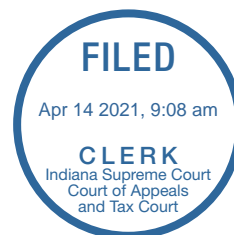


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Kevin R. Hemingway,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

April 14, 2021

Court of Appeals Case No.
20A-CR-2126

Appeal from the
Dearborn Superior Court

The Honorable
Sally A. McLaughlin, Judge

Trial Court Cause No.
15D02-2003-F6-82

Vaidik, Judge.

Case Summary

- [1] Kevin R. Hemingway appeals the revocation of his probation and the imposition of his entire suspended sentence. We affirm.

Facts and Procedural History

- [2] On April 7, 2020, Hemingway pled guilty to strangling his fiancée, C.E., a Level 6 felony, and was sentenced to 910 days, with 64 days to serve and the other 846 days suspended to probation. Because he had already served the executed portion, he was immediately released, and he moved back into the apartment he shared with C.E., who was pregnant at the time.
- [3] On April 20, the two had an argument, and C.E. told Hemingway to leave. According to C.E., Hemingway returned to the apartment on April 23, woke her up, accused her of cheating on him, pulled her hair, hit her face, head, and back, and put his hands around her neck. Hemingway then took C.E.'s phone and began trying to go through it. C.E. stomped on the floor—which her downstairs neighbors knew to be a signal she needed help—and Hemingway left the apartment with her phone. C.E. spoke to a police officer about the incident, and Hemingway was arrested. In a recorded phone call from jail, Hemingway admitted he slapped C.E.
- [4] Based on the April 23rd incident, the State (1) filed a new criminal case against Hemingway, charging him with burglary, domestic battery with a previous conviction for a battery offense against the same victim, strangulation,

intimidation, and interference with reporting a crime, *see* Cause No. 15C01-2004-F3-7, and (2) moved to revoke Hemingway’s probation in this case, citing the new charges. The new charges are still pending, but the probation matter proceeded to a fact-finding hearing in September 2020. At the end of the hearing, the trial court found Hemingway had “not necessarily” committed all the new crimes with which he was charged but that it is “obvious” he committed domestic battery. Tr. pp. 42-43. The court revoked Hemingway’s probation and ordered him to serve his entire suspended sentence in the Department of Correction, with credit for time served.

[5] Hemingway now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

[6] Hemingway first contends the State failed to present sufficient evidence to prove he violated his probation. In reviewing such a claim, we consider only the evidence most favorable to the judgment, we will not reweigh the evidence or judge the credibility of witnesses, and we will affirm if there is substantial evidence of probative value to support the trial court’s finding of a violation. *Murdock v. State*, 10 N.E.3d 1265, 1267 (Ind. 2014). Whereas criminal

convictions require proof beyond a reasonable doubt, probation violations need be proven only by a preponderance of the evidence. Ind. Code § 35-38-2-3(f).¹

[7] The trial court found Hemingway violated probation by committing a new crime. On appeal, Hemingway addresses all five crimes alleged as a result of the incident on April 23: burglary, domestic battery with a previous conviction for a battery offense against the same victim, strangulation, intimidation, and interference with reporting a crime. However, the trial court did not find Hemingway committed all five crimes. It found he committed domestic battery and did not reach a conclusion as to the other four crimes. Therefore, we focus on domestic battery.

[8] Regarding that crime, Hemingway notes C.E. gave conflicting testimony at the fact-finding hearing about how her back and head got hit during the incident. *See* Tr. pp. 18, 22, 25. This is a request for us to reweigh the evidence, which we will not do. *See Murdock*, 10 N.E.3d at 1267. In any event, Hemingway does not mention the jail call in which he admitted slapping C.E. or the other evidence he pulled C.E.'s hair, hit her face, and put his hands on her neck. There is ample evidence supporting the trial court's finding Hemingway committed domestic battery.

¹ The State relies on caselaw providing that when the alleged probation violation is the commission of a new crime, the trial court only needs to find there is "probable cause" to believe the defendant committed the crime. Appellee's Br. p. 9 (citing *Whatley v. State*, 847 N.E.2d 1007, 1010 (Ind. Ct. App. 2006)). Our Supreme Court overruled that caselaw in *Heaton v. State*, 984 N.E.2d 614 (Ind. 2013).

II. Sanction

- [9] Hemingway also argues that even if the trial court properly found he violated his probation, it should not have imposed his entire suspended sentence. Trial courts enjoy “considerable leeway” in determining the proper sanction for a probation violation, so we review such a determination only for an abuse of discretion. *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007).
- [10] In his one-paragraph argument on this issue, Hemingway cites several mitigating factors: this was his first probation violation in this case; he has a GED and has been employed with family businesses; and he had requested participation in the chemical-addictions program at the county jail. He doesn’t acknowledge some very troubling facts: he had been on probation for barely two weeks when he committed his violation, and he violated probation by battering the same person who was the victim of the strangulation that landed him on probation in the first place—his fiancée, C.E., who was pregnant at the time of both incidents. Furthermore, the pre-sentence investigation report indicates that Hemingway had at least twenty criminal convictions, including nine felonies, before this probation violation. Given these facts, the trial court acted well within its discretion when it ordered Hemingway to serve all his suspended time in the DOC.
- [11] Affirmed.

Bradford, C.J., and Brown, J., concur.