STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0466

State of Minnesota,
Respondent,

vs.

David Lyle Austin,
Appellant.

Filed May 12, 2009
Affirmed
Minge, Judge

Sherburne County District Court
File No. K4-06-2130

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Kathleen Heaney, Sherburne County Attorney, Arden Fritz, Assistant County Attorney, Government Center, 13880 Highway 10, Elk River, MN 55330 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Larkin, Presiding Judge; Minge, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

MINGE, Judge

Appellant challenges the revocation of his probation, arguing that the district court abused its discretion in determining that respondent proved the probation violations by clear and convincing evidence. We affirm.

FACTS

In 2006, when appellant David Lyle Austin was a juvenile, he was charged with criminal sexual conduct in the second degree under Minn. Stat. § 609.343, subd. 1(a) (2000), was prosecuted as an extended jurisdiction juvenile (EJJ) pursuant to Minn. Stat. § 260B.130 (2000), pled guilty, was adjudicated delinquent, and was given a stayed adult sentence of 39 months. After a probation violation, the district court revoked the EJJ portion of his sentence and imposed and stayed his adult sentence, placing appellant on supervised probation. The terms of probation prohibited contact with the victim and use of non-prescribed mood-altering chemicals.

In June 2007, a probation-violation report was filed, alleging appellant used methamphetamine and marijuana and stopped in front of his victim's home to verbally threaten her. In September 2007, there were new allegations that appellant contacted the victim at a church playground and again tested positive for marijuana. A revocation hearing was held, and appellant admitted using drugs twice but denied any contact with the victim.

At the hearing, the victim's mother testified that in June 2007, she looked out her kitchen window and saw a blue-colored, newer-type truck pull up. She recognized the

driver as appellant and the passenger as Christa Bumgarner, who lived down the street. Her daughter yelled from the garage, but she was unable to hear what she said. She then hurried outside, but the vehicle left. The victim testified that, in June 2007, she was in her garage with her younger sister when a new-looking, blue-green pickup truck pulled up with appellant driving and Bumgarner in the passenger seat. Appellant rolled down the window and threatened her and her sister and called them names. The victim also testified that, in September 2007, she was at a church playground when appellant rode by on a bike and told her that he would find her and kill her if he were sent to prison.

Appellant testified that he was friends with Bumgarner, that she owned an older blue-green Chevrolet Blazer, and that, although he drove by the victim's house four or five times during the summer of 2007, he did not have any contact with the victim. He also stated that, although the church is located between his parents' and sister's homes and that he visits his sister several times per week, he did not have a bike and did not recall encountering the victim at the church playground.

The district court found that the victim was credible and that her statements were corroborated by her mother's testimony. The district court did not believe appellant's testimony and concluded that the state proved by clear and convincing evidence that appellant violated his probation by contacting the victim on both occasions and that the contacts were intentional and without legal excuse. The district court vacated the stay of imposition previously imposed, revoked his probation, and executed the 39-month sentence. This appeal follows.

D E C I S I O N

The issue is whether the district court abused its discretion in determining that respondent proved by clear and convincing evidence that appellant violated the terms and conditions of his probation. "A district court has broad discretion in determining if there is sufficient evidence to revoke probation and should be reversed only if there is a clear abuse of that discretion." *State v. Osborne*, 732 N.W.2d 249, 253 (Minn. 2007) (quotation omitted); *State v. Johnson*, 679 N.W.2d 169, 176 (Minn. App. 2004) (holding that what constitutes a probation violation is a factual matter, reviewed under the abuse-of-discretion standard).

The district court must find "clear and convincing evidence" that any condition of probation has been violated before executing a stayed sentence. Minn. R. Crim. P. 27.04, subd. 3(3). The clear and convincing standard "requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt." *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998) (quotation omitted). This "standard is met when the truth of the facts sought to be admitted is highly probable." *Id.* (quotation omitted). Part of the district court's role as factfinder in a probation-revocation hearing is to judge the credibility of witnesses, and this court defers to the district court's credibility evaluations. *State v. Losh*, 694 N.W.2d 98, 102 (Minn. App. 2005), *aff'd*, 721 N.W.2d 886 (Minn. 2006), *cert. denied*, 127 S. Ct. 2437 (2007).

Appellant's probation conditions required him to avoid using drugs and contacting the victim. He admitted two instances of drug use, and the district court found that there

was clear and convincing evidence of two instances of prohibited victim contact, based on credible testimony by the victim and her mother.

Appellant claims that because the testimony of the victim and her mother differed regarding certain details, the victim was not credible and her testimony could not be a basis for establishing his violation of probation by clear and convincing evidence. The victim's testimony is largely consistent with, and is corroborated by, her mother's testimony. Additional evidence revealed that appellant knowingly passed the victim's home in a blue-green truck several times during the summer of 2007 and frequently passed the church playground involved in the second incident. The victim's account of the second instance of contact is uncorroborated, but the clear and convincing standard can be met by uncorroborated testimony. *Kennedy*, 585 N.W.2d at 391; *see also State v. Hamilton*, 646 N.W.2d 915, 918 (Minn. App. 2002) (holding testimony of arresting officer was clear and convincing evidence of probation violation and the district court's decision to revoke probation solely based on that testimony was not an abuse of discretion), *review denied* (Minn. Sept. 25, 2002), *abrogated on other grounds by State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005).

Because appellant admitted to using illegal drugs twice and there was credible testimony that appellant contacted the victim twice, we conclude that the district court did not abuse its wide discretion in finding that there was clear and convincing evidence that appellant violated the terms and conditions of his probation.

Affirmed.

Dated: