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IN THE
COURT OF APPEALS OF INDIANA

Jesse Phipps,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 7, 2021

Court of Appeals Case No.
21A-CR-587

Appeal from the Elkhart Superior
Court

The Honorable Teresa L. Cataldo,
Judge

Trial Court Cause No.
20D03-1502-FB-8

Weissmann, Judge.

[1] After molesting his brother, Jesse Phipps was forbidden from having contact with his victim's family. The intertwining of his and his brother's family trees led Phipps to be confused as to which limbs were forbidden to him. After helping his uncle move, Phipps attended a goodbye dinner with his uncle's family, including minors who sat at a different table. Construing these acts as a violation of his probation, the trial court revoked Phipps's probation and returned him to prison for 10 years. We reverse and remand for further proceedings.

Facts

[2] In 2015, Phipps pleaded guilty to two counts of child molesting. Phipps's younger brother was one of the victims. The trial court sentenced Phipps to a term of 20 years, with 10 years suspended to probation. About 5 years later, Phipps was released from prison and placed on probation.

[3] Phipps met with his probation officer and signed the terms of his probation agreement on November 3, 2020. Those terms included the following conditions:

21. You shall have no contact with your victim or victim's family unless approved in advance by your probation officer and treatment provider for the benefit of the victim. Contact includes face-to-face, telephonic, written, electronic, or any indirect contact via third parties.

22. You shall have no contact with any person under the age of 16 unless you receive court approval or successfully complete a court-approved sex offender treatment program, pursuant to IC

35-38-2-2-4. Contact includes face-to-face, telephonic, written, electronic, or any indirect contact via third parties.

App. Vol. II, p. 50. Because Phipps is the older brother of one of his victims, Phipps's contact with his own family is restricted by Condition 21. Phipps wrote his initials next to both conditions, indicating that he had read and understood them. *Id.*

[4] Twenty days later, the State filed a petition alleging Phipps twice violated the conditions of his probation. The alleged violations both stemmed from Phipps's contact with family members who were moving to Texas. Phipps helped his uncle move over the course of several days and then joined his uncle's family at a local restaurant for a goodbye celebration. In addition to being the uncle of one of Phipps's victims, Phipps's uncle is the father of four minor children, who also attended the dinner.

[5] Both Phipps and his uncle testified that the children were never in or around the house while Phipps was helping with the move. Tr. Vol. II, pp. 46, 58-59. They also testified that Phipps's aunt drove Phipps to and from the restaurant separately from the minors. *Id.* at pp. 42-43, 47, 60. Additionally, they testified that the adults and minors did not share a table, the minors were seated "two or three tables away," and Phipps had no contact with the minors at any point during dinner. *Id.* at 43, 60. During his testimony, Phipps referred to his uncle's family as "my family." *Id.* at 60.

[6] Phipps told his probation officer about the gathering as it was happening, and the probation officer immediately went to the restaurant. Though he arrived after Phipps had left, the probation officer believed he located Phipps's table. The probation officer testified that the minors' table was "a couple arms' length [sic] away" from where the adults were sitting. *Id.* at 13. Otherwise, the trial court heard no evidence that contradicted Phipps's story. The probation officer also testified that he did not know what Phipps's relatives looked like and could not confirm that he had observed the right tables. *Id.* at 31-32.

[7] The trial court concluded that the State had met its burden to prove two probation violations. It concluded that the word "family" in Condition 21 includes extended relations like aunts and uncles. Tr. Vol. II, p. 74. It also concluded that dining in a group, even at separate tables, constitutes contact. *Id.* at 73-74. At a separate hearing, the trial court revoked Phipps's probation and ordered him to serve the remaining 10 years of his sentence in the Department of Correction. *Id.* at 94. Phipps now appeals.

Discussion and Decision

[8] Phipps raises three issues: First, he argues that Condition 21 is vague; second, he argues that the evidence was insufficient to find a violation of Condition 22; third, he argues that the trial court abused its discretion by imposing his entire remaining suspended sentence. We find Phipps's first two arguments meritorious and, therefore, decline to reach the third. Accordingly, we reverse the trial court's revocation of Phipps's probation.

I. Standard of Review

[9] Probation is not a right but “a matter of grace left to trial court discretion.” *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). The court may revoke a person’s probation if the State proves by a preponderance of evidence that the person has violated a condition of probation during the probationary period. Ind. Code § 35-38-2-3(a), (f); *Heaton v. State*, 984 N.E.2d 614, 617 (Ind. 2013). Revocations are reviewable using the abuse of discretion standard. *Prewitt*, 878 N.E.2d at 188. “An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances.” *Id.* “We consider only the evidence most favorable to the judgment, without reweighing evidence or judging the credibility of witnesses.” *Woods v. State*, 892 N.E.2d 637, 639 (Ind. 2008).

II. Condition 21: No Contact with the Victim’s Family

[10] Phipps argues that he did not adequately understand the terms of Condition 21, which prohibits him from having any contact with “the victim’s family unless approved in advance.” Again, because one of Phipps’s victims was his brother, this term restricts Phipps’s interaction with his own family. Phipps maintains that the term “family” is ambiguous and led him to believe contact was only restricted as to the victim’s parents and siblings. Tr. Vol. II, p. 56.

[11] “Like statutes defining penal offenses, the language [of probation conditions] must be such that it describes with clarity and particularity the misconduct that

will result in penal consequences.” *Hunter v. State*, 883 N.E.2d 1161, 1163 (Ind. 2008). Probation conditions must be reasonably related to the rehabilitation of the defendant and the protection of public safety. *Foster v. State*, 813 N.E.2d 1236, 1237 (Ind. Ct. App. 2004). A probation condition is so vague as to violate due process if “individuals of ordinary intelligence would not comprehend it to adequately inform them of the conduct to be proscribed.” *Weida v. State*, 94 N.E.3d 682, 688 (Ind. 2018); *Foster*, 813 N.E.2d at 1238. “Fastidious specificity is not required.” *Weida*, 94 N.E.3d at 688. We consider the challenged condition in context, not in isolation. *Id.*

[12] Neither Phipps’s probation conditions nor any statute relating to probation defines “family.”¹ Tr. Vol. II, p. 56. We therefore take the term in its “plain, or ordinary and usual, sense.” Ind. Code § 1-1-4-1(1); *see also Rainbow Realty Group, Inc. v. Carter*, 131 N.E.3d 168, 174 (Ind. 2019). Most commonly, “family” is understood to encompass a broad swath of relations. *See Family, Merriam-Webster*, <https://www.merriam-webster.com/dictionary/family> (last visited

¹ Indiana’s criminal code includes varying definitions of terms related to family. The general definition of “family or household member” includes people “related by blood or adoption” or “related by marriage,” which would encompass aunts and uncles. Ind. Code § 35-31.5-2-128. The incest statute similarly includes aunts and uncles in its prohibition against sex with biological or marital relations. Ind. Code § 35-46-1-3. The resisting law enforcement statute, however, limits the meaning of “family member,” as used therein, to a “child, grandchild, parent, grandparent, or spouse of the person.” Ind. Code § 35-44.1-3-1. Meanwhile, the Victim Rights article defines “immediate family member” as a spouse, child, parent, or sibling, which is both narrower and broader. Ind. Code §35-40-4-4.5.

Black’s Law dictionary defines “family” variously as: (1) “A group of persons connected by blood, by affinity, or by law, esp. within two or three generations”; (2) “A group consisting of parents and their children”; and (3) “By extension, a group of people who live together and usu. [sic] have a shared commitment to a domestic relationship.” *Family, Black’s Law Dictionary* (11th ed. 2019)

Sept. 16, 2021) (hereinafter “Merriam-Webster”); *Family, The Am. Heritage Dictionary*, <https://www.ahdictionary.com/word/search.html?q=family> (last visited Sept. 16, 2021) (hereinafter “Am. Heritage”). A family is “a group of people who are related to each other,” “a group of related people including people who lived in the past,” or “[a] group of persons related by descent or marriage.” *Merriam-Webster, Am. Heritage*. It can also be defined more narrowly as “[a] fundamental social group in society typically consisting of one or two parents and their children,” which appears to limit the definition to immediate family or household units.² *Am. Heritage*. This last definition is much closer to the type of familial connections Phipps testified to avoiding. Tr. Vol. II, p. 56 (“As far as I knew, it was supposed to be my mom, my step-dad, any like immediate family members, like brothers and sisters, and everything.”).

[13] The conflicting definitions of “family” fall neatly into the parties’ conflicting camps, suggesting Condition 21 is indeed unclear. We therefore agree with Phipps that in the context of his case, the language of his probation condition lacks the “clarity and particularity [of] the misconduct that will result in penal consequences.” *Hunter v. State*, 883 N.E.2d 1161, 1163 (Ind. 2008).

² These dictionaries also define family as meaning someone’s children alone, which is inapt in this context. The condition in question is meant to protect people victimized as children, who may remain children during the probation period and, because of their age, are less likely to have children of their own.

III. Condition 22: No Contact with Minors

- [14] Phipps next argues the evidence was insufficient to show that he had contact with minors. We agree. The word “contact” does not clearly apply to Phipps’s behavior as alleged. *See Hunter v. State*, 883 N.E.2d 1161, 1164 (Ind. 2008).
- [15] As our Supreme Court observed in *Hunter*, “‘contact’ is not commonly understood to occur by mere presence alone.” *Id.* Rather, the word implies physical touching or communication. *Id.* The evidence viewed in the light most favorable to the State is insufficient to show that Phipps had contact with minors beyond being physically present, “a couple arms’ length away.” Tr. Vol. II, p. 13. The record contains no evidence that Phipps touched any of the children or that he communicated with them in any way. Even the trial court’s expressed disbelief that the tables were kept completely separate did not suppose that Phipps, in fact, spoke with or touched any of the children present. *See id.* at 73 (stating: “You are dining as a group. Children will come up and ask the parent something, *can I have a pop; Billy’s picking on me.*” (emphasis in original)).
- [16] Both Phipps and the defendant in *Hunter* were apparently diligent in attempting to avoid contact with children in the incidents alleged. In *Hunter*, the defendant, who was remodeling his sister’s bathroom, would pack up his tools as soon as his sister’s kids returned from school. 883 N.E.2d at 1162. Similarly, Phipps encouraged his uncle to arrange for his kids to be away from home while Phipps assisted with the move, Phipps rode to the restaurant separately from

the children, and they sat at different tables at least two arm's lengths apart. Tr. Vol. II, pp. 42-47. For both defendants, "[t]here was no definitive evidence presented to establish that [they] had any face-to-face contact with the children." *Hunter*, 883 N.E.2d at 1163. Although Phipps's dinner may have been longer in duration than the "contact" alleged in *Hunter*, there remains no proof of contact, and little to show Phipps was ever "face-to-face" with the children present. Additionally, Phipps immediately informed his parole officer about the purported contact, unlike the defendant in *Hunter*. *Id.* at 1163; Tr. Vol. II, p. 10-11. The evidence was insufficient to establish Phipps had "contact" with minors.

[17] Because Condition 21 as applied to Phipps is overly broad and vague and the State failed to prove that Phipps violated Condition 22, we vacate the revocation order and remand to the trial court to reconsider and re-enter the terms of Phipps's probation. *See Garrett v. State*, 680 N.E.2d 1, 4 (Ind. Ct App. 1997).

[18] The judgment is reversed and remanded.

Mathias, J., and Tavitas, J., concur.