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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-274

FEBRUARY TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Windsor Circuit
	}	
Richard Barber	}	DOCKET NO. 942-8-08 Wrcr
		Trial Judge: Theresa S. DiMauro

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

Defendant appeals from a violation of probation, asserting that: (1) the trial court's findings are clearly erroneous, and (2) the trial court erroneously relied on a witness's prior inconsistent statement for its truth. We affirm.

In November 2008, defendant pled guilty to a charge of sexual assault on a victim under the age of sixteen. He was sentenced to a term of three to five years, all suspended except for 120 days, and placed on probation. In March 2009, defendant was charged with violating the probation condition prohibiting him from having any contact with children under the age of sixteen, other than his own. An evidentiary hearing was held over the course of two days in May and June 2009.

In addition to defendant's probation officer, two witnesses testified for the State. S.K., a tenant of the five-unit apartment building where the prohibited contact allegedly occurred, testified that she had seen defendant at the building on many occasions and more than once had observed defendant with the two young children of another tenant, H.H., in the latter's apartment. The property manager of the apartments also testified that he had frequently seen defendant at the building, and had observed him with H.H.'s children both in her apartment and entering and leaving the building.

Defendant called two witnesses. T.H., a self-described "good friend" of defendant's and a tenant in the same building as S.K. and H.H., testified that she had allowed defendant to stay in her apartment when she and her daughter were gone, but asserted that she had never seen defendant with children other than his own. She stated that when defendant brought his children for her or for H.H. to take care of he would call ahead to ensure that their own children were gone. T.H. acknowledged that she had given a prior affidavit to the probation officer stating that she had seen defendant at H.H.'s apartment while H.H.'s children were present, but claimed that she was mistaken, explaining that H.H. had informed her before the hearing that her children were not there.

H.H. also testified on defendant's behalf, stating that she had never seen him—whom she described as a "good friend"—with children other than his own and that defendant had never

been in her apartment when her children were there. Defendant testified in his own behalf, confirming T.H. and H.H.'s testimony that he would call ahead when he visited to ensure that no children were present, and denying that he had ever been in H.H.'s apartment when her children were there.

The trial court entered findings at the conclusion of the hearing. The court stated that it credited the testimony of S.K, whom the court characterized as a disinterested witness with "no interest in the outcome," nor "any ax to grind," and with "no bias for or against the Defendant," as well as the testimony of the building manager. The court further indicated that it found neither T.H. nor H.H. to be credible witnesses, recalling that both were friends of defendant, and that T.H. had recanted her earlier affidavit only after speaking with H.H. before the hearing. The court thus concluded that defendant had committed the violation as charged, and later revoked probation and sentenced defendant to serve nineteen months to five years. This appeal followed.

Defendant contends the court's findings concerning the credibility of the witnesses were clearly erroneous in several respects. Our review of the claim is limited. We accord substantial deference to the factual findings of the trial court, which has the sole discretion to determine the weight and sufficiency of the evidence, the credibility of the witnesses, and the persuasive effect of their testimony. State v. Ives, 162 Vt. 131, 135 (1994). "[A]lthough there may be inconsistencies or even substantial evidence to the contrary," the trial court's findings will be upheld if they are supported by credible evidence and are not clearly erroneous. Id. (quotation omitted).

Defendant first challenges the court's finding that S.K. was an unbiased witness, citing S.K.'s testimony acknowledging that she had called the police about T.H. and H.H. in the past, and H.H.'s testimony that she did not like or trust S.K. Although the evidence in question may suggest some tension between S.K. and the other tenants, it does not necessarily suggest any animus toward defendant, and S.K. also testified that she was friendly enough with both women to borrow a cell phone. Hence, we cannot conclude that the court's finding in this regard was "clearly erroneous." Id. Defendant also challenges the court's reliance on the building manager as an unbiased witness, noting that he had described defendant as a squatter. But again, this does not clearly undermine the court's finding that the manager was reliable and credible.

Finally in this regard, defendant contends the court erred in finding a contradiction between H.H.'s affidavit, in which she indicated that she was unaware of defendant's probationary restrictions, and her trial testimony indicating that she had worked out a system with defendant to ensure that he was never there when her daughter was present. Defendant contends the court erred in characterizing her earlier statement as indicating that she was unaware that defendant "had any restrictions placed on him," when in fact she stated only that she was unaware defendant was not allowed at her house. The discrepancy is a minor one, particularly in view of H.H.'s acknowledgment on cross-examination that, when she wrote the initial statement, she "didn't know that there were restrictions on who [defendant] could be with." Accordingly, we find no error.

Lastly, defendant contends the court erred in relying on T.H.'s prior inconsistent statement in her affidavit as substantive evidence. Although admissible for impeachment purposes, prior inconsistent statements are generally not admissible for the truth of the matters asserted unless the statement "was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." V.R.E. 801(d)(1)(A). As defendant failed to raise the objection below, it can only be considered for plain error, i.e., error that "strikes at the heart of defendant's constitutional rights or results in a miscarriage of justice." State v. Ayers,

148 Vt. 421, 426 (1987). The claim here does not reach this standard. First, "[h]earsay is not categorically inadmissible in a probation-revocation proceeding because the rules of evidence do not apply." State v. Decoteau, 2007 VT 94, ¶ 12, 182 Vt. 433. There was nothing to indicate that the sworn statement was unreliable, and the declarant witness testified at the hearing and was subjected to cross-examination. Accordingly, we find no due process violation or other error in its admission. Moreover, two eyewitnesses whom the court found to be credible testified unequivocally to observing defendant in the presence of young children who were not his own. Thus, any possible error in the court's reliance on the affidavit was plainly harmless. See State v. Leggett, 167 Vt. 438, 444-45 (1997) (affirming probation revocation where sufficient evidence supported finding without reliance on objectionable hearsay testimony). We therefore discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice