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ATTORNEY FOR APPELLANT:

T. ANDREW PERKINS
Rochester, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana
Indianapolis, Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JAMES BISHOP,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 25A03-0807-CR-370
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FULTON CIRCUIT COURT
The Honorable Douglas B. Morton, Judge
Cause No. 25C01-9603-CF-9
25C01-9604-CF-12
25C01-9604-CF-13

JULY 10, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Appellant-Defendant James Bishop appeals the revocation of his probation and the trial court's order that he serve his suspended twenty-year sentence. We affirm.

ISSUES

Bishop raises two issues for our review, which we restate as:

I. Whether the trial court committed reversible error when it granted the State's objection to certain opinion testimony pertaining to a witness's character.

II. Whether the trial court abused its discretion in reinstating Bishop's entire suspended sentence.

FACTS AND PROCEDURAL HISTORY

On June 25, 1996, Bishop pled guilty to three counts of Class B felony robbery. The trial court accepted the plea and sentenced Bishop to forty years, with twenty years suspended and twenty to be served in the Department of Correction. In addition, the trial court ordered Bishop to serve a term of probation upon his release.

In August of 2006, Bishop was released to probation, and seven months later, in March of 2007, Bishop battered his fourteen-year-old nephew. The State charged him with Class D felony battery and with being a habitual offender.

On April 28, 2007, Bishop allegedly attempted to rob Jonathon Heckaman and Brock Hawthorn at gunpoint after offering to drive them to an ATM machine. On April 30, 2007, the State charged Bishop with two counts of Class B felony attempted robbery,

unlawful possession of a firearm by a serious violent felon, and with being a habitual offender.

On May 1, 2007, the State filed a petition to revoke Bishop's probation based upon both the battery charge and the attempted robbery and related charges. In October of 2007, Bishop pled guilty to Class D felony and to being a habitual offender, and in December of the same year, the State dismissed the attempted robbery and related charges.

A hearing was held on the petition to revoke probation in early 2008. Both Heckaman and Hawthorne, as well as witness Jennifer Stouder, testified to the attempted robberies. During the cross-examination of the investigating detective, Todd Sautter, Bishop questioned him regarding his personal opinion about Hawthorn's credibility based upon prior investigations involving both Detective Sautter and Hawthorn. The State objected, and the trial court sustained the objection.

The trial court subsequently found that Bishop had violated his probation by committing Class B felony battery, to which Bishop had pled guilty, and by committing two counts of attempted armed robbery and unlawful possession of a firearm by a serious violent felon. The trial court ordered Bishop to serve his suspended twenty-year sentence, and Bishop now appeals.

DISCUSSION AND DECISION

I. EXCLUSION OF TESTIMONY

Bishop contends that the trial court erred in granting the State's objection to the questions asked of Detective Sautter about his opinion of Hawthorn's credibility. He asserts that Sautter's opinion was key because the prior witnesses had "vastly different accounts of the events"; therefore, it was "crucial for the trial court to permit this evidence." (Appellant's Brief at 3). Central to Bishop's argument is his belief that had the trial court not found that he committed the attempted armed robbery by brandishing and attempting to discharge a handgun, it would not have reinstated the suspended sentence.

This court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *McVey v. State*, 863 N.E.2d 434, 440 (Ind. Ct. App. 2007), *trans. denied*. An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*. In *Isaac v. State*, 605 N.E.2d 144, 148 (Ind.1992), *cert. denied*, 508 U.S. 922, 113 S.Ct. 2373, 124 L.Ed.2d 278 (1993), our supreme court held that a defendant at a probation revocation hearing does not have all the same rights he or she possessed prior to conviction. The court determined that, among other things, formal evidentiary rules are not observed at probation revocation hearings. *Id*. That ruling was later codified in Ind. Evidence Rule 101(c), which states, in pertinent part: "[t]he rules, other than those with respect to privileges, do not apply in ... [p]roceedings relating to ... sentencing, probation, or parole." In addition, the State's burden of proof is lower, as the State need prove an

alleged violation of probation by only a preponderance of the evidence. *Rosa v. State*, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005).

At the revocation hearing, Heckaman testified that Bishop told him that he would take Heckaman and Hawthorn from a motorcycle rally in the town of Syracuse to an ATM machine, so that Hawthorn could get some money to lend to Heckaman. Heckaman further testified that Bishop took the two men in a pickup truck to a remote location and forced them at gunpoint to exit the vehicle. Bishop then demanded money, hit Heckaman with the pistol, and twice attempted to fire the pistol. Heckaman gave Bishop some money and then started sprinting toward an approaching pickup truck. They entered the back of the truck and were taken to Syracuse, where they talked with police officers.

Hawthorn testified that when he exited the truck, he was frozen with fear as he watched Bishop strike Heckaman and attempt to discharge the pistol. As soon as he saw the approaching vehicle, he regained his senses and ran toward it.

Stouder testified that she was Bishop's girlfriend at the time and that Bishop told her earlier in the day that he intended to rob Heckaman. Stouder further stated that Bishop told her to lay on the floor of the rear section of the cab while he drove Heckaman and Hawthorn to a place where he could rob them. Stouder testified that she heard the words exchanged during the robbery and that she observed Bishop removing money from a wallet before speeding off. She further testified that after the incident, she and Bishop went to her house, where Bishop successfully discharged the weapon.

After these three witnesses testified, the State called Detective Sautter, who testified about his investigation. On cross-examination, the following exchange occurred:

Q Ok. Are you familiar with [Heckaman] through your law enforcement experience other than this?

A I never met with [Heckaman] before this incident.

Q Never had any contact with [Heckaman]?

A No.

Q. Have you had contact with [Hawthorn]?

A Yes, I had.

Q Is it safe to say he's got a fairly extensive criminal history?

A He has a history.

Q In your opinion, is [Hawthorn] credible?

Mr. Brown: I would object, that's not a question any witness could answer.

The Court: Sustain.

Q Had you questioned [Hawthorn] in the past on any of the criminal history that you say that he has?

Mr. Brown: Again, I'm gonna object Judge. We're getting down into investigations of other cases. This credibility can be attacked by the fact that he's had prior (INAUDIBLE) convictions and that's it.

The Court: Maybe I misunderstood the question.

Mr. Heller: Well…

The Court: Did you ask this man if he was involved in any of the other investigations?

Mr. Heller: Correct. Yes, did he question [Hawthorn] in any of his previous criminal history?

The Court: Why would (INAUDIBLE)

Mr. Heller: (INAUDIBLE) [Hawthorn]. I want to see in previous investigations if he had formed an opinion as to the credibility of [Hawthorn}

The Court: His opinion about [Hawthorne's] credibility…doesn't matter much, does it?

Mr. Heller: Well, I think the credibility of [Hawthorn] matters.

The Court: I do too.

Mr. Heller: And…

The Court: Now having said that I thought that was for me to decide and not for him.

Mr. Heller: And I thought it would aid the Court if you had evidence or testimony in that in the past a law enforcement official has found his credibility to be lacking.

The Court: I'll sustain the objection.

(Tr. at 106-07).

Bishop cites Indiana Rule of Evidence 608(a), which allows the credibility of a witness to be attacked in the form of opinion if the evidence refers only to the witness's character for truthfulness. It is apparent, however, that the trial court determined that Detective Sautter's testimony was of no value to the court in making its determination. We cannot say that the trial judge, a veteran jurist, would have been shocked, informed,

or assisted by Detective Sautter's omitted opinion; thus, we conclude that the trial court did not abuse its discretion.

II. PROPRIETY OF REINSTATEMENT OF SENTENCE

Bishop contends that the trial court erred in reinstating the entire suspended sentence. In support of his argument, he cites *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007), wherein our supreme court held that maximum possible sentences are most appropriate for the worst offenders.

Probation is a conditional liberty, and "the granting of a conditional liberty is a favor and not a right." *Gardner v. State*, 678 N.E.2d 398, 401 (Ind. Ct. App. 1997). A probation hearing is in the nature of a civil proceeding and, therefore, a violation need only be proven by a preponderance of the evidence. *Washington v. State*, 758 N.E.2d 1014, 1017 (Ind. Ct. App. 2001).

We initially observe that we review a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion. *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). We do not review the sentence under Indiana Appellate Rule 7(B), which was the standard used in *Reid*. *Id*. "A defendant may not collaterally attack a sentence on appeal from a probation revocation." *Jones v. State*, 838 N.E.2d 1146, 1148 (Ind. Ct. App. 2005).

As long as the proper procedures have been followed in conducting a probation revocation hearing pursuant to Indiana Code § 35-38-2-3, the trial court may order execution of a suspended sentence upon a finding of any violation by a preponderance of

the evidence. *Id.; Goonen v. State*, 705 N.E.2d 209, 212 (Ind.Ct.App. 1999). Indiana Code § 35-38-2-3(g) provides:

> 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.

Because the trial court properly found that Bishop violated probation, it was within the trial court's discretion to determine and impose a sanction under Indiana Code § 35-38-2-3(g). *See Prewitt*, 878 N.E.2d at 187. The trial court ordered execution of the entire remaining suspended sentence in line with Indiana Code § 35-38-2-3(g)(3). Given Bishop's multiple probation violations within a short time after his release to probation, his previous failure to adhere to probation conditions, and his extensive criminal record, the trial court acted well within its discretion by ordering Bishop to serve the remainder of his previously suspended sentence.

CONCLUSION

The trial court did not abuse its discretion in finding multiple violations of Bishop's probation or in reinstating the suspended sentence. We affirm.

DARDEN, J., and BAILEY, J., concur.