Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-279

JUNE TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
	}	
Philip H. Bessette	}	DOCKET NO. 2420-5-05 Cncr
		Trial Judge: Michael S. Kupersmith

In the above-entitled cause, the Clerk will enter:

Defendant appeals from the trial court's order revoking his probation. He argues that the court erred by: (1) finding that he violated certain conditions of probation; (2) denying his right to present a defense; and (3) revoking his probation absent a sufficient statutory basis for doing so. We affirm.

The record indicates that defendant was charged with one count of lewd and lascivious conduct in May 2005. Pursuant to a plea agreement, the felony charge was reduced to three misdemeanors, and defendant pled guilty to three counts of prohibited acts. He received consecutive sentences of four to twelve months on each count, all suspended, and he was placed on probation with standard and special conditions.

In March 2007, defendant's probation officer filed a complaint alleging that defendant violated three conditions of his probation. She first alleged that defendant violated condition "M," which prohibited violent or threatening behavior. She explained that, according to an affidavit of probable cause to arrest, defendant had called another individual and left a message, stating in part that the victim should "look over [his] shoulder . . . if I get you, don't think it's going to be two on one. It's going to be you and me, motherfucker. So hold onto that because you are going to be needing it." The probation officer also alleged that defendant violated condition "35," which prohibited contact with minors under sixteen unless the contact was incidental in public or had been approved by the probation officer; and condition "41," which allowed the probation officer to restrict defendant's associates. The probation officer stated that defendant had been staying overnight at his girlfriend's apartment, where his girlfriend's thirteen-year-old son also resided, despite being instructed that he was not permitted to do so under any circumstances.

Following a hearing, the court concluded that defendant had violated all three conditions of probation. It first found that defendant admitted making the telephone call noted above, and that this constituted a threat in violation of Condition M. Turning to the remaining allegations, the court explained that, pursuant to the probation order, defendant was prohibited from having contact with minors under sixteen except incidental contact or as allowed by his probation officer, and the probation officer could also restrict defendant's associates. In January 2007, the probation officer allowed defendant to have contact with his girlfriend, but specified that the contact could be only for a few hours in the evening. The court found that defendant violated both conditions repeatedly by staying overnight at his girlfriend's apartment. While defendant presented evidence that he had not had actual contact with his girlfriend's minor son, the court noted that defendant's physical proximity to this child could constitute contact for purposes of a no-contact order. Based on its findings, the court revoked probation on the first count prohibited act, and imposed the underlying sentence, suspended except for twenty days on work crew. It continued defendant on probation on the remaining counts; it also modified certain probation conditions and extended the term of probation until July 2009. This appeal followed.

Defendant first argues that the court erred in concluding that he violated probation by engaging in violent or threatening behavior. He maintains that the court's conclusion that his telephone message qualified as threatening behavior was not reasonably supported by the findings and cannot stand.

The court's conclusion that defendant violated his probation presents a mixed question of law and fact. State v. Woolbert, 2007 VT 26, ¶ 8. The court must first make a factual determination of the probationer's actions, and then make an implicit legal conclusion that the probationer's actions violated his probationary terms. Id. On review, we will uphold the court's findings if supported by credible evidence, and we will uphold the court's conclusion if reasonably supported by its findings. Id. It is axiomatic that it is the role of the trial court, not this Court, to assess the credibility of witnesses and weigh the evidence. State v. Mayo, 2008 VT 2, ¶ 14 ("[T]he credibility of witnesses, weight of the evidence and its persuasive effect are matters for the exclusive determination of the trier of fact.").

In this case, as recounted above, the court found that defendant made the telephone call in question, and it concluded that the call constituted threatening behavior. Defendant does not challenge the court's finding that he made this call, rather, he asserts that his behavior was not sufficiently threatening to constitute a probation violation. We disagree. Certainly, the tenor of the message is that defendant intends to stalk this person for the purpose of injuring him or her. No other intent is evident. This meets the definition of "threat" discussed in State v. Ashley, 161 Vt. 65, 72 (1993). See Ashley, 161 Vt. at 72 (relying on definition of "threat" for purposes of obstruction-of-justice charge as "[a] communicated intent to inflict physical or other harm . . . . A declaration of intention . . . to inflict punishment, loss, or pain on another") (quoting Black's Law Dictionary 1480 (6th ed. 1990)). The court thus did not err in finding that defendant violated Condition M.

Defendant next argues that the State failed to prove that he violated an express or clearly implied condition of probation by staying overnight at his girlfriend's house. He states that the

restriction of no overnight visits was so vague and inconsistent as to deny him sufficient notice of the conduct prohibited. He also maintains that the evidence shows that he did not understand that spending the night would violate probation. In a related vein, defendant argues that he did not willfully violate the conditions of the probation because he was in fact trying to comply with the requirements as he understood them. Even if the Court were to find that he knew that overnight visits were prohibited, defendant continues, he had insufficient notice that he could violate the no-contact provision by mere proximity contact to his girlfriend's son, given that his probation officer had approved proximity contact to this particular child by virtue of authorizing visits to the girlfriend's home when the child would be there.

As both parties recognize, the State must establish a probation violation by a preponderance of the evidence. State v. Klunder, 2005 VT 130, ¶ 7, 179 Vt. 563 (mem.). "The State meets its burden by showing that there has been a violation of the express conditions of probation, or of a condition so clearly implied that a probationer, in fairness, can be said to have notice of it." Id. (citations omitted). A defendant may be put on notice as to what may constitute a probation violation merely by the instructions and directions of a probation officer. State v. Hammond, 172 Vt. 601, 602 (2001) (mem.). We have cautioned, however, that a "defendant is entitled to know what conduct is forbidden before the initiation of a probation revocation proceeding," because due process demands it. Id.

In this case, the court found that defendant knew that he was not allowed to stay at his girlfriend's house overnight, and the record supports this finding. Defendant's probation officer testified that defendant had been requesting permission to visit his girlfriend at her home since November 2006. In January 2007, she agreed to allow defendant to visit his girlfriend, but she informed him that he was not allowed to spend the night at her apartment. She testified that defendant understood the conditions imposed on these visits. The probation officer also indicated that she spoke with defendant's girlfriend to discuss the conditions of contact, and that his girlfriend understood the conditions imposed on the visitation as well. That the court believed the probation officer's version of events, over the contrary testimony and notes of the girlfriend, is left entirely to the court's determination. See Mayo, 2008 VT 2, ¶ 14 ("[T]he credibility of witnesses, weight of the evidence and its persuasive effect are matters for the exclusive determination of the trier of fact.").

The court's finding that defendant knew of the restrictions is supported by the evidence, and thus it must stand on appeal. Defendant does not challenge the court's finding that he stayed overnight at his girlfriend's house, and certainly, this was a willful act on his part. We agree with the trial court that this behavior constituted a violation of his probation. The fact that the probation officer allowed proximity contact with defendant's girlfriend's child for several hours in the evening does not mean that defendant therefore had blanket permission to have proximity contact with this child beyond what was authorized. In fact, the record shows the opposite. Defendant was allowed proximity conduct only for several hours in the evening. We find no error in the court's conclusion that defendant violated the no-contact and restricted-associates conditions of his probation.

Defendant next argues that the court violated his due process right to present evidence and to cross-examine adverse witnesses. Contrary to defendant's assertion, this argument was

not raised below with specificity, and it was not preserved for review on appeal. See In re White, 172 Vt. 335, 343 (2001) ("[T]o preserve an issue for appeal a party must present the issue with specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it."). The record shows that the court limited defense counsel's cross-examination of the probation officer on relevancy grounds. While counsel suggested to the court that her inquiry was appropriate, she did not object to the court's ruling on constitutional grounds or any other ground. We thus do not address this claim of error.

Finally, defendant argues that the court erred in revoking his probation because its decision is not supported by any of the grounds set forth in 28 V.S.A. § 303(b). We disagree. The trial court has discretion in deciding whether probation should be revoked after finding that a violation of probation has been established. State v. Priest, 170 Vt. 576, 576 (1999) (mem.). While the court must find that there is at least one statutory basis for revoking probation, it "need not specifically identify which of the alternatives set forth in § 303(b) it has employed so long as at least one readily supports the court's conclusion." State v. Millard, 149 Vt. 384, 387 (1988). In this case, the record supports a finding that probation revocation was warranted because "[i]t would unduly depreciate the seriousness of the violation if probation was not revoked." 28 V.S.A. § 303(b)(3). The court found that defendant had chosen to defy the restrictions imposed by his probation officer, and it indicated that defendant had been resistant in complying with her directions and with the conditions of his probation. In light of the evidence, we find no error in the court's decision to revoke defendant's probation.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice