2014 IL App (1st) 113207-U

SIXTH DIVISION
June 20, 2014

No. 1-11-3207



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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| | ) | Appeal from the |
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Circuit Court of |
| | ) | Cook County |
| Plaintiff-Appellee, | ) | |
| | ) | |
| v. | ) | No. 10 CR 17063 |
| | ) | |
| JONATHAN GAYLES, | ) | |
| | ) | Honorable |
| Defendant-Appellant. | ) | Steven Goebel, |
| | ) | Judge Presiding. |

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JUSTICE REYES delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court's judgment revoking defendant's probation is affirmed as defendant's claim that his due process rights were violated at his probation revocation hearing did not satisfy the plain error exception to forfeiture rule, and his trial counsel did not render ineffective assistance. The sentencing credit on defendant's mittimus is corrected.

¶ 2 Following a hearing, the circuit court revoked the probation of defendant Jonathan Gayles (Gayles) and sentenced him to four years' imprisonment for residential burglary. On appeal, Gayles contends he was denied his right to due process because: (1) his probation was

revoked based on conduct not alleged in any of the revocation petitions filed with the trial court; and (2) the State relied on inadmissible hearsay to support its allegations. Gayles also asserts defense counsel was ineffective for not objecting to the State's failure to file a supplemental petition which formed the basis of the probation violation, and not objecting to the State's use of inadmissible hearsay to support its claims. Gayles also contends, and the State agrees, that his mittimus should be corrected to reflect two additional days of sentencing credit for time spent in custody prior to sentencing. For the following reasons, we affirm and correct the mittimus.

¶ 3 BACKGROUND

¶ 4 On November 24 2010, Gayles pleaded guilty to a charge of residential burglary for breaking into a neighbor's apartment with the intent to commit a theft. The trial court sentenced Gayles to the agreed term of two years' probation, which was conditioned upon Gayles receiving treatment through the Treatment Alternatives for Safe Communities (TASC) program pursuant to section 40-10 of the Alcoholism and Other Drug Abuse and Dependency Act (20 ILCS 301/40-10 (West 2010)). In addition, the trial court ordered Gayles to serve his first year of probation in the intensive probation supervision program. Gayles' appointed counsel was present at the proceeding.

¶ 5 A. First and Second Petitions

¶ 6 On March 15, 2011, the State requested and was granted leave to file a petition alleging Gayles violated his probation when: (1) "he was arrested * * * on January 13, 2011, for the charge of criminal trespass to state property;" and (2) "he failed [to] abide by his curfew on January 10, 2011." The State informed the court that Gayles pleaded guilty to the criminal trespass charge and was sentenced to 30 days in the Cook County Department of Corrections. Gayles stated he was arrested when he walked past his former school on the way to his great-

grandmother's house, which is located next to the school. Gayles explained the police at the school stopped him because they knew him, and when they learned he was on probation, charged him with criminal trespass. The trial court allowed Gayles to continue his probation, asked the State to determine the facts of the trespass charge, and continued the case for status of probation terms. Gayles' appointed counsel was present at the proceeding.

¶ 7 On April 5, 2011, the State submitted a copy of Gayles' arrest report. The trial court dismissed the petition for violation of probation based on the criminal trespass charge. The State also presented a supplemental petition for violation of probation alleging Gayles "failed to report to or call his intensive probation supervision office on [March 3, 8, 10, 17, and 21, 2011]."[1] Gayles' appointed counsel stated a probation officer, Payne, had communicated to Gayles that he could inform the trial court he had been performing his community service on those dates. The trial court asked an unidentified probation officer to verify Gayles' claim. Gayles' counsel also stated Gayles had given him a letter from The Sky is the Limit drug recovery facility, indicating he was doing well in the treatment program. The trial court allowed Gayles to continue his probation and continued the case for status of the probation terms.

¶ 8 On June 2, 2011, Gayles was arrested for violating his probation as he did not report to his probation officer on May 23, 26 and 31, 2011, and June 2, 2011. On June 3, 2011, the State filed a second petition for violation of probation alleging: (1) "[Gayles] failed to report to probation on [May 23, 26 and 31, 2011, and June 2, 2011];" and (2) he "failed to comply with [his] curfew on [May 26, 2011]."

¶ 9 B. Third Supplemental Petition

¶ 10 On June 7, 2011, TASC filed with the trial court a termination report, which stated

[1] The supplemental petition for violation of probation in the record is not file stamped nor signed by a judge.

Gayles had been "unsuccessfully terminated" from the TASC program the day before. Attached to the report was a summary stating Gayles was terminated due to his failure to follow the recommendations from TASC and The Sky is the Limit. Gayles attended all of his group sessions with TASC until March, when his attendance became sporadic. The summary indicated Gayles tested positive for cannabis (i.e., marijuana) on April 4, 2011. Gayles also failed to keep an appointment with TASC on April 28, 2011. In addition, the summary stated The Sky is the Limit informed TASC on April 29, 2011, that Gayles was instructed he would be discharged immediately if he missed three consecutive days of treatment. Gayles was unsuccessfully terminated from The Sky is the Limit program on May 9, 2011. Thereafter, Gayles did not contact TASC.

¶ 11 In court on June 7, 2011, probation officer Doris Holder (Holder) referred to a supplemental petition and stated Gayles violated his probation when "he failed to report, failed to complete the community service, failed to complete the TASC requirement, and * * * [was] not in compliance with any condition of his [i]ntensive [p]robation [s]upervision except [for] payment." Holder did not indicate on what days Gayles violated his probation. Holder further stated Gayles "lied, stating that he didn't report to [the probation office] due to going to treatment" as he "was not attending treatment or community service." As Gayles' counsel was unavailable, the trial court held the matter over for a week.

¶ 12 On June 14, 2011, Gayles' appointed counsel stated Gayles had been arrested for various probation violations including "curfew violations, failure to comply with community service, and testing positive for marijuana on at least one occasion." The State then requested leave to file a supplemental petition for violation of probation. An unidentified probation officer responded "[i]t's been filed." The State apologized and noted Gayles also failed to report to the probation

office but did not specify which dates. The trial court then asked, "[w]hat's the allegation, Number 5" and noted, "[a]llegation is he lied, stating he didn't report to intensive probation, supervision due to going to treatment." The trial court set the case for a probation revocation hearing.

¶ 13 On July 12, 2011, the case was called for a possible probation revocation hearing. The case was then continued for a hearing, or in the alternative a Supreme Court Rule 402 conference.

¶ 14 C. Probation Revocation Hearing

¶ 15 On August 23, 2011, the trial court held a probation revocation hearing. The trial court asked on which petition the State was proceeding, to which the State replied it was proceeding on the third supplemental petition "that was filed, [it] believe[d]" on June 7, 2011 (third supplemental petition).[2] Neither the court nor defense counsel questioned the violation allegations being addressed.

¶ 16 At the hearing, probation officer Nateva Montgomery (Montgomery) testified that, under the terms of Gayles' probation, Gayles was required to meet with her at the probation office twice a week. Gayles, however, failed to appear for his meetings with the probation office on April 11, 14, 18 and 25, 2011, and May 3 and 5, 2011. Gayles did not contact Montgomery by phone or any other mode of communication. On April 18 and 28, 2011, Montgomery went to Gayles' home for a curfew check between 7 p.m. and 7 a.m. and found he was not home. Gayles was also required to complete 130 hours of community service at St. Sabina church. Church personnel informed Montgomery that Gayles had completed only 12 hours of service.

[2] There is no June 7, 2011, third supplemental petition included in the common law record on appeal. The State alleges this petition was filed on June 7, 2011, while Gayles claims it was never filed.

Consequently, the church terminated him from its program. In addition, Gayles was required to cooperate with TASC by undergoing intensive outpatient drug and alcohol treatment at The Sky is the Limit recovery facility. The Sky is the Limit personnel informed Montgomery that Gayles failed to appear for eight of his 12 treatment sessions. Gayles informed the facility staff he was meeting with his probation officer when he was not. Montgomery testified a status report from The Sky is the Limit indicated Gayles was to be terminated from its treatment program for having three consecutive absences, and for testing positive for marijuana on April 4, 2011.[3] Montgomery testified she met with Gayles at his home on May 9, 2011, and that he claimed he missed his meetings with her because he was participating in his community service and drug treatment.

¶ 17 On cross-examination, Montgomery testified she was assigned as Gayles' probation officer on April 15, 2011. Prior to that date, Gayles was assigned to another probation officer. The first time Montgomery met with Gayles was May 5, 2011. Gayles' counsel cited the third supplemental petition, while cross-examining Montgomery:

> "GAYLES' COUNSEL: Help me out. There's a line in your violation. Could you look at your petition, please, if you have a copy of your petition. Is there some indication he tested positive on April 4, 2011, comma when they dropped him from April 11—
>
> MONTGOMERY: That's a whole new sentence. That's a whole different sentence. It states he also tested positive for marijuana April 4, 2011, when they dropped him, period. New sentence, from April 11 to April 27, he did not attend required groups.

[3] The status report from The Sky is the Limit is not included in the record. The termination report that TASC filed with the trial court on June 7, 2011, however, is in the record and indicates The Sky is the Limit informed TASC that Gayles was to be terminated from its treatment program for having three consecutive absences, and for testing positive for marijuana on April 4, 2011.

GAYLES' COUNSEL: Excuse me. There is a period in there. I apologize. Mine did not have it."

¶ 18 Montgomery further testified that Gayles' mother, Doris Gayles, said she was concerned with his mental health, but did not specify her concerns. Montgomery advised Doris Gayles to have Gayles complete a mental health evaluation.

¶ 19 After considering the evidence presented and hearing closing arguments, the trial court found Gayles violated his probation for "counts one through five" of the third supplemental petition. The trial court specifically found that Gayles had deliberately lied to his probation officer when he claimed he did not meet with her because he was engaged in community service and drug treatment. The trial court stated it believed Gayles deliberately missed his appointments and curfews because he did not want to comply with the conditions of his probation.

¶ 20 On September 27, 2011, the trial court revoked Gayles' probation and sentenced him to the minimum of four years' imprisonment with two years mandatory supervised release. Gayles did not file a motion to reconsider. This appeal timely followed.

¶ 21 ANALYSIS

¶ 22 I. Denial of Due Process

¶ 23 On appeal, Gayles contends he was denied his right to due process for two reasons. First, Gayles' probation was revoked based on conduct not alleged in any of the revocation petitions filed with the court. At the hearing, the State presented evidence that Gayles failed to meet with his probation officer on six occasions in April and early May in 2011, violated his curfew on at least two occasions in April 2011, failed to complete his community service, and failed to complete his drug and alcohol treatment. Gayles contends, however, a petition raising these

allegations was never filed because the common law record does not contain the third supplemental petition. On that basis, Gayles claims his due process rights were violated.

¶ 24 Second, Gayles contends his due process rights were violated because the State relied on Montgomery's testimony that was inadmissible hearsay. Gayles concedes his counsel failed to preserve the issues because he did not object to the State's allegations or to Montgomery's testimony at the probation revocation hearing. Gayles asserts, however, that this court should review his claims under the plain-error doctrine.

¶ 25 The State argues Gayles' due process argument fails for two reasons. First, Gayles forfeited review of his claims because he failed to object to proceeding on the third supplemental petition and the hearsay evidence during the probation revocation hearing, and failed to raise the issues in a posthearing motion. The State argues the plain-error doctrine does not apply in this case because no error occurred. The State asserts that, although the third supplemental petition is not contained in the common law record on appeal, the transcript included in the report of proceedings clearly indicates: (1) the petition was properly filed; and (2) Gayles' counsel had a copy of the petition when he cross-examined Montgomery. Second, the State asserts Montgomery's hearsay testimony that Gayles failed to meet with her on several occasions and violated his curfew were within her personal knowledge, and sufficiently supported the trial court's finding that Gayles violated his probation.

¶ 26 In general, failure to raise an objection and file a written posttrial motion forfeits the issue on appeal. *People v. Johnson*, 238 Ill. 2d 478, 484 (2010) (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). This rule applies to probation revocation proceedings. *People v. Turner*, 233 Ill. App. 3d 449, 452 (1992). Illinois Supreme Court Rule 615(a) allows courts of review to bypass the rules of forfeiture to note "[p]lain errors or defects affecting substantial rights."

*People v. Eppinger*, 2013 IL 114121, ¶ 18. Under the Illinois' plain-error doctrine, a reviewing court may consider a forfeited claim when:

> " '(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the strength of the evidence.' " *Johnson*, 238 Ill. 2d at 484 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

¶ 27 The plain-error doctrine is intended to ensure a defendant receives a fair trial, but it does not guarantee every defendant a perfect trial. *Id.* Rather than operating as a general savings clause, it is construed as a narrow and limited exception to the typical forfeiture rule applicable to unpreserved claims. *Id.* The burden of persuasion rests with the defendant under both prongs of the plain-error analysis. *People v. Sargent*, 239 Ill. 2d 166, 190 (2010). The ultimate question of whether a forfeited claim is reviewable as plain error is a question of law reviewed *de novo*. *Johnson*, 238 Ill. 2d at 485. The first step of plain-error review is to determine whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 28 A. Notice of Petition to Revoke Probation

¶ 29 We first address whether Gayles had notice of the allegations contained in the third supplemental petition. While a defendant is entitled to due process of law at a probation revocation hearing, it has been reiterated by the courts that there is a qualitative difference between a criminal proceeding and the revocation of probation. See *People v. Lindsey*, 199 Ill. 2d 460, 465 (2002) (probation revocation proceedings are civil, not criminal, in nature). Because probation revocation proceedings are not determinative of the defendant's guilt or innocence of a

substantive criminal offense, only "minimum requirements" of due process need be applied. *People v. Kruszyna*, 245 Ill. App. 3d 977, 980 (1993); see also *People v. Hall*, 198 Ill. 2d 173, 177 (2001) (defendant responding to a petition to revoke probation is entitled to fewer procedural rights than a defendant facing trial).

¶ 30 A probationer is entitled to notice of the petition charging the violation; a court hearing on the violation; the right to be heard in person; the right to confront and cross-examine witnesses; and the right to counsel in all circumstances. 730 ILCS 5/5-6-4(a)-(c) (West 2010); see also *Lindsey*, 199 Ill. 2d at 474; *People v. Cox*, 197 Ill. App. 3d 239, 243 (1990). These requirements focus on fairness. *People v. Acevedo*, 216 Ill. App. 3d 195, 201 (1991). Due process requires "a fair determination that the acts which formed the basis of the revocation petition did occur and that fairness be accorded a defendant during the proceedings." *Id*. (citing *Cox*, 197 Ill. App. 3d at 243). As Gayles was provided with a probation revocation hearing, an opportunity to testify and cross-examine the State's witness, and an appointed counsel in all circumstances, we address whether Gayles had notice of the third supplemental petition raising the State's allegations.

¶ 31 Our review of the entire record indicates the third supplemental petition was filed on June 7, 2011. The record of proceeding, specifically the transcript of the probation revocation hearing, demonstrates that on June 7, 2011, probation officer Holder identified the State's allegations contained in the third supplemental petition to the trial court while referring to a "supplemental petition" to revoke probation. Holder stated Gayles had "failed to report, failed to complete the community service, failed to complete the TASC requirement, and * * * [was] not in compliance with any condition of [i]ntensive [p]robation [s]upervision except payment." Holder also stated Gayles had "lied, stating that he didn't report to [the probation office] due to

going to treatment." The record further indicates that on June 14, 2011, when the State asked for leave to file the third supplemental petition to revoke probation, a probation officer informed the trial court it had already "been filed." The trial court then noted the State's "allegation, number 5" was that "[Gayles] lied, stating he didn't report to intensive probation, supervision due to going to treatment." The record also demonstrates that at the probation revocation hearing on August 23, 2011, the State confirmed it was "proceeding on [a] supplemental petition * * * that was filed * * * [on] June 7."

¶ 32 The record also establishes the third supplemental petition was before the trial court during the probation revocation hearing, as Gayles' counsel cited the third supplemental petition while cross-examining Montgomery. Montgomery pointed out that the sentence Gayles' counsel referred to was actually two separate sentences–the first stated Gayles tested positive for marijuana on April 4, 2011, and the second stated that from April 11 to 27, 2011, Gayles did not attend his required groups. Gayles' counsel responded that his petition was missing a period between the sentences stating, "Excuse me. There is a period in there. * * * Mine did not have it." It is apparent from the report of proceedings that Gayles' counsel and Montgomery each had a copy of the third supplemental petition at the probation revocation hearing.

¶ 33 Gayles mistakenly relies on *People v. Cooper*, 132 Ill. 2d 347, 364-65 (1989), for the proposition that notice to counsel is insufficient for due process and adequate notice to the defendant is necessary. *Id*. In *Cooper*, the Illinois supreme court found that a court order notifying the defendant to be present at a hearing is sufficient notice for due process. *Id*. at 364. In *Cooper*, the defendant was not present at his hearing and no other evidence indicated defendant ever received notice. *Id*. Here, Gayles was present at his probation revocation hearing, indicating he had proper notice of the probation revocation proceeding.

¶ 34 Gayles also incorrectly relies on *People v. Bedenkop*, 252 Ill. App. 3d 419, 423-24 (1993), for the proposition that a defendant's due process rights are violated when the State's allegations are not included in a filed petition. *Id*. In *Bedenkop*, the trial court included allegations of the defendant's drug use during the probation revocation hearing on its own motion, although the State had never requested it in any petition filed. *Id*. at 423. *Bedenkop* is distinguishable from this case, where the record of proceedings here indicates the State's allegations were included in the third supplemental petition.

¶ 35 Based on the entire record, the report of proceedings clearly reflects that the third supplemental petition was filed, that Gayles had proper notice as he was present at the probation revocation hearing, and Gayles' counsel had a copy of the third supplemental petition, while he cross-examined Montgomery. Therefore, we conclude Gayles had proper notice of the third supplemental petition, and was not denied due process on these grounds. See *Lindsey*, 199 Ill. 2d at 473-74; *Cox*, 197 Ill. App. 3d at 243. Accordingly, we find no error. Having found no error, there can be no plain error. *People v. Williams*, 193 Ill. 2d 306, 349 (2000).

¶ 36 B. Admission of Hearsay

¶ 37 Next, we address whether Gayles was denied his due process rights because the trial court relied on Montgomery's hearsay testimony. A defendant is guaranteed the right to confront the witnesses against him by the confrontation clauses of both the United States and Illinois Constitutions. U.S. Const., amends. VI, XIV; Ill. Const.1970, art. I, § 8. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *People v. Smith*, 256 Ill. App. 3d 610, 615 (1994); M. Graham, Cleary & Graham's Handbook of Illinois Evidence §§ 801, 807 (7th ed.1999). The fundamental reason for excluding hearsay is the lack of an opportunity to cross-examine the declarant. *People v. Shum*, 117 Ill. 2d 317, 342 (1987).

Testimony about an out-of-court statement which is used for a purpose other than to prove the truth of the matter asserted in the statement, however, is not hearsay. *People v. Williams*, 181 Ill. 2d 297, 313 (1998). For example, an out-of-court statement is allowed where it is offered for the limited purpose of demonstrating the course of a police investigation where such testimony is necessary to fully explain the State's case to the trier of fact. *Id.* (and cases cited therein).

¶ 38 The constitutional protection due to a defendant at the probation revocation stage, however, is not as strict as that due to a nonconvicted person. *People v. Allegri*, 127 Ill. App. 3d 1041, 1045 (1984) (parolee's liberty is conditional). The defendant, at the probation revocation stage, has already been convicted. *People v. Henderson*, 2 Ill. App. 3d 401, 405 (1971). At a probation revocation proceeding, therefore, the defendant is awaiting resentencing, not sentencing. *Allegri*, 127 Ill. App. 3d at 1045. Evidentiary rules are not applied with full force to probation revocation proceedings. *Id*. at 1046 (citing *People v. Dowery*, 62 Ill. 2d 200, 204-05 (1975)). The State's standard of proof is lower as it needs to demonstrate only by a preponderance of the evidence that the act giving rise to the petition to revoke probation occurred. *Id*. at 1045 (citing *People v. Crowell*, 53 Ill. 2d 447, 451 (1973)). A defendant need not be indicted, prosecuted, or convicted of the offense forming the basis of the revocation proceeding. *Id*. (citing *People v. Burkett*, 19 Ill. App. 3d 410, 412 (1974)). The petition to revoke probation need not be based on an act that is criminal in nature. *Id*. (citing *People v. DeWitt*, 66 Ill. App. 3d 146, 150 (1978), *aff'd*, 78 Ill. 2d 82, 397 (1979)).

¶ 39 Similar to probation revocation proceedings, ordinary rules of evidence are relaxed in sentencing hearings because the defendant has already been convicted. *People v. Varghese*, 391 Ill. App. 3d 866, 873 (2009). The only requirement for admission of evidence in a sentencing hearing is that the evidence must be reliable and relevant as determined by the trial court within

its sound discretion. *People v. Jett*, 294 Ill. App. 3d 822, 830 (1998); *People v. Alksnis*, 291 Ill. App. 3d 347, 359 (1997) (hearsay evidence of unprosecuted crimes is admissible in sentencing hearings if it is relevant and reliable). A hearsay objection affects the weight rather than the admissibility of the evidence. *Jett*, 294 Ill. App. 3d at 830. Hearsay evidence may be found to be reliable, relevant, and admissible when it is "corroborated" by other evidence. *People v. Hudson*, 157 Ill. 2d 401, 450 (1993). Likewise, reliable hearsay evidence that is corroborated by other evidence should be admissible in probation revocation proceedings as well. *United States v. Pratt*, 52 F. 3d 671, 676-77 (7th Cir. 1995) (reliable hearsay evidence may be admitted to substitute live testimony in a probation revocation hearing); *United States v. Thomas*, 934 F. 2d 840, 846 (7th Cir. 1991) (double hearsay testimony about a report that carries a presumption of reliability is admissible in probation revocation proceedings); *United States v. Verbeke*, 853 F. 2d 537, 539 (7th Cir. 1988).

¶ 40 In this case, Montgomery's testimony regarding Gayles' failure to complete his community service requirements and drug test results had slight or no relevance when offered for a nonhearsay purpose. Montgomery's testimony was offered only to prove Gayles had failed to comply with his probation requirements, including his community service hours and drug treatment. Accordingly, Montgomery's testimony as to the community service and the drug testing was hearsay, and thus admission was error. For the reasons which follow, however, we conclude the error is not structural and thus not reversible error.[4]

¶ 41 Gayles relies on the second prong of the plain-error doctrine, contending that the trial court's admission of Montgomery's testimony deprived him of his rights to confrontation and his substantial right to a fair hearing. Gayles cites *Crawford v. Washington*, 541 U.S. 36, 68-69

[4] Also, for the reasons discussed *infra* regarding the error is also harmless. See *infra* ¶ 44.

(2004), which prohibited the use of hearsay in an attempt to evade the confrontation clause.

¶ 42 As to the second prong, we note "[e]rror under the second prong of plain error analysis has been equated with structural error." *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 78. Automatic reversal is only required where an error is "structural." *Thompson*, 238 Ill. 2d at 613-14. "An error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence." *Id*. at 609 (citing *People v. Glasper*, 234 Ill. 2d 173, 196 (2009)). The United States Supreme Court has found that the infringement of four basic rights of defendants constitutes structural error requiring automatic reversal: the right to counsel; the right to self-representation; the right to a public trial; and the right to trial by jury when an erroneous instruction on reasonable doubt affects that right. *People v. Pitchford*, 401 Ill. App. 3d 826, 836-37 (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006)). Illinois courts have extended this list to include infringement of the right to a jury trial by the denial of a defendant's request for special verdict forms where the answers to those forms could affect the defendant's sentence. *Pitchford*, 401 Ill. App. 3d at 837 (citing *People v. Smith*, 233 Ill. 2d 1, 27-28 (2009); *Glasper*, 234 Ill. 2d at 192; *People v. Moore*, 397 Ill. App. 3d 555, 568-75 (2009)).

¶ 43 The alleged error here–the admission of Montgomery's hearsay testimony–does not fall into any of those categories. Therefore, that error is not reversible as it was not a structural error and there was also no prejudice to Gayles where he has not demonstrated how cross-examination of church personnel and the person who performed the drug test could have aided his defense or would have made any difference in the trial court's determination. See *Pitchford*, 401 Ill. App. 3d at 837 (where one physician was permitted to testify concerning the results of an autopsy performed by another physician, error was not reversible as it did not fall into any structural error

category and defendant did not demonstrate how error prejudiced him).

¶ 44 Further, Gayles does not cite to any case holding that confrontation clause error amounts to structural or second prong plain error. Even in the context of a criminal trial, *Crawford* violations have been found to be harmless error. *In re Rolandis G.*, 232 Ill. 2d 13, 43 (2008). Accordingly, we conclude the error in this case was not structural error, and thus not plain error. *Cosmano*, 2011 IL App (1st) 101196, ¶ 78 ("[e]rror under the second prong of plain error analysis has been equated with structural error.").

¶ 45 II. Ineffective Assistance of Counsel

¶ 46 The defendant next asserts defense counsel was ineffective for: (1) not objecting to the State's failure to file the third supplemental petition; and (2) not objecting to the State's use of inadmissible hearsay to support its claims.

¶ 47 Generally, in order to demonstrate ineffective assistance of counsel, a defendant must establish: (1) counsel's representation was deficient; and (2) counsel's alleged deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Colon*, 225 Ill. 2d 125, 135 (2007). To satisfy the deficient prong of the *Strickland* test, a defendant must overcome the strong presumption the challenged action or inaction "might have been the product of sound trial strategy." *People v. Evans*, 186 Ill. 2d 83, 93 (1999) (and cases cited therein). To satisfy the prejudice prong of the *Strickland* test, a defendant must demonstrate a reasonable probability that the outcome of the trial would have been different or that the result of the proceeding was unreliable or fundamentally unfair. *Strickland*, 466 U.S. at 687; *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Such a reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a reviewing court finds that the defendant did not suffer prejudice, it need not decide whether

counsel's performance was constitutionally deficient. *People v. Perkins*, 408 Ill. App. 3d 752, 760 (2011) (citing *People v. Buss,* 187 Ill. 2d 144, 213 (1999)). When the trial court has erroneously admitted a hearsay statement, a reversal is mandatory unless it is clearly shown that the error was not prejudicial. *People v. Bridgewater*, 259 Ill. App. 3d 344, 349 (1994). In other words, an error is harmless only if properly admitted evidence is so overwhelming that no fair-minded trier of fact could reasonably have acquitted. *Id*.

¶ 48 In this case, Gayles cannot establish the prejudice prong of the *Strickland* standard because: (1) as previously determined, the record indicates the third supplemental petition was filed; and (2) even if counsel erred in failing to object to the admission of Montgomery's statement, the result of the proceeding would not have been different. *Strickland,* 466 U.S. at 687; *Evans,* 209 Ill. 2d at 220.

¶ 49 First, absent Montgomery's testimony that Gayles did not complete his community service requirement and tested positive for marijuana, the record supports the fact that Gayles violated the terms of his probation by a preponderance of the evidence. Montgomery testified that after she was assigned as Gayles' probation officer on April 15, 2011, Gayles failed to report to her on four different occasions from April through May 2011. Further, Montgomery testified she went to Gayles' home for curfew checks on April 18 and 28, 2011, and found he was not home. This evidence alone supports the trial court's determination that Gayles violated his probation. See *People v. Cozad*, 158 Ill. App. 3d 664, 669 (1987) (affirmed revocation of probation where witnesses' testimonies that defendant violated his curfew restrictions twice were sufficient to prove violation by a preponderance of the evidence); see also *In re B.R.J.*, 133 Ill. App. 3d 542, 545 (1985) (affirmed revocation of probation where failure to report to a probation officer on two occasions was on itself sufficient to prove violation).

¶ 50 Second, the evidence presented establishes Gayles lied to Montgomery and the trial court when he claimed he was unable to report to the probation office because of his drug treatment. The attached summary to TASC's termination report filed on June 7, 2011, corroborates Montgomery's testimony that Gayles was "unsuccessfully terminated" from the Sky is the Limit program on May 9, 2011, after being warned he would be discharged immediately if he missed three consecutive days of treatment. *Hudson,* 157 Ill. 2d at 450 (hearsay evidence may be found to be reliable, relevant, and admissible when it is "corroborated" by other evidence); *Thomas*, 934 F.2d at 846. The attached summary also notes Gayles was "unsuccessfully terminated" from TASC's program due to his frequent absences at The Sky is the Limit recovery facility. Further, the attached summary establishes Gayles' attendance for his group sessions with TASC became "sporadic" from March 2011. The record thus demonstrates Gayles lied to Montgomery and the trial court when he claimed he was unable to report to the probation office because of his drug treatment.

¶ 51 Based on the entire record, we have determined the third supplemental petition was filed as demonstrated by the record of proceedings, and that the admission of Montgomery's hearsay testimony was harmless. Gayles, therefore, cannot demonstrate a reasonable probability that the outcome of the trial would have been different or that the result of the proceeding was unreliable or fundamentally unfair. *Buss,* 187 Ill. 2d at 213.

¶ 52 Additionally, Gayles asserts his trial counsel's representation was deficient but has failed to demonstrate that counsel's performance was objectively unreasonable and that he suffered prejudice. Gayles merely asserts no sound strategy would allow him to submit to a hearing based on allegations that were not in a filed petition, and that it was unreasonable for counsel to fail to object to Montgomery's hearsay testimony. Gayles then simply asserts, if counsel had

objected on these grounds, the probation revocation hearing would not have occurred. Similar to his plain error argument, Gayles' bald conclusory assertions fail to establish that counsel's representation was deficient. Accordingly, we reject Gayles' claim that counsel rendered ineffective assistance.

¶ 53 III. Correction of the Mittimus

¶ 54 Lastly, Gayles contends, and the State agrees, his mittimus should be corrected to include two additional days of sentencing credit for time spent in custody prior to sentencing. The mittimus indicates Gayles was given credit for 203 days. Pursuant to our authority (Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995)), we direct the clerk of the circuit court to correct the mittimus to indicate Gayles is to receive 205 days of credit for time served.

¶ 55 CONCLUSION

¶ 56 In sum, the third supplemental petition was filed and the admission of Montgomery's hearsay testimony was harmless and did not rise to the level of plain error. Accordingly, Gayles cannot establish a claim of ineffective assistance of counsel. For these reasons, we direct the clerk of the circuit court to correct the sentencing credit on the mittimus, and affirm defendant's conviction and sentence in all other respects.

¶ 57 Affirmed; mittimus corrected.