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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

**NO. 32,292 & 32,291
(consolidated)**

5
6 **ANTHONY VIGIL,**

7 Defendant-Appellant.

8 **APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY**

9 **Abigail Aragon, District Judge**

10 Gary K. King, Attorney General

11 Santa Fe, NM

12 M. Anne Kelly, Assistant Attorney General

13 Albuquerque, NM

14 for Appellee

15 Jorge A. Alvarado, Chief Public Defender

16 Allison H. Jaramillo, Assistant Appellate Defender

17 Santa Fe, NM

18 for Appellant

19 **MEMORANDUM OPINION**

20 **VIGIL, Judge.**

1 {1} Defendant Anthony Vigil appeals an order of the district court revoking his
2 probation. Because sufficient evidence to establish with a reasonable certainty that
3 Defendant consumed alcohol in violation of his probation was presented to the district
4 court, we affirm.

5 **BACKGROUND**

6 {2} In 2011, Defendant had two criminal cases pending against him, one for larceny
7 and receiving stolen property, and the other for DWI (7th or greater offense) and
8 related traffic offenses. Defendant agreed to plead guilty to larceny and DWI (4th
9 offense) in exchange for guaranteed concurrent probationary sentences and dismissal
10 of the remaining charges. He was placed on supervised probation for three years
11 beginning June 27, 2011. Defendant signed an order of probation, agreeing to abide
12 by the following pertinent terms: (1) “STATE LAWS: I will not violate any of the
13 laws or ordinances of the State of [New Mexico], or any other jurisdiction. I shall not
14 endanger the person or property of another” and (2) “ALCOHOL: I shall not possess,
15 use or consume any alcoholic beverages.”

16 {3} On August 13, 2011, while on probation, Defendant was a passenger in his
17 truck driven by his girlfriend, Katherine Houk, when she lost control and flipped the
18 vehicle, causing her serious injuries. Defendant was not at the scene when police
19 arrived. Moreover, police discovered unopened beer cans in the truck, and they could

1 smell alcohol within the truck, making them suspect that Defendant was the driver.
2 On August 25, 2011, the State filed a motion to revoke Defendant's probation for
3 violating the above provisions.

4 {4} At the revocation hearing, Ms. Houk testified that she and Defendant were
5 drinking alcohol at his boss' house the evening before the accident and that they both
6 had one beer on the morning of the accident. She said that she and Defendant were
7 traveling in his truck on an errand to cash his pay check the morning of the accident,
8 although she could not remember who was driving. She admitted to losing memory
9 of some of the events leading up to the accident as a result of her injuries.

10 {5} The investigating officer, Officer Duran, also testified. He explained that his
11 investigation revealed that Ms. Houk had been driving the vehicle because the driver's
12 side had blood on it and she was the only one bleeding. Officer Duran said he
13 questioned Defendant in October of 2011 about the accident and recorded the
14 interview. He stated that Defendant told him that Ms. Houk was driving his truck at
15 a high rate of speed. Officer Duran also said that Defendant admitted to drinking
16 alcohol the night before the accident, but that this admission occurred before he had
17 initiated the recording. Another State witness testified that he had not seen Defendant
18 drink any alcohol at the gathering the night before the accident, though he was not
19 paying attention.

1 {6} The district court found that Defendant “did consume alcoholic beverages and
2 endangered the person of Katherine Houk” and entered an order revoking Defendant’s
3 probation. The court based its finding that Defendant consumed alcohol on Ms.
4 Houk’s testimony that she saw him drink and Officer Duran’s testimony that
5 Defendant admitted he drank. The court based its endangerment finding on the
6 testimony that Ms. Houk had been consuming alcoholic beverages, that while under
7 the influence of alcohol she drove the vehicle in Defendant’s presence, and that the
8 vehicle belonged to Defendant and thus he had the right to either deny or allow her to
9 drive the vehicle. After Defendant underwent a diagnostic evaluation, the district
10 court sentenced Defendant to a total of four years incarceration, with his three-year
11 sentence enhanced by one year pursuant to the habitual offender enhancement.
12 Defendant appeals the revocation of his probation.

13 **DISCUSSION**

14 **Sufficiency of the Evidence Supporting the Probation Revocation**

15 {7} “[T]he evidentiary requirement for violation of probation is that the violation
16 be established with reasonable certainty.” *State v. Sanchez*, 2001-NMCA-060, ¶ 13,
17 130 N.M. 602, 28 P.3d 1143. “The proof must be that which inclines a reasonable and
18 impartial mind to the belief that defendant had violated the terms of probation.” *Id.*
19 (internal quotation marks and citation omitted). The proof “need not be established

1 beyond a reasonable doubt.” *State v. Martinez*, 1989-NMCA-036, ¶ 4, 108 N.M. 604,
2 775 P.2d 1321.

3 {8} “We review the trial court’s decision to revoke probation under an abuse of
4 discretion standard. To establish an abuse of discretion, it must appear the trial court
5 acted unfairly or arbitrarily, or committed manifest error.” *Id.* ¶ 5 (citations omitted).

6 **1. Endangering the Person of Ms. Houk**

7 {9} Defendant challenges the finding that he violated condition one related to
8 endangering Ms. Houk by challenging (1) the constitutionality of the condition, and
9 (2) the sufficiency of the evidence that he endangered Ms. Houk.

10 **a. Constitutional Arguments**

11 {10} Defendant raises two constitutional challenges regarding the revocation of his
12 probation for violating condition one. First, he asserts that the State failed to provide
13 sufficient notice it intended to revoke his probation for endangering Ms. Houk.
14 Second, he argues that the condition is unconstitutionally vague because it fails to
15 provide fair notice of what conduct is prohibited.

16 {11} Defendant argues that the probation violation report failed to give him notice
17 regarding the allegation of endangerment of Ms. Houk’s because the report incorrectly
18 stated that he was arrested for leaving the scene of the accident, rather than alleging
19 he endangered Ms. Houk by letting her drive his truck while intoxicated. However,

1 Defendant acknowledges that the report includes language from condition one
2 regarding the promise not to endanger another. He also acknowledges that the State
3 moved to continue the revocation hearing at one point so that it could present a
4 witness that would testify how Defendant failed to comply with condition one “by
5 endangering” Ms. Houk. The State responds that Defendant failed to raise the notice
6 issue in the district court, and in any event, that Defendant had sufficient notice.

7 {12} Regardless, Defendant maintains that condition one cannot be enforced as it is
8 unconstitutionally vague. Defendant claims that the language in condition one fails
9 to provide fair notice as to what behavior is prohibited because what it means to
10 “endanger” a person, particularly an adult, is unclear. He argues that the condition is
11 not defined with sufficient definiteness to inform citizens of the prohibited conduct
12 and to prevent law enforcement from arbitrary and discriminatory enforcement. The
13 State again responds that Defendant failed to raise any of these arguments at the
14 revocation hearing. The State points out that defense counsel’s argument below was
15 that there was no evidence Defendant knew Ms. Houk was intoxicated, not that he did
16 not know that letting her drive his truck while intoxicated would endanger her.

17 **b. Sufficiency of the Evidence Argument**

18 {13} Defendant also argues that the State nonetheless failed to present sufficient
19 evidence to establish with reasonable certainty that Defendant violated condition one

1 by endangering Ms. Houk. He asserts that there was no evidence to suggest that he
2 acted with “willful disregard” of Ms. Houk’s safety or that he placed her in a situation
3 which resulted in a “reasonable probability or possibility that she would be
4 endangered.” He points out that Ms. Houk, an adult, chose to drink and drive and
5 contends he was merely a passenger and did not cause the accident. Thus, Defendant
6 asserts, he committed no act or omission that could form the basis of revoking his
7 probation for violating condition one. The State responds that proof of a probation
8 violation does not equate to proof required to prove the commission of a criminal
9 offense and that proving Defendant knowingly allowed Ms. Houk to drive his vehicle,
10 knowing she had been drinking alcohol, was sufficient to prove a probation violation
11 in this case.

12 {14} All of these issues are challenging and raise several questions regarding the
13 court’s determination that Defendant violated condition one by endangering Ms.
14 Houk. However, we need not resolve them here because we affirm the district court’s
15 order based on the sufficiency of the evidence that condition two was violated with
16 reasonable certainty. *See State v. Leon*, 2013-NMCA-011, ¶ 37, 292 P.3d 493 (“[I]f
17 there is sufficient evidence to support just one violation, we will find the district
18 court’s order was proper.”), *cert. quashed*, 2013-NMCERT-010, 313 P.3d 251.

19 **2. Consuming Alcohol**

1 {15} Defendant also challenges the credibility of the State's evidence that he
2 consumed alcohol in violation of his probation. He asserts that Ms. Houk was
3 intoxicated when she allegedly saw Defendant consume alcohol and had suffered head
4 trauma that affected her memory and that Officer Duran did not have a recording of
5 Defendant's alleged admission to consuming alcohol.

6 {16} The State responds that the testimony of Ms. Houk and Officer Duran is
7 sufficient to support the district court finding that Defendant consumed alcohol. We
8 agree. *See State v. Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482
9 (recognizing that it is for the fact finder (in this case, the judge) to resolve any conflict
10 in the testimony of the witnesses and to determine where the weight and credibility
11 lay). Ms. Houk testified she saw Defendant drink alcohol and Officer Duran testified
12 that Defendant admitted to drinking alcohol. Defendant presented his case at the
13 hearing, attacking Ms. Houk's memory and Officer Duran's credibility. By
14 concluding that Defendant consumed alcohol, the district court necessarily found the
15 testimony regarding his consumption of alcohol to be credible and we refuse to disturb
16 that finding.

17 **CONCLUSION**

18 {17} The order of the district court revoking Defendant's probation is affirmed.

19 {18} **IT IS SO ORDERED.**

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WE CONCUR:

MICHAEL E. VIGIL, Judge

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TIMOTHY L. GARCIA, Judge

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M. MONICA ZAMORA, Judge