Opinion filed November 5, 2020

In The

Eleventh Court of Appeals

No. 11-18-00321-CR

AMBER PATINO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 244th District Court
Ector County, Texas
Trial Court Cause No. C-17-0561-CR

M E M O R A N D U M O P I N I O N

On August 11, 2017, Appellant, Amber Patino, pleaded guilty to the offense of forgery. *See* TEX. PENAL CODE ANN. § 32.21 (West Supp. 2020). The trial court deferred a finding of guilt and placed Appellant on community supervision for a term of four years. The State later filed a motion to revoke community supervision and adjudicate Appellant's guilt. After a revocation hearing, the trial court found

four allegations in the State's motion to adjudicate true, revoked Appellant's community supervision, convicted her of forgery, and sentenced her to eighteen months' confinement in the State Jail Division of the Texas Department of Criminal Justice. Appellant brings two issues on appeal, arguing (1) that the trial court committed fundamental error by engaging in adversarial questioning of a witness and (2) that the trial court abused its discretion in granting the State's motion to revoke Appellant's community supervision. We affirm the trial court's judgment.[1]

Issue One: The trial court did not commit fundamental error.

Appellant complains that the trial court "overstepped its boundaries by engaging in adversarial questioning of a witness, in effect becoming an advocate for the State."

At the revocation hearing, the State called Andrea Moralez, an Ector County probation officer. During cross-examination, Moralez testified that Appellant had not made any payments required under the terms and conditions of her community supervision order since being placed on community supervision. Here, the trial court questioned Moralez as follows:

> THE COURT: No payment of any sort?
>
> THE WITNESS: No, sir.
>
> THE COURT: No restitution payment, no supervision fee, no Crime Stoppers fee, no payment at all?
>
> THE WITNESS: No, sir.
>
> THE COURT: Go ahead, Counsel. Did she ever indicate to you she was unable to -- financially unable to make a payment?
>
> THE WITNESS: No, sir.

[1]We address in a separate opinion the companion case to this case, *Patino v. State*, No. 11-18-00322-CR, involving the same facts but applied to a separate offense adjudicated under a different cause number.

THE COURT: Did you admonish her that payments were due?

THE WITNESS: Yes, sir. Every month she came in.

THE COURT: You told her she had to make her payments and that she had not yet made any payments?

THE WITNESS: Yes, sir.

THE COURT: Did she ever respond to your admonishments?

THE WITNESS: She would just say she would make a payment when she could.

THE COURT: Okay. Go ahead, Counsel.

Appellant did not object to the trial court's questioning of Moralez.

Appellant also complains of questions posed by the trial court to another witness, Lisa Wallace, the office manager of the insurance agency where Appellant worked. Wallace testified in reference to the State's allegation that Appellant had violated the terms of her community supervision by committing the offense of theft. Appellant contends that, here too, the trial court's questions went "beyond mere clarification," but Appellant does not specifically identify which of the trial court's questions to Wallace crossed the line into advocacy for the State. The record reflects that the trial court's questions to Wallace concerned the insurance company's policies and procedures regarding the handling of cash, the setting up of payment methods for new customers, and Appellant's compliance with those procedures.

Appellant argues that the trial court's actions were fundamentally erroneous and that, therefore, no objection was necessary to preserve the error. On this record, we cannot agree with Appellant.

Generally, before a party may pursue a complaint on appeal, she must have presented the trial court with a timely request, objection, or motion; the grounds must be presented "with sufficient specificity to make the trial court aware of the

complaint." TEX. R. APP. P. 33.1(a)(1)(A); *Krause v. State*, 243 S.W.3d 95, 102 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). In the absence of an objection, remarks or conduct of a trial court may not be challenged on appeal unless they are fundamentally erroneous. *Brewer v. State*, 572 S.W.2d 719, 721 (Tex. Crim. App. 1978); *Moreno v. State*, 900 S.W.2d 357, 359 (Tex. App.—Texarkana 1995, no pet.). It is permissible for a trial court to seek facts for use in its role as a factfinder. *Moreno*, 900 S.W.2d at 359–60. A trial court may question a witness to clarify an issue before the court so long as it maintains an impartial attitude. *Brewer*, 572 S.W.2d at 721; *Munoz v. State*, 485 S.W.2d 782, 784 (Tex. Crim. App. 1972); *Navarro v. State*, 477 S.W.2d 291, 292 (Tex. Crim. App. 1972).

In *Moreno*, the Texarkana court noted that the questions asked by the trial court were within the bounds of what the attorneys would have been allowed to ask. *Moreno*, 900 S.W.2d at 359. Further, the answers would have been admissible testimony. *Id.* at 359–60. As a further observation, the record in *Moreno* did not reveal that the trial court became so entangled as an advocate that it could not properly make objective findings. *Id.* at 360.

In this case, the trial court asked clarifying questions of Moralez concerning Appellant's failure to pay her community supervision fees. The trial court asked questions of Wallace concerning the company's procedures for handling cash and setting up payment methods for new customers. These appear to have been questions seeking facts for the trial court's fact-finding role. The questions were ones that would have been admissible if asked by the attorneys, and the testimony elicited constituted admissible testimony. Finally, the record does not show anything indicating that the trial court failed to maintain an impartial attitude during its questioning. Therefore, the trial court's conduct was permissible. *See Bernal v. State*, No. 11-17-00338-CR, 2019 WL 5617627, at *2–3 (Tex. App.—Eastland

Oct. 31, 2019, no pet.) (mem. op., not designated for publication); *Moreno*, 900 S.W.2d at 359–60.

The actions of the trial court did not constitute error, fundamental or otherwise. We overrule Appellant's first issue.

Issue Two: The trial court did not abuse its discretion.

In the motion to adjudicate, the State alleged five violations of the terms and conditions of Appellant's community supervision. Specifically, the State alleged that, in violation of the terms and conditions of the community supervision order, Appellant (1) failed to complete a drug and alcohol evaluation; (2) committed a new offense; (3) failed to make minimum monthly payments toward her supervision fee and restitution in the months of September, October, November, and December of 2017; (4) failed to make minimum monthly payments toward her supervision fee and restitution in the months of January and February of 2018; and (5) failed to participate in community service at a monthly rate of five hours each month from September through December of 2017. At the conclusion of the hearing, the trial court made a finding of "not true" concerning the first allegation and made a finding of "true" for each remaining allegation. Appellant asserts that the trial court abused its discretion in making these findings.

An appellate court reviews an order revoking community supervision for an abuse of discretion. *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984); *Caddell v. State*, 605 S.W.2d 275, 277 (Tex. Crim. App. [Panel Op.] 1980). In a revocation hearing, the State must prove by a preponderance of the evidence that the defendant violated the terms and conditions of community supervision as alleged in the motion to revoke. *Caddell*, 605 S.W.2d at 277. Proof of a violation of a single condition is sufficient to support a trial court's decision to revoke. *Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. [Panel Op.] 1980). A review of the evidence

supporting revocation is considered in the light most favorable to the trial court's decision to revoke. *Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App. [Panel Op.] 1981).

Here, Appellant contends that the record reflects no evidence of Appellant's ability to pay the fees addressed in allegations (3) and (4). The State apparently concedes this point, stating that, "[e]ven setting aside the issue of Appellant's inability to pay fees, Appellant has not demonstrated that she is entitled to appellate relief because she has failed to nullify all of the findings on which the revocation order is based."

The remaining violations on which the revocation order is based are the commission of a new offense and failure to participate in community service for a minimum of five hours per month from September through December of 2017.

Although the parties brief and argue the issue of a new offense, Appellant also concedes that she failed to participate in community service as required by the community supervision order. Appellant argues that, "[i]n the ordinary course of dispositions, courts of this State would like [sic] as not grant an extension to community supervision rather than revoke for such a *de minimus* violation." However, Appellant cites no authority supporting this assertion. Viewing the evidence in the light most favorable to the trial court's decision to revoke, we conclude that, because Appellant has conceded that she violated one of the terms of her community supervision, the trial court did not abuse its discretion in revoking Appellant's community supervision. *See Garrett*, 619 S.W.2d at 174 (evidence supporting revocation is considered in the light most favorable to the trial court's decision to revoke); *Moore*, 605 S.W.2d at 926 (one sufficient ground will support a revocation order). We overrule Appellant's second issue.

This Court's Ruling

We affirm the judgment of the trial court.

KEITH STRETCHER
JUSTICE

November 5, 2020

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[2]

Willson, J., not participating.

[2]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.