

ARKANSAS COURT OF APPEALS

DIVISION I

No. CACR 09-45

GREGORY A. ANDREWS
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered SEPTEMBER 30, 2009

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT,
FORT SMITH DISTRICT,
[NO. CR-05-1262, CR-07-473]

HONORABLE JAMES O. COX,
JUDGE

AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Gregory Allen Andrews appeals the revocation of his suspended imposition of sentence (SIS), entered by the Sebastian County Circuit Court after a revocation hearing. Appellant was accused of violating the terms of his SIS by committing battery against his wife, Tami Andrews. The judge found that the State had proven by a preponderance of the evidence that appellant committed third-degree domestic battery. Appellant argues on appeal that the revocation must be reversed because there is insufficient evidence of “physical injury” inflicted on his wife. We disagree and affirm the revocation.

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). 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). Under these standards, we have reviewed this appeal and affirm the trial court's conclusion that appellant violated the terms of his SIS.

A person commits third-degree domestic battering if acting with the purpose to cause physical injury to a family or household member, the person causes physical injury. Ark. Code Ann. § 5-26-305(a). Physical injury is defined as "impairment of physical condition; infliction of substantial pain; or infliction of bruising, swelling, or a visible mark associated with physical trauma." Ark. Code Ann. § 5-1-102(14) (Supp. 2007). This statutory definition was amended in the 1999 legislative session to add the "infliction of bruising, swelling, or a visible mark associated with physical trauma." In *Napier v. State*, 74 Ark. App. 272, 46 S.W.3d 565 (2001), we recognized that this amendment altered the definition of criminal conduct to such a degree as to make it easier for the State to show that appellant committed battery in the third degree.

It is not necessary that the victim seek medical treatment in order to establish "physical injury." See *Conner v. State*, 75 Ark. App. 418, 58 S.W.3d 865 (2001). In determining whether a physical injury exists, the fact finder may consider the severity of the attack and the sensitivity of the area of the body to which the injury was inflicted. See *Linn v. State*, 84 Ark.

App. 141, 133 S.W.3d 407 (2003). The fact finder may consider the proof in light of experiences in the affairs of life and common knowledge. See *Farrelly v. State*, 70 Ark. App. 158, 15 S.W.3d 699 (2000); *Holmes v. State*, 15 Ark. App. 163, 690 S.W.2d 738 (1985).

Here, the State presented the testimony of the alleged victim, appellant's wife Tami Andrews, who had been the victim of prior batteries by her husband. Tami testified that as to the present allegation, she was residing in the Regency Inn on July 31, 2008, in Fort Smith, Arkansas, when appellant became upset with her for speaking to a mutual friend outside the hotel room. Tami testified that appellant grabbed her by the back of her hair, hit her on the side and top of her head running her into a door frame, and threw her against a van. Tami said that he pulled some of her hair out and she hurt for a couple days afterward. She denied seeking any medical treatment for this attack.

Regency Inn's office manager, Lori Wilkett, testified that Tami's teenage son came into her office stating that appellant was hitting his mother. Wilkett testified that she emerged from the office and observed appellant holding Tami by her hair and throwing Tami into the side of a van. Wilkett told appellant to stop, whereupon appellant released Tami and left the scene. Another resident of the Inn, Gregory Gibbons, testified that he saw appellant "drilling" or hitting on Tami, trying to pick Tami up to throw her onto the van, and Wilkett intervening.

The judge found this evidence compelling, finding that the State had presented a preponderance of evidence to sustain that appellant battered his wife. Revocation followed.

Appellant's primary contention is that there is insufficient proof of battery in the absence of any visible indications of physical injury, and there is paltry proof of "impairment of physical condition" or "infliction of substantial pain." We disagree.

First, it must be remembered that the burden of proof, while remaining on the State, is at a lower threshold in revocation proceedings than in a criminal trial. Thus, 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). We have no hesitancy in affirming this revocation. The trial court had before it evidence that met the preponderance burden of proof to show that appellant inflicted "physical injury" to his wife by pulling her hair and throwing her against a vehicle, resulting in her having pain for a couple of days.

We affirm the revocation.

MARSHALL and BAKER, JJ., agree.