IN THE
TENTH COURT OF APPEALS

No. 10-17-00118-CR

POWELL JONES, JR.,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 66th District Court
Hill County, Texas
Trial Court No. 35,707

MEMORANDUM OPINION

In four issues, appellant, Powell Jones Jr., challenges the revocation of his community supervision. Specifically, appellant contends that: (1) the trial court abused its discretion by denying his request for appointment of an expert; (2) the evidence is insufficient to show that he failed to complete "Anger Management Training"; (3) the evidence is insufficient to support the trial court's order that he pay $140 in new, court-appointed attorney's fees; and (4) the imposition of a sixty-year sentence constitutes cruel

and unusual punishment. Because we conclude that the trial court's judgment improperly assessed $140 in new, court-appointed attorney's fees in this case, and because we overrule all of appellant's remaining issues, we affirm as modified.[1]

I. BACKGROUND

In January 2009, appellant was indicted for the offense of unlawful possession of a firearm by a felon. *See* TEX. PENAL CODE ANN. § 46.04(a) (West 2011). The indictment also contained four enhancement paragraphs referencing appellant's prior felony convictions for: (1) two instances of burglary of a habitation; (2) aggravated assault; and (3) aggravated assault on a correctional officer. Appellant pleaded guilty to the charged offense and "true" to the enhancement paragraphs. The trial court accepted appellant's pleas, deferred an adjudication of guilt, and placed appellant on community supervision for ten years.

Throughout the years, appellant's community supervision was amended four different times in response to appellant's commission of new criminal offenses and a positive test for cocaine. Ultimately, in February 2017, the State filed its "First Amended

[1] Despite our disposition, we also note that Rule 9.4(d) requires that, with few exceptions, the text in all documents filed with an appellate court must be double-spaced. *See* TEX. R. APP. P. 9.4(d) ("Text must be double-spaced, but footnotes, block quotations, short lists, and issues or points of error may be single-spaced."). The State's brief is single-spaced and, thus, does not comply with Rule 9.4(d). *See id.* Furthermore, the use of single-spacing in briefs makes it difficult for the Court to read. Nevertheless, in the interest of justice, we will use Rule 2 to suspend Rule 9.4(d) and consider the State's brief in this case. *See id.* at R. 2.

Application to Proceed to Final Adjudication," wherein the State alleged that appellant committed nine violations of the terms and conditions of his community supervision.

The trial court subsequently conducted a hearing on the State's motion. Prior to the hearing, the State abandoned three of the alleged violations in its motion. At the conclusion of the hearing, the trial court found to be true that appellant violated the terms and conditions of his community supervision by failing to: (1) report to his Community Supervision Officer on July 19, 2016; (2) complete 250 hours of community service at a rate of no less than ten hours per month by the due date of February 14, 2012; (3) pay an $8 urinalysis fee by the due date of September 13, 2014; and (4) attend and successfully complete the Intensive Out-Patient Treatment as instructed. Given these violations, the trial court found appellant guilty of the underlying offense, revoked his community supervision, and sentenced him to sixty years' incarceration in the Institutional Division of the Texas Department of Criminal Justice.

Appellant filed a motion for new trial, arguing that "the verdict is contrary to the law and the evidence." Appellant's motion for new trial was overruled by operation of law, and this appeal followed. *See* TEX. R. APP. P. 21.8(a), (c).

II. STANDARD OF REVIEW

We review an order revoking community supervision under an abuse-of-discretion standard. *See Rickels v. State*, 202 S.W.3d 759, 763-64 (Tex. Crim. App. 2006). To justify revocation, the State must prove by a preponderance of the evidence that the

defendant violated the terms and conditions of his community supervision. *See Hacker v. State*, 389 S.W.3d 860, 864-65 (Tex. Crim. App. 2013). "In the probation-revocation context, '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 probation.'" *Id.* at 865 (quoting *Rickels*, 202 S.W.3d at 764). The trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony; thus, we review the evidence in the light most favorable to the trial court's ruling. *See id.*

If the State fails to produce a preponderance of the evidence to support a violation of the terms of appellant's community supervision, the trial court abuses its discretion. *See Cardona v. State*, 665 S.W.2d 492, 493-94 (Tex. Crim. App. 1984). However, proof by a preponderance of any one alleged violation is sufficient to affirm an order revoking community supervision and adjudicating guilt. *See Smith v. State*, 286 S.W.3d 333, 342 (Tex. Crim. App. 2009) ("We have long held that 'one sufficient ground for revocation would support the trial court's order revoking' community supervision" (quoting *Jones v. State*, 571 S.W.2d 191, 193-94 (Tex. Crim. App. [Panel Op.] 1978))); *Clay v. State*, 361 S.W.3d 762, 765 (Tex. App.—Fort Worth 2012, no pet.); *see also Nathan v. State*, No. 10-12-00432-CR, 2013 Tex. App. LEXIS 7511, at *3 (Tex. App.—Waco June 20, 2013, pet. ref'd) (mem. op., not designated for publication).

III. APPOINTMENT OF AN EXPERT

In his first issue, appellant argues that the trial court abused its discretion and denied him due process by denying his request for appointment of an expert to opine on his inability to comply with the terms and conditions of his community supervision due to complications arising from his diabetes. We disagree.

We review the denial of a request for the appointment of an expert for an abuse of discretion. *Ake v. Oklahoma*, 470 U.S. 68, 82-86, 105 S. Ct. 1087, 1096-97, 84 L. Ed. 2d 53 (1985); *Griffith v. State*, 983 S.W.2d 282, 287 (Tex. Crim. App. 1998). Indigent defendants may have access to expert witnesses provided by the State for the preparation of a defense where the defendant has made a preliminary threshold showing with facts or evidence that the expert's testimony will likely be a significant factor in his defense or the State's prosecution. *Ake*, 470 U.S. at 86, 105 S. Ct. at 1096-97; *Griffith*, 983 S.W.2d at 286-87. An expert may be approved where there is a high risk of an inaccurate verdict and a fundamentally unfair trial if the defendant does not have an expert appointed. *Busby v. State*, 990 S.W.2d 263, 271 (Tex. Crim. App. 1999); *Mason v. State*, 341 S.W.3d 566, 568 (Tex. App.—Amarillo 2011, pet. ref'd). However, satisfying the preliminary condition requires more "than undeveloped assertions that the requested assistance would be beneficial." *Williams v. State*, 958 S.W.2d 186, 192 (Tex. Crim. App. 1997). The reasonableness of the trial court's decision is determined when it is made. *Mason*, 341 S.W.3d at 568 (citing *Rey v. State*, 897 S.W.2d 333, 342 n.9 (Tex. Crim. App. 1995)). The defendant's preliminary

burden is not met unless his motion contains affidavits or other evidence that would support the need for an expert witness for his defensive theory or show how the expert's testimony would help in questioning the State's expert witness and testing the proof. *Rey*, 897 S.W.2d at 341. Where the defendant has made his defensive theory clear, and has outlined with factual allegations supported by affidavits or other evidence, the need for an expert witness, the trial court should allow the appointment and retention of the expert witness. *Id.*

In his motion for the appointment of an expert witness in diabetic illness, appellant stated the following, in relevant part:

> 2. Based on limited investigation in this case, the undersigned counsel believes that certain medical issues are present pertaining to the diabetic illness of the Defendant while on probation. Further, counsel believes that these medical issues which must be investigated and explored. Counsel does not possess the knowledge or expertise to address all the issues involved in this medical investigation which it is believed can only be done properly and effectively through the use of an expert witness.
>
> 3. Appointment of an expert witness is necessary to insure that Powell Jones, Jr. receives his rights to effective assistance of counsel, cross-examination and confrontation of witnesses, and compulsory process, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, § 10 of the Texas Constitution; also his right to due process and due course of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, §§ 13, 19 and 29 of the Texas Constitution; and, his right to the equal protection of the law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1, Section 3 and 3a of the Texas Constitution.

Appellant did not present any evidence or attach affidavits to his motion for the appointment of an expert witness.

Based on the foregoing, we cannot say that appellant, at the time he filed his motion for appointment of an expert witness, made a threshold showing with facts or evidence that an expert's testimony will likely be a significant factor in his defense or the State's prosecution. *See Ake*, 470 U.S. at 86, 105 S. Ct. at 1096-97; *Griffith*, 983 S.W.2d at 286-87; *see also Rey*, 897 S.W.2d at 342 n.9; *Mason*, 341 S.W.3d at 568. Rather, the statements made in his motion for appointment of an expert witness are no more "than undeveloped assertions that the requested assistance would be beneficial"—something that the Court of Criminal Appeals has held is not enough to satisfy appellant's preliminary burden. *See Williams*, 958 S.W.2d at 192.

Additionally, we also note that appellant contends on appeal that the appointment of an expert would address three of the four conditions of community supervision that the court found he violated. This is significant because expert testimony would not affect one of the conditions of community supervision that the court found that appellant violated, and as mentioned earlier, proof by a preponderance of any one alleged violation is sufficient to affirm an order revoking community supervision and adjudicating guilt. *See Smith*, 286 S.W.3d at 342; *Clay*, 361 S.W.3d at 765; *see also Nathan*, 2013 Tex. App. LEXIS 7511, at *3. Or in other words, we cannot say that appellant was harmed by the failure to appoint an expert in this case because his community supervision could have been revoked on the condition that did not require expert testimony. *See Smith*, 286 S.W.3d at

342; *Clay*, 361 S.W.3d at 765; *see also Nathan*, 2013 Tex. App. LEXIS 7511, at *3. We therefore overrule appellant's first issue.

IV. "ANGER MANAGEMENT TRAINING"

In his second issue, appellant asserts that the trial court abused its discretion by finding that he failed to complete "Anger Management Training" because the evidence supporting the finding is insufficient. This allegation corresponds with Count 7 of the State's "First Amended Application to Proceed to Final Adjudication," which provided as follows:

> 7. VIOLATION OF CONDITION (1) (Order filed: 11/16/2015) of the defendant's amended terms and conditions of probation, to wit: Within 30 days pre-register for Anger Management Training approved by the CSC Department, attend and successfully complete at the 1st available scheduling and pay the fees assessed as required by the provider, to wit: Defendant failed to attend and successfully complete the Intensive Out-Patient Treatment as instructed and/or defendant failed to provide documentation of completion to date.

In the order filed on November 16, 2015, the trial court amended the terms and conditions of appellant's community supervision in response to appellant testing positive for cocaine in Tarrant County, Texas. Specifically, the trial court amended appellant's community supervision to require him to do the following, among other things: "Beginning immediately, attend and participate in Intensive Out-Patient Program at the 1st available scheduling. Follow all rules and successfully complete said Intensive Out-Patient Program." Nowhere in this order did the trial court order appellant to complete "Anger Management Training."

As shown above, the State's "First Amended Application to Proceed to Final Adjudication" specifically references the order filed on November 16, 2015. And though the State's "First Amended Application to Proceed to Final Adjudication" contains some surplusage, especially with regard to "Anger Management Training," the majority of the allegation in Count 7 is substantially similar to that which was ordered by the trial court in the order filed on November 16, 2015. *See, e.g., Curry v. State*, 30 S.W.3d 394, 399 (Tex. Crim. App. 2000) ("In *Burrell v. State*, we explained that 'allegations not essential to constitute the offense, and which might be entirely omitted without affecting the charge against the defendant, and without detriment to the indictment are treated as mere surplusage, and may be entirely disregarded.'" (quoting *Burrell v. State*, 526 S.W.2d 799, 802 (Tex. Crim. App. 1975))). Thus, we cannot say that, after reviewing both documents, appellant was insufficiently informed of the charge against him such that he could not prepare an adequate defense. *See, e.g., Gollihar v. State*, 46 S.W.3d 243, 246 (Tex. Crim. App. 2001) (stating that only a material variance between the indictment and the proof will render evidence insufficient; that a "fatal variance" mandates reversal only if it is material and prejudices the defendant's substantial rights; and that such a variance occurs when the defendant is insufficiently informed of the charge against him so as to prevent him from preparing an adequate defense at trial or subjects the defendant to the risk of being prosecuted later for the same crime). In other words, we do not believe that the erroneous inclusion of the "Anger Management Training" language in the State's "First

Amended Application to Proceed to Final Adjudication" caused appellant harm. *See id.*; *see also Pierce v. State*, 113 S.W.3d 431, 439 (Tex. App.—Texarkana 2003, no pet.) ("[N]ot every variance between pleadings and proof is fatal; only a material variance is fatal. The variance is only material if it operated to the defendant's surprise or prejudiced his or her rights." (internal citations omitted)).

And with respect to the sufficiency of the evidence supporting Count 7 of the State's "First Amended Application to Proceed to Final Adjudication," we find ample evidence in the record in support of this Count. Specifically, Dr. Keith Manning, the Deputy Director at Hill County Adult Probation, testified that appellant was ordered in 2015 to complete intensive outpatient treatment due to testing positive for cocaine and that appellant was unsuccessfully discharged from intensive outpatient treatment for matters of noncompliance. Krystina Marmino, an employee of Hill County Adult Probation, also testified that appellant failed to successfully complete the ordered intensive outpatient treatment.

Viewing the evidence in the light most favorable to the trial court's ruling, we conclude that the record contains sufficient evidence to demonstrate by a preponderance of the evidence that appellant violated his community supervision by failing to complete intensive outpatient treatment. *See Hacker*, 389 S.W.3d at 864-65. We overrule appellant's second issue.

V. COURT-APPOINTED ATTORNEY'S FEES

In his third issue, appellant challenges the portion of the trial court's judgment that imposes $140 in new, court-appointed attorney's fees. Appellant contends that he has been indigent at all times; thus, the trial court erred by requiring him to pay these court-appointed attorney's fees. The State concedes that there is insufficient evidence to support the assessment of $140 in new, court-appointed attorney's fees. We, therefore, sustain appellant's third issue. *See Mayer v. State*, 309 S.W.3d 552, 555-56 (Tex. Crim. App. 2010); *see also Felan v. State*, No. 10-12-00080-CR, 2014 Tex. App. LEXIS 4764, at **5-6 (Tex. App.—Waco May 1, 2014, pet. ref'd) (mem. op., not designated for publication).

VI. CRUEL AND UNUSUAL PUNISHMENT

In his fourth issue, appellant contends that his sixty-year sentence for failure to pay an $8 fee constitutes cruel and unusual punishment that violates the Eighth Amendment of the United States Constitution. *See* U.S. CONST. amend. VIII.

A disproportionate-sentence claim must be preserved for appellate review. *See* TEX. R. APP. P. 33.1(a)(1); *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996) (noting that constitutional rights, including the right to be free from cruel and unusual punishment, may be waived); *Mercado v. State*, 718 S.W.2d 291, 296 (Tex. Crim. App. 1986) (en banc); *see also Noland v. State*, 264 S.W.3d 144, 151 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) ("[I]n order to preserve for appellate review a complaint that a sentence is grossly disproportionate, constituting cruel and unusual punishment, a defendant

must present to the trial court a timely request, objection, or motion stating the specific grounds for the ruling desired."). Here, appellant did not assert a disproportionate-sentence claim in the trial court; rather, he raises this complaint for the first time on appeal. And though appellant did file a motion for new trial, nowhere in that motion did he argue that his sentence was grossly disproportionate. Accordingly, we conclude that appellant has failed to preserve this complaint. *See* TEX. R. APP. P. 33.1(a)(1); *Rhoades*, 934 S.W.2d at 120; *Mercado*, 718 S.W.2d at 296; *see also Noland*, 264 S.W.3d at 151. We overrule appellant's fourth issue.

VII. CONCLUSION

Based on the foregoing, we modify the trial court's judgment to delete the imposition of $140 in new, court-appointed attorney's fees. We affirm the trial court's judgment as modified.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
(Chief Justice Gray concurring with a note)*
Affirmed as modified
Opinion delivered and filed January 3, 2018
Do not publish
[CR25]

*(Chief Justice Gray concurs in the Court's judgment as modified. A separate opinion will not issue.)