Circuit Court for Baltimore City
Case No. 115356005

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1192

September Term 2017

JAVIER REYES

v.

STATE OF MARYLAND

Woodward, C. J.,
Friedman,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: November 27, 2018

Following a violation of probation hearing in the Circuit Court for Baltimore City, appellant Javier Reyes was sentenced to nine years for first degree assault and use of a dangerous or deadly weapon in that crime. Challenging his sentence, appellant presents the following questions:

1. Did the trial court violate Appellant's Fourteenth Amendment Due Process Right to confront witnesses in his probation violation hearing?

2. Did the trial court err in admitting and/or considering improper hearsay?

3. Did the probation court improperly defer to the personnel at Gaudenzia in derogation of its judicial responsibilities; and/or did the probation court err in concluding that the discharge of appellant was justified because the discharge was arbitrary and capricious.

4. Was the evidence legally insufficient to sustain the violation of probation finding?

We conclude there was no error and sufficient evidence to support the court's determination that appellant violated his probation by behaving aggressively during drug treatment, resulting in his discharge from that program.

FACTUAL AND PROCEDURAL BACKGROUND

The Probation

In May 2016, appellant pleaded guilty to one count of first degree assault and one count of using a deadly weapon (a knife) with intent to injure the victim during that incident. Following a plea agreement, he was sentenced to fifteen years, with fourteen years, three months, and three days suspended and three years of supervised probation. This sentence was subject to an agreement that appellant would be evaluated for drug abuse

treatment pursuant to Md. Code Ann., Health General Article ("HG"), § 8-505[1] (2015 Repl. Vol.). In August 2016, after a favorable drug treatment recommendation, appellant's sentence was modified to suspend all remaining incarceration, in favor of commitment to the Department of Health and Mental Hygiene, pursuant to HG § 8-507 (set forth and discussed below). One condition of appellant's revised sentence was that he was required to "[a]ttend and successfully complete drug treatment and follow aftercare recommendations." On October 28, 2016, appellant was released from the Department of Corrections (the "Department") and accepted into a qualifying residential drug treatment program in Crownsville, which was administered by Gaudenzia and its staff.

On December 28, 2016, the division director of the Gaudenzia program, Kristy Blaylock, informed appellant's probation agent, Tiana Smith, that "due to Reyes' aggressive nature that they wanted him terminated from the program." According to Agent

[1] HG § 8-505 provides in pertinent part:

(a)(1) Before or during a criminal trial, before or after sentencing, or before or during a term of probation, the court may order the Department to evaluate a defendant to determine whether, by reason of drug or alcohol abuse, the defendant is in need of and may benefit from treatment if:

(i) It appears to the court that the defendant has an alcohol or drug abuse problem; or

(ii) The defendant alleges an alcohol or drug dependency.

(2) A court shall set and may change the conditions under which an examination is to be conducted under this section.

(3) The Department shall ensure that each evaluation under this section is conducted in accordance with regulations adopted by the Department.

Smith, April Shepherd, a Gaudenzia counselor, also told the agent that appellant had been "aggressive toward" her and "made like aggressive demeanor with her [sic] hands" at a community meeting.

Based on that information, Agent Smith wrote a report and statement of charges alleging that appellant had violated the terms of his probation and requesting a warrant. This document, which was considered by the court, states as follows:

> On December 28, 2016, during a scheduled visit to the Gaudenzia facility this agent was informed by the Division Director Kristy Blalock, that it is there [sic] recommendation that Mr. Reyes be discharge[d] from the program due to his continued use of K2 [a synthetic form of marijuana] and aggressive behavior toward staff.

Also set forth in Agent Smith's report was the following email to her dated later that day, December 28, from appellant's counselor at Gaudenzia, April Shepherd:

> Good afternoon Ms. Smith,
>
> First, I apologize [sic] for waiting to the end of the day to inform you about Mr. Reyes. Javier Reyes has been using K-2 in treatment. He has been identified by an anonymous source that he has been using on the grounds of Gaudenzia. Also, Mr. Reyes became very aggressive towards me in the community meeting, and made threatening gestures. My supervisor spoke with him about the matter, and I also spoke with Mr. Reyes, and put him on a 30 day contract which went into effect [sic] on 12/16/16. Mr. Reyes is resistant towards change.
>
> My clinical team is recommending Mr. Reyes return to the DOC.
>
> April Shepherd, ADT
> Counselor II

On December 30, 2016, the court issued a violation of probation warrant. Appellant was arrested at the Gaudenzia facility on January 4, 2017.

The Revocation of Probation Hearing

At a violation of probation hearing on July 5, 2017, the State presented Tiana Smith, appellant's probation agent who, was "assigned to Gaudenzia Crownsville," and Darlene Brashears, a program supervisor at Gaudenzia who was present at the community meeting when appellant was allegedly aggressive toward Ms. Shepherd. Neither Ms. Shepherd, who left Gaudenzia's employment shortly after that incident, nor Kristy Blaylock testified.

Agent Smith testified that her responsibility is to "deal with all the 8507 cases who are currently on probation" at that facility, including appellant, whose fifteen-year sentence was suspended on the condition that he successfully complete the Gaudenzia inpatient drug treatment program. In that capacity, Smith worked "onsite at the facility" and was able to "see their interactions" with staff.

Appellant, she explained, "was terminated from the program due to his aggressive behavior towards staff[.]" Smith spoke with April Shepherd, appellant's counselor, and Kristy Blaylock, "the division director of the program." According to Smith, she "received an email from" Blaylock, "saying due to [appellant's] aggressive nature that they wanted him terminated from the program." Smith then spoke to Shepherd, who said that appellant "made threatening gestures toward her and was very aggressive while in a community meeting."

On cross-examination, defense counsel elicited the following regarding that incident between appellant and Shepherd:

> [DEFENSE COUNSEL]: Right. Okay. So Ms. Shepherd, when she – did you talk to her personally or just get a note from her about it?

[AGENT SMITH]: I spoke to her personally.

[DEFENSE COUNSEL]: Okay. And she indicated to you that he had exhibited aggressive behavior during a meeting, correct?

[AGENT SMITH]: Uh-huh.

[DEFENSE COUNSEL]: A group meeting?

[AGENT SMITH]: Uh-huh.

[DEFENSE COUNSEL]: Okay. Did she explain the circumstances of that meeting?

[AGENT SMITH]: She didn't tell me the specifics of the meeting or I can't remember at this specific time, but I do remember her saying that she felt very intimidated, like he – kind of swelled up at her and she thought he was going to maybe possibly attack her.

When asked about progress notes made by another Gaudenzia counselor, Lynetta Mason, Smith testified that Mason indicated that although appellant was making progress, she also "reference[d] more than just one situation of his aggressive nature[.]" Smith acknowledged to Mason that after appellant's altercation with Shepherd, he expressed his "disappointment" with the program and "said that the staff members were disrespectful and abusive to the clients."

With respect to Smith's reference to alleged K2 use in her report, Smith acknowledged "that someone had been anonymously reported that they thought he was involved in smoking K2" but she was never told "who the anonymous reporter was[,] that "[t]here is no specific test for K2" which could identify all the "rapidly" changing strands of that drug, that Gaudenzia did not perform any kind of testing for K2 at the time appellant

was in its program, and that appellant was never "caught actually smoking K2." Smith further testified that she was not aware that appellant had ever had a positive urinalysis.

Darlene Brashears testified that she is a "certified addiction counselor" who served as the program supervisor at Gaudenzia Crownsville, "overseeing the whole facility, staff, as well as house managers and clients[,]" including "daily activity, movement within the facility." On direct, she recounted events leading to appellant's discharge from the program, as follows:

> [PROSECUTOR]: And you knew of Mr. Reyes when he was in treatment at Gaudenzia, correct?
>
> [MS. BRASHEARS]: Yes.
>
> [PROSECUTOR]: And Mr. Reyes was discharged unsuccessfully from the Gaudenzia program, correct?
>
> [MS. BRASHEARS]: Correct.
>
> [PROSECUTOR]: For one reason or more than one reason?
>
> [MS. BRASHEARS]: More than one reason.

Ms. Brashears then identified, as the three reasons for appellant's discharge, appellant's reported use of K2, aggressiveness toward staff, and use of a cell phone.

> [PROSECUTOR]: What was the first reason that he was discharged from the Gaudenzia program?
>
> [MS. BRASHEARS]: One that he was implicated on numerous occasions for smoking K2, which is a synthetic marijuana.
>
> [PROSECUTOR]: And what led you to believe that he had been smoking synthetic marijuana?

> [MS. BRASHEARS]: It was reported by one of the house managers who were making – who was making rounds one evening and observed Mr. Reyes hanging out of the window smoking a substance.
>
> [PROSECUTOR]: And was that reported directly to you?
>
> [MS. BRASHEARS]: It was reported to myself and Ms. Blaylock – through a phone call which led up to an incident report.
>
> [PROSECUTOR]: From the staff member?
>
> [MS. BRASHEARS]: From the staff.

On cross-examination, Ms. Brashears clarified that "[t]here were numerous incidents" of aggression, with "the one incident [reported] by staff" and "other communications by residents/clients."

With respect to the reported incidents of aggression, Ms. Brashears testified on direct that she witnessed the altercation reported by appellant's counselor, April Shepherd:

> [PROSECUTOR]: And you indicated that there was more than one reason why he was discharged unsuccessfully from the Gaudenzia program?
>
> [MS. BRASHEARS]: Yes. The main reason was for aggression towards staff.
>
> [PROSECUTOR]: And did you ever personally observe any of the aggressive behavior from Mr. Reyes?
>
> [MS. BRASHEARS]: Yes.
>
> [PROSECUTOR]: Okay. Can you describe any of that behavior?
>
> [MS. BRASHEARS]: On that particular day, it was the community meeting when we were downstairs in the cafeteria. The community meeting which is held every Friday and at the time of the community meeting they're given their social passes, they're given . . . their certificates to phase up which move throughout the treatment process. On this particular day following the community meeting, I observed Mr. Reyes approach Ms. April and have a dialogue. I'm not sure what was said because I was not in close proximity. I just observed the behavior. I overheard my staff, Ms. April say, "you need

to back off" which prompted me to turn and observe Mr. Reyes who in turn came towards me to try to discuss the situation.

[PROSECUTOR]: All right. And did Mr. Reyes discuss that situation with you?

[MS. BRASHEARS]: No, that is not our TC protocol. We have – there's a structure that we follow, so I directed him that his first point of contact would be his counselor and there was is [sic] communication process that he needed to submit to meet with her.

[PROSECUTOR]: Did he go back and attempt to speak with her on that occasion after the community meeting?

[MS. BRASHEARS]: He went towards her as she was exiting out the door – very aggressively. And she just said he needs to back off. She needs to back off and then turned so –

THE COURT: I'm sorry, ma'am. You've got to – maybe you could be a little more explicit. What – so you're saying, okay, this is after he then came up to you he has to go to address this with his counselor. And then what do you observe?

[MS. BRASHEARS]: So he walked back towards Ms. April . . . as she was exiting out of that room – the community room, the kitchen area to attempt to have this communication with her again.

THE COURT: Okay.

[MS. BRASHEARS]: However, the situation had already escalated and she came to me already and did not want him by her.

THE COURT: Yeah, but what did you see him do when he went over to her?

[MS. BRASHEARS]: His hands were wailing and they both – she was telling him to back off because she had – he had invaded her space and his hands was wailing –

THE COURT: How close was he, ma'am?

[MS. BRASHEARS]: Close, about this distance (indicating).

[PROSECUTOR]: If I . . . walk towards – if I may, walk towards Ms. Brashears and she can tell me to stop when I get as close as they were.

THE COURT: Okay.

[MS. BRASHEARS]: Come to about right here (indicating). About right this close, about this distance with his arms, within arm's length.

[PROSECUTOR]: Within arm's length, Your Honor.

THE COURT: What did you hear Ms. Shepherd say?

[MS. BRASHEARS]: Ms. Shepherd then stated loudly, "back off from me, Javier. Back off from me." . . .

[PROSECUTOR]: What happened as a result of that incident?

[MS. BRASHEARS]: I met with him following and I just told him to let things settle down before he reapproached her.

[PROSECUTOR]: Did you observe – on any other occasions, did you observe any other behavior by Mr. Reyes that was not what was expected from the program participants?

[MS. BRASHEARS]: Not directly to my recall at the moment.

[PROSECUTOR]: Were any other instances of inappropriate behavior reported to you regarding Mr. Reyes?

[MS. BRASHEARS]: Reported, yes.

[PROSECUTOR]: And –

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Okay. Well, maybe a little more specific regarding what exactly you're talking about.

[PROSECUTOR]: Other than this incident, if you can identify another incident that was reported to you regarding inappropriate behavior from Mr. Reyes?

[DEFENSE COUNSEL]: Objection, Your Honor. By whom?

THE COURT: Okay. Well, that's what I need to know. Who reported this to you, ma'am?

> [MS. BRASHEARS]: Another incident within her office during an individual session. And she also asked Mr. Reyes to leave her office.

Lastly, as the third basis for discharging appellant, Ms. Brashears cited reports that appellant violated the program rules against using a cell phone:

> [PROSECUTOR]: And were you aware of another incident involving the unauthorized use of a cell phone?
>
> [MS. BRASHEARS]: Yes, vaguely.
>
> [PROSECUTOR]: What do you recall regarding the unauthorized use of the cell phone?
>
> [MS. BRASHEARS]: He was observed – to my recollection he was observed by staff on a cell phone in his room.
>
> [PROSECUTOR]: And that is something that's allowed or not allowed?
>
> [MS. BRASHEARS]: That is not allowed. Their cell phones are not allowed in our facility.

On cross-examination, Ms. Brashears acknowledged that appellant's cell phone use was not cited in the violation report and that she had no personal knowledge of it.

In his defense, appellant called James LaPlant, "a friend of his family" who was a roommate at the Gaudenzia program, which LaPlant completed on December 31, 2016. According to Mr. LaPlant, the facility "was understaffed," so that there frequently were no counselors to lead group sessions. He characterized April Shepherd, who had been his counselor "[a]t one time," as having "talked down to us, very heavy and ignorant and disrespectful," saying that she "threaten[ed] to send people back to jail[.]" Although he never saw appellant smoking K2, using a cell phone, or being aggressive, he also did not

see appellant interacting with Ms. Shepherd, but did remember him being "upset about his passes."

Jamie Hoffman, another Gaudenzia roommate of appellant, was present at the community meeting in question. He described April Shepherd, who was also his counselor, as "rough[,]" "very arrogant[,]" "hard to get along with[,]" "unprofessional[,]" and not "there to help me or the other men[.]" He never saw appellant "partake in any illegal substances[.]"

According to Hoffman, at the community meeting, he received a pass for Christmas, but appellant did not. Hoffman was able to hear about "75 percent" of appellant's ensuing conversation with April Shepherd. Appellant "asked Shepherd about obtaining a pass for the Christmas holiday." He testified that

> [w]e were getting ready to exit and Javier wanted to speak with her . . . because he wanted to go home for Christmas. Wouldn't you? And he approached her an in a non-violent manner and wanted to talk to her. She turned and went on him.

Shepherd "got real angry, very vulgar, told him to get away from her" and "put him on blast."

Hoffman felt "she was wrong for what she did[,]" by "embarrass[ing] him and all he wanted to do was go home to his family." Although appellant "was so upset" and may have been using his hands while "talking to her[,]" Hoffman did not hear him say anything threatening or profane to Shepherd; "[h]e wasn't aggressive to her. He didn't touch her. He wasn't that arm length close to her[.]" In contrast, Shepherd "screamed at him, 'Get away from me." And 'why do you approach me now. This ain't the time.'" Hoffman

claimed that he did not hear appellant say or do anything to threaten Shepherd and "wasn't aggressive to her."

Hoffman also testified that he and appellant had reported a house manager for stealing Christmas presents that had been donated to the program participants and for repeatedly being "nodded out on the job . . . where he's supposed to be doing security and watching videos." In response, the manager "accused two of the men in [Hoffman's] room that they were getting high in the room by the window." On cross-examination, Hoffman admitted that he and others who reported the manager did thereafter successfully complete the program.

Appellant recounted the altercation on December 16th. Although his relationship with Ms. Shepherd "was pretty good up . . . until that particular incident[,]" when she did not call his name for a pass, he "raised [his] hand up" and asked, "why didn't I get my pass. She "said she was going to see [him] after the community meeting." The court then elicited the following account of the ensuing encounter:

> THE COURT: So explain – the Court really needs to know what occurred between the two of you. That's the most important thing there that we're talking about. Can you just explain what you said, what she said, and how it was said, et cetera, to the best of your ability.
>
> [APPELLANT]: Well, I remember I walked up to her. I said, excuse me, Ms. April, can I talk to you please – I mean, you know, this is very important to me because it was the first time I would have been going home for six hours in fourteen months.
>
> So, she said not right now, I'm busy. And I said, well, you know, as soon as you go upstairs, I know you're going to be busy upstairs, because every time she goes into her office, you never see her. So I was like I really need to see you so we can try to get the pass taken care of.

> And she was just very boisterous and she was like –
>
> [THE COURT]: What exactly did she say?
>
> [APPELLANT]: I mean, I can't remember word for word, but she was just like very – like, you know, first of all don't come up on me like that or, you know, don't come at me like that. And I'm like what are you talking about? I'm just trying to get my pass taken care of.
>
> And she said, well, like I said, I'm busy. So I said, well, I need to speak to your supervisor. Well, no, I said well I want to talk to your supervisor, which was Ms. Darlene [Brashears], but I had to talk to Ms. April before I could talk to Ms. Darlene. That was the rule.
>
> So, she said I don't give an F, she's right there. And so I walked over to Ms. Darlene and I said, Ms. Darlene I need to speak to you. You know, you hear what's going on and she said, "Well, I didn't hear, but I'll see you when I get upstairs."
>
> So, when I went upstairs, she basically went to Ms. April's – Ms. Shepherd's office first and then she came back to the day room and grabbed me and took me into her office and then she said -- I said, Ms. Darlene, why did you go to Ms. Shepherd's office before, you know, to talk to her before you talk to me? You – I'm the one with the problem. You know, I'm the one that – she didn't do her job. I'm the one that has the problem. I'm the one who didn't get a pass and I earned it.
>
> And, she said, well, she's staff and you're a client. And I said, she was wrong. I said she – you know, she didn't do her job. I submitted both my and Jamie Hoffman's pass at the same time. And she said, yeah, but she's saying now that she felt threatened. And I was like, well, you know, you were right there. How did I – how did I – how did she feel threatened? You were right there. You saw everything. She said, well, I really didn't see everything. You know, she was just like – basically the staff was going to be right no matter what and because I was the client I was just going to have to basically suck it up and basically accept it, which basically I accepted after the fact, but –

Appellant then explained that Ms. Shepherd "didn't talk to" him "until that following Monday[,]" after Kristy Blaylock and Lynetta Moore "set up a meeting" at which he apologized that it was not his intent to be aggressive. After he reminded her that he had

not been home for fourteen months and "really wanted to go home for Christmas [that] coming Saturday," Shepherd told him she would "let him go home for Christmas[.]" But that Wednesday, after a staff meeting, she informed him that "they didn't approve [his] pass for Christmas" and that she "was told to put [him] on a contract." He was never shown a contract and never told that Ms. Shepherd was "violating" him. On cross-examination, appellant admitted that "sometimes I move my hands when I talk," but denied that he acted aggressively or threateningly toward Shepherd.

Appellant denied smoking K2 while in the program. On the night the facility manager came into his room claiming to smell K2, appellant was sitting by the open window because he had breathing problems and the vents in the facility "spew this really hot air that's got dust in it."

At the conclusion of the hearing, the court credited the State's evidence, ruling as follows:

> I do find by a preponderance of the evidence that [appellant] did violate a condition and what was noted on here is condition [n]umber 14, I would call a special condition. The tenant [sic] successfully completed drug treatment. I did find that Ms. Brashear[s] is credible in her testimony and I don't think she was describing that someone was merely being upset. Someone who was very close range to his counselor, within striking distance, articulating, speaking in a very loud voice. I think his actions – I know Mr. Hoffman, that wasn't his intent, but clearly what he described and the reasons that were leading to this particular action, I think corroborated what Ms. Brashear[s] had found.
>
> This is not somebody who's just going to be because he is merely difficult. [Sic] But they found that in fact and I find that they were reasonable in finding that he exhibited aggressive behavior, intimidating behavior towards staff and appropriately discharged him.

As a result of that determination, and the underlying assault in which appellant "stabbed someone several times," the court terminated appellant's probation "unsatisfactorily" and sentenced him to nine years in the Department of Corrections. This Court granted leave to appeal that sentence.

DISCUSSION

Standards Governing Revocation of Probation

At issue in this appeal is the revocation of a probation granted pursuant to HG § 8-507 (2015 Repl. Vol.), which authorizes a court to order probation in lieu of incarceration for eligible drug offenses. In pertinent part, the statute provides:

> (a) Subject to the limitations in this section, a court that finds in a criminal case or during a term of probation that a defendant has an alcohol or drug dependency may commit the defendant as a condition of release, after conviction, or at any other time the defendant voluntarily agrees to participate in treatment, to the Department for treatment that the Department recommends . . . .
>
> **Duration; extension; termination**
>
> (j)(1) A commitment under this section shall be for at least 72 hours and not more than 1 year. . . .
>
> (3) Except during the first 72 hours after admission of a defendant to a treatment program, the Department may terminate the treatment if the Department determines that:
>
> (i) Continued treatment is not in the best interest of the defendant; or
>
> (ii) The defendant is no longer amenable to treatment.

HG § 8-507.

In deciding whether to revoke probation, a sentencing court must satisfy the substantive and procedural standards established by Md. Code Ann., Criminal Procedure Article ("CP") § 6-231 (2008 Repl. Vol.).

> Before the revocation of any probation ordered under this title, and in addition to any other factors the court considers in connection with the determination of an appropriate sentence, the court shall:
>
> (1) consider any evaluation or recommendation of any health professional licensed under the Health Occupations Article;
>
> (2) consider relevant information about the defendant's drug or alcohol abuse; and
>
> (3) make a finding on the record as to the defendant's amenability to treatment and the interest of justice.

CP § 6-231.

Maryland Rule 4-347(e) applies in a hearing to revoke probation, providing in pertinent part:

> (1) *Generally*. The court shall hold a hearing to determine whether a violation has occurred and, if so, whether the probation should be revoked. The hearing shall be scheduled so as to afford the defendant a reasonable opportunity to prepare a defense to the charges. Whenever practicable, the hearing shall be held before the sentencing judge . . . .
>
> (2) *Conduct of Hearing*. The court may conduct the revocation hearing in an informal manner and, in the interest of justice, may decline to require strict application of the rules in Title 5, except those relating to the competency of witnesses. **The defendant shall be given the opportunity to admit or deny the alleged violations, to testify, to present witnesses, and to cross-examine the witnesses testifying against the defendant.** If the defendant is found to be in violation of any condition of probation, the court shall (A) specify the condition violated and (B) afford the defendant the opportunity, personally and through counsel, to make a statement and to present information in mitigation of punishment.

Md. Rule 4-347(e).

Recently, in *State v. Brookman*, 460 Md. 291 (2018), the Court of Appeals, while establishing due process standards for drug court proceedings, reviewed and summarized the due process standards that govern proceedings to revoke probation, explaining:

> Because a revocation of probation may result in a loss of liberty, due process requires that an individual on probation have an opportunity for a hearing having certain components before the probation is revoked. *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *cf. Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (parole revocation hearing must satisfy certain standards of due process). In particular, the minimum requirements for a hearing concerning revocation of probation must include at least the following elements: (1) written notice of the alleged violation; (2) disclosure of the evidence on which the alleged violation is based; (3) an opportunity to be heard and to present witnesses and documentary evidence; (4) **an opportunity to confront and cross-examine adverse witnesses**. *Gagnon*, 411 U.S. at 786, 93 S.Ct. 1756; *see also* Maryland Rule 4-347(e) (incorporating due process requirements in rule governing hearings on revocation of probation).
>
> These protections are necessary because, as the Supreme Court explained: "Both the probationer . . . and the State have interests in the accurate finding of fact and the informed use of discretion – the probationer ... to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community." *Gagnon*, 411 U.S. at 785, 93 S.Ct. 1756. . . . [D]ue process does not require that such a hearing be conducted under the formal rules of evidence.

Id. at 315-16 (emphasis added).

"[A]ppellate review of a probation revocation order may be sought only by filing an application for leave to appeal." *Brookman*, 460 Md. at 311-12 (2018). *See* Md. Code, § 12–302(g) (2013 Repl. Vol.) of the Courts & Judicial Proceedings Article ("CJP") ("Review of an order of a circuit court revoking probation shall be sought by application for leave to appeal.").

Issues I and II. Confrontation Clause and Hearsay Challenges

In his first assignment of error, appellant contends that "the trial court violated [his] Fourteenth Amendment Due Process right to confront witnesses in his probation violation hearing[,]" because neither April Shepherd, nor Kristy Blaylock was present to testify regarding the interactions with appellant that led them to characterize his behavior toward staff as "aggressive" and to terminate him from the drug treatment program upon which his probation was conditioned. In a corollary assignment of error, appellant argues that the court erroneously admitted hearsay testimony by Smith regarding out-of-court statements by Shepherd and Blaylock, as well as Smith's email recapitulating such statements, without determining that they were "otherwise reasonably reliable[.]"

The State responds that appellant "has not preserved any appellate complaint with respect to the admission of this evidence or his off-shoot theory of a due process violation resulting therefrom." To the extent this Court can address the merits of appellant's challenges based on the existing record, the State maintains "that the trial court did not abuse its discretion in considering the challenged evidence because the out-of-court statements at issue, if hearsay, were 'reasonably reliable.'"

We agree that appellant did not preserve either his due process or hearsay challenges stemming from out-of-court statements by Gaudenzia employees April Shepherd and Kristy Blaylock. The record shows that defense counsel, on multiple occasions during the testimony of the State's first witness, probation agent Smith, failed to object when the

prosecutor elicited evidence of out-of-court statements made by Shepherd and Blaylock. We excerpt the relevant portions of that transcript below.

After the court advised the prosecutor that it "just need[ed] to know what exactly did Agent Smith personally witness and what's based on . . . other sources[,]" the following occurred:

> [PROSECUTOR]: Did you receive any documentation from Gaudenzia?
>
> [AGENT SMITH]: I did. I actually – when I was on site I spoke to Ms. April while she was employed there and she's the one who told me about Ms. –
>
> **[DEFENSE COUNSEL]: Objection, Your Honor.**
>
> [AGENT SMITH]: -- Mr. Reyes.
>
> THE COURT: All right. So you spoke to who? I'm sorry, ma'am.
>
> [AGENT SMITH]: Ms. April who was his counselor at the time.
>
> THE COURT: Okay. Is that a last name or first name?
>
> [AGENT SMITH]: Her first name.
>
> THE COURT: Okay. Do you know her last name?
>
> [AGENT SMITH]: Shepherd, I believe it is.
>
> THE COURT: Okay. You spoke to her?
>
> [AGENT SMITH]: Yeah, I spoke to her while onsite at the facility. She told me about –
>
> **THE COURT: All right. So you['re] objecting it's hearsay? I'm going to overrule the objection.** All right. So what did she say?
>
> [AGENT SMITH]: She – I just remember her saying that he was aggressive toward her. He made like aggressive demeanor with her [sic] hands. I also received an email from [Kristy] Blaylock and Ms. –

THE COURT: And who is [Kristy] Blaylock?

[AGENT SMITH]: -- She is the division director of the program –

THE COURT: All right.

[AGENT SMITH]: -- stating that –

THE COURT: You received an email.

[AGENT SMITH]: Uh-huh.

THE COURT: And what did the email say?

[AGENT SMITH]: Which is also attached to my report.

THE COURT: Okay.

[AGENT SMITH]: Which is what she was saying due to his aggressive nature that they wanted him terminated from the program. And then I requested a warrant based on that.

THE COURT: Did they give any elaboration as to what the aggressive behavior was?

[AGENT SMITH]: She just said like his – I can't remember specifically off hand, but she said he made threatening gestures toward her and was very aggressive while in a community meeting.

[DEFENSE COUNSEL]: I'm sorry, Your Honor. If we could clarify. Is she talking about aggressive gestures towards Ms. Shepherd or Ms. Blaylock?

[AGENT SMITH]: Towards Ms. Shepherd.

THE COURT: All right. So Ms. Shepherd and then you said something about community meetings? What happened? . . .

[AGENT SMITH]: I'm not exactly sure what was going on in the community meeting because I wasn't there. She just informed me that he was aggressive towards her and made threatening gestures.

THE COURT: Okay. All right. Next question.

[PROSECUTOR]: Did you ever receive . . . anything in writing or electronically from anyone at Gaudenzia indicating that Mr. Reyes had been – was being discharged from the Gaudenzia program?

[AGENT SMITH]: Yes, the email I received.

[PROSECUTOR]: And –

THE COURT: From Ms. –

[AGENT SMITH]: Ms. Blaylock.

THE COURT: -- Blaylock, is it?

[AGENT SMITH]: Yes. . . .

[PROSECUTOR]: And did you memorialize that email in the report that you submitted to the Court?

[AGENT SMITH]: Yes, I did.

[PROSECUTOR]: I'd ask the Court to take judicial notice of that documentation the Court's already received, Your Honor.

THE COURT: Okay. All right. Next question.

[PROSECUTOR]: And if I may approach the agent, Your Honor?

THE COURT: Okay.

[PROSECUTOR]: Agent, I am showing you first what's been premarked as State's Exhibit No. 1. Do you recognize this document?

[AGENT SMITH]: Yes. They're the monthly progress notes from Ms. Shepherd. . . .

[PROSECUTOR]: And do you have a copy of this report in your file?

[AGENT SMITH]: Yes, I do. . . .

[PROSECUTOR]: Your Honor, I would offer this as State's Exhibit 1.

THE COURT: These are progress notes the end of October?

[PROSECUTOR]: Yes. The monthly . . . progress report, Your Honor.

THE COURT: All right. What's the Defense position?

[DEFENSE COUNSEL]: No objection.

The prosecutor thereafter authenticated and moved into evidence, without objection, the remaining monthly progress notes and individual progress notes.

As the excerpted transcript demonstrates, and our review of the full hearing record confirms, at no point did defense counsel complain that April Shepherd and Kristy Blaylock were not present for the hearing.[2] Nor did counsel invoke due process or otherwise assert that appellant had a right to confront those two individuals. Instead, defense counsel merely lodged a general objection when Agent Smith began to testify what April Shepherd told her about her altercation with appellant. *Cf. Blanks v. State*, 228 Md. App. 335, 359 n.13 (2016) (lawyer preserved objection "based on confrontation rights"). The court expressly interpreted this as a hearsay objection, then overruled it. Defense counsel did not request a continuing objection to that line of questioning. *See* Md. Rule 4-323(b) ("At the request of a party . . . , the court may grant a continuing objection to a line of questions by an opposing party.") Nor did counsel object when Agent Smith later testified about out-of-court statements by both Shepherd and Blaylock or when Smith's report memorializing such conversations was admitted into evidence. Moreover, when the State moved to admit authenticated treatment notes, defense counsel expressly stated she had no objection.

[2] According to Darlene Brashears, April Shepherd was no longer employed at Gaudenzia because she took a job "closer to her house" that "had better salary. Having given two weeks' notice, Shepherd's last day was the same day that appellant was arrested.

Having failed to raise these challenges at the revocation hearing, appellant is not entitled to appellate relief on such grounds. *See* Md. Rule 8-131(a) (except for certain jurisdictional reasons, appellate court will ordinarily not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court.). *Cf. Brown v. State*, 409 Md. 1, 9 (2009) (double jeopardy claim was waived because defendant did not assert it before appeal). Similarly, appellant failed to preserve his hearsay complaint for appellate review. Although defense counsel's general objection to testimony about what Shepherd told Agent Smith challenged that evidence on hearsay grounds, the objection was limited to that evidence and did not extend to out-of-court statements by Blaylock or other statements by Shepherd. Moreover, that limited objection was subsequently abandoned, when defense counsel remained silent during Agent Smith's extensive testimony about what Shepherd and Blaylock told her, then failed to object to the admission of Smith's email and questioned Smith about her conversation with Shepherd. *See generally Brown v. State*, 373 Md. 234, 238 (2003) ("'[A] party introducing evidence cannot complain on appeal that the evidence was erroneously admitted.'") (citation omitted); *Williams v. State*, 131 Md. App. 1, 26 (2000) ("When evidence is received without objection, a defendant may not complain about the same evidence coming in on another occasion"). In these circumstances, the court did not err in failing, *sua sponte*, to announce on-the-record that such evidence was sufficiently reliable to be admitted under the due process standards governing proceedings to revoke probation. *Cf. Bailey v. State*, 327 Md. 689, 699 (1992) ("hearsay evidence not coming within any firmly rooted hearsay

exception may still be admitted at a probation revocation hearing if the trial judge decides that it is 'reasonably reliable' and determines that there is good cause for its admission.").

III. and IV. Challenges to Basis for Revocation

Appellant next challenges his sentence on the ground that

> the probation court improperly deferred to the personnel at Gaudenzia in derogation of its judicial responsibilities; and/or the probation court erred in concluding that the discharge of appellant was justified because the discharge was arbitrary and capricious.

"Piggybacking" on that claim, appellant also contends, in his final assignment of error, that "the evidence was legally insufficient to sustain the violation of probation finding." In his view:

> [t]he bald assertion contained [in] Shepherd's statements that [a]ppellant "became very aggressive towards me in the community meeting and made threatening gestures" is too general and vague to amount to sufficient evidence to support his discharge from the program, and, in turn, to support a violation of probation therefor.

The State counters that the court did not improperly defer to the probation agent or treatment counselor and, instead, "was free not to be persuaded" by appellant's claim that he was discharged from Gaudenzia for reasons other than his aggressive behavior and use of prohibited substances. In turn, the State argues, there was sufficient evidence to support the court's ruling that appellant was discharged for aggression and therefore failed to complete the program, which violated the terms of his probation.

We have set forth a detailed review of the hearing transcript and documentary evidence, both in our factual summary and in our discussion of the first two issues raised by appellant. Based on that record, we are satisfied that the court did not merely defer to

the evidence from Gaudenzia, in determining that appellant's aggression toward Shepherd constituted sufficient grounds to discharge him. To the contrary, the court actively questioned witnesses and resolved conflicts in the evidence, explaining why it found the evidence of aggression persuasive.

Specifically, the court pointed to the testimony of Darlene Brashears, an eyewitness to appellant's interaction with April Shepherd at the community meeting, finding that "Ms. Brashears was credible" and that she was not "describing someone who was merely upset." The court concluded from her testimony that appellant "was very close range to his counselor, within striking distance, speaking in a very loud voice." In addition, the court cited testimony by appellant's witness, Jamie Hoffman, finding that "what he described and the reasons that were leading to this particular action . . . corroborated what Ms. Brashears had found." Conversely, the court did not credit all the evidence presented by Gaudenzia, because it did not premise its decision on any of the reports from Gaudenzia that appellant used K2 and cell phones. Therefore, we reject appellant's contention that the "court improperly deferred to the personnel at Gaudenzia in derogation of the judicial responsibilities."

We turn now to the remaining two issues: 1) whether the evidence was sufficient to show that appellant violated the conditions of probation; and 2) if so, whether the resolution warranted revocation.

In regard to the sufficiency issue, the State is required to prove a probation violation by a preponderance of the evidence. This was made clear in *Wink v. State*, 317 Md. 330, 338 (1989):

> [T]he State must demonstrate the basic facts of the defendant's conduct and the ultimate fact that that conduct is violative of one or more conditions of probation. [T]here is an issue of the legal sufficiency of the State's presentation to support a finding of violation, the law tests for sufficiency by determining whether a reasonable person, presented with the same data, could find the existence of the facts sought to be established to the legally requisite degree of persuasiveness. Here, as in civil cases generally, that degree is only that the fact finder conclude that the existence of the fact sought to be proved is more likely than unlikely. Conversely, a judge who is satisfied that the existence of a fact is more likely than not, when reasonable persons would conclude that the fact's existence is less likely than its nonexistence, has not been reasonably satisfied.

(Footnote omitted.)

Based on this record, we are satisfied that the court exercised its independent judgment as a fact-finder and that the evidence supports its determination, by a preponderance of the evidence, that appellant violated a condition of his probation by behaving so aggressively toward a Gaudenzia staff member that he was discharged from the program.

Appellate courts do not weigh the evidence, resolve conflicts in it, or judge the credibility of witnesses, "[b]ecause the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony[.]" *Smith v. State*, 415 Md. 174, 185 (2010).

The resolution of the issue of whether the violation proven in this case warrants revocation is governed by an abuse of discretion standard. *Id.* at 338-39. That standard of

review was discussed in *Pasteur v. Skevofilax*, 396 Md. 405, 418-89 (2007). The *Pasteur* Court said:

> The analytical paradigm by which we assess whether a trial court's actions constitute an abuse of discretion has been stated frequently. In *Wilson v. John Crane, Inc.*, 385 Md. 185, 867 A.2d 1077 (2005), for example, we iterated
>
> > [t]here is an abuse of discretion "where no reasonable person would take the view adopted by the [trial] court[ ]" . . . or when the court acts "without reference to any guiding principles." An abuse of discretion may also be found where the ruling is "violative of fact and logic."
> >
> > Questions within the discretion of the trial court are "much better decided by the trial judges than by appellate courts, and the decisions of such judges should be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred." In sum, to be reversed "[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that courts deems minimally acceptable."
>
> 385 Md. at 198-99, 867 A.2d at 1084 (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312-313, 701 A.2d 110, 118-89 (1997)). An abuse of discretion, therefore, "should only be found in the extraordinary, exceptional, or most egregious case." *Wilson*, 385 Md. at 199, 867 A.2d at 1084.

The circuit court's determination that appellant's probation should be revoked is one that we would not necessarily have made if the matter was for us to decide. But there was sufficient evidence for the court to conclude, as it did, that appellant, while on probation, acted aggressively toward a Gaudenzia staff member and under such circumstances the court's determination that revocation was a proper sanction was not an abuse of discretion, i.e., it was not well removed from any center mark imagined by [us]

and beyond the fringe of what [we] deem[ ] minimally acceptable." *Id*. (quoting *Wilson v. John Crane*, 385 Md. 185, 199 (2005).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.