

ARKANSAS COURT OF APPEALSDIVISION II
No. CACR11-386

TYRONE ALLEN ELLIS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered November 2, 2011APPEAL FROM THE COLUMBIA
COUNTY CIRCUIT COURT,
[NO. CR-2008-164B]HONORABLE LARRY W.
CHANDLER, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Tyrone Ellis appeals the revocation of his probationary sentences, for which he was sentenced to a total of twelve years in the Arkansas Department of Correction. He argues that there was insufficient evidence to support the circuit court's finding that he violated the conditions of his probation. We affirm.

Appellant was convicted of aggravated assault and criminal use of a prohibited handgun in case number CR2008-164 and of second-degree domestic battering in case number CR2008-252 in Columbia County Circuit Court on April 2, 2009. He was sentenced to sixty-months' probation on each of the two convictions. On April 26, 2010, a petition to revoke his probation was filed alleging that he violated the terms and conditions of his probation by (1) committing criminal offenses punishable by imprisonment; (2) using and

possessing a controlled substance; (3) possessing a firearm; and (4) failing to pay fees, costs, and fines.

At the revocation hearing, witnesses for the State included Kevin McRae, Jonathan Ellis, Paul McBride, Jamie Whitaker, Michael Richardson, Bret McMahon, and David Edwards. When the State rested, appellant's counsel moved for directed verdicts regarding each of the alleged violations, but the only motion granted was the one regarding failure to pay fees and costs. Appellant then testified on his own behalf, denying that he had possessed a firearm or committed a criminal offense punishable by imprisonment on the day in question. The defense rested and renewed its motions for directed verdict on the same grounds, which were again denied.

The circuit court found that appellant had violated the terms of his probation by (1) possessing a firearm on March 14, 2010; (2) being convicted of indecent exposure on October 6, 2009; (3) testing positive for marijuana on February 25, 2010; and (4) committing an offense punishable by imprisonment by firing a firearm that resulted in the death of Keith Thomas. He was sentenced as previously stated pursuant to a judgment and commitment order filed on December 22, 2010. Appellant filed a timely notice of appeal on January 19, 2011, and this appeal followed.

Under Arkansas Code Annotated section 5-4-309(d) (Supp. 2009),¹ a circuit court may revoke a defendant's probation if it finds by a preponderance of the evidence that the

¹This statute was repealed in the most recent legislative session, but the identical provision is now codified at Arkansas Code Annotated section 16-93-308 (Supp. 2011).

defendant has inexcusably failed to comply with a condition of his probation. *Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004). The State bears the burden of proof but need only prove that the defendant committed one violation of the conditions. *Id.*

Because the determination of a preponderance of the evidence turns on questions of credibility and weight to be given testimony, appellate courts defer to the trial judge's superior position to gauge these matters. *Williams v. State*, 351 Ark. 229, 91 S.W.3d 68 (2002). Moreover, the circuit judge is not required to believe the defendant's testimony, as he is the person most interested in the outcome. *Hoyle v. State*, 2011 Ark. 321, ___ S.W.3d ___.

I. *Possession of a Firearm*

While appellant acknowledges that there were witnesses who testified that they saw him with a firearm, he notes that neither was he apprehended with a firearm in his possession nor was there any independent scientific evidence connecting him to any firearm. We find no merit to appellant's argument.

Kevin McRae, a lifelong friend of appellant, Jonathan Ellis, appellant's brother, and Paul McBride, appellant's uncle, all testified that they saw appellant with a gun in his hand on the date and time and in the place where Keith Thomas, appellant's stepfather, was shot and killed. Additionally, Michael Richardson, who booked appellant at the Columbia County Detention Facility after his arrest, testified that he found three, .22-caliber bullet casings in appellant's jeans pocket. Columbia County Sheriff's Office Lieutenant Bret McMahon testified that he found a .22-caliber gun in the area where the shooting took place. The three spent casings appeared to be of the same caliber as the cartridges and a live round that were

removed from that gun. Additionally, the medical examiner's report indicates that Mr. Thomas died as a result of a gunshot wound to the chest.

Although appellant specifically denied having a gun or the three bullet casings in his possession, the trier of fact was free to believe all or part of any witness's testimony and to resolve all questions of conflicting testimony and inconsistent evidence. *Hoyle, supra*. Conflicts in testimony are for the fact-finder to resolve, and the judge is not required to believe the testimony of any witness, especially that of the accused, since he or she is the person most interested in the outcome of the proceedings. *Id.* Additionally, appellant gave improbable explanations of the circumstances, which evidenced guilt. *Stewart v. State*, 338 Ark. 608, 999 S.W.2d 684 (1999).

II. *Indecent Exposure Conviction*

Appellant's probation officer, David Edwards, testified that based on his records, appellant was convicted of indecent exposure on October 6, 2009, in the Columbia County District Court. Appellant argues that because Mr. Edwards did not indicate that he had firsthand knowledge of the conviction, the proper evidence would have been a certified copy of the conviction.

Appellant failed to timely object to the admission of this testimony. A party who does not object to the introduction of evidence at the first opportunity waives such an argument on appeal. *Swanigan v. State*, 336 Ark. 285, 984 S.W.2d 799 (1999). Alternatively, the circuit court may permit the introduction of any relevant evidence of an alleged violation, including affidavits and other documentary evidence, regardless of its admissibility under the rules

governing the admission of evidence in a criminal trial. Ark. Code Ann. § 5-4-310(c)(2) (Repl. 2006).²

III. *Possession of a Controlled Substance*

Mr. Edwards also testified that his records reflected that appellant tested positive for marijuana on February 25, 2010. Again, appellant argues that because Mr. Edwards did not have firsthand knowledge of the testing, the State failed to prove that he violated this particular condition of his probation.

As discussed in the previous section, appellant failed to timely object to the admission of this testimony. Accordingly, his argument is waived. *Swanigan, supra*. Alternatively, the circuit court properly allowed the testimony.

IV. *Commission of an Offense Punishable by Imprisonment*

Appellant acknowledges that multiple witnesses testified that they saw him shoot a firearm at Mr. Thomas; however, he reasserts that he was neither apprehended with a firearm in his possession nor was there any independent, scientific evidence connecting him to any firearm. Accordingly, he claims that the State failed to prove that he violated the conditions by committing an offense punishable by imprisonment by firing a firearm that resulted in the death of Mr. Thomas.

As previously discussed under Point I, three witnesses, all of whom were either close friends or family members of appellant, testified that appellant both had possession of a gun

²This statute was repealed in the last legislative session, but an identical provision is now codified at Arkansas Code Annotated section 16-93-308 (Supp. 2011).

and shot Mr. Thomas. Despite appellant's denial of having a gun or the three bullet casings in his possession, and his specific denial regarding shooting Mr. Thomas, the circuit court was free to believe all or part of his testimony and was charged with resolving all questions of conflicting testimony and inconsistent evidence. *Hoyle, supra*. Further, appellant's credibility was weakened by the fact that he had more at stake than the State's witnesses, *see Nelson v. State*, 365 Ark. 314, 229 S.W.3d 35 (2006), and his improbable explanations of the circumstances were evidence of guilt. *Stewart, supra*.

Although the State need only prove that appellant committed one violation of the conditions, *see Richardson, supra*, we hold that the preponderance of the evidence supports the circuit court's findings with respect to each of the alleged violations. Accordingly, we affirm.

Affirmed.

VAUGHT, C.J., and MARTIN, J., agree.