Affirmed and Memorandum Opinion filed July 18, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00582-CR

ALEXANDER DENARD WRIGHT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 1364465

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

Appellant Alexander Denard White was found to have violated the terms of his deferred-adjudication community supervision by committing two new offenses. The trial court adjudicated appellant's guilt for the original offense of aggravated assault and sentenced him to twelve years in prison. In one issue, appellant argues that the evidence is factually insufficient to support, by a preponderance of the evidence, a finding that he committed either new offense. We affirm.

FACTUAL BACKGROUND

In 2012, appellant pleaded guilty to a charge of aggravated assault by threatening and by using and exhibiting a firearm. On April 3, 2013, the trial court deferred adjudication for three years.

About two years later, the State filed a motion to adjudicate appellant's guilt, alleging that appellant had violated the conditions of his community supervision by: (1) committing assault by intentionally and knowingly causing injury to a person with whom appellant had a dating relationship, by impeding the normal breathing and circulation of the blood of the complainant by applying pressure to the complainant's throat; and (2) evading detention by intentionally fleeing from an officer who was attempting to detain appellant.

A hearing was held on the State's motion. The complainant did not testify, but Officer Castellanos of the Texas Southern University (TSU) Police Department testified that on August 21, 2015, he was dispatched to a student-housing apartment in response to a call that a female had been assaulted. Officer Castellanos located the complainant, who appeared distraught and was crying.

The complainant told Officer Castellanos that she and appellant used to date, but were separated—they had "broken up." She also said that she and appellant had a child together. According to the complainant, appellant came to her apartment that evening and asked her to make him some food, which she did. Appellant then asked her whether "she [was] talking to anyone, any other males." When the complainant answered "yes," their discussion escalated. Appellant threw her on the bed, put a pillow on her face, and grabbed her neck with both hands, causing her to "nearly black out." The complainant also said that she nearly blacked out when appellant "choked her." When the complainant pushed appellant off, he grabbed her phone and left.

The assault occurred about five or ten minutes before Officer Castellanos arrived. The officer observed a bruise on the complainant's neck. He also observed "white marks around her neck" which, based on his experience, were consistent with someone having "rubbed – grabbed their hand and squeezed, causing [the complainant's] skin to ash." The officer pointed out the complainant's injuries on photographs taken of the complainant's face and neck, which were admitted into evidence.

During Officer Castellanos's interview of the complainant, she identified appellant as her attacker by name, and gave the officer appellant's correct date of birth and his phone number. The officer called the number, and the complainant identified appellant's voice on speakerphone. The officer spoke to appellant about coming to the police substation to return the complainant's phone, but appellant did not go to the substation.

Officer Houseman, another TSU officer, testified that two days later an arrest warrant was issued for appellant. He and another officer went to execute the warrant on the TSU campus, where appellant was reportedly located. Officer Houseman did not know what appellant looked like, but the dispatcher provided a description of his clothing. The officers went to the location and saw appellant. The officers were in uniform and in a patrol car with the emergency lights flashing when they parked and attempted to contact appellant. Officer Houseman approached appellant and said, "Sir, can I please talk to you for a second?" Appellant ran. The two officers pursued appellant, but he got away. Appellant turned himself in a few days later.

At the hearing, appellant denied that he and the complainant ever dated. Appellant described the complainant as "one of his friends," but he acknowledged that they had intercourse and had a child together. He denied choking or hitting the

complainant. He also denied running from the police officers, claiming they were mistaken or lying about the incident.

At the conclusion of the hearing, the trial court found both the assault and the evading detention allegations true and sentenced appellant to twelve years in the Institutional Division of the Texas Department of Criminal Justice.

ANALYSIS OF APPELLANT'S ISSUE

In one issue, appellant contends that the State's evidence was factually insufficient to prove by a preponderance of the evidence that he committed the aggravated assault or the evading detention allegations.

Standard of Review

We review a trial court's decision to revoke community supervision for an abuse of discretion. *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006). In a revocation proceeding, the State must prove by a preponderance of the evidence that the defendant violated the terms and conditions of community supervision. *Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993). 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." *Rickels*, 202 S.W.3d at 763–64.

The trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Davila v. State*, 547 S.W.2d 608, 609 (Tex. Crim. App. 1977); *Houston-Randle v. State*, 499 S.W.3d 912, 914 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). Inconsistencies in the testimony at the revocation hearing merely raise credibility issues for the trial court, which is free to accept or reject any or all of the witnesses' testimony. *Miles v. State*, 343 S.W.3d 908, 913–14 (Tex. App.—Fort Worth 2011, no pet.).

We examine the evidence in the light most favorable to the trial court's ruling. *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984). If the State fails to meet its burden of proof, the trial court abuses its discretion by revoking the community supervision. *Id.* at 493–94. When a trial court finds several violations of community supervision conditions, we will affirm if the proof of any single allegation is sufficient. *Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. [Panel Op.] 1980); *Bessard v. State*, 464 S.W.3d 427, 429 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd).

When the State's burden is one of a preponderance of the evidence, the legal-sufficiency standard has been described as a review for whether there is more than a scintilla of evidence. *Hacker v. State*, 389 S.W.3d 860, 865 (Tex. Crim. App. 2013); *Houston-Randle*, 499 S.W.3d at 914. Appellant suggests, however, that we may also conduct a factual-sufficiency review of the trial court's decision to revoke deferred adjudication community supervision, citing *Moon v. State*, 451 S.W.3d 28, 46 (Tex. Crim. App. 2014) ("[E]ven in criminal cases, we have said that the courts of appeals may conduct factual-sufficiency reviews when confronted with fact issues for which the burden of proof is by a preponderance of the evidence."). *Moon* did not involve a trial court's revocation of deferred-adjudication community service, and appellant has cited no case in which an appellate court has applied the factual-sufficiency standard in this context.

This court has previously declined to conduct a factual-sufficiency review in cases involving a revocation of community service. *See Joseph v. State*, 3 S.W.3d 627, 642 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding factual-sufficiency standard inapplicable in revocation cases); *see also Allen v. State*, No. 14-14-00798-CR, 2016 WL 269900, at *9 (Tex. App.—Houston [14th Dist.] Jan. 21, 2016, no pet.). Several of our sister courts have also found that a factual

sufficiency analysis is inappropriate in such cases. *See, e.g.*, *Miles*, 343 S.W.3d at 913; *Antwine v. State*, 268 S.W.3d 634 (Tex. App.—Eastland 2008, pet. ref'd); *Davila v. State*, 173 S.W.3d 195, 198 (Tex. App.—Corpus Christi 2005, no pet.); *Brooks v. State*, 153 S.W.3d 124, 126 (Tex. App.—Beaumont 2004, no pet.): *Pierce v. State*, 113 S.W.3d 431, 436 (Tex. App.—Texarkana 2003, pet. ref'd); *Johnson v. State*, 943 S.W.2d 83, 85 (Tex. App.—Houston [1st Dist.] 1997, no pet.). We decline appellant's request to revisit the issue.[1]

The Alleged Assault

A person commits assault if he "intentionally, knowingly, or recklessly causes bodily injury to another." Tex. Penal Code § 22.01(a)(1). The offense is generally a Class A misdemeanor but is elevated to a third degree felony if (1) the offense is committed against a person with whom the defendant has or has had a "dating relationship," and (2) "the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth." *See id.* § 22.01(b)(2)(B); Tex. Fam. Code § 71.0021(b).

Section 22.01(b)(2) of the Penal Code incorporates by reference section 71.0021(b) of the Family Code, which defines a "dating relationship" as "a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature." Tex. Fam. Code § 71.0021(b). The existence of such a relationship is determined based on the length of the relationship, the nature of the relationship, and the frequency and type of interaction between the persons involved in the relationship. *Id.*

Appellant contends that the State's allegation is that the complainant and

[1] Even if we were to review the record for factual sufficiency, the record would support an affirmance of the trial court's judgment.

appellant "had" a relationship, and did not allege the alternative of their "having had" a relationship—meaning that the State believed the relationship was ongoing at the time of the alleged offense, rather than a past relationship. According to appellant, the record shows that the two were not in a dating relationship at the time of the alleged offense, and no evidence was presented as to the length, nature, or frequency of interaction between them. Appellant notes that Officer Castellanos testified that the complainant told him she and appellant had recently broken up from a dating relationship, and that appellant testified that he and the complainant had sex but "never dated."

Appellant's argument fails because the Family Code defines "dating relationship" as either a present or a past relationship. *See id.* The State was not required to show that appellant and the complainant were in an ongoing relationship. A rational fact finder could find, by a preponderance of the evidence, that appellant and the complainant had a dating relationship as alleged. The complainant stated that she and appellant used to date, but were separated at the time of the assault. And, although appellant denied having a dating relationship, he admitted that he had intercourse with the complainant and had a child with her. From this testimony, the trial court could have rationally concluded that even though appellant and the complainant were separated at the time of the assault, their past relationship was sufficient to show that they had a dating relationship.

Appellant also complains that the evidence is insufficient to show that appellant impeded the normal breathing or circulation of the complainant, because Officer Castellanos testified that the complainant told him she had been able to breathe. Appellant cites to the following exchange with the prosecutor just after the officer described the injuries he saw on the photographs of the complainant's neck:

> Q. Offer Castellanos, when you were speaking with [the

complainant], were you able to determine whether she was able to breath [sic] during this time?

A. During my interview, she did advise us she was able to breath; [sic] but she –

After a hearsay objection from defense counsel, the prosecutor elicited testimony from the officer that the complainant relayed to him what had happened to her about thirty to forty-five minutes after he arrived, while she was still under the effects of an exciting event. The trial court did not rule on the objection and was not asked to do so.

Relying solely on this testimony, appellant argues that no reasonable fact finder could infer that the complainant could not breathe when she said that she could. But we do not review appellant's evidence in a vacuum. Assuming the complainant conveyed that she was able to breathe at some unspecified time, she did not claim an ability to do so normally. *See* Tex. Penal Code § 22.01(b)(2)(B) (offense is committed by impeding "normal breathing"); *Marshall v. State*, 479 S.W.3d 840, 845 (Tex. Crim. App. 2016) (explaining that "[a]n impediment to normal breathing does not necessarily prevent breathing altogether because an impediment is merely a hindrance or obstruction" and holding that evidence was sufficient to show impeded breathing even though victim stated she was never entirely unable to breathe).

The record reflects that the complainant told Officer Castellanos that appellant threw the complainant onto a bed, placed a pillow on her face, and grabbed her neck with both hands, which caused the complainant "to nearly black out." The complainant also stated that appellant choked her until she nearly blacked out. The fact that the complainant almost lost consciousness demonstrates that the pressure appellant applied to her throat while choking her with both hands impeded her ability to engage in normal breathing. Moreover, when Officer

Castellano arrived a short time after the assault, he saw bruise marks on the complainant's neck. He also saw white marks on her neck, which based on his experience, were consistent with someone putting their hands on the complainant's neck and squeezing, causing her skin to "ash." The evidence is sufficient to prove, by a preponderance of the evidence, that appellant assaulted the complainant by intentionally or knowingly causing bodily injury to the complainant, a person with whom appellant had a dating relationship, by impeding her normal breathing and blood circulation by applying pressure to her throat.

The trial court did not abuse its discretion in revoking appellant's community supervision. As the State is required to prove only a single violation of a community supervision condition to support the trial court's decision to revoke community supervision, we need not reach the sufficiency of the evading detention allegation. *See Moore*, 605 S.W.2d at 926; *Bessard*, 464 S.W.3d at 429.

CONCLUSION

We overrule appellant's issue and affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Justices Christopher, Brown, and Wise.
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