# In The
# Court of Appeals
# Seventh District of Texas at Amarillo

No. 07-16-00345-CR

ARIN MIKAL JONES, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 181st District Court
Randall County, Texas
Trial Court No. 23,260-B; Honorable John Board, Presiding

May 8, 2017

## MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

In March 2012, pursuant to a plea bargain, Appellant, Arin Mikal Jones, was granted deferred adjudication and placed on community supervision for seven years for the offense of unlawfully carrying a weapon on licensed premises, a third degree felony.[1] After the State filed a motion to revoke in December 2013, the trial court continued Appellant on deferred adjudication and ordered him into an Intermediate

[1] TEX. PENAL CODE ANN. § 46.02(c) (West Supp. 2016).

Sanction Facility for treatment, which he successfully completed. In July 2016, the State again moved to revoke Appellant's community supervision alleging only one violation of the terms and conditions thereof. The State alleged that Appellant committed the offense of terroristic threat by threatening to commit violence against his former girlfriend with intent to place her in fear of imminent serious bodily injury that constituted family violence.[2] At a hearing on the State's motion, Appellant entered a plea of not true to the allegation. At the conclusion of the hearing, the trial court found the allegation to be true and proceeded to the sentencing phase without an adjudication of guilt.[3] After hearing testimony, the trial court sentenced Appellant to ten years confinement.

By two issues, Appellant (1) challenges the sufficiency of the evidence to establish he committed a new offense in violation of the terms and conditions of his community supervision and (2) asserts the State violated *Brady v. Maryland*, 373 U.S.

[2] *See* TEX. PENAL CODE ANN. § 22.07(a)(2) (West 2011) (providing that a person commits the offense of terroristic threat if he "threatens to commit any offense involving violence to any person . . . with intent to place any person in fear of imminent serious bodily injury"). An offense under this section is a Class B misdemeanor unless the offense is committed against a member of the threatened person's family or household or otherwise constitutes family violence, in which case it is a Class A misdemeanor. *See id.* at § 22.07(c)(1). Relevant to the allegations involved in this case, "family violence" includes an act, other than a defensive measure, that is a threat that reasonably places the victim in fear of imminent physical harm, bodily injury, assault, or sexual assault. *See id.* at § 22.07(f)(2); TEX. FAM. CODE ANN. § 71.004 (West Supp. 2016).

[3] We note the trial court did not orally pronounce Appellant's guilt before proceeding to sentencing. The trial court's pronouncement was as follows:

> [b]ased on the evidence and testimony, I do find that Allegation Number 1 is true and we'll proceed, then, to hear any other evidence or testimony with regard to what action, if any, the Court should take with regard to that finding.

The failure to pronounce guilt notwithstanding, the trial court's action in assessing punishment after a hearing is an implied rendition of guilt and such finding was entered by the written judgment. *See Villela v. State*, 564 S.W.2d 750, 751 (Tex. Crim. App. 1978). *See also Holeman v. State*, No. 07-06-13-00191-CR, 2014 Tex. App. LEXIS 2388, at *6 (Tex. App.—Texarkana March 4, 2014, no pet.) (mem. op., not designated for publication); *Ray v. State*, No. 07-12-00184-CR, 2013 Tex. App. LEXIS 11478, at *3 (Tex. App.—Amarillo Sept. 5, 2013, pet. ref'd) (mem. op., not designated for publication).

83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), by not disclosing that the victim had recanted prior to the revocation hearing. We affirm.

BACKGROUND

During the afternoon hours of May 30, 2016, an officer was dispatched to a residence for a report of threats being made. The officer encountered the victim who had ended her relationship with Appellant earlier that day. According to the officer, she was visibly upset from three voicemails Appellant had left threatening her and her family. Appellant had indicated he was going to "bring his heat." She reported to the officer that Appellant owned a semi-automatic pistol.

During the officer's interview with the victim, her phone continued to ring. The officer recognized the number as the same one from which the threatening voicemails had been made so he answered the call. The caller identified himself as Appellant and spoke to the officer. At first, Appellant provided a false address of his location but was located after several more phone calls.

Other officers were dispatched to Appellant's location. The officer at the residence recorded the voicemails from the victim's phone onto his in-car recording system then left to interview Appellant. When confronted by the officer, Appellant stated he could not recall what he had said in the voicemails because he had blacked out from anger. However, when he heard the voicemails, he became apologetic.[4] He was arrested for terroristic threat against a family member.

[4] Appellant admitted to sending his former girlfriend a text with a photo of a gun he had downloaded. She did not mention that to the officer during her interview.

During cross-examination, the officer testified that Appellant claimed he had gone to his former girlfriend's home and another female occupant had pointed a gun at him. However, when the officer arrived, he did not observe any adult females matching the description offered by Appellant. Regarding the voicemails, they were not timestamped and the officer could not determine when they were sent. The victim had reset her phone and deleted the voicemails by the time detectives contacted her.[5] The only evidence of the voicemails was the officer's recording of them on his in-car recording system which was introduced into evidence. The officer is heard quoting Appellant's last voicemail—"[i]t's liable to get you killed just like I said."

The State called the victim to testify. She confirmed that Appellant had lived with her in the past and they had a dating relationship for over a year. She recanted her earlier statements to the police and testified that Appellant "didn't do anything." Defense counsel objected to the witness's testimony on the ground that if she had recanted, this was the first he knew of it. The State responded that it knew she was not going to cooperate in prosecuting Appellant but called her to testify solely to establish a relationship for purposes of the family-violence element of the offense.

The victim testified she was scared for her son but that she personally was not scared of Appellant. Eventually, she answered "yes" when asked if Appellant had called and threatened to shoot her. She also acknowledged that Appellant had threatened to hit her car with his car but claimed "he wasn't going to do it."

[5] During redirect, the officer testified that Appellant knew he was talking about voicemails that had occurred that day, not in the past.

Appellant testified in his own defense. His version of events that day was that he and four of his children had driven to the victim's residence so he could return a driver's license to her. He testified that upon his arrival, a friend of the victim's came out and waved a gun at him and he left for fear his children could have been hurt.

Appellant denied leaving threatening voicemails even though he was the only person in possession of his phone that day. He also denied owning a gun. He did admit to downloading a photo of a gun onto his phone and sending it by text to the victim.

STANDARD OF REVIEW

When reviewing an order revoking community supervision, the sole question before this court is whether the trial court abused its discretion. *Hacker v. State*, 389 S.W.3d 860, 865 (Tex. Crim. App. 2013) (citing *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 a condition of community supervision as alleged in the motion to revoke. *Cobb v. State,* 851 S.W.2d 871, 874 (Tex. Crim. App. 1993). Where, as here, the commission of an offense against the laws of this State is the violation of community supervision alleged, the State must prove each element of the offense by a preponderance of the evidence. *Rice v. State*, 801 S.W.2d 16, 17 (Tex. App.—Fort Worth, 1990, pet. ref'd) (holding that "when an offense is relied upon as a basis of revocation every element of that offense must be proved . . . .").

In the context of a revocation proceeding, "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 [community supervision]." *Hacker*, 389 S.W.3d at 865 (citing *Rickels*, 202 S.W.3d at 764). The trial court abuses its discretion in revoking community supervision if, as to every ground alleged, the State fails to meet its burden of proof. *Cardona v. State*, 665 S.W.2d 492, 494 (Tex. Crim. App. 1984). In determining the sufficiency of the evidence to sustain a revocation, we view the evidence in the light most favorable to the trial court's ruling. *Jones v. State*, 589 S.W.2d 419, 421 (Tex. Crim. App. 1979).

ISSUE ONE—SUFFICIENCY OF THE EVIDENCE

Here, the State alleged only one violation of the terms and conditions of community supervision—that Appellant committed the offense of terroristic threat. Thus, the State was required to show by a preponderance of the evidence that Appellant threatened to commit an offense involving violence against his former girlfriend with the intent to place her in fear of imminent serious bodily injury. TEX. PENAL CODE ANN. § 22.07(a)(2) (West 2011).

The gist of Appellant's first issue is that the State failed to prove, even by a preponderance of the evidence, that his voicemails could convey a threat of "imminent" serious bodily injury when the timing of those threats was never established and the intended victim was not in proximity for him to carry out the threats. Because Appellant confuses the victim's "fear of imminent serious bodily injury" with the perpetrator's imminent (temporal and physical) ability to carry out that threat we disagree with his interpretation of section 22.07(a)(2) of the Penal Code.

For purposes of an offense committed under section 22.07 of the Penal Code, "imminent" is not defined in the Penal Code. The Texas Court of Criminal Appeals has, however, defined that term to mean "ready to take place, near at hand; impending, hanging threateningly over one's head, menacingly near." *See Garcia v. State*, 367 S.W.3d 683, 689 (Tex. Crim. App. 2012) (construing "imminent" in the context of an offense under section 22.041 of the Penal Code pertaining to abandoning or endangering children). Under this definition, threatening to commit an act could cause fear of imminent serious bodily injury if, in the mind of the victim, the commission of the act was "near at hand" or "hanging threateningly over one's head."

What constitutes the offense of terroristic threat is the threat to commit a violent act with the intent to create fear of imminent serious bodily injury. Whether the accused had the temporal or physical ability to actually carry the threat out at that moment is immaterial. *See Williams v. State*, 432 S.W.3d 450, 453 (Tex. App.—San Antonio 2014, pet. ref'd) (citing *Dues v. State*, 634 S.W.2d 304, 305 (Tex. Crim. App. [Panel Op.] 1982)). *See also Cook v. State*, 940 S.W.2d 344, 347 (Tex. App.—Amarillo 1997, pet. ref'd) (finding the contents of three threatening voicemails sufficient to justify conviction for terroristic threat notwithstanding the appellant's argument that the voicemails were conditional threats of future harm). "[I]t is not necessary that the victim or anyone else was *actually* placed in fear of imminent serious bodily injury" if the actor acted with the intent to create that fear. *Heinert v. Wichita Falls Housing Authority*, 441 S.W.3d 810, 818 (Tex. App.—Amarillo 2014, no pet.) (citing *Dues*, 634 S.W.2d at 305) (emphasis in original). Importantly, the intent to place the victim in fear of imminent serious bodily

injury can be inferred from the acts, words, and conduct of the accused. *Cook*, 940 S.W.2d at 347.

During the officer's testimony, he confirmed that Appellant acknowledged leaving voicemails for the victim but could not remember what he had said. Appellant also confirmed to the officer that he had sent a text to the victim of a photo of a gun. Notwithstanding the victim's recantation, she did eventually confirm that she told the officer that Appellant threatened to shoot her or hit her car with his car. This alone would be sufficient to infer the intent to place the victim in fear of imminent serious bodily injury. Accordingly, the State established by the requisite burden of proof that Appellant made threats of family violence with the intent to place the victim in fear of imminent serious bodily injury. Issue one is overruled.

ISSUE TWO—BRADY VIOLATION

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.[6] To find reversible error under *Brady*, an appellant must show (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to him; 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. *Pena v. State*, 353 S.W.3d 797, 809 (Tex. Crim. App. 2011). When, as here, the violation is disclosed during the hearing, Appellant must

[6] The requirement under *Brady* that there be a request was abandoned in *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

demonstrate prejudice arising from the timing of the disclosure. *Little v. State*, 991 S.W.2d 864, 867 (Tex. Crim. App. 1999).

The State argues that Appellant waived his *Brady* complaint. This court must assure itself that the alleged error was preserved for appellate review. *See* TEX. R. APP. P. 33.1(a). *See also Pena*, 353 S.W.3d at 807-09. When the victim testified that Appellant "didn't do anything," defense counsel objected and asked to approach the bench. The following colloquy occurred:

> [Defense counsel]: For her to say she - - nothing happened, I mean, that indicates to me that she retracted and this is the first I've heard of that. So I'm going to object to any testimony out of her. The case I'm thinking of - - I don't remember the style, but it says it's improper for the State to call somebody solely for the purposes of impeachment.

The prosecutor explained she had only called the witness to establish family violence because she knew the witness was not going to cooperate. The prosecutor conceded "we shouldn't have alleged that additional allegation . . . ."

When evidence withheld in violation of *Brady* is disclosed at trial, the defendant's failure to request a continuance waives the error "or at least indicates that the delay in receiving the evidence was not truly prejudicial." *Apolinar v. State*, 106 S.W.3d 407, 421 (Tex. App.—Houston [1st Dist.] 2003), *aff'd on other grounds*, 155 S.W.3d 184 (Tex. Crim. App. 2005). Requesting a continuance and presenting the *Brady* violation in a motion for new trial preserves the complaint for appellate review. *Jones v. State*, 234 S.W.3d 151, 158 (Tex. App.—San Antonio 2007, no pet.).

Although this court does not condone the State's conduct in failing to disclose the victim's recantation and unwillingness to cooperate in Appellant's prosecution, Appellant did not request a continuance nor file a motion for new trial raising a *Brady* violation. Consequently, a *Brady* analysis is waived. Issue two is overruled.

## CONCLUSION

The trial court's judgment is affirmed.

Patrick A. Pirtle
Justice

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