ATTORNEY FOR APPELLANT:

BRYAN LEE CIYOU
Marion County Public Defender
Appellate Division
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

KAYLENE D. ALMY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0607-CR-370
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0410-FC-183004

April 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Kaylene D. Almy appeals the revocation of her probation. We affirm.

Issue

We restate the issue as whether the trial court abused its discretion in revoking Almy's probation.

Facts and Procedural History

The facts most favorable to the revocation indicate that on June 1, 2005, Almy agreed to plead guilty to one count of class D felony theft in exchange for the dismissal of two counts of class C felony forgery and one count of class D felony theft. The plea agreement called for a three-year sentence, with executed time left to the trial court's discretion. The trial court suspended the entire sentence to probation.

On May 22, 2006, Almy's probation officer, Jennifer Herriott, filed a notice of probation violation with the following allegations:

> Ms. Almy:
> 1. on or about May 8, 2006, was arrested for Ct. I: Domestic Battery (MA) and Ct. II: Battery (MA) …. On April 26, 20[0]6, a Probable Cause warrant was issued. A Court Trial date has been set for June 27, 2006. Ms. Almy was released on her own recognizance.
> 2. non-compliance with Mental Health Treatment
> 3. non-compliance with community service work
> ADDITIONAL INFORMATION:
> On September 13, 2005, the Court approved a Request for Modification. Ms. Almy agreed to perform 96 hours of community service work at $6.00 per hour for a total of $576.00. This would be in place of her financial obligation leaving her a balance of $149.00 to pay. As of this date, Ms. Almy has completed 40 hours of the community service work.
> On September 7, 2005, Ms. Almy was referred to Gallahue Mental Health. On April 19, 2006, this Officer received a letter from Ms. Almy's counselor, Linda Kinney indicating that Ms. Almy was seen for a total of three times; intake appointment 9-19-05 and 10-5-05 and 10-24-05. Ms. Kinney's plan for

> Ms. Almy was individual treatment, in an effort to engage her in addressing the issues of anger and sadness and possible medication. On April 18, 2006, an Administrative Hearing was held to discuss Ms. Almy's non-compliance with mental health treatment. Ms. Almy was advised to get back into treatment at Gallahue Mental Health. As of this date, this Officer has not received any verification that Ms. Almy has re-entered treatment.
> Ms. Almy is currently working two jobs and all urine drug screens have been negative.

Appellant's App. at 37.

The trial court held a probation violation hearing on June 9, 2006. Almy's former live-in boyfriend, Tavieuss Phillips, testified that on April 11, 2006, Almy got out of her car and confronted him at a bus stop in downtown Indianapolis. At the time of the altercation, Phillips and Almy were not living together and had obtained protective orders against each other. Almy argued with Phillips about his alleged involvement with another woman and hit him on the back of the head. Almy denied getting out of her car and hitting Phillips.

The trial court found that Almy violated her probation by "knowingly touch[ing] Mr. Phillips in a rude, insolent and angry manner." Tr. at 51. The court found Phillips "to be quite credible" and that Almy "was not very credible with regard to that incident." *Id*. The court further found that Almy "had not complied with her mental health treatment." *Id*. The court revoked Almy's probation and executed her suspended sentence.[1]

Discussion and Decision

[1] The trial court did not find that Almy failed to comply with her community service work requirement. At the hearing, Sara Brunner, the probation department's record keeper, acknowledged that Almy still had "a substantial amount of time to complete [her] community service hours." Tr. at 29-30.

Almy appeals the revocation of her probation. "Probation is a favor granted by the State, not a right to which a criminal defendant is entitled." *Sanders v. State*, 825 N.E.2d 952, 955 (Ind. Ct. App. 2005), *trans. denied*. A probationer faced with a petition to revoke her probation is not entitled to the full panoply of rights she enjoyed prior to the conviction. *Rosa v. State*, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005). "The rules of evidence do not apply in a revocation proceeding, and the State's burden of proof is lower, as the State need prove an alleged violation of probation by only a preponderance of the evidence." *Id.* "'Preponderance of the evidence,' when used with respect to determining whether or not one's burden of proof has been met, simply means the 'greater weight of the evidence.'" *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 361 (Ind. 1982) (citation omitted).

"Probation revocation is a two-step process. First, the court must make a factual determination that a violation of a condition of probation actually has occurred. If a violation is proven, then the trial court must determine if the violation warrants revocation of the probation." *Cox v. State*, 850 N.E.2d 485, 488 (Ind. Ct. App. 2006) (citations omitted).

> When we review the determination that a probation violation has occurred, we neither reweigh the evidence nor reassess witness credibility. Instead, we look at the evidence most favorable to the probation court's judgment and determine whether there is substantial evidence of probative value supporting revocation. If so, we will affirm.

Whatley v. State, 847 N.E.2d 1007, 1010 (Ind. Ct. App. 2006) (citation and quotation marks omitted). We review the trial court's decision to revoke probation for an abuse of discretion. *Rosa*, 832 N.E.2d at 1121. "An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the court." *Id.* "The violation of a single condition of probation is sufficient to permit a trial court to revoke probation." *Id.*

Almy first contends that the State failed to prove that she violated her probation by committing class A misdemeanor battery or class A misdemeanor domestic battery against Phillips, her ex-boyfriend.[2]

> When, as here, the alleged probation violation is the commission of a new crime, the State does not need to show that the probationer was convicted of a new crime. The trial court only needs to find that there was probable cause to believe that the defendant violated a criminal law.[3]

Whatley, 847 N.E.2d at 1010 (citation omitted).

To convict a person of either class A misdemeanor battery or class A misdemeanor domestic battery, the State must show that the person knowingly or intentionally touched another person in a rude, insolent, or angry manner that resulted in bodily injury to the other person. *See* Ind. Code § 35-42-2-1(a) ("A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is: (1) a Class A misdemeanor if: (A) it results in bodily injury to any other person[.]"); Ind. Code § 35-42-2-1.3(a) ("A person who knowingly or intentionally touches an individual who: … (2) is or was living as if a spouse of the other person … in a rude, insolent, or angry manner that results in bodily injury to the person described in [subdivision (2)] commits domestic battery, a Class A misdemeanor."). Indiana Code

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[2] The conditions of Almy's probation are not in the record before us. At the hearing, Brunner stated that "one of the issues is [Almy] is not to be *arrested* for any new offenses." Tr. at 25 (emphasis added). Nevertheless, the primary focus at the hearing was whether Almy had battered Phillips, and the trial court found that Almy had violated her probation by doing so. We therefore address Almy's argument in this context.

[3] As such, we are not swayed by Almy's extra-record assertion that the State dismissed the battery charges "for evidentiary problems." Appellant's Br. at 7 n.4.

Section 35-41-1-4 defines "bodily injury" as "any impairment of physical condition, including physical pain."

Here, the trial court did not make a finding as to bodily injury, and Phillips's own testimony establishes that he did not suffer bodily injury:

> **Q** How did that feel when she hit you?
>
> **A** It didn't really hurt, but I was just, like, I guess embarrassed or something. Everybody was outside.
>
> **Q** Okay. You said it didn't really hurt?
>
> **A** No - - I mean, it just - - it didn't hurt at all I guess - -
>
> **THE COURT:** Hurt your feelings more than anything; right?
>
> **THE WITNESS:** Yeah.

Tr. at 19.

In light of the foregoing, we presume that the trial court found that Almy committed the lesser included offense of class B misdemeanor battery, which requires only a knowing or an intentional touching in a rude, insolent, or angry manner. Ind. Code § 35-42-2-1(a). Almy does not raise any cognizable due process concerns in this regard, but simply argues that the State failed to carry its burden of proof.[4] Almy's argument is merely an invitation to

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[4] Almy states,

> Assuming *arguendo* that minimal due process was afforded to Ms. Almy by the Notice of Probation Violation asserting the basis for violation being commission of crimes battery causing injury, and thereby encompassing simple battery of a rude, angry, or insolent touching (without injury), this evidentiary showing was not made by a preponderance.

Appellant's Br. at 12.

reweigh evidence and reassess credibility in her favor, which we may not do. We therefore affirm the trial court's finding that Almy violated her probation by battering Phillips.

Almy also claims that the State did not prove that she failed to comply with mental health treatment. According to Sara Brunner, the probation department's record keeper, the trial court ordered that Almy undergo a "mental health evaluation and treatment, if necessary." Tr. at 25. At the probation violation hearing, Brunner testified,

> We referred [Almy] to Gal[l]ahue Mental Health Treatment and we received a letter from them on April 19, 2006, stating [Almy] was seen only a total of three times. The intake appointment on September 19th of '05 and two follow-up appoint[ment]s, one on October 5th of '05 and one on October 24th of '05. They show no record of further appointments. But it states in here the counselor wanted Ms. Almy to reschedule. This states the plan was [for] her to attend individual treatment and […] the counselor then called us on March 29th of 2006, stated they had last seen [Almy] sometime in November. They felt that [Almy] really needed to be seen. That she had anger issues and they would recommend life effectiveness class and anger management. She stated that she sent - - she will send [Almy] a letter with an appointment and send the [probation officer] a copy of that letter. Due to that phone call, we had an administrative hearing with the supervisor and [Almy]. On April 18th of 2006, we told her that she must follow through with the counselor's recommendation. She must go to the treatment. And if she failed to return to treatment, we would file a violation. And then we saw her on May 22nd and reiterated that she needed to be in treatment. And we did not receive any verification that she had gone back to treatment.

Id. at 26-27.

Almy testified to the following version of events on direct examination:

> I went and I spoke - - after I had that administrative hearing with Ms. Harriett [sic[5]] and her supervisor. I had to make an appointment with Ms. Kinney. I went and seen her, uhm, let's see, that was like the 18th of April. I want to say the end of April - - I don't know the exact date - - but I went and spoke with her and she informed me that she wasn't going to be there that much longer and she was going to talk to Ms. Harriett about a mentoring program because

[5] Jennifer Herriott, Almy's probation officer, did not testify at the hearing.

> she felt like, uhm, I needed to be mentored, have somebody there that I could talk to. She said she just felt that I needed somebody there that I could talk to. And she was going to relay that to Ms. Harriett and I set up another appointment with her in June - - or it was May - - the end of May. And I called her and my work called me into work and I told her that I was able - - unable to go because I had to go to work. And she said fine, we'll just reschedule. And I don't remember the date, you but I have the schedule date at my house. It was suppose to be for sometime this month before I was suppose to go back and see Ms. Harriett on the 26th.

Id. at 35-36.

On cross-examination, the State asked Almy whether she had returned to counseling after October 24, 2005. Almy replied,

> I did go back but not for awhile. Because when I spoke to her in October, it - - actually, I think it was after October, but you guys are saying October, so I'm going to stick with October. When I went and seen her, she said that you don't have to come back if you - - she set another date for me, and she said, "You don't have to come back if you don't want to." And I said, well - - I said, "But it's part of my probation, I'm suppose to see you." She said, "I will send a note to Ms. Harriett and tell her that you don't like coming here, and if you feel like I don't want to come back, you don['t] have to." And then Ms. Harriett said she never got that, so I couldn't - - I can't blame anybody else but myself because I should have got that verification then and there when she said that to me.

Id. at 44-45. On redirect, defense counsel asked whether Almy had seen her counselor "a few times" since October 2005. *Id*. at 46. Almy responded, "Yes, I could if I - - if I was able to get released. I could go, because they have in their folder, the dates that I went and seen her. Because I just went and seen her right before I got arrested in May." *Id*.

At this point, we observe that the State offered practically no details regarding Almy's mental health treatment obligation. There is no evidence as to the required frequency of counseling sessions, if any, or that Almy failed to attend any sessions without sufficient cause. The State offered no affirmative evidence to rebut Almy's testimony that she saw her

counselor in April 2006 and scheduled an appointment for the end of May, which she rescheduled for June because of a work-related conflict. Instead, the State relied on testimony that the probation department "did not receive any verification that [Almy] had gone back to treatment." *Id*. at 27. We agree with Almy that "[t]his appears to be nothing more than 'code-speak' reflecting *de* [*minimis*] contact by probation with their provider Gallahue: they did not tell us if she had been there after the Administrative Hearing, and we did not ask." Appellant's Br. at 15. Even under the relaxed standards of probation proceedings, we must conclude that the State failed to meet its burden of proving that Almy violated this condition of probation.

That said, we reiterate that "[t]he violation of a single condition of probation is sufficient to permit a trial court to revoke probation." *Rosa*, 832 N.E.2d at 1121. We commend Almy's vocational and educational efforts during her probation, but we reluctantly conclude that the trial court's finding that she battered her ex-boyfriend is sufficient to affirm the revocation of her probation.

Affirmed.

SULLIVAN, J., and SHARPNACK, J., concur.