Affirmed and Memorandum Opinion filed January 28, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00611-CR

MICHAEL DAVID WHITTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 123rd District Court
Shelby County, Texas
Trial Court Cause No. 05CR-16,357

MEMORANDUM OPINION

Appellant Michael David Whitton appeals the revocation of deferred adjudication community supervision. In five issues, appellant challenges the legal sufficiency of the evidence to sustain the adjudication, the trial court's admission of polygraph evidence and evidence of extraneous offenses, and appellant's life sentence on the basis of cruel and unusual punishment. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged by indictment in 2005 for the offense of aggravated sexual assault of a child. Appellant waived his right to trial by jury and judicially confessed to committing the offense. He received ten years' deferred adjudication probation, among other things, in November 2006.

In April 2007, the State moved to adjudicate appellant's guilt, alleging that appellant had violated the terms and conditions of his community supervision. In its motion, the State alleged the following violations of the terms and conditions of appellant's community supervision: twice failing to register as a sex offender on or about April 6, 2007, consuming an alcoholic beverage on or about March 27, 2007, failing to report a change in residence seven days prior to moving on or about March 27, 2007, several instances of failing to remit monies due for costs and fees associated with his probation and supervision, failing to work court-ordered community service hours, failing a polygraph examination by deception, failing to attend group counseling for sex offenders, and failing to provide proof of registration to his probation officer.

Appellant pleaded "not true" to the allegations in the State's motion to adjudicate. The trial court conducted an evidentiary hearing to determine whether appellant had violated the terms of his community supervision. The trial judge found the State's allegations to be true and found appellant guilty of the offense of aggravated sexual assault of a child. After the State presented evidence in the sentencing phase, the trial judge sentenced appellant to a life of confinement. On appeal, appellant challenges his life sentence and the evidence supporting the revocation of his deferred adjudication.[1]

[1] This appeal was transferred to the Fourteenth Court of Appeals from the Twelfth Court of Appeals. In cases transferred by the Supreme Court of Texas from one court of appeals to another, the transferee court must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court. *See* TEX. R. APP. P. 41.3.

II. ISSUES AND ANALYSIS

A. Is the evidence legally sufficient to sustain the adjudication?

In his third issue, appellant challenges the legal sufficiency[2] of the evidence to sustain the adjudication. According to appellant, the State offered conflicting testimony about appellant's registration status and where he resided.

Our review of the trial court's order revoking probation is limited to determining whether the trial court abused its discretion. *Caddell v. State*, 605 S.W.2d 275, 277 (Tex. Crim. App. 1980). When a trial court finds several violations of probationary conditions, we affirm the order revoking probation if the proof of any single allegation is sufficient. *See Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. 1980) ("We need not address appellant's other contentions since one sufficient ground for revocation will support the court's order to revoke probation."); *Hart v. State*, 264 S.W.3d 364, 367 (Tex. App.—Eastland 2008, pet. ref'd); *Greer v. State*, 999 S.W.2d 484, 486 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd).

A claim of insufficient evidence is limited to the traditional legal-sufficiency analysis in which we view the evidence in the light most favorable to the decision to revoke. *See Hart*, 264 S.W.3d at 367. In determining questions regarding the sufficiency of the evidence in probation revocation cases, the State has the burden to establish by a preponderance of the evidence that appellant committed a violation of the terms and conditions of community supervision. *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984). The preponderance-of-the-evidence standard is met when the greater weight of the credible evidence before the trial court supports a reasonable belief that a condition of probation has been violated. *Rickels v. State*, 202 S.W.3d 759, 764

[2] In his appellate brief, appellant indicates he also would challenge the factual sufficiency of the evidence if it were allowed. As noted by appellant, a factual-sufficiency review is not available for an appeal for revocation of probation. *See Hart v. State*, 264 S.W.3d 364, 367 (Tex. App.—Eastland 2008, pet. ref'd); *Joseph v. State*, 3 S.W.3d 627, 642 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

(Tex. Crim. App. 2006). When the State fails to meet its burden, it is an abuse of discretion for the trial court to issue a revocation order. *Cardona*, 665 S.W.2d at 493–94.

In a revocation proceeding, the trial judge is the sole trier of the facts, the credibility of the witnesses, and the weight to be given to witnesses' testimony. *Diaz v. State*, 516 S.W.2d 154, 156 (Tex. Crim. App. 1974); *Aguilar v. State*, 471 S.W.2d 58, 60 (Tex. Crim. App. 1971). "Reconciliation of conflicts and contradictions in the evidence is within the province of the jury, and such conflicts will not call for reversal if there is enough credible testimony to support the conviction." *Bowden v. State*, 628 S.W.2d 782, 784 (Tex. Crim. App. 1982); *see* TEX. CODE CRIM. PROC. ANN. art. 38.04 (Vernon 1979).

Testimony at trial reflects that, as a sex offender, appellant was required to update any change of residence seven days prior to moving. When appellant first received probation in November 2006, he registered his address at the Dorsey Motel in Timpson, Texas. When he moved to the Iley Motel in February 2007, he registered that address with his probation officer. On about March 6, 2007, appellant indicated to his probation officer that he wanted to move back to the Dorsey Motel. The probation officer and an administrative secretary with the sheriff's office testified that appellant's registration records were not updated with any change of residence back to the Dorsey Motel.

On March 27, 2007, the probation officer went to the Dorsey Motel to find appellant, but learned from a woman named Maxine Reed that appellant had moved out and was no longer living there at that time. Reed's testimony at the adjudication hearing confirmed that appellant had moved out and no longer resided at the Dorsey Motel when the probation officer came to visit. The probation officer testified that she learned from appellant on April 3, 2007, that appellant had been living with his mother in Timpson during that time. According to the probation officer, appellant failed to report a change in residence to reflect he was currently residing at his mother's home.

The record in this case contains sufficient credible evidence for the trier of fact to have formed the reasonable belief that appellant failed to register his address in accordance

with the terms of his community supervision. *See Mauney v. State*, 107 S.W.3d 693, 695 (Tex. App.—Austin 2003, no pet.) (concluding trial court did not abuse its discretion in revoking probation based on evidence that appellant failed to register a change of address as required by the conditions of his probation). The State met its burden of proving that appellant violated the terms of his community supervision.[3] *See id.* The evidence is sufficient to support the order revoking appellant's probation. *See id.* Accordingly, the trial court did not abuse its discretion in finding that appellant had violated these conditions of his probation and in revoking appellant's probation. *See id.* We, therefore, overrule appellant's third issue.

B. Did the trial court err in admitting evidence?

Appellant complains in two issues that the trial court erred in admitting evidence that he failed a polygraph examination and extraneous-offense evidence of his sexual conduct with minors, as reflected in the polygraph examination results.

In his first issue, appellant asserts the trial court erred in considering evidence that he failed a polygraph examination, because, according to appellant, polygraph tests or results are inadmissible for all purposes. In his appellate brief, appellant does not identify any place in the record at which he voiced any objection to the trial court's consideration of the polygraph test; however, our independent review of the record reveals that there are two places in the record in which appellant objected to portions of the polygraph examination. Appellant objected to the probation officer's testimony regarding certain parts of the polygraph examination that appellant failed. Appellant alleged that such testimony was hearsay and denied appellant the opportunity to confront the polygraph examiner as an expert witness. The probation officer testified that she received a report

[3] To the extent that appellant complains in his fourth issue that the State failed to carry its burden in proving that appellant had violated the terms of his community supervision by failing to pay fines and fees, a finding of any violation is sufficient to uphold the trial court's revocation of probation. *See Moore*, 605 S.W.2d at 926 (declining to address appellant's other sufficiency challenges because one sufficient ground for revocation will support the court's order to revoke probation); *Greer*, 999 S.W.2d at 486.

pertaining to the polygraph examination and that it was part of appellant's probation file; however, the probation officer did not testify as to particular questions in the polygraph examination or the results of the examination. At no point during this testimony did appellant object to the polygraph examination results as being inadmissible.

During the polygraph examiner's testimony, appellant objected on relevance grounds to references to the portions of the polygraph examination pertaining to appellant's prior sexual history. Appellant asked for and received a running objection to any testimony that did not specifically pertain to the conditions of appellant's supervision and treatment. When the polygraph examination results were admitted into evidence, appellant re-urged the objection that portions of the examination did not pertain to conditions of appellant's treatment and probation. Appellant did not object at the adjudication hearing to the polygraph examination or its results as being inadmissible for all purposes.

To preserve a complaint for appellate review, a party must present to the trial court a timely request, objection, or motion stating the specific grounds for the ruling desired. TEX. R. APP. P. 33.1(a); *see Sanchez v. State*, 222 S.W.3d 85, 89–90 (Tex. App.—Tyler 2006, no pet.) (holding that an appellant's failure to object to polygraph results at trial waived error). A defendant's appellate contention must comport with the specific objection made at trial. *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). An objection stating one legal theory may not be used to support a different legal theory on appeal. *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995). Appellant's complaint on appeal that the polygraph examination results are inadmissible for all purposes was raised for the first time on appeal. Because appellant's argument on appeal does not comport with the objection raised in the trial court, appellant has failed to preserve this issue for review. *See* TEX. R. APP. P. 33.1(a); *Marcum v. State*, 983 S.W.2d 762, 765 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd) (providing that "on proper objection," polygraph results are inadmissible). We overrule appellant's first issue.

In his second issue, appellant contends that the trial court committed reversible error in admitting evidence of extraneous offenses. In support of this argument, appellant points to the testimony of the polygraph examiner who testified that appellant was deceptive in his polygraph answers regarding his sexual contact with minors. Appellant also points to the polygraph examination results, which appellant claims contain numerous uncharged extraneous offenses. Appellant also asserts that the trial court erred in the sentencing phase by admitting the testimony of a Child Protective Services investigator who testified that appellant admitted during a 1997 investigation that he had sexual relations with his sisters and some cousins. According to appellant, all of this evidence is inadmissible extraneous-offense evidence under Texas Rule of Evidence 403 because its probative value is substantially outweighed by the danger of unfair prejudice.

The record does not reflect that appellant raised an objection to any extraneous-offense evidence on Rule 403 grounds. Appellant objected to the examiner's testimony, asserting that reference in the polygraph results to appellant's prior sexual history was not relevant because it did not relate specifically to the conditions of appellant's treatment and probation. The trial court overruled this objection. When the State sought to admit the polygraph examination results, appellant re-urged this objection; however, the trial court admitted the exhibit. The record does not reflect that appellant objected to evidence of extraneous offenses under Rule 403 during the adjudication hearing.

Similarly, at the sentencing phase, appellant objected to the investigator's testimony on "custodial interrogation" grounds. The trial court overruled the objection. The investigator testified that appellant admitted that he had induced young children to touch his penis; appellant did not object to this testimony. The trial court asked the investigator for more information about the investigation. In response, the investigator testified that the investigation was initiated because of appellant's sister's allegation that he had sexual

contact with her. Appellant objected on hearsay grounds, and the trial court sustained the objection.

As discussed above, a defendant's appellate contention must comport with the specific objection made at trial. *Wilson*, 71 S.W.3d at 349. An objection stating one legal theory in the trial court may not be used to support a different legal theory on appeal. *Broxton*, 909 S.W.2d at 918. Appellant's complaints to this evidence under Rule 403 were raised for the first time on appeal. Because appellant's argument on appeal does not comport with any objection raised in the trial court, appellant has failed to preserve this issue for appellate review. *See* TEX. R. APP. P. 33.1(a). We therefore overrule appellant's second issue.

Likewise, because appellant has failed to preserve his second issue for appellate review, we do not address the merits of appellant's fourth issue in which he asserts he sustained harm from the cumulative effect of the errors asserted in appellant's first three issues. *See Gamboa v. State*, 296 S.W.3d 574, 585 (Tex. Crim. App. 2009) ("Though it is possible for a number of errors to cumulatively rise to the point where they become harmful, we have never found that 'non-errors may in their cumulative effect cause error.'"). On this basis, we overrule appellant's fourth issue.

C. Did the trial court err in sentencing appellant to life imprisonment?

In his fifth issue, appellant contends that the trial court's sentence of life imprisonment amounts to cruel and unusual punishment in violation of the United States Constitution. According to appellant, the sentence is grossly disproportionate to the offense for which appellant was convicted.

Appellant has not shown, and our independent review of the record has not revealed, that appellant timely lodged this specific objection at the time his sentence was assessed or in any post-trial motion. *See Schneider v. State*, 645 S.W.2d 463, 466 (Tex. Crim. App. 1983); *Jacobs v. State*, 80 S.W.3d 631, 632–33 (Tex. App.—Tyler 2002, no

pet.). Because appellant did not raise this objection in the trial court, appellant has not preserved this issue for appellate review. *See* TEX. R. APP. P. 33.1(a); *Schneider*, 645 S.W.2d at 466; *Jacobs*, 80 S.W.3d at 632–33. Therefore, appellant has waived this complaint and we overrule his fifth issue.

Having overruled all of appellant's issues on appeal, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Yates, Frost, and Brown.

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