



**In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana**

No. 06-10-00087-CR

CHARLES EDWARD MARZEK, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 8th Judicial District Court
Hopkins County, Texas
Trial Court No. 9915654

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Justice Moseley

MEMORANDUM OPINION

Charged with aggravated assault (TEX. PENAL CODE ANN. § 22.02 (Vernon Supp. 2010)), Charles Edward Marzek, Jr., entered into a plea agreement in 2000 wherein he was given deferred adjudication and was placed on community supervision. The following year, Marzek was determined to have failed to comply with the terms of community supervision; he was adjudged guilty and his punishment was assessed at ten years' confinement and a fine, but this sentence was probated and he was once again placed on community supervision. As the result of allegations that he had committed a subsequent criminal offense, his community supervision was revoked in 2010 and he was sentenced to ten years' confinement.

Marzek appeals the judgment revoking community supervision on the following grounds: (1) He maintains that the trial court erred in admitting a certified application for a protective order in violation of the Confrontation Clause. (2) He complains that the trial court erred by requiring the appearance and examination of specific witnesses after the State had announced that it had rested its case. (3) He contends that the trial court abused its discretion in finding that he violated conditions of community supervision by failing to pay fees and fines. Because there was no violation of the Confrontation Clause, Marzek failed to preserve complaints as to the appearance and questioning of additional witnesses, and sufficient evidence supported the court's decision to revoke community supervision, we affirm the trial court's judgment.

I. No Violation of the Confrontation Clause

In addition to allegations of failure to pay fees, the State alleged Marzek violated “condition A of his community supervision” by committing “Assault Family Violence” against his girlfriend, Amanda Pruitt. In support of this allegation, the State introduced a certified copy of an application for protective order containing Pruitt’s affidavit in which she claimed Marzek

grabbed me by my jaw/throat and squeezed as he was pushing me to the back door. . . . he then slapped me on the right side of my face and slammed my head in to the icebox. It hurt my right ear and he then grabbed my throat and pulled me up straight up He then slammed my left side of my head through the folding doors. He told me to get out and if I took anything that wasn’t mine he would burn me in my truck He told me I would make good tree fertilizer. He then asked me if I needed an ambulance, I said yes he said ok, let me find my knife.

The disturbance prompted a telephone call to the police, who arrested Marzek and helped initiate the process for Pruitt to obtain a protective order. Marzek agreed to the entry of a protective order, which included among its findings that Marzek had “committed family violence and [was] likely to commit family violence in the future.” Marzek’s counsel objected to introduction of the exhibit, stating, “[I]t’s a certified copy, but I do object on the basis that there is some information in there that I wish that I could cross-examine the person who made out the affidavit. It’s my understanding that that person is not here today, and based on that, I do object to that coming in.”¹

Marzek argues that the trial court erred in admitting the application for protective order containing Pruitt’s affidavit and that its admission violated his Sixth Amendment right to confront

¹We determine that the objection, although not terribly precise, was sufficient to raise an issue of an alleged violation of a Constitutional right to confront an adverse witness.

witnesses against him. We review a trial court's decision to admit evidence under an abuse of discretion standard. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex. Crim. App. 2005). "Although we defer to a trial court's determination of historical facts and credibility, we review a constitutional legal ruling . . . de novo." *Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006). A trial court's ruling to admit evidence will not be reversed so long as it falls within the zone of reasonable disagreement. *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g).

"In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." U.S. CONST. amend. VI; *see also* TEX. CONST. art. I, § 10. The admission of a testimonial, out-of-court statement from a declarant who does not appear at trial violates the Confrontation Clause unless the declarant was unavailable to testify at trial and the defendant had a prior opportunity for cross-examination. *Davis v. Washington*, 547 U.S. 813, 821 (2006); *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

At the first stage of the evidentiary hearing (during which the application for protective order was introduced), Pruitt was not present. Marzek testified that he did not assault Pruitt and that he only agreed to the entry of the protective order because he believed it best for both of them to leave each other alone. He argued that he did not understand the full import of his acquiescence to the protective order because he was not represented by counsel. The trial court stated,

This is a court concern -- great concern by the Court. Somebody is not telling the truth here and it's very, very serious. So I'm going -- I want the deputies that appeared that night -- I want them here next Tuesday morning. I want -- I want both deputies. I want Ms. Pruitt and . . . any other witness -- potential witness.

And we'll see what—because this is really serious, and so justice must be done.

Without objection, the proceedings were recessed to allow the witnesses to appear.

When the hearing resumed, Pruitt was called to testify. On taking the stand, she recanted the statements made in her affidavit and claimed that Marzek had not struck her. Because Pruitt was then made available, testified at trial, and was cross-examined by Marzek, there was no Confrontation Clause violation. *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 2531 (2009); *Crawford*, 541 U.S. at 53–54; see *Briggs v. State*, 789 S.W.2d 918 (Tex. Crim. App. 1990). Thus, the trial court did not abuse its discretion in admitting the application for protective order.

II. Marzek Failed to Object to Appearance and Testimony of Additional Witnesses

Marzek complains that the trial court “active[ly] participat[ed] in prosecuting” Marzek in such a manner that “undermined the proper functioning of the adversarial process” by asking that additional witnesses appear after the State had rested.² “As a prerequisite to presenting a complaint for appellate review, the record must show that: (1) the complaint was made to the trial court by a timely request, objection, or motion” TEX. R. APP. P. 33.1(a)(1). Our review of

²We observe that it seems a bit paradoxical that when the affidavit of Pruitt was introduced, Marzek's counsel expressed his “wish” to cross-examine Pruitt, yet Marzek now complains on appeal of the trial court's sua sponte requirement that Pruitt and others be brought in to testify (allowing that opportunity for cross-examination).

the record fails to reveal any objection to either the trial court's request that additional witnesses be called or to the testimony of any of the additional witnesses. Because Marzek failed to preserve this point of error, it is overruled.³

III. Sufficient Evidence Supported the Trial Court's Judgment

We review the 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 re T.R.S.*, 115 S.W.3d 318, 320 (Tex. App.—Texarkana 2003, no pet.). The trial court does not abuse its discretion if the order revoking community supervision is supported by a preponderance of the evidence; in other words, the greater weight of the credible evidence would create a reasonable belief that the defendant has violated a condition of his community supervision. *Rickels*, 202 S.W.3d at 763–64; *T.R.S.*, 115 S.W.3d at 320. In conducting our review, we view the evidence in the light most favorable to the trial court's ruling. *Cardona v. State*, 665 S.W.2d 492 (Tex. Crim. App. 1984); *T.R.S.*, 115 S.W.3d at 321.

In a revocation hearing, the trial judge is the sole trier of the facts and determines the credibility of the witnesses and the weight to be given to the testimony. *T.R.S.*, 115 S.W.3d at 320. The judge may accept or reject any or all of a witness' testimony. *Id.* at 321 (citing *Mattias v. State*, 731 S.W.2d 936, 940 (Tex. Crim. App. 1987)). Thus, we defer to the trial court's resolution of disputed facts and to any reasonable inferences which can be drawn from those facts.

³Had the error been preserved, this Court would conduct an analysis such as the one completed by our sister court in *Smith v. State*, 290 S.W.3d 368, 370–75 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd).

Cantu v. State, 253 S.W.3d 273, 282 (Tex. Crim. App. 2008). If a single ground for revocation is supported by a preponderance of the evidence and is otherwise valid, then an abuse of discretion is not shown. *Sanchez v. State*, 603 S.W.2d 869, 871 (Tex. Crim. App. [Panel Op.] 1980); *T.R.S.*, 115 S.W.3d at 321 (citing *Stevens v. State*, 900 S.W.2d 348, 351 (Tex. App.—Texarkana 1995, pet. ref'd)).

Marzek only challenges the trial court's finding that he failed to pay fees as alleged in the State's motion to revoke community supervision. The State's motion alleged Marzek failed to pay his community supervision fee fifty-two times, and his fines, court costs, court-appointed attorney fee, and restitution seventy-three times, in the span of seven years. Marzek complains this was due to an inability to pay. In any event, after receiving a settlement in a personal injury lawsuit, Marzek paid the total arrearage of \$15,241.00. His community supervision officer affirmed that all of Marzek's fees and fines were "paid in full."

Marzek does not challenge the court's finding that he violated his community supervision by committing family violence against Pruitt. Deputy Stacy Green, who was dispatched to the scene of the domestic disturbance, found a sobbing Pruitt claiming "[t]hey [had] started arguing. And that he had slapped her and hit her and pushed her against the -- against the wall and put her head into a door." Green took photographs (which were admitted without objection) depicting injuries to Pruitt and the screen door broken by Pruitt's head. "[Pruitt] had also stated that [Marzek] had grabbed her by the throat and pushed her into the ice box, or refrigerator." Green

testified that Pruitt had bruises and “markings on her face and throat.” Statements made to Green were corroborated by the audiotape recording from the arrest, also admitted without objection. On the recording, a distraught Pruitt told officers that Marzek had struck her, rammed her head through the screen door, and had grabbed her by the neck. In that recording, Pruitt claimed she was afraid for her life. Marzek’s version of the story to the police was that Pruitt had caused herself to hit the refrigerator and door.

Although Pruitt took the stand to testify in favor of Marzek, the trial court was within its discretion to reject the testimony that conflicted with the other evidence as an attempt to save her abuser. Based on the photographs, the application for protective order, the audiotape recording of Marzek’s arrest, and Green’s testimony, the trial court was within its discretion to find by a preponderance of the evidence that the State met its burden to prove Marzek had committed family violence. We overrule Marzek’s last point of error.

IV. Conclusion

We affirm the trial court’s judgment.

Bailey C. Moseley
Justice

Date Submitted: January 24, 2011
Date Decided: January 25, 2011

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