In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-22-00286-CR

KIMBERLY R. BAKER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 297th District Court
Tarrant County, Texas
Trial Court No. 1511496D, Honorable David C. Hagerman, Presiding

August 7, 2023

MEMORANDUM OPINION

Before QUINN, C.J., and DOSS and YARBROUGH, JJ.

Appellant, Kimberly R. Baker, appeals the revocation of her community supervision. On appeal,[1] she challenges the sufficiency of the State's allegations in its

[1] Because this appeal was transferred from the Second Court of Appeals pursuant to a docket-equalization order; *see* TEX. GOV'T CODE ANN. § 73.001, we apply its precedent consistent with the principles of horizontal *stare decisis*. *See* TEX. R. APP. P. 41.3. *See Mitschke v. Borromeo*, 645 S.W.3d 251, 254 (Tex. 2022).

petition and the sufficiency of the evidence supporting revocation. Finding no abuse of discretion in the revocation, we affirm the trial court's judgment.

Background

1. Underlying Offense

In August 2017, Appellant was indicted for the theft of between $2,500 and $30,000 from Mary Brooks, an elderly person, without her effective consent (count 1); TEX. PENAL CODE ANN. § 31.03(a), (e)(4)(A), (f)(3), and exploitation of the elderly by deception (count two). *Id.* at § 32.53. In January 2018, Appellant pleaded guilty pursuant to a plea agreement to the lesser-included offense of theft of property $750-$2500, a state jail felony.[2] *Id.* at 31.03(a), (e)(4)(a). On the same date, the trial court issued an Order of Deferred Adjudication Community Supervision and placed Appellant on community supervision with conditions[3] for two years; the court assessed restitution of $1,500.

For reasons not relevant here, Appellant's period of community supervision was extended through July 6, 2022. On October 28, 2021, the State filed its Petition to Proceed to Adjudication, alleging in part that Appellant "committed the offense of INJ CHILD/ELD/DISABL-BI" on October 5, 2021. In November, the State filed a first amended petition to proceed to adjudication, adding the allegation that Appellant also "committed the offense of ASSAULT-BODILY INJURY" on October 5. In August 2022,

[2] Conviction for a state jail felony requires a punishment "by confinement in a state jail for any term of not more than two years or less than 180 days" with the possibility of a fine not to exceed $10,000. TEX. PENAL CODE ANN. § 12.35(a), (b).

[3] One such condition was that Appellant would "[c]ommit no offense against the laws of this State or of any other State or of the United States."

after the extended supervision period had ended, the State filed a second amended petition to clarify an earlier allegation that Appellant "committed the offense of Injury to a Child when [sic] by recklessly spraying pepper spray into an occupied vehicle" on October 5, 2021.

2. The October 5, 2021 Incident

On September 2, 2022, a revocation hearing was held. The following facts are not in dispute:

- On October 5, 2021, Argelia Salas drove Maria Morales and Salas's six-month-old in a pickup to Appellant's home and parked in her driveway.
- Salas knocked on Appellant's front door. When there was no answer, Salas returned to the vehicle.
- Salas took at least one photo of Appellant's home.
- Appellant then opened the home's front door and inquired why Salas and Morales were in the driveway.[4]
- Salas speaks Spanish but very little English.[5] Appellant speaks English but limited Spanish.
- Salas backed out of the driveway and parked in front of the home of Labrea Lewis, Appellant's neighbor. Lewis came out of her home to assist Salas and Morales.
- Appellant left her home with a container of pepper spray or "mace."
- Appellant approached the vehicle and sprayed pepper spray at Salas's window.

The trial court heard conflicting testimony regarding the remaining details. Salas said she had driven to Appellant's home accidentally thinking it was the address for an

[4] Salas said Appellant approached the pickup, while Appellant says she spoke from the front porch.

[5] Salas testified at the revocation hearing with the assistance of a Spanish interpreter.

in-home nail salon. She said she took a single photo of Appellant's home so she could ask her daughter whether they had the right address. When Appellant "very aggressive[ly]" approached the vehicle in the driveway and yelled at the women, Salas said she apologized and drove to the front of Lewis's home "to ask for help."

According to Salas and Lewis, the women attempted to communicate through the open truck window by using Google Translator. Lewis said she attempted to calm down Salas and Morales, who had typed out, "We're lost. Help. Help. Attack." Lewis said Appellant left her house and walked toward Lewis's home directing obscenities at the women. After Appellant sprayed Salas in the face, Salas felt stinging, couldn't see, and suffered symptoms for three days. Lewis said Appellant then separately sprayed Morales (which also hit Lewis). Lewis then testified Appellant moved so she could spray the baby:

> I couldn't tell what [Appellant] had in her hand but the next thing I know, the driver got maced, the passenger got maced, and because she reached into the vehicle, I actually got maced as well. But then she proceeded to go to the back of the vehicle while still yelling obscenities. I couldn't make out what she was saying. And she leaned in the vehicle and maced the infant . . .

Lewis testified Appellant's spray got "very close" to the infant, and that the infant could not breathe.[6] She said she and others put milk on the baby's face and tried to help the baby to resume breathing. Lewis said that meanwhile, Appellant "was still outside yelling

[6] Lewis further described the baby's struggles with breathing as "trying to breathe so he really couldn't cry. It was more of a whining, but he couldn't breathe. We were trying to get him to breathe." Lewis estimates it required approximately 20 minutes of washing the baby's face with almond milk and water before the child's symptoms subsided.

obscenities, and she didn't try to [render] aid at all to any of the people in the vehicle or to the infant."

Appellant offered a different version of events. She acknowledged difficulty communicating with Salas and Morales because of a language barrier, but when she asked them to leave, "the refusal was there and they knew what I was saying, 'leave.'" Appellant says the truck remained in her driveway for 10-11 minutes before Salas drove in front of Lewis's home. Appellant said she was initially fearful, but then "beg[a]n to think it was a setup"– and that the women had been sent by Lewis. After deciding that the women talking to Lewis "wasn't good enough for me," Appellant left her home and walked to the truck. Appellant said she asked the women why they had pulled into her driveway and received a response in the form of "smirks and giggles like laughing, like, you understand . . . ." Believing she "was going to be attacked,"[7] Appellant said she sprayed the mace/pepper spray "one time only" in the truck's driver's side window. Appellant denied spraying the baby.

The trial court found paragraphs one, two, and four of the State's Petition true and adjudicated Appellant guilty of the offense of theft $750-$2500. Following a punishment hearing, the trial court revoked Appellant's community supervision and sentenced her to one year in a state jail facility. This appeal followed.

[7] Appellant conceded she had not been threatened: "Two Hispanic women, no, I didn't hear them threaten my life. How would I know? I don't speak Spanish." She said, instead, the women "were still agitating me, provoking by sitting in front of the yard while I'm asking them to leave and pointing."

Analysis

"A revocation hearing is neither criminal nor civil in nature; rather, it is an administrative proceeding." *Miles v. State*, 343 S.W.3d 908, 911 (Tex. App.—Fort Worth 2011, no pet.) (citing *Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993)). The standard of proof needed to show the truth of an allegation is less than in a criminal trial. *Akbar v. State*, 190 S.W.3d 119, 122 (Tex. App.—Houston [1st Dist.] 2005, no pet.). In other words, the State must prove by a preponderance of evidence that the defendant violated only one term or condition of community supervision. *Miles*, 343 S.W.3d at 911. The State satisfies this burden when the greater weight of the credible evidence before the court creates a reasonable belief that it is more probable than not that the defendant has violated a condition of community supervision as alleged in the State's motion. *Id.* at 912.

On appeal, Appellant first contends the State's petition was deficient because it does not name a victim or victim-status. We disagree and note that such error was waived in the absence of a timely motion to quash on such grounds. *McCain v. State*, 2018 Tex. App. LEXIS 382, at *6 (Tex. App. —Fort Worth 2018, no pet.) (citing *Marcum v. State*, 983 S.W.2d 762, 767 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd)). Moreover, we point out that the Appellant's role in causing the child's injuries was clarified in the second amended petition.

Appellant next argues the State's evidence was insufficient to establish assault, or bodily injury to a child. With regard to the question of whether Appellant committed an assault, we observe that the Texas Penal Code defines "assault" as "intentionally,

knowingly, or recklessly caus[ing] bodily injury to another. TEX. PENAL CODE ANN. § 22.01(a)(1). Section 1.07(a)(8) defines "[b]odily injury" as "physical pain, illness, or any impairment of physical condition." *Id.* at § 1.07(a)(8). Bodily injury "encompasses even relatively minor physical contact if it constitutes more than offensive touching." *Laster v. State*, 275 S.W.3d 512, 524 (Tex. Crim. App. 2009) (factfinder could reasonably infer defendant intended to inflict bodily injury when victim felt pain due to defendant grabbing her around the waist and pulling). The factfinder may "infer that a victim actually felt or suffered pain because people of common intelligence understand pain and some of the natural causes of it." *Smith v. State*, 587 S.W.3d 413, 420 (Tex. App.—San Antonio 2019, no pet.).

The evidence permitted the court to find that after Salas had moved the pickup to the front of Lewis's house on a public street, Appellant left her home and walked to the open driver's side window. Sufficient evidence shows the women in the vehicle were not threatening Appellant, but she nevertheless used pepper spray to spray Salas in the face, followed by Morales. Appellant then proceeded to the back of the pickup, where she sprayed the infant. The testimony and all reasonable inferences to be drawn therefrom reveals that the spray injured Salas's eyes and caused three-days of lasting effects. And, Appellant's use of the spray forced the infant to cease breathing, and caused sufficient other problems that Lewis and others were forced to wash the child with almond milk and water for 20 minutes. From this evidence, the factfinder could reasonably infer Salas and the baby felt and/or suffered pain due to Appellant's conduct.[8]

[8] Appellant also contends the State's evidence is insufficient because the State failed to offer any expert witness to define "pepper spray" or "mace." Appellant did not object at trial regarding the necessity

Appellant also complains of an absence of evidence that her conduct was intentional. Intent can be inferred from such circumstantial evidence as the person's acts and conduct because "[o]ne's acts are generally reliable circumstantial evidence of one's intent." *Lay v. State*, 359 S.W.3d 291, 295 (Tex. App.—Texarkana 2012, no pet.). Appellant's own testimony admits she walked to a vehicle parked on a public street in front of another's home and "sprayed [the pepper spray] one time" at the driver's side window. This was intentional. The evidence indicates the window was open at the time. The trial court had sufficient evidence to conclude Appellant's assault on Salas was intentional. And even if the trial court had believed only Appellant's version of events[9] – that she sprayed the pepper spray only once, and only at Salas – the trial court had a sufficient basis to find an assault on the baby under the doctrine of transferred intent. *See* TEX. PEN. CODE ANN. § 6.049(b)(2). Viewing the evidence in a light most favorable to the order, we conclude the trial court had a sufficient basis for finding Appellant intended the consequences of her acts.

Conclusion

We conclude that the State's pleadings were not timely challenged, and that the evidence sufficiently supports the trial court's decision to revoke Appellant's community supervision. Appellant's single issue is overruled. *McCain*, 2018 Tex. App. LEXIS 382,

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of any expert testimony to define or explain the makeup of these substances or their effect on a person who has been sprayed. By failing to object, Appellant waived any complaint about the necessity of expert testimony. *See* TEX. R. APP. P. 33.1(a); *Martinez v. State*, 22 S.W.3d 504, 507 (Tex. Crim. App. 2000).

[9] Of course, the trial court was not required to believe Appellant. *Miles*, 343 S.W.3d at 912. Therefore, consistent with our standard of review, we conclude the trial court found Lewis's account to be more credible: that Appellant positioned herself to spray Salas, Morales, and the infant in three separate acts.

at *5 (proof by a preponderance of the evidence of any *one* of the alleged violations of the conditions of community supervision is sufficient to support a revocation order). We affirm the trial court's judgment.

Lawrence M. Doss
Justice

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