Affirmed and Memorandum Opinion filed September 7, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00254-CR

CASEY LYNN MCCAIN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 09-CR-0336

M E M O R A N D U M O P I N I O N

Appellant Casey Lynn McCain appeals the trial court's judgment revoking his community supervision. He contends that the trial court committed reversible error by allowing a probation officer to testify regarding reports filed by a prior probation officer, thereby admitting hearsay evidence and depriving him of his Confrontation Clause rights. Because the probation officer's testimony falls within a hearsay exception and appellant failed to preserve his Confrontation Clause complaint, we affirm the trial court's judgment.

BACKGROUND

A jury convicted appellant of aggravated assault with a deadly weapon and assessed his punishment at six years' confinement, probated for six years. The sentence was imposed on July 16, 2010. Community supervision was conditioned, among other things, upon the following requirements:

> 4. Report in person to the Supervision Officer, at least once each month as directed by the Supervision Officer and obey all rules and regulations of the G.C.C.S.C.D.;
>
> 12. Pay to the G.C.C.S.C.D. $40.00 per month as a Community Supervision fee;
>
> 13. Pay to the G.C.C.S.C.D. $256.00 in Court Costs . . .;
>
> 16A. Pay to the G.C.C.S.C.D. $25.00 as a Crime Stoppers Program payment . . .;
>
> 26. Perform 240 hours of Community Service work as approved by the Court. Said hours shall be completed at a rate of no less than sixteen (16) hours per month until completed . . . .

The State filed a motion to revoke community supervision on January 21, 2016. The State filed an amended motion to revoke community supervision on February 10, 2016, alleging that appellant violated the terms and conditions of community supervision by, among other things, failing to (1) report in person for the months of January 2012; June 2013; February and March 2014; and June, July, August, October, and November 2015; (2) pay supervision fees as ordered; (3) pay court costs as ordered; (4) make a Crime Stoppers Program payment; and (5) participate in the community service work program at a rate of no less than sixteen (16) hours per month until completed.

The trial court held a hearing on the motion to revoke on February 29, 2016. Appellant pleaded not true to the State's allegations. After hearing testimony from appellant's current probation officer, the victim in the original aggravated assault

with a deadly weapon case, and appellant's father, the trial court found that appellant violated conditions of his community supervision by failing to participate in the community service work program as alleged by the State, and to report in person for all months alleged by the State "with the exclusion of August and June."

The trial court signed a judgment revoking community supervision on February 29, 2016. Appellant filed a timely appeal.

ANALYSIS

Appellant argues in his sole issue that the trial court "committed reversible error by allowing, over defense objection, a probation officer to testify to reports filed by a previous probation officer, thus depriving [appellant] of his Confrontation Clause rights and prejudicing [appellant] through the introduction of otherwise inadmissible testimony."

I. Standard of Review

An order revoking probation must be supported by a preponderance of the evidence, meaning that the greater weight of the credible evidence would create a reasonable belief that the defendant has violated a condition of his community supervision. *Rickels v. State*, 202 S.W.3d 759, 763-64 (Tex. Crim. App. 2006). We review an order revoking community supervision under an abuse of discretion standard. *Id*. In conducting this review, we view the evidence in the light most favorable to the trial court's order. *Greer v. State*, 999 S.W.2d 484, 486 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). The trial court is the sole trier of fact and determines the credibility of the witnesses and the weight to be given their testimony. *Moore v. State*, 11 S.W.3d 495, 498 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Proof of any one of the alleged violations of the community supervision terms is sufficient to support a revocation of community supervision.

Leonard v. State, 385 S.W.3d 570, 576 (Tex. Crim. App. 2012); *Moore*, 11 S.W.3d at 498.

II. Hearsay

We first address appellant's argument that the trial court erroneously allowed appellant's current probation officer, Eric Kemmerer, to testify about the times appellant failed to report and failed to complete community service requirements based on the contents of appellant's probation file. Appellant contends that Kemmerer was not the probation officer in charge of appellant's case at the time of the alleged probation violations and his testimony constituted inadmissible hearsay. He contends the trial court erroneously relied on a hearsay exception in Texas Rule of Evidence 803(6) "carved into law that allows the introduction of 'Records of [a] Regularly Reported Conducted Activity'" because "paragraph (8) of the same rule excludes from the public records exception 'in criminal cases matters observed by police officers and other law enforcement personnel.'" Appellant argues that *Cole v. State*, 839 S.W.2d 798 (Tex. Crim. App. 1990), demonstrates the inadmissibility of Kemmerer's testimony relating to appellant's probation file.

In *Cole*, the State sought to introduce hearsay statements contained in reports from a chemist employed by the Texas Department of Public Safety during trial. *Id.* at 800. In the absence of the chemist, the supervising chemist with the same laboratory was allowed to testify over the defendant's hearsay objection as to the tests conducted and the test results shown in the reports. *Id.* The State tendered the evidence under Rule 803(6). *Id.* The defendant "contended the admission of this hearsay statement of [the chemist] through the testimony of [his supervisor] was in contravention of that portion of [Rule 803(8)(A)(ii)] which prohibits as hearsay 'matters observed by police officers and other law enforcement personnel.'" *Id.* The Court of Criminal Appeals agreed, holding that the reports failed to satisfy the

requirements of Rule 803(8)(A)(ii) and were inadmissible because the reports (1) "constitute[d] 'matters observed' by 'other law enforcement personnel;'" (2) were prepared during a criminal investigation; and (3) were not "ministerial, objective observations of an unambiguous factual nature." *See id*. at 810.

Appellant invites us to hold that the requirements of Rule 803(8)(A)(ii) are not satisfied based on *Cole* because Kemmerer qualifies as "other law enforcement personnel" and the probation file contains subjective information and is not merely prepared for rehabilitative purposes.

We rejected the same argument in *Greer v. State*, 999 S.W.2d at 489. Employing the analysis the Court of Criminal Appeals outlined in *Cole*, we held that the trial court did not err in admitting the probation officer's testimony derived from the file another probation officer compiled. *Id*. We concluded that "[a]ppellant's probation file contains information that is objective and routine." *Id*. We stated that "[w]hether appellant failed to report to his probation officer . . . is an unambiguous factual matter and is not an issue susceptible to any degree of subjectiveness by the probation officer." *Id*. We also stated that the nature of probation is rehabilitative and that the records prepared by probation officers are not done in either an adversarial or investigative context. *Id*. "Consequently, we h[e]ld that the probation file satisfies the requirements of rule 803(8)[(A)(ii)] because it does not constitute a matter observed by 'other law enforcement personnel,' and, therefore, was admissible." *Id*.

The same reasoning applies in this case, and we follow our precedent in *Greer*. Therefore, we conclude that the trial court did not err by determining that Kemmerer's testimony about the times appellant failed to report and failed to complete community service requirements based on the contents of appellant's probation file was admissible.

III. Confrontation Clause

We now turn to appellant's contention that admission of "Kemmerer's testimony regarding the previous probation officer's notations" constitutes a violation of his Sixth Amendment right to confront witnesses against him.

The record reflects that appellant asserted a hearsay objection to Kemmerer's testimony. Appellant has not shown and our independent review of the record does not reflect that appellant made a timely request, objection, or motion with sufficient specificity to apprise the trial court of his complaint asserting a violation of his rights under the Confrontation Clause to Kemmerer's testimony. *See* Tex. R. App. P. 33.1(a); *Reyna v. State*, 168 S.W.3d 173, 179 (Tex. Crim. App. 2005); *Dreyer v. State*, 309 S.W.3d 751, 755 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

"An objection on hearsay does not preserve error on Confrontation Clause grounds." *Reyna*, 168 S.W.3d at 179; *Dreyer*, 309 S.W.3d at 755. The trial court did not have an opportunity to rule on an objection for a violation of the Confrontation Clause during Kemmerer's testimony. *See Reyna*, 168 S.W.3d at 179; *Dreyer*, 309 S.W.3d at 755. Therefore, appellant has failed to preserve his Confrontation Clause complaint for appellate review. *See* Tex. R. App. P. 33.1(a); *Reyna*, 168 S.W.3d at 179; *Dreyer*, 309 S.W.3d at 755.

Accordingly, we overrule appellant's issue.

CONCLUSION

We affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Jamison and Brown.
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