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ARKANSAS COURT OF APPEALS

DIVISIONS I AND II

No. CR-17-1017

DAVID CALDWELL APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered:** December 5, 2018 APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT [NO. 17CR-14-281] HONORABLE GARY COTTRELL, JUDGE AFFIRMED

N. MARK KLAPPENBACH, Judge

David Caldwell appeals from an order revoking his suspended sentence and sentencing him to two years in the Arkansas Department of Correction. He argues that the trial court erred in finding that he violated the conditions of his suspension and that he was denied the constitutional right to confront his accuser. We affirm.

Appellant pled guilty in 2014 to possession of a controlled substance (methamphetamine). He was sentenced to four years' imprisonment, with imposition of any additional imprisonment suspended for a period of two years subject to various conditions, including that he exercise good behavior. In 2017, the prosecuting attorney filed a petition to revoke appellant's suspension, alleging that appellant had violated the good-behavior condition by committing a number of new crimes, including multiple drug offenses and felony fleeing. A warrant was issued, and appellant was arrested. The petition to revoke was later amended to add an allegation of second-degree battery on a

law enforcement officer for appellant's attack on a Crawford County deputy sheriff working at the jail where appellant was being housed after his arrest.

At the hearing on the petition, the State decided to present evidence related only to the battery charge. The State did not call the victim as a witness. Instead, it offered proof in the form of testimony from two other jail officials and a video of the attack. That evidence indicated that appellant refused an order to leave a common area, became aggressive with the jailers, was shocked with a Taser weapon, removed the Taser barbs from his body, and threw a punch at Deputy Logan Hight, hitting him in the chest. No testimony was offered to establish the extent, if any, of injury to the victim, and the video does not show any evidence of injury. Appellant did not present any evidence. At the conclusion of the hearing, the trial court found that appellant had violated the good-behavior condition of his suspended sentence by his attack on the officer, revoked the suspension, and sentenced appellant to an additional two years in prison on the underlying 2014 conviction for possession of a controlled substance.

I. *Sufficiency of the Evidence*

Appellant argues that the revocation order should be reversed and dismissed because the evidence is insufficient to support a finding that he committed second-degree battery as charged in the petition to revoke. He does not contend that the conditions of his suspension were insufficient to communicate that he was not to violate the law. Instead, appellant specifically argues only that the State failed to prove that he acted knowingly or that Deputy Hight suffered any physical injury, which are elements of second-degree battery on a law enforcement officer. While we agree that the physical-injury element of the offense alleged in the petition was not proved, we find no reversible

error because the evidence was sufficient to establish a lesser-included offense of the one charged.

A trial court may revoke a defendant's suspended sentence or probation if it finds by a preponderance of the evidence that the defendant has violated a condition of the suspension or probation. *Atteberry v. State*, 2016 Ark. App. 331. The State bears the burden of proof, but it need only prove that the defendant committed one violation of the conditions. *Lewis v. State*, 2015 Ark. App. 222. Evidence that is insufficient for a criminal conviction may be sufficient for revocation of a suspension. *Id.* On appeal, the trial court's decision will not be reversed unless it is clearly against the preponderance of the evidence. *Mosley v. State*, 2016 Ark. App. 353, 499 S.W.3d 226. Because the determination of a preponderance of the evidence turns heavily on questions of credibility and weight to be given the testimony, we defer to the trial court's superior position to make those determinations. *Mars v. State*, 2013 Ark. App. 173.

The amended petition to revoke in this case accused appellant of violating the good-behavior condition of his suspension by committing second-degree battery on a law enforcement officer. As is pertinent here, Arkansas Code Annotated section 5-13-202(a)(4)(A)(i) (Supp. 2017) provides that a person commits second-degree battery if he knowingly, without legal justification, causes physical injury to a person whom he knows to be a law enforcement officer while the officer is acting in the line of duty.[1] A person acts "knowingly" with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause the result. Ark. Code Ann. § 5-2-202(2)

[1]Section 5-13-202(a)(4)(A)(i) also criminalizes knowingly incapacitating an officer, but that was not argued below or on appeal.

(Repl. 2013). "Physical injury" is defined as the impairment of physical condition; the infliction of substantial pain; or the infliction of bruising, swelling, or a visible mark associated with physical trauma. Ark. Code Ann. § 5-1-102(14) (Repl. 2013).

As stated, neither the witnesses nor the video established any physical injury to the victim in this case. Nevertheless, the law is settled that, although the evidence may be insufficient in a revocation proceeding to sustain an allegation that appellant committed a specific offense, revocation will be affirmed on appeal if the evidence establishes commission of a lesser-included offense of the one charged.[2] *E.g.*, *Atteberry*, 2016 Ark. App. 331; *Pratt v. State*, 2011 Ark. App. 185; *Willis v. State*, 76 Ark. App. 81, 62 S.W.3d 3 (2001).[3] There is no requirement that lesser-included offenses be separately charged and no due-process problem in not doing so; because lesser-included offenses are, indeed, *included* within a greater offense, charging a person with a greater offense implicitly charges him with all lesser-included offenses. *See Hughes v. State*, 347 Ark. 696, 705, 66 S.W.3d 645, 650 (2002); *X.O.P. v. State*, 2014 Ark. App. 424, 439 S.W.3d 711; *see also* Original Commentary to Ark. Code Ann. § 5-1-110 (Repl. 1995) (primary purpose of section 5-1-

[2]An offense is "included" within a charged offense if it meets any of three independent tests: (1) it "[i]s established by proof of the same or less than all of the elements required to establish the commission of the offense charged"; (2) it "[c]onsists of an attempt to commit the offense charged or to commit an offense otherwise included within the offense charged"; or (3) it "[d]iffers from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish the offense's commission." Ark. Code Ann. § 5-1-110(b) (Repl. 2013); *see McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002).

[3]*See also Davis v. State*, 308 Ark. 481, 825 S.W.2d 584 (1992); *Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978); *Mosley*, 2016 Ark. App. 353, 499 S.W.3d 226; *Mars*, 2013 Ark. App. 173; *Walchli v. State*, 2012 Ark. App. 473; *Felix v. State*, 20 Ark. App. 44, 723 S.W.2d 839 (1987).

110(b) is to authorize conviction of offenses not expressly named in indictment or information). Likewise, when a trial court finds that a person has committed an offense, it logically also finds that he has committed the elements of lesser-included offenses.

We have held that second-degree assault under Arkansas Code Annotated section 5-13-206 (Repl. 2013) is a lesser-included offense of second-degree battery on a law enforcement officer. *Allen v. State*, 64 Ark. App. 49, 55, 977 S.W.2d 230, 233 (1998). A person commits second-degree assault if he *recklessly* engages in conduct that creates a *substantial risk* of physical injury to another person. Ark. Code Ann. § 5-13-206(a) (Repl. 2013). A person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the attendant circumstances exist or that the result will occur. Ark. Code Ann. § 5-2-202(3)(A) (Repl. 2013). In *Allen*, *supra*, the appellant was convicted in a bench trial of second-degree battery on a law enforcement officer. There was evidence that Allen struck an officer one time on the head with either his hand or his arm. While we held on appeal that the proof was insufficient to establish physical injury as required for second-degree battery, we further held that the proof was clearly sufficient to establish the lesser-included offense of second-degree assault. *Allen*, 64 Ark. App. at 54–55, 977 S.W.2d at 232–33.

Here, appellant is a relatively young man with a stocky build. There was testimony that he refused a lawful instruction, became aggressive with jailers, and "swung at" Deputy Hight, hitting him in the chest. The video shows that, after removing the Taser barbs, appellant squared his body and threw a well-aimed, solid punch from close range in the direction of Deputy Hight's chin or throat. The trial court quite reasonably could have concluded that appellant acted at least recklessly and that, had the punch connected

cleanly, there very likely would have been physical injury to the officer. Viewing the video, it further appears that the only thing that prevented the punch from connecting squarely was the officer's ability to quickly dodge its full impact. We hold that the proof in this case was clearly sufficient to support a finding that appellant violated the conditions of his suspension by committing the lesser-included offense of second-degree assault against Deputy Hight and that the trial court did not clearly err in ordering revocation based on those actions.[4]

[4]The dissenting judges argue that we should reverse and dismiss the revocation order without considering any lesser-included offense. They suggest that to do otherwise is wrong in the absence of an "invit[ation]" from the appellee on appeal to consider an alternative basis for affirmance. However, the three cases that they cite in support of that argument speak to the principle that our appellate courts will not *reverse* a trial court's judgment based on an argument not made by an *appellant*. Those cases do no violence to the longstanding general rule that we may *affirm* a correct result reached by a trial court even though the reason given by the trial court may have been wrong. *See Ramage v. State*, 61 Ark. App. 174, 966 S.W.2d 267 (1998). Our courts have affirmed judgments on different bases than those used by trial courts regardless of whether appellees have raised the issues at trial, *Stokes v. State*, 375 Ark. 394, 291 S.W.3d 155 (2009); *Ramage*, *supra*; and regardless of whether appellees have raised the issues on appeal, *Malone v. Malone*, 338 Ark. 20, 991 S.W.2d 546 (1999); *Duckett v. State*, 268 Ark. 687, 600 S.W.2d 18 (Ark. App. 1980).

Two cases are of particular relevance in response to the dissent. First, we have previously affirmed a revocation based on sufficient proof of a lesser-included offense where the State filed no brief and therefore made no argument on appeal whatsoever. *Atteberry*, 2016 Ark. App. 331. Second, we have already rejected the precise argument made by the dissenting judges here. *Willis*, 76 Ark. App. 81, 62 S.W.3d 3. There, this court affirmed a revocation based on proof of a lesser-included offense of the one charged below and found by the trial court. We did so over a dissent that insisted on reversal and dismissal because the State "vigorously pursued only the [greater] charge of first-degree battery . . . and is sticking to its guns on appeal that Willis committed a non-existent first-degree battery offense and not some lesser-included offense." *Id.* at 90, 62 S.W.3d at 10 (Roaf, J., dissenting).

II. *Confrontation*

At the close of the State's case, appellant moved to dismiss the petition due to the State's failure to call the victim as a witness. He argued, as he does on appeal, that he was denied his rights under the Confrontation Clauses of the United States and Arkansas Constitutions. We disagree.

The Sixth Amendment to the United States Constitution and article 2, section 10 of the Arkansas Constitution provide that the accused in a criminal prosecution has the right "to be confronted with the witnesses against him." A defendant at a revocation proceeding also has the right to confront and cross-examine witnesses against him unless the trial court specifically finds good cause for not allowing confrontation. Ark. Code Ann. § 16-93-307(c) (Repl. 2016); *Robinson v. State*, 2014 Ark. App. 579, 446 S.W.3d 190. One's right to confront the witnesses against him, however, applies only to witnesses who testify or to those persons whose out-of-court testimonial statements are offered in evidence for the truth of the matter asserted. *Davis v. Washington*, 547 U.S. 813 (2006); *Tarkington v. State*, 2010 Ark. 548, 376 S.W.3d 537. The right generally does not compel the State to produce every possible witness. *Lockett v. State*, 271 Ark. 860, 611 S.W.2d 500 (1981); *see United States v. Bell*, 785 F.2d 640 (8th Cir. 1986). As our supreme court has explained,

> Amendment Six to the United States Constitution and Art. 2, § 10 of the Arkansas Constitution only assure an accused that he shall enjoy the right to be confronted with the *witnesses* against him. . . . .
>
> These constitutional provisions are but a declaration of the common law rule and the constitutional guaranty is confined to those who are witnesses against the accused. They do not require that every witness who has knowledge of relevant facts testify. They do not guarantee the accused that a victim, accuser, complainant, complaining witness, or private prosecutor will be called as a witness or appear at

> the trial, and the establishment of the elements of the crime by the testimony of other witnesses does not constitute a variance from an indictment naming the victim. . . .
>
> . . . These constitutional provisions do not apply when no testimony, prior statement or utterance of the victim is brought to the attention of the trier of fact, or is offered by the state, or when the accused has been given the right to cross-examine every person whose testimony or statements have been used to prove the elements of the crime with which he is charged.

Hoover v. State, 262 Ark. 856, 866–67, 562 S.W.2d 55, 60–61 (1978) (emphasis in original) (internal citations omitted).

Here, the case against appellant was made by the two witnesses who actually testified together with the video of the attack; no hearsay evidence was offered. Appellant was allowed to confront and cross-examine all of the witnesses who provided evidence against him, and thus there was no violation of his right to confrontation.

Affirmed.

GRUBER, C.J., and GLOVER and MURPHY, JJ., agree.

WHITEAKER and HIXSON, JJ., concur in part and dissent in part.

PHILLIP T. WHITEAKER, Judge, concurring in part and dissenting in part. I agree with the majority that there was insufficient evidence to revoke appellant David Caldwell's suspended imposition of sentence (SIS) based on a finding that he committed the offense of second-degree battery on a law-enforcement officer. I likewise agree with the majority that there was no confrontation-clause violation in this case. I must respectfully dissent, however, because the majority has decided to affirm this case based on an argument never advanced by any party either below or on appeal.

It may be true, as the majority states, that the law is well settled that although the evidence in a revocation proceeding may be insufficient to sustain an allegation that one

committed a specific offense, revocation can be affirmed if the evidence establishes the commission of a lesser-included offense. It is also a well-settled principle of appellate law, however, that we will not make a party's argument for him. *See Running M Farms, Inc. v. Farm Bureau Mut. Ins. Co. of Ark.*, 371 Ark. 308, 265 S.W.3d 740 (2007); *Kinchen v. Wilkins*, 367 Ark. 71, 238 S.W.3d 94 (2006); *Ark. Dep't of Human Servs. v. Schroder*, 353 Ark. 885, 122 S.W.3d 10 (2003). The State never asked the circuit court to revoke Caldwell's SIS on this principle; moreover, the State never invited this court to affirm on this alternative basis. I simply do not believe we should do so. As noted above, the majority correctly holds that there was insufficient evidence that Caldwell committed the offense that was charged in the State's petition to revoke. I would therefore reverse and dismiss.

Hixson, J., joins.

Lisa-Marie Norris, for appellant.

Leslie Rutledge, Att'y Gen., by: *Jacob H. Jones*, Ass't Att'y Gen., for appellee.