NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

KEYVON EDDIE EDWARDS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D19-2734

Opinion filed June 5, 2020.

Appeal from the Circuit Court for Hillsborough County; Nick Nazaretian, Judge.

Howard L. Dimmig, II, Public Defender, and Kevin Briggs, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Peter Koclanes, Assistant Attorney General, Tampa, for Appellee.

ROTHSTEIN-YOUAKIM, Judge.

Keyvon Edwards appeals from the revocation of his probation based on the trial court's conclusion that he had willfully and substantially violated a special condition of his probation. Because the evidence was insufficient to establish any violation, let alone a willful and substantial one, we reverse.

In December 2018, after pleading nolo contendere to multiple offenses, Edwards was sentenced to one year and one day of imprisonment followed by three years of probation. Special condition nine of Edwards's probation required him to be at his residence between 10:00 p.m. and 6:00 a.m. every day.

In April 2019, Edwards's probation officer, Christine Ashcraft, performed two curfew checks on Edwards. The first took place at 5:00 a.m. on April 7. Before approaching Edwards's house, Officer Ashcraft called the phone number in Edwards's file, which corresponded to his sister's cell phone. No one answered, and Officer Ashcraft left a voicemail. She then approached the house and noticed that the door was slightly ajar. She knocked and called into the house, but no one responded. She could hear that the television was on inside but could see no one. After a few minutes, Officer Ashcraft again called the number in the file. This time, Edwards's sister answered. Officer Ashcraft told Edwards's sister that she was at the house to conduct a curfew check on Edwards, and the sister responded that she (the sister) was not at the house. After speaking with Edwards's sister, Officer Ashcraft waited another few minutes to see if anyone would come to the door. No one did. In total, she spent approximately ten minutes at the house on that date.

Five days later, at approximately 5:30 a.m., Officer Ashcraft performed a second curfew check at Edwards's house. Again, the door to the house was slightly ajar, but this time, Officer Ashcraft could see a male figure, whom she did not recognize, sleeping on the couch in the front room. As before, she knocked on the door and called into the house. No one answered, and the person on the couch did not stir. This time, she spent a total of approximately five to seven minutes at the house.

Based on these two occasions, Edwards was alleged to have violated special condition nine.

At the violation hearing, Edwards testified that he had been home sleeping when Officer Ashcraft had conducted the two curfew checks. Edwards's mother also testified that Edwards had been home sleeping, that he was "a hard sleeper," and that she had not heard anyone knocking or calling into the house on either morning. Edwards's sister testified that on April 7, she had been awake and getting ready for work around 5:00 a.m. but had not heard anyone knocking or calling into the house. She further testified that on April 12, she had arrived home from her boyfriend's house at around 5:00 or 6:00 a.m. and had seen Edwards and his brother sleeping on the couch.

To support a revocation of probation, "the State [must] prove[] by the greater weight of the evidence that the probationer willfully and substantially violated probation." Savage v. State, 120 So. 3d 619, 621 (Fla. 2d DCA 2013) (citing Del Valle v. State, 80 So. 3d 999, 1012 (Fla. 2011)). "[O]n appeal, competent substantial evidence must support a finding of a willful and substantial violation; only then will we assess whether the trial court abused its discretion in revoking probation." Id. at 624.

We find this case strikingly similar to Brown v. State, 280 So. 3d 1117 (Fla. 2d DCA 2019). Brown's community control was revoked based on his alleged failure to comply with his curfew. Id. at 1118. Brown's community control officer testified that she had arrived at his apartment at 6:50 a.m., when Brown was supposed to be home, and that although she had tried calling his cell phone and knocking on the door "several times very hard," she had gotten no answer. Id. She had then left her

business card in the door, with a note instructing Brown to call her immediately. Id. Brown testified that he had been asleep at home when the officer had come by, that he had not heard her calling or knocking, and that he had not seen the card. Id.

The issue in Brown is the same issue in this case: "whether the State's evidence that no one answered the door in response to a knock is legally sufficient to prove that [the defendant] was not home." Id. at 1119. And in Brown, we held that the answer to that question was no. See id. ("[From the State's evidence] the court could certainly infer that Brown was not home. But it could just have reasonably inferred that Brown was asleep, in the shower, or otherwise occupied."); see also Brown v. State, 813 So. 2d 202, 203-04 (Fla. 2d DCA 2002) (reversing revocation of probation that was based solely on the probation officer's testimony that the probationer had not answered the door to the officer's knocking at the "unreasonable hour" of 2:00 a.m.).

The State, however, argues that Brown, 280 So. 3d at 1117, should not control here because this case is more like Dietz v. State, 534 So. 2d 808 (Fla. 2d DCA 1988), and Hurst v. State, 941 So. 2d 1252 (Fla. 1st DCA 2006). In Dietz, the community control officer testified that he had gone to Dietz's house at 4:20 p.m., had found both the front and side doors locked, and had received no response despite "knock[ing] on the front door . . . the windows on all sides of the house, and . . . on the side door." 534 So. 2d at 809. In addition, two other officers who had supervised Dietz testified that he did not have a hearing problem and that he had answered the door any time that they had knocked or rung the doorbell. Id. We affirmed the revocation of Dietz's community control, concluding that that evidence was legally sufficient to establish that Dietz had not been at home when he was supposed to be. Id. at 809-10.

We disagree that Dietz is more on point. Unlike Dietz's community control officer, who knocked on doors and windows on all sides of the house, Officer Ashcraft knocked and called into the house only from the front door. More significantly, the curfew check in Dietz was done at 4:20 p.m., when one would expect the probationer to be awake and aware. Here, Officer Ashcraft conducted both of her curfew checks early in the morning, and as we observed in Brown:

> [V]iolation cases involving the alleged failure to remain confined to an approved residence invariably follow a pattern of the supervising officer appearing at a residence early in the morning or late at night—when the average person is typically sleeping. We understand the rationale is to catch those under supervision away from their residences at a time when they should be home. But the approach of simply knocking on the door and then declaring a violation when no one answers provides strong potential defenses to the person being supervised. If the supervising officer truly believes that a person under supervision is not home, it would behoove that officer to acquire evidence that corroborates the alleged absence from the residence.

280 So. 3d at 1120.

In Hurst, 941 So. 2d at 1253, the probation officer conducted a curfew check at Hurst's trailer at 11:48 p.m. and knocked so hard and for so long that she woke Hurst's neighbors, but Hurst never responded. Similarly, the State argues here: "The instant case contains multiple knocks, multiple yells into an open door, and phone calls followed by waiting for several more minutes. This was a sufficiently aggressive attempt to determine [Edwards's] presence." Yet Officer Ashcraft's own testimony established that she never successfully roused *anyone* by knocking and calling into the house from the front door, including the person who was asleep on the couch just a few feet away from her on her second visit.

Because Brown, unlike Dietz and Hurst, is not meaningfully distinguishable here, we conclude that the evidence was legally insufficient to show that Edwards willfully and substantially violated special condition nine. Accordingly, we reverse the order revoking Edwards's probation.

Reversed.

SILBERMAN and VILLANTI, JJ., Concur.