Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00251-CR

Christopher Anthony **GARCIA**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 187th Judicial District Court, Bexar County, Texas
Trial Court No. 2014CR8550A
Honorable Steve Hilbig, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: June 28, 2017

AFFIRMED

On March 20, 2015, Appellant Christopher Anthony Garcia entered into a plea agreement with the State of Texas regarding the offense of Aggravated Robbery with a Deadly Weapon Causing Bodily Injury. On April 14, 2015, the trial court assessed punishment at ten years' deferred adjudication community supervision and a $1,500.00 fine. Six months later, on November 24, 2015, the State filed its Motion to Enter Adjudication of Guilt and Revoke Community Supervision. The trial court subsequently revoked Garcia's deferred adjudication, found Garcia guilty of the charged offense, and assessed punishment at twenty-four years'

confinement in the Institutional Division of the Texas Department of Criminal Justice and a fine of $1,500.00. On appeal, Garcia contends the trial court erred in denying his motion for continuance and admitting the audio-recordings offered by the State. We affirm the trial court's judgment.

FACTUAL BACKGROUND

Garcia was charged by indictment with the first-degree offense of aggravated robbery with a deadly weapon, alleged to have occurred on July 11, 2014. On March 20, 2015, Garcia entered into a plea agreement with the State. The trial court ordered a presentence investigation report and reset the case. On April 14, 2015, the trial court sentenced Garcia to ten years' deferred adjudication community supervision and a $1,500.00 fine.

On November 24, 2015, the State filed its Motion to Enter Adjudication of Guilt and Revoke Community Supervision alleging multiple technical violations and two new offenses; the motion alleged Garcia committed robbery and injury to a disabled individual-serious bodily injury, both alleged to have been committed on August 21, 2015. On January 11, 2016, the State filed a supplemental motion to adjudicate in which the State alleged two additional offenses—theft from a person and aggravated assault causing serious bodily injury. Both of the additional offenses were also alleged to have been committed on August 21, 2015.

On January 28, 2016, Garcia's counsel filed a motion for continuance asserting the State's delay in providing a copy of a videotape purporting to record the charged offenses. The trial court reset the matter.

The matter was recalled for hearing on February 4, 2016; the State announced its intent to proceed on its supplemental motion to adjudicate, including the two additionally charged offenses. Garcia's defense counsel objected, asserting that he never received a copy of the supplemental motion. The trial court reaffirmed the supplemental motion was filed with the trial court on

January 11, 2016, and the new charges stemmed from the same set of events and incidents, on the same day, as the State alleged in its original motion to adjudicate. The State presented evidence regarding Garcia's technical violations of his conditions of probation and several witnesses regarding the events occurring on August 21, 2015.

After the conclusion of testimony, the trial court announced it was proceeding on "the original motion to enter adjudication of guilt," and found by a preponderance of the evidence that Garcia committed the following violations of the community supervision:

1) On August 21, 2015, "committed the lesser included offense of theft from a person;"
2) On August 21, 2015, "committed the lesser included offense of aggravated assault serious bodily injury;"
3) On July 24, 2015, and August 21, 2015, failed to submit to a drug test;
4) In September and October 2015, failed to report to the probation office;
5) Failed to perform community service as directed; and
6) Failed to enroll in a GED program.

On February 24, 2016, following a sentencing hearing and arguments of counsel, the trial court revoked Garcia's deferred adjudication, found Garcia guilty of the first-degree felony aggravated robbery with a deadly weapon, and assessed punishment at twenty-four years' confinement in the Institutional Division of the Texas Department of Criminal Justice and a fine of $1,500.00. This appeal ensued.

INSUFFICIENT NOTICE OF ALLEGED VIOLATIONS

A. Arguments of the Parties

Garcia contends the State violated his due process rights by failing to provide him with written notice of the State's supplemental motion to adjudicate. Specifically, Garcia argues the State's supplemental motion contains allegations that Garcia committed two new offenses during

the term of his probation and the two alleged offenses are different from the two offenses described in the State's original motion to adjudicate.

B. Required Notice

Constitutional and statutory protections available at a criminal trial are not synonymous with those afforded a defendant at a revocation of probation proceeding. *Ex parte Carmona*, 185 S.W.3d 492, 495 (Tex. Crim. App. 2006); *Ruedas v. State*, 586 S.W.2d 520, 523 (Tex. Crim. App. 1979). Due process requirements pursuant to a final revocation of probation require the defendant be provided the following:

> the final revocation of probation must be preceded by a hearing, where the probationer is entitled to written notice of the claimed violations of his probation, disclosure of the evidence against him, an opportunity to be heard in person and to present witnesses and documentary evidence, a neutral hearing body, and a written statement by the fact finder as to the evidence relied on and the reasons for revoking probation.

Carmona, 185 S.W.3d at 495 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973)).

C. Motion to Adjudicate Hearing—February 4, 2016

At the hearing's outset, the State announced it was proceeding on the technical violations and the allegations contained in the State's supplemental motion to adjudicate filed on January 11, 2016—aggravated assault serious bodily injury and theft from a person. When Garcia's counsel objected that he never received a copy of the supplemental motion, the trial court reiterated that the supplemental motion was filed in the trial court on January 11, 2016.

In response, the State explained that the charges in the supplemental motion were "effectively almost the same charges [as those contained in the original motion];" all of the charges involved the same complainants, the same events, and the same discovery. "They're the same cases." The State announced that it was ready to proceed on both the original and the supplemental motions. The trial court overruled Garcia's objection.

1. Technical Violations

The State called Bexar County Adult Probation Officer Ronald Jimenez who testified that he was Garcia's probation officer until October 8, 2015. On July 24, 2015, Jimenez conducted his initial interview with Garcia. During their initial visit, Jimenez instructed Garcia to submit to a drug test, provide proof of address, begin working on his GED, and to make a payment to the court. Jimenez testified that Garcia failed to complete any of the itemized instructions.

The second, and only other time that Jimenez met with Garcia, was on August 21, 2015. Jimenez again asked about the GED program and Garcia reported that his program was starting on August 28th. Once again, Garcia failed to follow Jimenez's instructions, including submitting to a drug test. A couple of weeks later, on September 14, 2015, Jimenez received an email from the Bexar County Sheriff's Office indicating the sheriff's office was in possession of two felony arrest warrants for Garcia and requesting Jimenez contact the sheriff's office when Garcia reported for probation. Garcia never again reported for probation visits.

Lastly, Jimenez testified that, during Garcia's probation, Garcia failed to complete any of the 200 court ordered hours of community service, and failed to pay any of the $607.59 court ordered fees.

Garcia's counsel again urged his motion for continuance. After a short recess, the trial court denied the motion.

> [Y]ou were already provided notice according to representation of the State attorney that you were provided notice, in essence, of the evidence because they all [arise] out of the same transaction unless you dispute [the prosecutor's] assertions to the Court, and I'll hear that dispute and make that determination.

The State proceeded to call additional witnesses.

2. Testimony Regarding Alleged Assault

Noemi Diaz testified that on August 21, 2015, she received a call from her daughter, Abigail Diaz. Abigail was walking home from the store when she was "jumped." Noemi left her residence and ran toward the store when she "saw a couple of guys hitting Serena [Abigail's friend] and [Abigail] and [her] grandbaby [were] crying out of fear." She ran screaming at the men with a stick; the men looked up and ran. Noemi handed the baby to a friend and followed Abigail and Serena to "Little C's" house.

Noemi identified Garcia as "Little C" and testified that he was an "affiliate" of the Party Boys—an aggressive and retaliatory gang. Abigail and Serena continued to fight with the men when Serena's uncle arrived. Noemi testified "the next thing" she saw was "a whole bunch of guys jump [Serena's uncle]. They were "stomping on his head" and "punching him;" he was unconscious and "they [were] still beating him." The State proceeded to offer a videotaped recording of the assault and Noemi testified the video fairly and accurately represented the events she witnessed. Garcia's counsel objected to the evidence's admission due to "accuracy." The judge overruled the objection and the videotaped recording was admitted into evidence.

Abigail Diaz testified that she and Serena were walking to the store when a man that she identified as "Goofy" stopped and started arguing with Serena. Goofy spit in Serena's face and pushed both Serena and Abigail; two other individuals—"Osek" and Garcia—joined the fight. Abigail identified Garcia and testified that she only knew him as "Little C." Abigail placed her four-year-old daughter on the grass and called her mother for help. "They started fighting and a whole bunch of guys ran out and started fighting and jumping us." Abigail testified that she witnessed Garcia take Serena's phone out of her pocket. Within a couple of minutes, Serena's uncle drove by and chased the three men. Her uncle was fighting when they "slammed him to the floor and his head hit the concrete . . . They still kept stomping on him." "They were all hitting

him. They were all stomping on him while he was unconscious on the ground." Abigail testified that when Serena tried to stop Garcia from hitting her uncle, Garcia hit Serena as well.

Oscar Cortes Jr. testified that he was on his way home from work when Abigail stopped his truck and told Cortes that Serena, his niece, was "getting beat up." "I remember coming out of the truck and confronting a whole bunch of guys. And that's all I remember, really." Cortes testified he had not been able to work since the assault, has suffered from severe memory loss, and had to move in with his parents. Additionally, both his vision and his speech were affected and the right side of his body is numb. On cross-examination, Cortes explained that although he was legally blind from cataracts prior to the attack, his vision worsened after the assault.

The State rested and the defense called two witnesses. Amparo Chavez, Garcia's uncle, testified that on the day in question he heard noise outside of his house. He walked outside to "run them off;" he fell and Garcia picked him up and helped fix the gate. Chavez heard "somebody say 'the police are coming,' and then all of a sudden everybody disappeared."

Marisol Colin, Garcia's mother, testified the fight occurred outside of her home, where she lives with Amparo and Maria Chavez. On the night in question, Colin walked up the street to purchase tacos and when she returned the boys were fighting; "they were all making a big scuffle." Colin heard someone yell that the police were coming and "they ran off." Both Chavez and Colin testified they never heard Garcia referred to as "Little C."

3. Trial Court Findings

The trial court reiterated the court was proceeding only on the State's original Motion to Enter Adjudication of Guilt and Revoke Community Supervision filed on November 24, 2015.

> The Court is proceeding on the original motion to enter adjudication of guilt. As to violation of Condition Number One, the Court will find by a preponderance of the evidence that the defendant on August 21st of 2015 committed the lesser included offense of theft from a person.

> As to violation of Condition Number Two, the Court will find that the defendant violated condition Number One by committing the lesser included offense of aggravated assault serious bodily injury.

The trial court further found several of the technical violations alleged in the State's motion true. Specifically, the trial court found that the State proved, by a preponderance of the evidence, that Garcia failed to complete the following conditions of his probation: (1) submit to probation requested drug tests, (2) monthly reports to the probation office, (3) complete court-ordered community service hours, or (4) enroll in a GED program. The trial court further found the alleged violations that Garcia failed to report an arrest to the probation office as not true.

D. Analysis

Garcia does not contest the State provided sufficient notice regarding the State's original motion to adjudicate. During the hearing, the trial court specifically addressed the distinctions between the original motion to adjudicate and the State's supplemental motion to adjudicate. Both motions contained two alleged violations of Garcia's first condition of probation—that he not commit nor be convicted of any additional offenses. The original motion alleged robbery and injury to disabled-serious bodily injury, both alleged to have been committed on August 21, 2015. The supplemental motion added the alleged offenses of aggravated assault causing serious bodily injury and theft from a person, also alleged to have been committed on August 21, 2015. The trial court clarified, and Garcia did not contest at trial or on appeal, that all of the allegations stemmed from the same incident, same witnesses, and same facts.

1. Lesser Included Offense

A trial court abuses its discretion if it revokes a probation on grounds that are not alleged in the State's motion to revoke. *Caddell v. State*, 605 S.W.2d 275, 277 (Tex. Crim. App. 1980). A trial court may, however, revoke a defendant's probation if the State proves a lesser included offense than what has been alleged. *See Greer*, 783 S.W.2d at 224 ("Since an accused may be

tried and convicted of a lesser included offense other than that alleged in an indictment, we conclude that a probationer is likewise accountable for lesser offenses included within the offense alleged in the motion to revoke."); *Wahab v. State*, No. 01–95–00948–CR, 1998 WL 4119, at *2 (Tex. App.—Houston [1st Dist.] Jan. 8, 1998, pet. ref'd) (not designated for publication) ("It is well settled that probation may be revoked if the State proves a lesser included offense of what it has alleged.").

An offense is considered a lesser included offense if the proof of the charged offense includes the proof required to establish the lesser included offense. TEX. CODE CRIM. PROC. ANN. art. 37.09 (West 2006). The determination of whether an offense is a lesser included offense is a question of law and is not dependent on the evidence produced at trial. *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007). The controlling factor is whether the lesser included offense could be proven by the same facts necessary to establish the offense charged. *Mello v. State*, 806 S.W.2d 875, 878 (Tex. App.—Eastland 1991, pet. ref'd) (citing *Jones v. State*, 586 S.W.2d 542 (Tex. Crim. App. 1979)).

A person commits injury to a disabled individual–serious bodily injury if he intentionally or knowingly causes serious bodily injury to a disabled individual. *See* TEX. PENAL CODE ANN. § 22.04(a)(1) (West Supp. 2016). A person commits aggravated assault if he intentionally or knowingly causes serious bodily injury to another. *See* TEX. PENAL CODE ANN. §§ 22.01, 22.02. The charges as alleged in the motions to adjudicate differ only in that injury to a disabled individual requires proof that Cortes was disabled. *See Skelton v. State*, 626 S.W.2d 589, 592 (Tex. App.—Texarkana 1981, no pet.). The trial court properly determined aggravated assault causing serious bodily injury was a lesser included offense of injury to a disabled individual-serious bodily injury. *See Hall*, 225 S.W.3d at 535–36. Because the testimony regarding Cortes's disability prior to the assault was limited, a reasonable factfinder could have disbelieved the necessary evidence

supporting the greater offense; in doing so, the factfinder could reasonably conclude that the State's evidence supported, beyond a preponderance of the evidence, that Garcia committed aggravated assault causing serious bodily injury. *See id*., *Hampton v. State*, 109 S.W.3d 437, 441 (Tex. Crim. App. 2003).

Similarly, the State's allegation of theft from a person, set forth in the supplemental motion to adjudicate, is a lesser included offense of robbery, as charged in the original motion. *Compare* TEX. PENAL CODE ANN. § 29.02(a) ("A person commits [robbery] if, in the course of committing theft . . . and with intent to obtain or maintain control of the property, he: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.") *with* TEX. PENAL CODE ANN. § 31.03(a) ("A person commits [theft] if he unlawfully appropriates property with intent to deprive the owner of property."); *Neelys v. State*, 374 S.W.3d 553, 560 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) (concluding theft is a lesser included offense of both robbery and aggravated robbery); *Earls v. State*, 707 S.W.2d 82, 84 (Tex. Crim. App. 1986).

Based on a review of the record, we conclude the aggravated assault causing serious bodily injury charge could be proven by the same facts necessary to prove the injury to a disabled individual alleged in the State's original motion to adjudicate. *See Mello*, 806 S.W.2d at 878. Likewise, the theft of a person could be proven by the same facts necessary to prove the robbery charge in the State's original motion to adjudicate. *See id*. Therefore, we conclude the evidence supports the trial court's finding, beyond a preponderance of the evidence, that Garcia committed aggravated assault causing serious bodily injury and theft of a person, both lesser included offenses of the violations of Garcia's conditions of probation alleged in the State's original motion to adjudicate.

Garcia's counsel did not object to the State proceeding on the original motion for adjudication, and the record supports the trial court proceeded only on the non-objected to motion for adjudication. Accordingly, the State's pleadings in the original motion to adjudicate provided Garcia "fair notice of allegations against him so that he [could] prepare a defense." *See Greer*, 783 S.W.2d at 224; *see also Solis v. State*, No. B14-87-00773-CR, 1990 WL 93230, at *1 (Tex. App.—Houston [14th Dist.] July 5, 1990, pet. ref'd) ("'[F]air notice' is satisfied when a 'greater' offense is alleged in the motion to revoke and the trial court ultimately revokes probation upon a finding that the probationer has committed a lesser included offense of the offense alleged.")

2. Single Violation

We remain mindful that proof of a violation of one condition of community supervision is sufficient to support the trial court's decision to revoke. *Garcia v. State*, 387 S.W.3d 20, 26 (Tex. Crim. App. 2012). Irrespective of the State's allegations of new offenses in violation of Garcia's first condition of probation, the trial court also found the State proved, beyond a reasonable doubt, that Garcia committed several technical violations of his probation. Specifically, the trial court found the evidence sufficient to support the allegations that Garcia failed to provide two drug tests, failed to report to the probation office as directed, failed to complete his court-ordered community service hours, and failed to enroll in a GED program. Garcia does not contest these findings on appeal.

We, therefore, conclude that the evidence of the technical violations alone is sufficient to support the trial court's revocation of Garcia's deferred adjudication. *See Pinon v. State*, No. 12-10-00400-CR, 2011 WL 3915653, at *1 (Tex. App.—Tyler Sept. 7, 2011, no pet.) (mem. op., not designated for publication) ("The testimony of a probation officer that a defendant is delinquent in paying fees has been found sufficient to support a trial court's decision to revoke community

supervision."); *see also Cherry v. State*, 215 S.W.3d 917, 919 (Tex. App.—Fort Worth 2007, pet. ref'd).

Accordingly, we overrule Garcia's first issue on appeal.

ADMISSION OF AUDIO-RECORDED TAPES

A. Arguments of the Parties

In his second issue on appeal, Garcia contends that because the State failed to provide reasonable notice, the trial court erred in admitting the audio-recordings of Garcia's telephone calls from the Bexar County Jail.

B. Standard of Review

We review the trial court's evidentiary rulings for an abuse of discretion. *Oprean v. State*, 201 S.W.3d 724, 726 (Tex. Crim. App. 2006); *Walker v. State*, 321 S.W.3d 18, 22 (Tex. App.—Houston [1st Dist.] 2009, pet. dism'd). Unless the trial judge's decision was outside the "zone of reasonable disagreement," we will uphold the ruling. *Oprean*, 201 S.W.3d at 726; *Walker*, 321 S.W.3d at 22.

C. Sentencing Hearing—February 24, 2016

On February 24, 2016, the trial court recalled Garcia's case for sentencing. The only witness called to testify was Bexar County Sheriff's Sergeant Marisa Alcaraz, the custodian of the records for the Bexar County Jail. The State offered an exhibit containing recordings of three telephone calls made by Garcia from the Bexar County Jail between February 5, 2016, and February 7, 2016. All parties agree the defense received a copy of the recordings shortly before the sentencing hearing.

Garcia's defense counsel objected, "This is the first time I have ever heard anything about the existence of any jail calls or the State's intention to introduce them. . . . I would object to their introduction as being unfair surprise." Defense counsel also objected "pursuant to due process and

surprise under [Texas Code of Criminal Procedure] 39.14." *See* TEX. CODE CRIM. PROC. ANN. § 39.14(h) (West 2013) (setting forth State's duty to disclose exculpatory evidence).

The trial court overruled the objections and admitted the audio-recordings.

D. Analysis

If Garcia did not suffer harm, whether the State provided timely notice is of no accord. We, therefore, look at any harm associated with the State's introduction of the audio-recordings.

"'The admission of an extraneous offense into evidence during the punishment phase when the State failed to provide notice required by statute is non-constitutional error.'" *Gonzalez v. State*, 337 S.W.3d 473, 485 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (quoting *Ruiz v. State*, 293 S.W.3d 685, 695 (Tex. App.—San Antonio 2009, pet. ref'd)). "An appellate court may reverse a judgment of conviction or punishment based on a non-constitutional error only if that error affected the defendant's substantial rights." *Id*. (citing TEX. R. APP. P. 44.2(b)). Because the purpose of evidentiary rules during the punishment hearing are designed to avoid unfair surprise and enable the defendant to prepare to answer the extraneous misconduct evidence, this court must analyze whether and how the notice deficiency affected Garcia's ability to prepare for this evidence. *See Roethel v. State*, 80 S.W.3d 276, 281–82 (Tex. App.—Austin 2002, no pet.) (op. on reh'g) (citing TEX. CODE CRIM. PROC. ANN. art. 37.07 (West 2006)).

Garcia's defense counsel had the opportunity to, and did, cross-examine Sergeant Alcaraz regarding the recording. If the evidence of the phone calls was a legitimate surprise that required a re-evaluation of Garcia's strategy at the punishment phase, defense counsel could have requested a continuance. *See Lara v. State*, 513 S.W.3d 135, 144 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Absent a motion for continuance or the identification—either in the trial court, or on appeal—on how the defense's strategy would have changed, we are precluded from holding that, even if there was error in the admission of the phone call evidence, the error was not harmful. *See*

id.; *see also Lindley v. State*, 635 S.W.2d 541, 544 (Tex. Crim. App. [Panel Op.] 1982) ("The failure to request a postponement or seek a continuance waives any error urged in an appeal on the basis of surprise."); *Martin v. State*, 176 S.W.3d 887, 900 (Tex. App.—Fort Worth 2005, no pet.) (explaining defendant waived any complaint that he was surprised by State's untimely notice by failing to request continuance).

Accordingly, we overrule Garcia's second issue on appeal.

CONCLUSION

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

Patricia O. Alvarez, Justice

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