Cite as 2009 Ark. App. 726

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR 09-256

	Opinion Delivered NOVEMBER 4, 2009
ERSKIN M. WHITNEY APPELLANT	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, [NOS. CR-2002-96, CR-2002-138, CR-2004-1414, CR-2008-777, CR-2008-855]
V.	
STATE OF ARKANSAS APPELLEE	HONORABLE STEPHEN TABOR, JUDGE
	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Erskin M. Whitney appeals the revocation of multiple suspended impositions of sentence, entered by the Sebastian County Circuit Court after a revocation hearing.[1] Appellant was accused of violating the terms of his suspended impositions of sentence by committing second-degree terroristic threatening against Greg Gipson. The trial judge found that the State had proved by a preponderance of the evidence that appellant committed this crime, therefore revocation followed. Appellant argues on appeal that the revocation must be reversed because the State's witnesses were inconsistent and unbelievable, in contrast to his

[1]The cases resulted from guilty pleas, and the resulting plea deals, in the following cases: CR2002-96 (residential burglary and theft of property), CR2002-138 (commercial burglary and theft of property), CR2004-1414 (residential burglary), CR2008-777 (possession of marijuana-second offense), CR2008-855 (criminal non-support).

and his girlfriend's accounts of the event in question. We disagree and affirm the trial court's decision to revoke.

A circuit court may revoke a suspension or probation if it finds by a preponderance of the evidence that the appellant inexcusably failed to comply with a condition of that suspension or probation. Ark. Code Ann. § 5-4-309(d) (Supp. 2009). The State bears the burden of proof at the trial court level. *See Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004). The trial court's findings are given deference because determinations of the preponderance of the evidence turn heavily on questions of credibility and the weight of the evidence. *Compare Williams v. State*, 351 Ark. 229, 91 S.W.3d 68 (2002). Evidence that is insufficient for a criminal conviction may be sufficient for revocation of probation or suspended imposition of sentence. *See Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004). Under these standards, we have reviewed this appeal and affirm the trial court's conclusion that a preponderance of the evidence supported a finding that appellant committed second-degree terroristic threatening.

A person commits second-degree terroristic threatening if, acting with the purpose of terrorizing another person, he threatens to cause physical injury or property damage to another person. Ark. Code Ann. § 5-13-201 (Supp. 2009). The conduct prohibited is the communication of a threat with the purpose of terrorizing. *See Smith v. State*, 296 Ark. 451, 757 S.W.2d 554 (1988). The defendant need not have the immediate ability to carry out the

threat. *Knight v. State*, 25 Ark. App. 353, 758 S.W.2d 12 (1988). Credibility determinations are left to the finder of fact. *Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002).

The evidence presented to the trial court included the testimony of Greg Gipson, who stated that he hired appellant to perform some construction-repair work to his duplex, which was to cost $1290. Gipson made partial payments during the construction project, and on Saturday, September 13, 2008, appellant arrived at the duplex to collect the final $130 due on the project. Gipson was not yet satisfied that the work was completed or properly done, so he declined to pay. Gipson testified that at that point, appellant threatened, "I want that $130 or I'm going to whip your ass." Gipson tried to show appellant what work was deficient on the outside of the duplex, whereupon appellant threatened to kill Gipson, to hit him with a pipe, and to blow up the duplex, his business, and his home. Gipson described appellant as drunk, yelling, going crazy, and out of control, so he called the police. At that point, appellant and his girlfriend left in their car. Gipson said that the verbal threats "shook me up pretty good."

Ed Curtis, a business partner with Gipson, lived in the side of the duplex Gipson was visiting, and he corroborated Gipson's account. Curtis said he heard appellant threaten to whip Gipson's ass and to use a pipe. Curtis described the event as starting out as "just arguing" but it led to the threats made by appellant. Galen Lemley, who worked with Curtis and Gipson, was visiting Curtis that day too, watching football. Lemley testified that the door

to the duplex was open, so he also heard the argument and threats, in line with Curtis's and Gipson's accounts.

Appellant and his girlfriend Cindy Dunfee testified. Dunfee characterized the meeting as mere "bickering" over money. Dunfee said she tried to intervene and yelled out that Gipson was drug-dealing from the duplex as they left the duplex. Dunfee said that she heard the whole interaction between the two men and that appellant never made threats.

Dunfee's daughter lived in the other side of the duplex, and she testified that she heard arguing but nothing more. She also said she understood that Gipson had filed a civil suit against appellant that he was willing to settle for $500. Appellant testified that he and Gipson argued over money but that he never made any kind of threats. Appellant admittedly had a history of twelve felonies in Sebastian County, but he insisted that he was not a violent person.

On this evidence, the trial judge found the State's three witnesses credible, describing their testimonies as consistent without sounding rehearsed. The judge found appellant's credibility to be suspect, in particular affected by his criminal history bearing on honesty. Appellant contends that he and his girlfriend were much more believable than Gipson, Curtis, and Lemley, and therefore reversal is mandated. We disagree.

Where inconsistent testimony has been given credence by the trier-of-fact, this court will not reverse a credibility determination unless the testimony is inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ

thereon. *See Kitchen v. State*, 271 Ark. 1, 607 S.W.2d 345 (1980). The reasonableness and sufficiency of appellant's explanation was a matter to be determined by the fact-finder, and the trial court had the right to accept or reject the testimony. *See Faulkner v. State*, 16 Ark. App. 128, 697 S.W.2d 537 (1985). This was essentially a swearing match, and we cannot conclude that the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence.

Affirmed.

KINARD and HENRY, JJ., agree.

Charles E. Smith, for appellant.

Dustin McDaniel, Att'y Gen., by: *Rachel M. Hurst*, Ass't Att'y Gen., for appellee.