AFFIRMED; Opinion Filed June 2, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01004-CR

No. 05-15-01005-CR

KYLE STEVEN CONNER, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 3
Dallas County, Texas
Trial Court Cause Nos. F-1551015-J, F-1551016-J

MEMORANDUM OPINION

Before Justices Fillmore, Stoddart, and Schenck
Opinion by Justice Stoddart

In separate cases, Kyle Steven Conner pleaded guilty to unauthorized use of a motor vehicle and possession of a controlled substance. The trial court sentenced him to two years' incarceration in each case. In a single issue, appellant argues the trial court abused its discretion by considering evidence outside of the record when assessing punishment. We affirm the trial court's judgments.

Appellant testified during the sentencing phase about his drug use and criminal history. While being questioned by his lawyer, appellant stated that "most of my crimes that I've committed over time has been over drug use, behind drugs, one way or the other." When his lawyer asked him to explain why he should be ordered to attend a drug treatment program, appellant replied that when looking at his record, he does not "deserve anything." He also

testified his elderly mother "hasn't had anything to do with me because of my drug use" and "as long as I'm living my life like I have been, she don't [sic] want nothing [sic] to do with me."

During cross-examination, appellant admitted he has had a pattern of "incarceration, new offenses around theft, robbery, back to prison…" for twenty years. He has reoffended each time he has been released from prison, committing crimes to support his drug habit. When asked by the State how he believed his pattern of offending would finally change, appellant responded that his "record speaks for itself." His record includes time spent in a Substance Abuse Felony Punishment Facility in the early 2000s.

Appellant sought community supervision rather than additional incarceration.[1] After testifying that his "record speaks for itself," he suggested that "incarceration maybe is not the answer for it," presumably meaning his drug addiction.

Following the prosecutor's cross-examination, the trial judge asked appellant several questions. She noted appellant's testimony and belief that additional incarceration "is not the answer" and that appellant previously attended inpatient drug treatment four times. Appellant and the judge discussed each of four drug programs he attended. The judge summarized appellant's record by stating:

> So you've gone to four separate inpatient drug programs, and we're still here. And, you know, I don't know whether to applaud you or to be saddened by you, because I have not seen a record like this before. I'm gonna be honest with you. I have not seen anybody with this large a number of offenses as you have.
>
> I mean, you got off - - and you're mobile. I mean, you've got Harris County, Galveston County, Dallas County, Hopkins County, Collin County, Rockwall County, Iowa. I mean, you - - you have truly gotten around, and you have, I mean, just a really, really extensive list of drugs - - I mean, I'm sorry, of offenses.
>
> Now, they're not violent offenses; they're all property offenses and things like that, but you have really gotten around.

[1] Appellant's written plea agreement shows that he entered a plea of "Guilty" and went "Open as to Community Supervision and Treatment," indicating his desire to be considered for community supervision.

[Appellant]: Yes, ma'am.

Noting she did not believe appellant's behavior would change if she placed him on community supervision, the judge asked appellant to explain to her how he would change. He replied that he "hoped" he would change and asked the trial court "how can somebody with an extensive background like that convince you to think that I'm gonna change? I can't."

On appeal, appellant argues the trial court abused its discretion by considering evidence outside the record when it assessed punishment in each case. He further asserts the trial judge's comments reveal she was biased in her sentencing decision. However, appellant did not object to the trial judge's questions or comments during the sentencing proceedings.

"Ordinarily, a complaint regarding an improper judicial comment must be preserved at trial." *Unkart v. State*, 400 S.W.3d 94, 99 (Tex. Crim. App. 2013); *see also Venegas v. State*, No. 05-14-00116-CR, 2015 WL 340585, at *3 (Tex. App.—Dallas Jan. 27, 2015, no pet.) (not designated for publication). However, "an exception to the general rule exists in cases where the court's comments and conduct amount to fundamental error." *Venegas*, 2015 WL 340585, at *3 (citing *Mays v. State*, No. 05–13–00086–CR, 2014 WL 3058462, at *3 (Tex. App.—Dallas July 8, 2014, no pet.) (mem op. not designated for publication) (citing *Urkart*, 400 S.W.3d at 99)). Assuming, without deciding, that appellant's complaints, if valid, implicate the type of fundamental error that can be raised for the first time on appeal, we conclude the judge's comments did not violate appellant's rights to an unbiased judge. *See Venegas*, 2015 WL 340585, at *3 (citing *Brumit v. State*, 206 S.W.3d 639, 644-45 (Tex. Crim. App. 2006) (declining to reach a preservation issue because in addressing the merits, the record did not reflect partiality by the trial court)).

An appellate court will sustain a claim of bias and partiality only if, from a review of the entire record, it finds judicial impropriety was committed and, as a result, the complaining party

suffered probable prejudice. *Fields v. State*, No. 05-13-01399-CR, 2015 WL 4112277, at *2 (Tex. App.—Dallas July 8, 2015, no pet.) (mem. op., not designated for publication) (citing *Dockstader v. State*, 233 S.W.3d 98, 108 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd)). Judges enjoy a presumption of impartiality, and a claim of bias by a judge will rarely succeed. *Id.* (citing *Liteky v. U.S.*, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring)). When partiality is at issue, the complainant must provide facts sufficient to establish that a reasonable person, knowing all the circumstances involved, would harbor doubts as to the judge's impartiality. *Escobar v. State*, No. 05-13-01562-CR, 2015 WL 1106579, at *4 (Tex. App.—Dallas Mar. 10, 2015, no pet.) (not designated for publication) (citing *Kemp v. State*, 846 S.W.2d 289, 305 (Tex. Crim. App. 1992)).

We begin by considering whether judicial impropriety was committed by the trial court judge. Appellant complains that the judge's questions show she improperly considered evidence outside of the record, but he does not specify what that evidence is. Specifically, he asserts the judge asked questions about his criminal history that were not supported by documents in the record, leading appellant to conclude that the judge improperly obtained information from an extrajudicial source. Appellant concedes the record does not show how the trial court became aware of his criminal history beyond the testimony he provided. Without evidence in the record that the judge improperly considered an extrajudicial source, we cannot conclude the judge's actions were improper. Further, once appellant affirmatively answered the judge's questions, the facts about which he now complains as originating from an extrajudicial source became part of the record.

A judge may is permitted to directly question a witness, including a defendant, when seeking information to clarify a point or repeat testimony the judge could not hear. *See Dominey v. State*, No. 12-14-00226-CR, 2015 WL 4462204, at *1 (Tex. App.—Tyler July 22, 2015, no

pet.); *Guin v. State*, 209 S.W.3d 682, 685 (Tex. App.—Texarkana 2006, no pet.). A judge has authority to independently seek information from a witness relevant to determining whether placing a person on community supervision is in the best interest of justice, the public and the defendant. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 §3(a) (West Supp. 2015) ("A judge, in the best interest of justice, the public, and the defendant, after conviction or a plea of guilty or nolo contendere, may suspend the imposition of the sentence and place the defendant on community supervision or impose a fine applicable to the offense and place the defendant on community supervision"); *Guin*, 209 S.W.3d at 686 ("In making the determinations that are required when a defendant is seeking community supervision, we believe the court has the authority to independently inquire from witnesses information relevant to those determinations."); *Dominey*, 2015 WL 4462204, at *1 (same).

Appellant sought community supervision rather than incarceration. The judge, then, had to consider whether community supervision was in his and the public's best interest. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 §3(a). As part of that analysis, the judge could question appellant to obtain relevant information. *See Guin*, 209 S.W.3d at 686; *Dominey*, 2015 WL 4462204, at *1.

The judge's questions related to appellant's belief that incarceration "is not the answer," his prior experiences with drug treatment programs, and the cycle of committing crimes to support his drug habit. Further, the trial judge sought to determine why appellant believed that community supervision and additional drug treatment would help him when prior efforts failed. Considering the record as a whole, we conclude the trial judge's questions related to her obligation to determine whether community supervision was in appellant's and the public's best interest. The judge's questions were not improper and do not show bias or partiality. We

conclude appellant failed to show the judge based her questions on an improper source and to overcome the presumption that the trial judge was impartial.

Even if appellant had shown judicial impropriety, he has not demonstrated he suffered probable prejudice. Before the trial court began asking its questions, appellant testified that he had a twenty-year criminal history that included repeated incarceration for committing offenses to support his drug use. He told the judge that he reoffended each time he was released from prison as part of an ongoing cycle of committing crimes to support his drug habit and then returning to prison. His explanation of his criminal history is consistent with the offenses to which he pleaded guilty: unauthorized use of a motor vehicle and possession of a controlled substance.

He also had informed the judge that he previously was admitted to a Substance Abuse Felony Punishment Facility in the early 2000s, and his addiction resulted in estrangement from his elderly mother. When asked by the State how he believed his pattern of offending would finally change, he did not provide an explanation but rather responded that his "record speaks for itself."

Even if we were to disregard appellant's exchange with the judge, appellant's own testimony provided facts sufficient to support the sentences imposed. Appellant testified about his extensive criminal history and chronic drug abuse, but could not explain why his pattern would change. The two-year sentences, which fall within the applicable range of punishment, are commensurate with the facts before the trial court. Based on this record, we conclude appellant has not shown he suffered probable prejudice by the alleged judicial impropriety.

We overrule Conner's sole issue. We affirm the trial court's judgment.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

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JUDGMENT

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

Judgment entered this 2nd day of June, 2016.

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