AFFIRM; and Opinion Filed March 11, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00351-CR

CORY ROSS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 204th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1131175-Q

MEMORANDUM OPINION

Before Justices Fillmore, Myers, and Whitehill
Opinion by Justice Fillmore

Cory Ross appeals the trial court's judgment adjudicating him guilty of injury to a child and sentencing him to forty years' imprisonment. In his first and second issues, Ross contends the trial court violated his Sixth Amendment right of confrontation by admitting testimonial hearsay evidence to prove he violated conditions of his community supervision. In his third issue, Ross contends the trial court abused its discretion by finding he violated condition (j) of his community supervision because the State failed to carry its burden of proof that Ross had the ability to pay community supervision fees. We affirm the trial court's judgment.

Background

Ross was charged with and pleaded guilty to the offense of injury to a child. *See* TEX. PENAL CODE ANN. § 22.04(a) (West Supp. 2015). On April 30, 2012, the trial court deferred adjudicating Ross's guilt and placed him on community supervision for ten years. On August

29, 2013, the State filed a motion to proceed with an adjudication of guilt, alleging Ross violated the following conditions of his probation:

> (a) Commit no offense against the laws of this or any other State or the United States, and do not possess a firearm during the term of Supervision;
>
> * * *
>
> (e) Permit the Supervision Officer to visit you at your home or elsewhere, and notify the Supervision Officer not less than twenty-four (24) hours prior to any changes in your home or employment address;
>
> * * *
>
> (g) Remain within a specified place; to wit: Dallas County, Texas, or Approved Supervising County, and do not travel outside Dallas County, or Approved Supervising County, without first having obtained written permission from the Court or Supervising Officer;
>
> * * *
>
> (j) Pay a Supervision fee of $60.00 per month plus a $2.00 transaction fee to the Supervision Officer of this Court on or before the first day of each month hereafter during Supervision.

The State contended Ross violated these conditions of community supervision by committing an August 16, 2013 offense of possession of a controlled substance in Hood County, Texas;[1] failing to notify his Supervision Officer within twenty-four hours of a change in his home address; traveling outside Galveston County, Texas, the Approved Supervising County, without permission of his Supervision Officer; and delinquency in payment of community supervision fees in the amount of $434. Ross pleaded not true to these alleged violations of his conditions of community supervision.

Following a hearing, the trial court found Ross violated conditions of community supervision (a), committing the offense of possession of a controlled substance; (g), traveling

[1] The State also asserted Ross violated condition (a) of community supervision by committing the offense of driving with an invalid driver's license on August 16, 2013, in Hood County, Texas, but the State later withdrew that allegation.

outside the Approved Supervising County without permission from his Supervision Officer; and (j), delinquency in payment of community supervision fees. The trial court adjudicated Ross's guilt for the offense of injury to a child and assessed punishment of forty years' imprisonment. Ross filed this appeal of the trial court's judgment.

Evidence of Conviction of Possession of Controlled Substance Offense

In his first issue, Ross argues the trial court violated his Sixth Amendment right of confrontation by impermissibly admitting testimonial hearsay statements consisting of book-in information, including a fingerprint card, contained in business records of the Hood County Sheriff's Office (State's Exhibit 1) and a certified copy of a possession-of-a-controlled-substance judgment of conviction (State's Exhibit 3) to prove he violated condition (a) of his community supervision. In addition, Ross contends the trial court violated his Sixth Amendment right of confrontation by admitting "surrogate witness" testimony regarding those testimonial hearsay statements to prove he violated condition (a) of his community supervision. The State responds that book-in information contained in the Hood County Sheriff's Office business records, and the certified copy of the judgment of conviction, are not testimonial hearsay and, therefore, the trial court did not err in overruling Ross's objections to admission of those documents and the witness testimony relating to those documents.

Evidence Admitted at the Hearing

At the hearing, the State elicited testimony from Wanda Flannery, an employee of the Hood County Sheriff's Office and a Hood County custodian of records. Flannery testified State's Exhibit 1 consisted of business records of the Hood County Sheriff's Office, and those business records contain a book-in photograph and fingerprints.

Margaret Brown-Lewis, a deputy in the identification section of the Dallas County Sheriff's Department who had experience "reading" fingerprints for seventeen years, testified

she had taken fingerprints of Ross that morning as contained on State's Exhibit 2, and she compared those fingerprints to the fingerprints contained in State's Exhibit 1, the Hood County Sheriff's Office business records. Brown-Lewis testified Ross's fingerprints in State's Exhibit 2 match the fingerprints contained in State's Exhibit 1, and the fingerprints contained in State's Exhibit 1 are Ross's. Brown-Lewis also testified the Texas Registration Number (TRN) 9156756399 appears on the two pages of fingerprints in State's Exhibit 1, as well as State's Exhibit 3, a certified copy of an October 22, 2014 judgment of conviction of "Cory Alexander Ross" for possession of a controlled substance from the 355th Judicial District Court of Hood County, and the Systems Identification (SID)[2] number 07247886 contained in State's Exhibit 1 is the same SID number contained in State's Exhibit 3. According to Brown-Lewis, State's Exhibits 1 and 3 reflect the charged offense of possession of a controlled substance and the August 16, 2013 date of the offense. Ross's running objection that State's Exhibits 1, 2, and 3 contain testimonial hearsay in violation of Ross's Sixth Amendment right of confrontation was overruled, and the trial court admitted State's Exhibits 1, 2, and 3 into evidence.[3]

Standard of Review

We generally review a trial court's decision on the admissibility of evidence under an abuse of discretion standard. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). As

[2] A SID number is an "identification number assigned by the Texas Department of Public Safety to each arrestee." *Camp v. State*, No. 07-11-00331-CR, 2013 WL 308992, at *1 (Tex. App.—Amarillo Jan. 25, 2013, pet. ref'd) (mem. op., not designated for publication); *see also Williams v. State*, No. 04-02-00161-CR, 2002 WL 31015258, at *1 n.1 (Tex. App.—San Antonio Sept. 11, 2002, no pet.) (not designated for publication) (a SID number is "a number given to any person arrested for purposes of identification").

[3] At the hearing, Ross objected that admission of State's Exhibit 2 violated his Sixth Amendment right of confrontation. In his appellate brief, Ross acknowledges:

> However, Dallas County Deputy Brown-Lewis was called at the 2015 revocation hearing to testify to, and was subject to cross-examination on, [State's Exhibit] 2, the Dallas County fingerprint card. Dallas County Deputy Brown-Lewis identified Mr. Ross in the court room, testified the fingerprints on [State's Exhibit] 2 were those of Mr. Ross, which she had obtained earlier in the morning prior to the revocation hearing. She also testified that there were two signatures on the fingerprint card: that of Mr. Ross, who she had asked to sign the card in her presence, and her signature. She also testified that [State's Exhibit] 2 contained the date on which the fingerprints and signature were obtained from Mr. Ross.

Despite Ross's acknowledgment that Brown-Lewis was subject to cross-examination, Ross states in his brief that State's Exhibit 2 was "created as [an] out-of-court substitute[ ] for testimony in a judicial setting." In his first issue on appeal, Ross complains only of the trial court's admission of State's Exhibits 1 and 3 as purportedly violating his Sixth Amendment right of confrontation. Therefore, we need not and do not address any assertion that the trial court erred in admitting State's Exhibit 2 into evidence.

long as the trial court's ruling is within the "zone of reasonable disagreement," there is no abuse of discretion. *Id*. However, when reviewing whether a statement is testimonial or non-testimonial, we give almost total deference to the trial court's determination of historical facts and review de novo the trial court's application of the law to those facts. *Wall v. State*, 184 S.W.3d 730, 742–43 (Tex. Crim. App. 2006) (applying hybrid standard of review to issue of whether statement was testimonial); *Mason v. State*, 225 S.W.3d 902, 906–07 (Tex. App.—Dallas 2007, pet. ref'd) (same).[4]

Under the Confrontation Clause of the Sixth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment,[5] "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Supreme Court has interpreted this right to mean that "testimonial" evidence is inadmissible at trial unless the witness who made the statement either takes the stand to be cross-examined or is unavailable and the defendant had a prior opportunity to cross-examine him. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004); *Burch v. State*, 401 S.W.3d 634, 636 (Tex. Crim. App. 2013); *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009). "While the exact contours of what is testimonial continue to be defined by the courts, such statements are formal and similar to trial testimony." *Burch*, 401 S.W.3d at 636. Testimonial statements include: (1) "ex parte in-court testimony or its functional equivalent," i.e., "pretrial statements that declarants would reasonably expect to be used prosecutorially"; (2) "extrajudicial statements contained in formalized testimonial materials," such as affidavits, depositions, or prior testimony; and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement

[4] *See also Gonzalez v. State*, No. 05-13-00630-CR, 2014 WL 3736208, at *8 (Tex. App.—Dallas July 14, 2014, no pet.) (not designated for publication).

[5] *See Pointer v. Texas*, 380 U.S. 400, 403 (1965).

would be available for use at a later trial." *Langham v. State*, 305 S.W.3d 568, 576 (Tex. Crim. App. 2010) (quoting *Wall*, 184 S.W.3d at 735); *see also Crawford*, 541 U.S. at 51–52. The threshold inquiry for any purported Confrontation Clause violation is whether the admitted statement is testimonial or non-testimonial in nature. *See Vinson v. State*, 252 S.W.3d 336, 338 (Tex. Crim. App. 2008).

Testimonial statements from a report that was not created by the declarant testifying at trial may not be offered into evidence through the testimony of a different, "surrogate" witness. *See Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011); *see also Burch*, 401 S.W.3d at 637. However, the admission of non-testimonial hearsay does not violate the Confrontation Clause. *Sanchez v. State*, 354 S.W.3d 476, 485 (Tex. Crim. App. 2011). Texas courts have drawn a distinction between "a factual description of specific observations or events that is akin to testimony" and "official records that set out a sterile and routine recitation of an official finding or unambiguous factual matter such as a judgment of conviction or a bare-bones disciplinary finding," which are not considered testimonial. *Segundo v. State*, 270 S.W.3d 79, 107 (Tex. Crim. App. 2008). "Boilerplate" language in public records that does not contain testimonial statements, narratives of specific events, or written observations falls beyond the prohibition of *Crawford*. *Smith v. State*, 297 S.W.3d 260, 276 (Tex. Crim. App. 2009); *see also Segundo*, 270 S.W.3d at 106–07.

Discussion

Ross contends the trial court violated his Sixth Amendment right of confrontation by impermissibly admitting testimonial hearsay statements contained in State's Exhibit 1 and the "surrogate witness" testimony of Brown-Lewis regarding the contents of testimonial hearsay statements contained in State's Exhibit 1. With regard to the testimony of Brown-Lewis, Ross specifically asserts the trial court violated his right of confrontation by admitting testimony

concerning Brown-Lewis's comparison of Ross's fingerprints taken the day of the hearing as contained in State's Exhibit 2 to the fingerprints contained in State's Exhibit 1.

State's Exhibit 1, the book-in documents of the Hood County Sheriff's Office, was admitted as a business record. *See* TEX. R. EVID. 803(6). "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." *Melendez-Diaz*, 557 U.S. at 324; *see also Bullcoming*, 131 S. Ct. at 2714, n.6. However, a business or public record may nevertheless be inadmissible pursuant to a Confrontation Clause challenge if it is prepared for prosecutorial use or in anticipation it will be used for prosecutorial purposes. *Grey v. State*, 299 S.W.3d 902, 909 (Tex. App.—Austin 2009, pet. ref'd) (intended or anticipated use of a statement determines whether it is testimonial) (citing *Davis v. Washington*, 547 U.S. 813 (2006)).

The right of confrontation applies to testimonial statements. *See Crawford*, 541 U.S. at 51–52. A statement is testimonial when made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*. at 52; *see also* TEX. R. EVID. 801(a) ("statement" means person's oral or written verbal expression, or nonverbal conduct that a person intended as a substitute for verbal expression). Fingerprints are not testimonial when they are given by a defendant. *See United States v. Wade*, 388 U.S. 218, 223 (1967); *Bell v. State*, 582 S.W.2d 800, 806–07 (Tex. Crim. App. 1979).[6] Here, the fingerprints contained in State's Exhibit 1 contain no testimonial notations. We conclude the fingerprint card contained in State's Exhibit 1 is not testimonial, and the trial court

[6] *See also Williams v. State*, No. 02-11-00290-CR, 2013 WL 6327375, at *6 (Tex. App.—Fort Worth Dec. 5, 2013, no pet.) (mem. op, not designated for publication) (fingerprints are not testimonial).

did not violate Ross's Sixth Amendment right of confrontation by admitting State's Exhibit 1. Accordingly, Brown-Lewis's testimony comparing the fingerprints in State's Exhibit 1 to Ross's fingerprints in State's Exhibit 2 did not constitute inadmissible testimony of a "surrogate witness." *See Bullcoming*, 131 S. Ct. at 2710; *Burch*, 401 S.W.3d at 637.

Ross also contends the trial court violated his Sixth Amendment right of confrontation by impermissibly admitting testimonial hearsay statements contained in State's Exhibit 3, the certified Judgment of Conviction of "Cory Alexander Ross" for possession of a controlled substance. Ross argues that the admission of the Judgment of Conviction containing allegedly testimonial hearsay was then improperly the subject of Brown-Lewis's testimony that the TRN and SID numbers contained on the Judgment of Conviction matched the TRN and SID numbers contained on the fingerprint card in State's Exhibit 1, the Hood County Sheriff Office's book-in records.

A judgment of conviction is not considered testimonial. *Segundo*, 270 S.W.3d at 107; *see also* TEX. R. EVID. 902(4) (certified copy of judgment admissible under the rules of evidence). State's Exhibit 3, the judgment of conviction, "set[s] out a sterile and routine recitation of an official finding." *See Segundo*, 270 S.W.3d at 107. It contains objective determinations of a factual nature, including TRN and SID numbers, but not a "factual description of specific observations or events that is akin to testimony," *see id.*, or "narratives of specific events, or written observations," *see Smith*, 297 S.W.3d at 276. We conclude the judgment of conviction was non-testimonial and, therefore, the trial court did not violate Ross's Sixth Amendment right of confrontation by the admission of State's Exhibit 3. Accordingly, Brown-Lewis's testimony that the SID and TRN numbers in State's Exhibits 1 and 3 are the same did not constitute inadmissible testimony of a "surrogate witness." *See Bullcoming*, 131 S. Ct. at 2710; *Burch*, 401 S.W.3d at 637; *see also Richardson v. State*, 432 S.W.2d 100, 101 (Tex. Crim. App. 1968)

(identity of person convicted in two prior cases alleged for punishment enhancement shown by testimony of fingerprint expert based upon comparison of appellant's known fingerprints with those found in prison records; such manner of proof approved by court and does not constitute denial of right of confrontation).

Neither the fingerprint card contained in the Hood County Sheriff's Office business records, nor the certified judgment of conviction were testimonial. Therefore, the trial court did not violate Ross's Sixth Amendment right of confrontation by the admission of State's Exhibits 1 and 3 or in admitting Brown-Lewis's testimony regarding those exhibits. We resolve Ross's first issue against him.

Evidence of Violation of Condition of Community Supervision

In his third issue, Ross argues the trial court abused its discretion by finding he violated condition (j) of his community supervision because the State failed to carry its burden of proof with regard to that condition. On appeal, the State concedes "it did not prove [Ross's] ability to pay community supervision fees." However, the State argues the trial court properly found Ross violated a condition of his community supervision and adjudicated his guilt because the State proved Ross violated condition (a) of community supervision by committing the offense of possession of a controlled substance in Hood County.

Standard of Review

The standard of review of a trial court's decision to adjudicate guilt based on the violation of a condition of a defendant's community supervision is abuse of discretion. *Hacker v. State*, 389 S.W.3d 860, 865 (Tex. Crim. App. 2013) (citing *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006)). Adjudication is appropriate when a preponderance of the evidence supports one of the State's allegations that the defendant violated a condition of his community supervision. *Leonard v. State*, 385 S.W.3d 570, 576 (Tex. Crim. App. 2012). "A preponderance

of the evidence means that greater weight of the credible evidence which would create a reasonable belief that the defendant has violated a condition of his probation." *Hacker*, 389 S.W.3d at 865. In determining whether the trial court abused its discretion in finding a defendant violated a condition of community supervision, the evidence should be viewed in the light most favorable to the trial court's findings and ruling. *Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App. [Panel Op.] 1981) (citing *Jones v. State*, 589 S.W.2d 419, 421 (Tex. Crim. App. 1979)).[7] A single violation of a term of community supervision is sufficient to support the trial court's decision to proceed with an adjudication of guilt. *Garcia v. State*, 387 S.W.3d 20, 26 (Tex. Crim. App. 2012) (proof of violation of single condition of community supervision will support revocation); *Smith v. State*, 286 S.W.3d 333, 342 (Tex. Crim. App. 2009) (one sufficient ground for revocation would support trial court's order revoking community supervision).

Discussion

The trial court found that by failing to pay community supervision fees, Ross violated condition (j) of his community supervision. At the time of Ross's February 2015 hearing, section 21(c) of article 42.12 of the code of criminal procedure provided in relevant part:

> . . . In a community supervision revocation hearing at which it is alleged *only* that the defendant violated the conditions of community supervision by failing to pay compensation paid to appointed counsel, community supervision fees, or court costs, the state must prove by a preponderance of the evidence that the defendant was able to pay and did not pay as ordered by the judge. . . .

Act of May 17, 2013, 83rd Leg., R.S., ch. 358, 2013 Tex. Gen. Laws 2888, 2888–89 (amended 2015) (current version at TEX. CODE CRIM. PROC. ANN. art. 42.12, § 21(c) (West Supp. 2015)) (emphasis added).[8]

[7] *See also Shephard v. State*, No. 05-13-00291-CR, 2014 WL 2151975, at *4 (Tex. App.—Dallas May 20, 2014, pet. ref'd) (mem. op., not designated for publication).

[8] The current version of section 21(c) article 42.12 provides in relevant part:

In addition to the failure to pay community supervision fees under condition (j), the State alleged, and the trial court found, violations of condition (a) by Ross committing the offense of possession of a controlled substance, and condition (g) by Ross traveling outside the Approved Supervising County without permission from his Supervision Officer. Although by its own acknowledgment, the State did not prove Ross's ability to pay community supervision fees under article 42.12, section 21(c) of the code of criminal procedure, proof of another alleged violation of a condition of community supervision would support the adjudication of Ross's guilt for the underlying offense. *See Garcia*, 387 S.W.3d at 26; *Smith*, 286 S.W.3d at 342.

We therefore turn to the sufficiency of the evidence of Ross's alleged violation of condition (a) of community supervision as a ground for the trial court's granting of the State's motion to adjudicate. State's Exhibit 3, the certified judgment of conviction of "Cory Alexander Ross" for possession of a controlled substance contains the TRN number 9156756399 that appears on the pages of fingerprints in State's Exhibit 1, the book-in records of Cory Alexander Ross for the charge of possession of a controlled substance. Further, the judgment of conviction contains the SID number 07247886, which also appears on the pages of fingerprints in the book-in records. Brown-Lewis testified the fingerprints taken of Ross the day of the hearing match the fingerprints contained in the book-in records and that the fingerprints in the book-in records are those of Ross. State's Exhibit 1 also contains a photograph and physical description of Cory Alexander Ross. Ross was present at the hearing, and the trial court could compare Cory Alexander Ross's photograph and the physical description of Cory Alexander Ross (white male, height of five feet seven inches, weight of 170 pounds, blue eyes, blond hair, light skin tone) to

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> . . . In a community supervision revocation hearing at which it is alleged only that the defendant violated the conditions of community supervision by failing to pay community supervision fees or court costs or by failing to pay the costs of legal services as described by Section 11(a)(11), the state must prove by a preponderance of the evidence that the defendant was able to pay and did not pay as ordered by the judge. . . .

TEX. CODE CRIM. PROC. ANN. art. 42.12, § 21(c).

Ross and determine that Ross and Cory Alexander Ross are the same individual. *See Johnson v. State*, 410 S.W.2d 785, 787 (Tex. Crim. App. 1967).

We conclude the State satisfied its burden by establishing by a preponderance of the evidence that Ross was convicted of possession of a controlled substance in violation of condition (a) of his community supervision, *see Hacker*, 389 S.W.3d at 864–65, which would support the trial court's granting the State's motion to adjudicate, *see Sanchez v. State*, 603 S.W.2d 869, 871 (Tex. Crim. App. [Panel Op.] 1980). Viewing the evidence in the light most favorable to the trial court's findings and ruling, we conclude the trial court did not abuse its discretion in granting the State's motion and adjudicating Ross guilty of the underlying offense. *See Garrett*, 619 S.W.2d at 174. Accordingly, we resolve Ross's third issue against him.

In his second issue, Ross contends the trial court violated his Sixth Amendment right of confrontation by admitting testimonial hearsay evidence contained in a Dallas County probation file and through "surrogate witness" testimony of the records custodian of the Dallas County Community Supervision and Corrections Department to prove Ross violated condition (g) of community supervision by traveling outside Galveston County without permission of his Supervision Officer. Because proof of the violation of condition (a) of community supervision is sufficient to support the trial court's decision to proceed with the adjudication of Ross's guilt, *see Garcia*, 387 S.W.3d at 26, we need not address the alleged ground of violation of community supervision condition (g), traveling outside the Approved Supervising County without permission from his Supervision Officer. *See Smith*, 286 S.W.3d at 342. Accordingly, we do not address Ross's second issue in which he complains of evidence admitted in support of violation of community supervision condition (g). *See id.*; *see also* TEX. R. APP. P. 47.1.[9]

[9] *See also Jackson v. State*, Nos. 05-13-00397-CR, 05-13-00399-CR, 05-13-00406-CR, & 05-13-00407-CR, 2014 WL 3845935, at *5 (Tex. App.—Dallas Aug. 6, 2014, no pet.) (mem. op., not designated for publication).

Conclusion

We affirm the trial court's judgment.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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TEX. R. APP. P. 47.2(b)

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CORY ROSS, Appellant	On Appeal from the 204th Judicial District Court, Dallas County, Texas,
No. 05-15-00351-CR V.	Trial Court Cause No. F-1131175-Q.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Fillmore, Justices Myers and Whitehill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 11th day of March, 2016.