MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Spenser G. Benge
The Law Office of Spenser G. Benge
Anderson, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Catherine E. Brizzi
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Peggie A. Nance,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 27, 2023

Court of Appeals Case No. 22A-CR-2376

Appeal from the Madison Circuit Court

The Honorable David A. Happe, Judge

Trial Court Cause No. 48C04-1812-F6-3137

Memorandum Decision by Judge Kenworthy
Judges Robb and Crone concur.

Kenworthy, Judge.

Case Summary

[1] Peggie A. Nance appeals following the revocation of her probation. She argues the trial court abused its discretion in determining Nance violated a condition of probation. She also argues the trial court abused its discretion in selecting a sanction, which was to revoke the previously suspended two-year sentence and place Nance in the Indiana Department of Correction ("DOC"). We affirm.

Facts and Procedural History[1]

[2] In cause number 48C04-1812-F6-3137 (the "3137 Cause"), the State charged Nance with Level 6 felony residential entry, Level 6 felony strangulation, Class A misdemeanor battery resulting in bodily injury, and Class A misdemeanor theft. Through a consolidated plea agreement, Nance resolved the 3137 Cause and two others. As to the 3137 Cause, the court imposed an aggregate sentence of two years in the DOC. The court suspended the sentence to probation on certain conditions, including that Nance refrain from committing a crime.

[3] Before serving the sentence in the 3137 Cause, Nance was to serve a sentence in another cause. In that cause, the court also suspended placement in the DOC, initially placing Nance in a program called Continuum of Sanctions ("COS").

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[1] We commend Judge David A. Happe, who presided over the underlying matters. In reviewing the transcript, we noticed Judge Happe showed particular care and respect in colloquies with Nance, and he ably navigated a potential competency issue that arose when Nance was deciding whether to plead guilty to several charged offenses. *See, e.g.*, *Tr. Vol. 2* at 12–22 (respectfully eliciting information bearing on competency, thoughtfully explaining why the court was doing so, holding a bench conference, and proactively taking measures to protect the rights of the accused and the integrity of the proceedings).

[4] In August 2019, the probation department filed a Notice of Violation in multiple causes, including the 3137 Cause, alleging Nance failed to successfully participate in COS and thereby violated a condition of her suspended sentences. At an initial hearing, Nance admitted to the allegations. The trial court later imposed a sanction of time served awaiting disposition of the matter. The trial court again allowed Nance to participate in COS, explaining:

> All right, Ms. Nance[,] this is a resolution that can happen once. This is not the kind of resolution that can happen twice. So if you didn't take this seriously and got out and didn't meet your obligations again[,] then something else has to happen. Then I know that COS doesn't work for you[,] and there are very few things left from this point forward. I don't want to have to go to those harsher punishments but that's what will happen if you can't make this work.

Tr. Vol. 2 at 60–61. Nance indicated she understood and would comply.

[5] In 2022, the probation department filed a Notice of Violation of Probation in the 3137 Cause, alleging Nance committed five criminal offenses, which were associated with new charges: (1) Level 2 felony burglary with a deadly weapon; (2) Level 3 felony armed robbery; (3) Level 3 felony pointing a firearm at another; (4) Level 4 felony unlawful possession of a firearm by a serious violent felon; and (5) Class A misdemeanor unlawful carrying of a handgun.

[6] At an evidentiary hearing, the sole witness was Anderson Police Department Officer Jerry Simmons. He testified about investigating a July 2022 home invasion where one resident heard a knock at the back door. The resident

encountered a female trying to enter through a window. The female, who was with a male, said she was there to pick up someone's property. After a second resident came to the back door, the male pulled a handgun out of his pocket and fired a round into the back porch area. The intruders forced the residents into a living area and instructed them to sit down. One resident sat with a dog.

[7] The male waved the handgun and pointed it at the residents. At some point, the male handed the gun to the female, who also waved the gun and pointed it at the residents. The male and the female kept asking for "Brooke Cash." The male went to other parts of the home. When the male returned and the dog began growling and barking, the male shot the dog in the head. Eventually, the male exited the home, stealing several items, including cash and a cell phone. Before leaving, the male handed the gun to the female. The female stayed for "a couple [of] minutes," then joined the male in a vehicle. *Id.* at 86. Around that time, another vehicle pulled up, and the female asked the driver to identify herself. When the driver did not reply, the male and the female drove off.

[8] One victim told Officer Simmons he recognized the female intruder, knowing her to use the name Honey Stennis on Facebook. Officer Simmons did not recognize the name. But when he looked up Honey Stennis on Facebook, he recognized Nance in a picture associated with the account. The State tendered a printout of a Facebook page for Honey Stennis, which was admitted into evidence. Officer Simmons said Nance was the person pictured in the printout.

[9] The day after the home invasion, law enforcement spoke with Nance in connection with an unrelated case; she was at the hospital, having reported being a victim of rape. Nance said she was afraid of the suspected male intruder, who she thought would kill her. At the evidentiary hearing, counsel for Nance elicited testimony about the possibility the male intruder forced the female to participate in the home invasion. *See, e.g.*, *id.* at 90 ("[S]o it's unclear to you whether she was forced or whether she went voluntarily?").

[10] In reflecting on the evidence, the trial court said it "wish[ed] that it had a fuller picture of evidence," with "additional evidence about what had taken place [in] a fairly complicated transaction like this." *Id.* at 97. Ultimately referring to the "preponderance standard," *id.*, the trial court found the State proved Nance committed the crimes alleged in the Notice of Violation of Probation. The matter proceeded to disposition, with arguments about a proper sanction. The State asked the court to revoke the suspended sentence and place Nance in the DOC, while Nance sought placement with Community Corrections; she acknowledged the burden of proof is "much lower" in a revocation hearing rather than a criminal trial, but asserted she had a strong defense. *Id.* at 98.

[11] In selecting a sanction for the violation, the court noted the violation was "just about as egregious as it could possibly be," and "Community Corrections [was] not a reasonable response[.]" *Id.* at 99. As for the 3137 Cause, the trial court decided it would revoke the two-year suspended sentence and order Nance to serve that sentence in the DOC. Nance now appeals.

Discussion and Decision

[12] Trial courts have broad discretion in sentencing matters. *See, e.g.*, Ind. Code § 35-38-1-7.1(d) (permitting a trial court to impose "any sentence . . . authorized by statute" if the sentence passes constitutional muster). For example, even if the court imposes time in the DOC, it may suspend placement in the DOC and give the defendant a chance to succeed in a less-restrictive setting. *See, e.g.*, I.C. § 35-38-1-7.1(b) (identifying factors that might "favor[] suspending the sentence and imposing probation"). Although a court may offer probation as a matter of grace, a defendant does not have the right to probation. *E.g.*, *id.*; *see also Murdock v. State*, 10 N.E.3d 1265, 1267 (Ind. 2014). In other words, "[t]he law does not compel the trial court to suspend the sentence nor compel the defendant to accept the suspended sentence under the terms imposed." *State ex rel. Wilson v. Lowdermilk*, 195 N.E.2d 476, 480 (Ind. 1964) (noting a defendant has options, including "accepting the benefits of a suspended sentence under the terms which the court sees fit to impose" or "serv[ing] the time" imposed).

[13] Under Indiana Code Section 35-38-2-3, before a court may revoke probation, the State must prove "by a preponderance of the evidence" the defendant violated a condition of probation. I.C. § 35-38-2-3(f). A preponderance of the evidence means the greater weight of the evidence, a standard "not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force." *Galloway v. State*, 938 N.E.2d 699, 708 n.7 (Ind. 2010) (quoting Black's Law Dictionary 1301 (9th ed. 2009)). Ultimately, once there is sufficient proof of a violation, the trial court has

"considerable leeway in deciding how to proceed." *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). The pertinent statute sets forth several options, and expressly allows the court to "[o]rder execution of all or part of the sentence that was suspended at the time of initial sentencing." I.C. § 35-38-2-3(h)(3).

1. Sufficiency of the Evidence

[14] Nance challenges the sufficiency of the evidence that she violated a condition of probation. On appeal, "we consider only the evidence most favorable to the judgment—without regard to weight or credibility—and will affirm if 'there is substantial evidence of probative value to support the trial court's conclusion that a probationer has violated any condition of probation.'" *Murdock*, 10 N.E.3d at 1267 (quoting *Braxton v. State*, 651 N.E.2d 268, 270 (Ind. 1995)).

[15] Nance does not dispute committing a criminal offense would violate a condition of her probation. Rather, Nance argues the State failed to present sufficient evidence *she* was the female involved in the home invasion. And, according to Nance, even if there is sufficient evidence identifying her, there is insufficient evidence she acted voluntarily—that is, without duress.

[16] In challenging the sufficiency of evidence identifying her as the intruder, Nance directs us to a photograph in her presentence investigation report. Nance asks us to compare that photograph to the photograph from the Facebook printout, asserting the photographs "do[] not look like the same person." *Appellant's Br.* at 10. At times, Nance also focuses on the court's brief remarks about the depth of the evidence presented. And as to duress, Nance focuses on evidence she

was a victim of rape and reported fearing the male suspect. According to Nance, the evidence indicates a lack of criminal culpability.

[17] To the extent the evidence supports conflicting inferences, we must decline Nance's requests to reweigh the evidence. *See, e.g.*, *Murdock*, 10 N.E.3d at 1267. Turning to the evidence favorable to the judgment, a victim of the home invasion recognized Nance as a person on Facebook under the name Honey Stennis. Officer Simmons then looked up Honey Stennis on Facebook and recognized the person pictured as Nance. The presentence investigation report states Nance has aliases of Honey, Peggie Stennis, and Peggy Nance. *Appellant's App. Vol. 2* at 50. Moreover, the pictures at issue were available to the fact-finder, who saw Nance in person. Under the circumstances, we conclude there is sufficient evidence to support the identification of Nance. *Cf. Love v. State*, 73 N.E.3d 693, 699 (Ind. 2017) (noting, in the related context of video evidence, we must defer to the fact-finder's interpretation unless "the video evidence indisputably contradicts the trial court's findings" such that "no reasonable person could view the video and conclude otherwise").

[18] Next, although Nance focuses on the evidence supporting her theory of duress, there is also evidence Nance exercised free will, staying in the house for minutes after the male left. In any case, as the State points out, the court determined Nance committed robbery, which is an offense against the person, *see* I.C. § 35-42-5-1, and the defense of duress "does not apply to a person who . . . committed an offense against the person," I.C. § 35-41-3-8(b)(2).

[19] All in all, there is sufficient evidence Nance violated a condition of probation.

2. Sanction Imposed

[20] Next, Nance challenges the sanction imposed for her violation, a matter we also review for an abuse of trial court discretion. *Prewitt*, 878 N.E.2d at 188.

[21] In challenging the sanction imposed, Nance reasserts several arguments presented in her sufficiency challenge. That is, Nance again directs us to "the trial court's comments," arguing they "reveal [the court] had doubts as to what exactly happened" during the home invasion. *Appellant's Br.* at 10. Nance also characterizes the evidence against her as "tenuous," asserting the record suggests she has a "strong defense" at a criminal trial. *Id.* at 11. She argues that, under the circumstances, the trial court should not have sanctioned her "as harshly as possible." *Id*.

[22] Having already identified sufficient evidence of a violation, we note Indiana Code Section 35-38-2-3(h)(3) expressly authorizes the trial court to "[o]rder execution of all or part of the sentence that was suspended at the time of initial sentencing." Here, the court did just that, ordering Nance to execute her previously suspended sentence in the DOC. All in all, because the trial court complied with the statute, we are unpersuaded the court abused its discretion.[2]

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[2] To the extent Nance argues the sanction is inappropriate, "[a] trial court's action in a post-sentence probation violation proceeding is not a criminal sentence as contemplated by [Appellate Rule 7(B)]" and so "[t]he review and revise remedy . . . is not available." *Jones v. State*, 885 N.E.2d 1286, 1290 (Ind. 2008).

Conclusion

[23] There is sufficient evidence Nance violated a condition of probation. And the trial court did not abuse its discretion in imposing a sanction.

[24] Affirmed.

Robb, J., and Crone, J., concur.