Farm); see also *Suttles v. Vickery*, 179 Ga. 751, 177 S.E. 714 (1934). Thus, the trial court correctly concluded that the Bank's reliance on the promise of the insurer's representative, and the resulting forebearance of legal action to enforce its right to the proceeds, constituted sufficient consideration under the facts of this case. See OCGA § 13-3-42; *Pepsi Cola Bottling Co. v. First Nat. Bank*, 248 Ga. 114(2), 281 S.E.2d 579 (1981).

2. We have examined Georgia Farm's remaining enumerations and find them to be without merit. Specifically, we find no merit to its argument that the indemnity agreements between it and the Worths and between the Worths and Alma Bank, created a "circular" indemnity by virtue of which Alma Bank should be permanently enjoined from pursuing its claim against Georgia Farm. Likewise, we find no merit to the argument that the indebtedness has been satisfied and hence the trial court erred in assessing damages in the amount of $27,532.59 for Alma Bank and against Georgia Farm.

Judgment affirmed.

BANKE, P.J., and SOGNIER, J., concur.

194 Ga.App. 892

BARNETT

v.

The STATE.

No. A89A2074.

Court of Appeals of Georgia.

March 15, 1990.

The Superior Court, Clarke County, Barrow, J., modified defendant's probation in probation revocation proceedings. Defendant appealed. The Court of Appeals, McMurray, P.J., held that: (1) hearsay evidence was incapable of supporting trial court's findings regardless of whether objection was lodged, and (2) although hearsay evidence was improperly used to support majority of findings, reversal of modification of probation was not required, where certain allegations were supported by probative evidence.

Affirmed.

Beasley, J., filed dissenting opinion.

1. Criminal Law ⚷982.9(5)

Hearsay evidence is inadmissible in probation revocation proceeding.

2. Criminal Law ⚷982.9(5)

Hearsay evidence is incapable of supporting trial court's findings in probation revocation matter regardless of whether objection to its admissibility is lodged.

3. Criminal Law ⚷1177

Trial court's error in relying upon hearsay evidence to support majority of its findings in probation revocation proceeding did not require reversal of order modifying defendant's probation where some probation violation allegations were supported by probative evidence.

Kathleen J. Anderson, for appellant.

Harry N. Gordon, Dist. Atty., for appellee.

McMURRAY, Presiding Judge.

The State brought this probation revocation proceeding against defendant alleging he violated the terms and conditions of his probation in a number of particulars. Specifically, it was alleged that defendant violated the rules of the Athens Diversion Center ("ADC") as follows: "Violation ADC Rule # 6 Failure to be at assigned destination 4-7-89 and 4-10-89. Violation ADC Rule # 3 Fired from job 4-11-89. Violation ADC Rule # 4 Failure to turn in pay to center 4-14-89. Violation ADC Rule # 1 Failure to obey order of staff member 4-18-89. Violation ADC Rule # 3 Fired from job 4-28-89. Violation of ADC policy to submit to urine test when ordered

on 5-16-89. Disorderly conduct 5-17-89." Following a hearing, the trial court determined that defendant violated "the terms of probation contained in the sentence imposed upon him ... as alleged in the petition for revocation of probation except the alleged discharge of the Defendant on April 28, 1989...." Based on the alleged violations, the trial court modified defendant's probation in certain particulars. We granted defendant's application for a discretionary appeal. *Held:*

[1] With regard to a majority of the allegations set forth in the petition, the only evidence introduced by the State was hearsay evidence. Although jurisdictions differ, see Annot., Admissibility of Hearsay Evidence in Probation Revocation Hearings, 11 ALR4th 999 (1982), in this jurisdiction hearsay evidence is inadmissible in a probation revocation proceeding. See *Holbrook v. State,* 162 Ga.App. 400, 402(2), 291 S.E.2d 729 (1982). See generally *Yarber v. State,* 162 Ga.App. 475, 291 S.E.2d 780 (1982); *Bradshaw v. State,* 163 Ga.App. 819, 821(3), 296 S.E.2d 119 (1982).

[2] Of course, hearsay evidence is without probative value. *Collins v. State,* 146 Ga.App. 857(1), 860, 247 S.E.2d 602 (1978). Thus, such evidence is incapable of supporting a trial court's findings whether or not objection was lodged.

[3] In relying upon hearsay evidence to support the majority of its findings in the case sub judice, the trial court erred. See *Mills v. Bing,* 181 Ga.App. 475, 477(2), 352 S.E.2d 798 (1987). However, inasmuch as some of the allegations in the petition were supported by probative evidence (e.g., the failure to submit to a urine test on May 16, 1989, and the disorderly conduct on May 17, 1989), it cannot be said the trial court erred in modifying defendant's probation. See *Allen v. State,* 172 Ga.App. 323, 323 S.E.2d 242 (1984).

Judgment affirmed.

CARLEY, C.J., and DEEN and BANKE, P.JJ., and BIRDSONG, SOGNIER, POPE and COOPER, JJ., concur.

BEASLEY, J., dissents.

BEASLEY, Judge, dissenting.

I dissent because, based on the ruling that the court took into account inadmissible evidence in determining to revoke probation and in fashioning a modified sentence, the case should be remanded for the trial court's reconsideration of the modified sentence. Since this court cannot substitute its judgment for that of a trial court in determining what is an appropriate sentence when a defendant has violated probation, it cannot assume that the court would have set the same sentence had it not considered the alleged infractions for which there was no competent evidence.

Appellant had originally negotiated pleas of guilty to entering an auto and theft by taking of an auto. He had been sentenced to serve three years, to be followed by five years of probation with certain conditions. After imprisonment, probation was started but was revoked and appellant was sent to the local diversion center. Alleged violations in that environment brought another revocation hearing, and we have now ruled that "a majority of the allegations" were inadequately proven. Thus the modification of sentence must be based on the failure to submit to a urine test and an instance of disorderly conduct the next day; allegations concerning employment and a staff member's order remain unproven and are not to be taken into account. Whether the appropriate disposition for the properly established violations is to be the same, i.e., 120 days at the detention center and then residence at a different diversion center, is problematic. The decision is up to the sentencing court, to be reached after a consideration of the proved violations which were proved, the circumstances presented, and the available resources.

By affirming without an opportunity for the trial court to exercise its own judgment to tailor the sentence to fit the proved allegations of misbehavior, this court usurps the trial court's function. OCGA §§ 42-8-34.1(b); 42-8-38(c). This is not to say that the trial court could not impose the same terms upon reconsideration.

Allen v. State, 172 Ga.App. 323, 323 S.E.2d 242 (1984), is distinguishable, at least in that the trial court revoked Allen's probation altogether. In this case the court continued defendant on probation and transferred him to a certain detention center for 120 days, with the balance of the sentence remaining in accordance with the original sentence as previously modified, except that his next residence following the detention center was to be a different and particular diversion center.

Also in *Allen*, the burden of proof of violation was only "slight evidence," whereas now it is "preponderance of the evidence." OCGA § 42-8-34.1(a).

194 Ga.App. 895

BUTLER

v.

The STATE.

No. A89A2086.

Court of Appeals of Georgia.

March 15, 1990.

Defendant was convicted in the DeKalb Superior Court, Hunstein, J., of several counts of assault, and he appealed. The Court of Appeals, Cooper, J., held that evidence was sufficient to support separate convictions.

Affirmed.

1. Criminal Law ⚷29(9)

Defendant could properly be charged with two counts of assault with stick where defendant's first attack on victim was completed crime before second assault, which occurred after intervening events, began.

2. Rape ⚷16(1)

Crime of aggravated assault with intent to rape is complete when there is "substantial step" toward battery of victim, coupled with intent to rape. O.C.G.A. § 16-5-21.

3. Rape ⚷53(2)

Conviction for assault with intent to commit rape was sufficiently supported by evidence of sexual nature of defendant's assault on victim. O.C.G.A. § 16-5-21.

4. Criminal Law ⚷30

Charge of assault with intent to commit rape did not merge with separate counts charging specific instances of assault; defendant committed sufficiently separate acts upon victim to justify all counts separately charged.

5. Criminal Law ⚷29(9)

Defendant charged with assaulting victim could also be charged with false imprisonment; each offense was established by proof of separate and distinct facts.

John D. McCord III, Buford, for appellant.

Robert E. Wilson, Dist. Atty., R. Stephen Roberts, Desiree L. Sutton, Asst. Dist. Attys., for appellee.

COOPER, Judge.

Appellant was indicted on seven counts, five of which are involved in this appeal. Count 3 alleged assault with a knife; Count 4 alleged assault with a stick by forcing it into the victim's anus; Count 5 was for assault with a stick by forcing it into the victim's vagina; Count 6 was a charge of assault with intent to rape; and Count 7 alleged false imprisonment. Appellant was tried by a jury and convicted on all counts. Appeal is taken from the convictions and sentences on Counts 4, 5, 6 and 7. Because the issue of the sufficiency of the evidence has been raised, it is necessary to recount the acts for which appellant was tried.

At 10:15 a.m. on August 30, 1988, the victim, a 29-year-old married mother with two children who worked as a sales representative for a trucking company, went to the Atlanta-Fulton County Stadium to buy baseball tickets for her customers. As she