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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. A-1-CA-36514

5 **TIMOTHY T. ROMERO,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

8 **Angela J. Jewell, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 Allison H. Jaramillo, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **VANZI, Chief Judge.**

1 {1} Defendant appeals from an order revoking his probation. We issued a calendar
2 notice proposing to affirm. Defendant has responded with a memorandum in
3 opposition. We affirm.

4 {2} Initially, we note that there are four separate records because the four
5 proceedings were initially filed separately but were consolidated for sentencing
6 purposes. All references will be to the record in D-202-CR-2013-00849.

7 **Cross-Examination**

8 {3} Defendant continues to claim that he was denied due process because the State
9 was allowed to cross-examine him about an alleged prior auto burglary; in that case
10 the same judge ruled that there was insufficient evidence to base probation revocation
11 on the allegation. [MIO 8] Defendant does not explain precisely how the cross-
12 examination violated one of the components of due process in the probation
13 revocation context, other than broadly asserting that it violated basic notions of
14 fairness. [MIO 9-10] *See generally State v. Guthrie*, 2011-NMSC-014, ¶ 12, 150 N.M.
15 84, 275 P.3d 904 (setting forth the framework of due process in the context of
16 probation). Although Defendant refers to this as “bad act” evidence [MIO 9], which
17 would have required admission under Rule 11-404(B) NMRA if the Rules of
18 Evidence applied, the cross-examination was more akin to impeachment under Rule
19 11-608(B)(1) NMRA. Even if the evidence of the earlier incident had not been found
20 sufficient to revoke probation in that case, the similarity of the conduct bore on the

1 truthfulness of Defendant’s testimony. In addition, we do not believe that Defendant
2 suffered any prejudice, since the presiding judge was not only aware of this prior
3 incident, but had ruled that it did not independently provide the basis for a revocation.
4 *See State v. Fernandez*, 1994-NMCA-056, ¶ 13, 117 N.M. 673, 875 P.2d 1104 (“In
5 the absence of prejudice, there is no reversible error.”).

6 {4} Defendant claims that the district court judge impermissibly took judicial notice
7 of the prior proceeding, specifically noting that Defendant’s credibility was
8 undermined by his pattern of behavior. [DS 6-7, 9] Again, the judge did not need to
9 take judicial notice because she had actual notice of that case. If Defendant did not
10 want this judge to be the fact-finder in this case, he could have sought a recusal.

11 **Employment as Condition of Probation**

12 {5} Defendant continues to claim that the underlying judgment and sentence did not
13 require him to obtain and maintain employment and, therefore, it could not be a
14 condition of probation. [MIO 12] Defendant concedes that the judgment and sentence
15 authorized the standard conditions of probation. [MIO 2; RP 127] One of the standard
16 conditions was that Defendant “make every effort to obtain and hold a legitimate
17 job[.]” [RP 193] To the extent that the judgment also contained an unchecked separate
18 box with respect to employment, checking this box would have been cumulative of
19 the “standard conditions” authorization. *See State v. Leon*, 2013-NMCA-011, ¶ 26,
20 292 P.3d 493 (“That the terms and conditions set by the probation office were not

1 spelled out in the order itself did not establish that those terms and conditions were not
2 imposed by the court.”).

3 **Sufficiency of the Evidence**

4 {6} Defendant challenges the sufficiency of the evidence to support the revocation
5 of his probation based on the violation of the requirement to make every effort to
6 obtain and hold employment. [DS 10] “In a probation revocation proceeding, the State
7 bears the burden of establishing a probation violation with a reasonable certainty.” *See*
8 *Leon*, 2013-NMCA-011, ¶ 36. “To establish a violation of a probation agreement, the
9 obligation is on the State to prove willful conduct on the part of the probationer so as
10 to satisfy the applicable burden of proof.” *In re Bruno R.*, 2003-NMCA-057, ¶ 11, 133
11 N.M. 566, 66 P.3d 339; *see also State v. Martinez*, 1989-NMCA-036, ¶ 8, 108 N.M.
12 604, 775 P.2d 1321 (explaining that probation should not be revoked where the
13 violation is not willful, in that it resulted from factors beyond a probationer’s control).

14 {7} Here, a probation officer testified that she helped Defendant secure employment
15 on January 25, 2017. [DS 8] On February 7, 2017, the officer contacted the employer
16 and was told that Defendant had only shown up for two or three days of work during
17 this period. [MIO 7; DS 8] Contrary to Defendant’s claim [MIO 14] that the probation
18 violation had been based on a single day of missed work, this evidence supports the
19 conclusion that Defendant had missed many days of work and therefore had not made
20 every effort to hold onto employment during the two weeks in question.

1 {8} For the reasons set forth above, we affirm.

2 {9} **IT IS SO ORDERED.**

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4

LINDA M. VANZI, Chief Judge

5 **WE CONCUR:**

6

7 **J. MILES HANISEE, Judge**

8

9 **JULIE J. VARGAS, Judge**