In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00066-CR

CLARENCE LEE HUNTER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 100th District Court
Childress County, Texas
Trial Court No. 5808, Honorable Stuart Messer, Presiding

September 29, 2017

MEMORANDUM OPINION

Before CAMPBELL and PIRTLE and PARKER, JJ.

Appellant Clarence Lee Hunter appeals from the trial court's order adjudicating him guilty of the enhanced felony offense of continuous violence against the family,[1] revoking his deferred adjudication community supervision, and sentencing him to 20 years of imprisonment. Through one issue, appellant contends his due process rights were violated when the State failed, prior to the hearing, to provide a recording of

[1] TEX. PENAL CODE ANN. § 25.11 (West 2016).

events bearing on his violation of community supervision. We will modify the court's order and affirm it as modified.

Background

In June 2015, appellant pleaded guilty to the charged offense. The court deferred a finding of guilt and placed appellant on deferred adjudication community supervision for a period of four years.

The State later filed a motion to adjudicate appellant's guilt, alleging three violations of the terms of community supervision: (1) appellant failed to timely notify his community supervision officer of his change in address; (2) appellant communicated with the victim of the offense for which he was charged; and (3) appellant failed to avoid any contact with the victim of the offense for which he was charged. The trial court held a hearing to consider the State's motion. Appellant pleaded "not true" to each of the State's allegations.[2] Appellant's community supervision officer testified appellant was given a travel permit on June 19, 2015 to travel to Austin but appellant failed to contact the Department to verify he arrived in Austin as he was required to do. The officer testified appellant made no contact with the Department until July 6, 2015, at which time appellant called the officer and informed her he had moved to Waco, Texas. A short

[2] We note the judgment in the appellate record indicates appellant pleaded "true" to the motion to adjudicate. The reporter's record shows he pleaded "not true" to each of the allegations in the State's motion. Accordingly, we will modify the judgment to reflect appellant's plea of "not true." *See* TEX. R. APP. P. 43.2(b); *Bigley v. State,* 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529-30 (Tex. App.—Dallas 1991, pet. ref'd) (this Court has the power to modify an incorrect judgment to make the record speak the truth when we have the necessary information to do so). Our authority to modify an incorrect judgment is not dependent on the request of any party, or on an objection raised in the trial court. *Asberry*, 813 S.W.2d at 529-30).

time later, appellant's mother called the community supervision officer and informed her appellant was living with her in Garland, Texas. Appellant then called back and gave the Department an address in Garland and stated he began living in Garland on a date before July 6.

The State also presented the testimony of the victim of appellant's offense. She testified that on June 24, 2015, she contacted police because appellant called her home by telephone. She testified he called a second time from a restricted number, but she recognized his voice. On that occasion, police officers were at her home when appellant called. She told the court appellant also had contacted her via Facebook.

Two officers, Gamble and Zuniga, also testified. They told the court they responded to the victim's report concerning appellant's contact. While they spoke with the victim at her house, the victim's phone rang. She activated the phone's speaker, so the victim and both officers heard appellant speaking. Gamble testified, "[i]t was a male voice easily recognized by myself and Officer Zuniga as Clarence Hunter. He was scolding her for avoiding his phone calls, asked her to step into the next room so he could speak with her. At this time, I took the phone off speaker phone, advised Mr. Hunter I did recognize his voice, that he wasn't allowed to speak with her. At this time, Mr. Hunter ended the phone call." The officer explained to the court he recognized appellant's voice from their prior contacts.

Asked if their body cameras recorded the telephone interaction with appellant, both officers gave negative responses.[3] Officer Zuniga testified he attempted to record the incident but his body camera was not functioning.[4]

Appellant also testified at the hearing. He told the court he attempted to live with his sister in Austin but was unable to do so. He then went to live with his mother in Garland sometime between June 19 and the end of July. He testified he told the Department about his move on July 6. He acknowledged he also told the Department he was in Waco because he was "confused."

Appellant then testified the victim of the offense had contacted him "several times" through Facebook. He denied contacting the victim and told the court the officers were mistaken when they identified him as the caller. He also denied knowing either officer and denied having previous "run-ins" with these particular officers.

After hearing the evidence and arguments of counsel, the trial court found to be true all the violations the State alleged in its motion to adjudicate.

The day after the hearing, the district attorney sent appellant's trial counsel a DVD recording, taken from officer Gamble's body camera, depicting some of the events

[3] Gamble told the court it is within the officer's discretion whether to record an incident with a civilian.

[4] The officer testified he believed he tried to operate his body camera but he thought "my body cam went dead at the time." He also told the court that "[e]very time we go to a call, we're supposed to be, you know, operating them."

that occurred when the officers interviewed the victim at her home on June 24, 2015.[5] The recording contains the conversation between the officers and the victim on the porch of her home. The recording does not show the telephone call from appellant that the victim and the officers described in their testimony. It does depict the victim, and other members of her family, telling the officers that appellant had been contacting her.

Appellant filed a motion for new trial, and the court held a hearing on the motion, at which the DVD recording was admitted. In support of his motion for new trial, appellant argued the existence of the recording diminished the officers' credibility, since both testified no recording was made, and argued he could have cross-examined the officers differently had he seen the recording beforehand. In particular, he argued the credibility of the officers' testimony they independently recognized appellant's voice over the phone was diminished by the recorded evidence that the victim and her family told them appellant had been calling. With that information, he argued, the officers "already know who they are listening for."

The trial court reviewed the recording. After the court did so, appellant made further arguments, pointing out the recording did not show the telephone call from appellant to which the victim and the officers testified. He also noted the victim said on the recording that appellant had driven past her house. Counsel argued, "Had I known this was coming, I could have put on evidence he wasn't even in town that day."

[5] The district attorney informed counsel that he had received the recording only that day.

The judge stated that despite the late production of the recording, he still found that "overall," the officers' testimony was credible, and he denied appellant's motion for new trial.[6] This appeal followed.

Analysis

On appeal, appellant contends the record reflects a *Brady* violation, occurring when the prosecution suppresses evidence favorable to an accused "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Wyatt v. State*, 23 S.W.3d 18, 27 (Tex. Crim. App. 2000) (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)). A finding of reversible error under *Brady* requires the defendant to show: (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to the defendant; and (3) the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. *Hampton v. State,* 86 S.W.3d 603, 612 (Tex. Crim. App. 2002).

The trial court's decision on a motion for adjudication of guilt and to revoke deferred adjudication community supervision is reviewable in the same manner as a revocation of ordinary community supervision. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5(b) (West 2016). We review an order revoking community supervision for abuse of discretion. *Akbar v. State,* 190 S.W.3d 119, 122 (Tex. App.—Houston [1st Dist.] 2005,

[6] The judge stated, "I have reviewed Defense Exhibit 1. I have listened to the arguments, and although this failure to produce this does call into question the credibility, I still find that overall, the officer's testimony to be credible, and I am denying the Motion for a New Trial."

no pet.); *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984). The State must prove by a preponderance of the evidence that the person on community supervision violated a term of his supervision. *Rickels v. State,* 202 S.W.3d 759, 763-64 (Tex. Crim. App. 2006). When the sufficiency of the evidence is challenged, the evidence is viewed in a light most favorable to the trial court's findings. *Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App. [Panel Op.] 1981). The State meets its burden when the "greater weight of the credible evidence creates a reasonable belief that the defendant violated a condition of his community supervision." *Akbar*, 190 S.W.3d at 123. "When a trial court finds several violations of community-supervision conditions, we will affirm the order revoking community supervision if the proof of any single allegation is sufficient." *Shah v. State,* 403 S.W.3d 29, 33 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd); *see also Marcum v. State,* 983 S.W.2d 762, 766-67 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd) (recognizing that the State only need prove one violation of a condition of probation and that the failure of a defendant to report to his community supervision officer as instructed on one occasion is sufficient grounds for adjudication of guilt).

For two reasons, we find the record does not demonstrate reversible error. First, the court found the State's allegation that appellant failed to report as required to be true, and proof of one violation alone is sufficient to support revocation of community supervision. *Shah,* 403 S.W.3d at 33. The DVD recording has no bearing on the evidence appellant failed to report his change of address as required. The State's case on that violation was made through the testimony of appellant's community supervision officer, and that of appellant himself. Appellant effectively admitted he failed to inform

the Department, within 48 hours, of his change of address. The evidence was sufficient to prove, by the necessary preponderance, that appellant violated this term of his community supervision. For that reason, appellant has not demonstrated there is a reasonable probability that had the recording been disclosed before the adjudication hearing, its outcome would have been different. *See Hampton*, 86 S.W.3d at 612 ("mere possibility" of effect on trial's outcome insufficient to require reversal) (citation omitted). *See also Garrett v. State,* No. 14-12-00595-CR, 2013 Tex. App. LEXIS 2961, at *4 (Tex. App.—Houston [14th Dist.] Mar. 21, 2013, no pet.) (mem. op., not designated for publication) (citing *Stevens v. State*, 900 S.W.2d 348, 352 (Tex. App.—Texarkana 1995, pet. ref'd) (both applying *Brady* in the context of a revocation proceeding).

Second, and with regard to the allegations of contact with the victim, we note that the recording itself was the only evidence presented to the court at the motion for new trial hearing. And even after reviewing the recording, the court still determined the officers' testimony was credible. At the adjudication hearing, the victim was thoroughly cross-examined regarding her identification of appellant's voice over the telephone. The recording has little or no bearing on the probative value of the victim's identification of appellant's voice. When deciding whether to accept the victim's testimony that appellant contacted her, or appellant's testimony he did not contact her, the trial court was the sole judge of the credibility of the witnesses and the weight to be given their respective testimony. *Callaway v. State,* No. 07-15-00228-CR, 2016 Tex. App. LEXIS 3218, at *3 (Tex. App.—Amarillo March 29, 2016, pet. ref'd) (mem. op., not designated for publication) (citing *Cardona v. State,* 665 S.W.2d 492, 493 (Tex. Crim. App. 1984)).

In sum, while the record shows the State failed to disclose the body camera recording before the adjudication hearing, and while in the context of all the evidence presented at that hearing the recording in some ways could be favorable to the defendant, the record does not reflect a reasonable probability that the outcome of the adjudication would have been different had the recording been earlier disclosed. We overrule appellant's issue on appeal. We modify the trial court's order to reflect that appellant pleaded "not true" to the State's allegations of violations of his community supervision conditions, and affirm the court's order as modified.

James T. Campbell
Justice

Do not publish.