a probationer who admits the allegations against himself must still be given an opportunity to offer mitigating evidence suggesting that the violation does not warrant revocation. *Id.*

Walton failed to object on this basis at the hearing. If an issue is not objected to at trial, it may not be raised on appeal. *Cooper*, 894 N.E.2d at 997. Therefore, Walton has waived this issue. Waiver notwithstanding, Walton's claim fails because he has made no

⁵ In revoking Walton's probation, the trial judge stated: "The Court finds that b[y] a preponderance of the evidence the State has proven the defendant has violated the conditions of his probation as he's admitted to it and it has been proven by the evidence and the Court revokes his probation and executes the defendant's suspended sentence[.]" *Tr.* at 62. The transcript of the hearing was later placed in the record. *See Hubbard*, 683 N.E.2d at 621 (placing transcript of evidentiary hearing in record satisfies writing requirement if transcript contains clear statement of trial court's reasons for revoking probation). Additionally, the court issued a written order, which provided that: "The defendant PARTIALLY admits to violation in that he/she used marijuana and failed to report to probation. Evidence presented regarding allegations of new charge of Robbery. The Court finds defendant violated the conditions of his/her probation as admitted and by a preponderance of evidence. The Court revokes the defendant's sentence[.]" *Appellant's App.* at 19 (emphasis in original). Although Walton does not argue that the trial court failed to satisfy the writing requirement, we note that the written statement in this case is ambiguous. It is unclear from the trial court's statement whether the court relied solely on Walton's admissions or whether the court relied on Walton's admissions combined with the evidence of the robbery. However, the written statement makes it clear that the trial court relied, at least in part, on Walton's admitted violations. Because Walton's admissions alone create a sufficient basis for revoking his probation, we conclude that the ambiguity in the trial court's written statements amounts to no more than harmless error.

offer of proof.

We first note that, at least with regard to his admitted violations, Walton was permitted to present mitigating evidence. After admitting to testing positive for marijuana and oxycodone and failing to report for drug screens, Walton attempted to mitigate these violations by explaining that, although he had been smoking marijuana, he had not taken oxycodone and that the marijuana he smoked must have had oxycodone in it. Also, Walton claimed that he had failed to report for drug screens because he did not have transportation. Therefore, Walton's right to present mitigating evidence regarding his admitted violations was not violated. Because violation of a single condition of probation is sufficient to revoke probation, *Hubbard*, 683 N.E.2d at 622, the trial court would have acted well within its discretion if it had revoked Walton's probation without hearing any further evidence.

Nevertheless, the trial court went on to consider the alleged robbery. Because Walton denied committing that violation, the trial court conducted an evidentiary hearing and heard testimony from witnesses. At the conclusion of the evidence, the trial court found that Walton had violated his probation. The court then revoked Walton's probation without allowing him another opportunity to explain the violation.

Even if this failure constituted error, Walton is not entitled to relief. In *Woods v. State*, our Supreme Court held that the trial court erred because it did not allow the defendant to explain his violation at the revocation hearing, but affirmed the revocation because the defendant did not make an offer of proof. 892 N.E.2d at 641-42. The Court held that "[t]o reverse a trial court's decision to exclude evidence, there must have been error by the court

that affected the defendant's substantial rights *and* the defendant must have made an offer of proof or the evidence must have been clear from the context." *Id.* at 641 (emphasis in original). The Court reasoned that "[t]his 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." *Id.* at 641-42. Therefore, the defendant's claim failed because he made no offer of proof to the trial court and failed to explain his violation on appeal. *Id.* at 642.

In the present case, Walton made no offer of proof regarding the robbery allegation to the trial court and he has not attempted to explain the violation on appeal. Nor is any mitigating evidence clear from the context. Therefore, his claim must fail. Moreover, given the fact that Walton admitted to committing four separate probation violations, the trial court's failure to allow Walton to explain the robbery allegation was, at most, harmless error.

Affirmed.

RILEY, J., and MATHIAS, J., concur.