TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00783-CR

Deron Frederick, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF BASTROP COUNTY, 21ST JUDICIAL DISTRICT
NO. 14,758, HONORABLE CHRISTOPHER DARROW DUGGAN, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Deron Frederick was charged with the offense of sexual assault of a child. *See* Tex. Penal Code § 22.011(a)(2)(A) (setting out elements of crime of sexual assault of child). Under the terms of a plea-bargain agreement, the State agreed to reduce the charge to indecency with a child by exposure and to recommend that Frederick's adjudication be deferred and that he be placed on community supervision in exchange for Frederick agreeing to enter a plea of guilty. *See id.* § 21.11(a)(2) (governing offense of indecency with child); *see also Shankle v. State*, 119 S.W.3d 808, 813 (Tex. Crim. App. 2003) (explaining that charge bargain in which defendant agrees to enter guilty plea "to a lesser or related offense" is plea-bargain agreement). The district court accepted the terms of the plea-bargain agreement, deferred Frederick's adjudication of guilt, and placed Frederick on community supervision for seven years. *See* Tex. Code Crim. Proc. art. 42.12, § 5 (authorizing trial court to defer adjudication of guilt and place defendant on community supervision). Several years

after the district court issued its order, the State moved to revoke Frederick's community supervision and to adjudicate his guilt because Frederick allegedly violated several conditions of his community supervision. *See id.* § 21. After convening a hearing on the motion to revoke, the district court determined that Frederick violated four conditions of his community supervision, revoked Frederick's community supervision, and sentenced Frederick to ten years' imprisonment. *See* Tex. Penal Code § 21.11(d) (explaining that offense of indecency with child by exposure is third-degree felony); *see also id.* § 12.34 (providing permissible punishment range for third-degree felony). In three issues on appeal, Frederick challenges the sufficiency of the evidence that he violated the conditions of his community supervision and argues that the district court erred in admitting hearsay evidence regarding two of those conditions. We will affirm the district court's judgment adjudicating Frederick's guilt.

STANDARD OF REVIEW

Appellate courts review a decision to adjudicate guilt in the same way that courts review a community-supervision revocation in which the adjudication of guilt was not deferred. Tex. Code Crim. Proc. art. 42.12, § 5(b); *Leonard v. State*, 385 S.W.3d 570, 573 n.1 (Tex. Crim. App. 2012) (explaining that adjudication hearings "are a subset of revocation hearings"). A trial court's decision to revoke community supervision is reviewed under an abuse-of-discretion standard of review. *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006). Similarly, we review a trial court's ruling on the admission of evidence for an abuse of discretion. *Davis v. State*, 329 S.W.3d 798, 803 (Tex. Crim. App. 2010). Under that standard, a trial court's ruling will only be deemed an abuse of discretion if it is so clearly wrong as to lie outside "the zone of reasonable

disagreement," *Lopez v. State*, 86 S.W.3d 228, 230 (Tex. Crim. App. 2002), or is "arbitrary or unreasonable," *State v. Mechler*, 153 S.W.3d 435, 439 (Tex. Crim. App. 2005).

An order that revokes community supervision must be supported by a preponderance of the evidence. *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984). In this 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.'" *Rickels*, 202 S.W.3d at 763-64 (quoting *Scamardo v. State*, 517 S.W.2d 293, 298 (Tex. Crim. App. 1974)). When making its determination, a trial court may make reasonable inferences from the evidence. *See id.* at 764. In addition, appellate courts review the evidence presented during the hearing in the light most favorable to the trial court's ruling. *Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App. 1981). The violation of a single condition of community supervision is sufficient to support a revocation determination. *Jones v. State*, 472 S.W.3d 322, 324 (Tex. App.—Eastland 2015, pet. ref'd) (mem. op.). Accordingly, "to prevail on appeal, the defendant must successfully challenge all of the findings that support the" trial court's "revocation order." *Silber v. State*, 371 S.W.3d 605, 611 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

DISCUSSION

Conditions 9 and 33

In his first issue on appeal, Frederick contends that there was insufficient evidence to establish that he violated "Condition Numbers 9 and 33 of the terms of his community supervision." Condition 9 required Frederick to "[p]ay $60.00 a month" for a "probation supervision fee," and condition 33 required Frederick to "[p]ay . . . a fee of $5.00 per month" with "said fee to

be credited to the Sexual Assault Program established under" the Government Code. *See* Tex. Gov't Code § 420.008 (setting out "sexual assault program fund"). Because we ultimately overrule the remainder of Frederick's issues on appeal and conclude that there is sufficient evidence to support the district court's determination that Frederick violated the other two conditions of his community supervision, we need not address Frederick's first issue on appeal. *See Jones*, 472 S.W.3d at 324.

Conditions 30 and 34

In his second and third issues, Frederick challenges the district court's determinations that Frederick violated conditions 30 and 34 of his community supervision. Condition 30 required Frederick to "[n]ot go in[,] on, or within 1000 feet of a premise where children commonly gather, including a school," and condition 34 prohibited Frederick from having "unsupervised contact with any person 17 years of age or younger unless approved by the Judge." When challenging the district court's determinations that those conditions had been violated, Frederick first argues in his second issue that the district court "erred in admitting hearsay evidence relating to Condition Numbers 30 and 34." *See* Tex. R. Evid. 801(d) (providing that hearsay is statement that "the declarant does not make while testifying at the current trial or hearing" and that "a party offers in evidence to prove the truth of the matter asserted in that statement"); *Briggle v. State*, No. 06-15-00041-CR, 2015 WL 5634441, at *6 (Tex. App.—Texarkana Sept. 25, 2015, no pet.) (mem. op., not designated for publication) (stating that "[h]earsay evidence is not admissible in a community supervision revocation proceeding"); *see also Ex parte Doan*, 369 S.W.3d 205, 212 (Tex. Crim. App. 2012) (determining that "[c]ommunity-supervision revocation proceedings are not administrative hearings; they are judicial proceedings, to be governed by the rules established to govern judicial proceedings");

Vega v. State, No. 13-13-00126-CR, 2014 WL 3724583, at *11 (Tex. App.—Corpus Christi July 24, 2014, pet. ref'd) (mem. op., not designated for publication) (concluding that witness's testimony regarding statements that victim made to witness before trial was hearsay). Next, Frederick contends in his third issue that insufficient evidence was presented "to prove that [he] violated Condition Numbers 30 and 34."

During the trial, evidence pertaining to conditions 30 and 34 was presented through Chad Vogler, who was "the sex offender officer for the Lee County Adult Probation [Department]" charged with supervising Frederick, and Detective Charles Anderlitch, who was investigating an incident involving Frederick that was unrelated to the revocation allegations. In his testimony, Vogler related that he "supposedly heard that [Frederick] was living . . . with [his] girlfriend," Shirley Everett, and her minor child, A.E., that Vogler "did a field visit," and that he spoke with A.E. about Frederick. After Vogler indicated that he was going to testify regarding what A.E. told him, Frederick raised a hearsay objection, and the district court overruled the objection. Following the ruling by the district court, Vogler testified that A.E. related that Frederick did not live with her and was never present when she was at the home. Later, when the State asked Vogler whether Frederick had been told that it was not proper for him to live with someone with a minor child, Frederick raised another hearsay objection, and the district court again overruled the objection. In his testimony, Detective Anderlitch explained that he interviewed A.E., who was sixteen at the time. Further, the State asked Detective Anderlitch if he "received information from" A.E. that caused him "to call the Community Supervision Department or . . . the Bastrop County Adult Probation Department," and Detective Anderlitch stated that he learned that Frederick was attending family movie nights with

A.E. Before Detective Anderlitch provided that answer, Frederick objected on hearsay grounds, and the district court overruled that objection.

Following that ruling, the questioning by the State continued as follows without any additional objections by Frederick:

> [State]: I'm going to stop you. I apologize. Could you tell me who they are?
>
> [Anderlitch]: They were Mr. Frederick, Ms. Shirley Everett, her mother, and her sister. And her sister's name is -- if you'll give me a moment -- [J.A.].
>
> [State]: And do you know how old is [J.A.]?
>
> [Anderlitch]: [J.A.] was roughly eighteen years of age. She had just turned eighteen years of age during this investigation.
>
> [State]: Okay. So as you were saying, I apologize I interrupted you, [A.E.] confirmed that Mr. Frederick was at her house?
>
> [Anderlitch]: Yes, ma'am.
>
> [State]: And again, movie night, I'm assuming she was – that's everybody?
>
> [Anderlitch]: Yes, ma'am.
>
> [State]: Okay. So what else did she -- what other information did she give you?
>
> [Anderlitch]: During this interview [A.E.] also stated that Deron – Mr. Frederick -- would drive her to basketball practice, to her place of employment, as well as he would stay with them for weekend trips, stay at the house. And also she admitted that she very much well liked Mr. Frederick. She liked having him around the house.
>
> [State]: So if I'm understanding you correctly, she did confirm that he -- he took her to the high school, yes?
>
> [Anderlitch]: Yes, ma'am.
>
> [State]: He attended -- did he attend functions at the high school with her?

> [Anderlitch]: She said he took her to sporting events. Took her to practice. I was unclear and did not ask if he attended the actual game.
>
> [State]: And did she -- did she say that her mother was with them at this time, or it was just Mr. Frederick and [A.E.]?
>
> [Anderlitch]: Just Mr. Frederick and [A.E.].

In light of the portion of Detective Anderlitch's testimony quoted above, we must conclude that Frederick did not preserve his hearsay complaint for appellate review. "Under Texas law, 'if, on appeal, a defendant claims the trial judge erred in admitting evidence offered by the State, this error must have been preserved by a proper objection and a ruling on that objection.'" *Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003) (quoting *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991)); *see also* Tex. R. App. P. 33.1(a) (stating that to preserve error for appeal, record must show that complaint was made to trial court and that trial court ruled on request or refused to rule and that "complaining party objected to the refusal"). For an objection to be proper, it must be "specific and timely." *Martinez*, 98 S.W.3d at 193. "Further, with two exceptions, the law in Texas requires a party to continue to object each time inadmissible evidence is offered." *Ethington*, 819 S.W.2d at 858. "The two exceptions require counsel to either (1) obtain a running objection, or (2) request a hearing outside the presence of the jury." *Martinez*, 98 S.W.3d at 193. "An error in the admission of evidence is cured where the same evidence comes in elsewhere without objection." *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003).

In this case, Frederick did not request a running objection to Detective Anderlitch's testimony relating what A.E. told him. Accordingly, we must overrule Frederick's second issue on appeal. *See id.* at 509-10 (overruling issue asserting that trial court erred by overruling relevance

objection when witness later repeated testimony that he feared for his life without objection in response to third question asked after relevance objection was overruled); *Ethington,* 819 S.W.2d at 859-60 (concluding that "appellant did not preserve error because he did not" request running objection or "object to the continued detailed testimony" from witness "concerning the armored truck robbery" that went on for three pages of record after initial objection); *Brown v. State*, No. 03-15-00154-CR, 2016 WL 3144338, at *3 (Tex. App.—Austin June 3, 2016, pet. ref'd) (mem. op., not designated for publication) (determining that appellant "did not preserve any hearsay complaint" where appellant objected to portions of witness's prior testimony on hearsay grounds but did not make additional hearsay objection to specific statement challenged on appeal or request running objection to witness's testimony after hearsay objection was overruled).

As discussed previously, Frederick asserted in his third issue that insufficient evidence was presented establishing that he violated conditions 30 and 34. When presenting this argument, Frederick urges that the only evidence presented regarding those violations was impermissible hearsay. However, as set out above, Frederick failed to preserve his hearsay objection by not raising further objections to the testimony from Detective Anderlitch or requesting a running objection. Moreover, when reviewing the sufficiency of the evidence supporting a revocation determination, appellate courts "consider all of the evidence, rightly or wrongly admitted." *Quisenberry v. State*, No. 03-03-00472-CR, 2004 WL 2186354, at *3 (Tex. App.—Austin Sept. 30, 2004, no pet.) (mem. op., not designated for publication). In addition, "when hearsay evidence is admitted without proper objection during a community supervision revocation hearing, it has probative value." *Briggle*, 2015 WL 5634441, at *6; *see Willis v. State*, 2 S.W.3d 397, 399 (Tex. App.—Austin 1999, no pet.) (stating that inadmissible hearsay admitted during revocation

proceeding "without objection shall not be denied probative value merely because it is hearsay"); *see also* Tex. R. Evid. 802 (providing that "[i]nadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay").

During his testimony, Detective Anderlitch testified, among other things, that A.E. told him that Frederick would drive her to her high school to take her to basketball practice and that she was alone with Frederick during those trips. Viewing the evidence in the light most favorable to the district court's ruling and bearing in mind the reasonable inferences that the district court was free to make from that testimony, we cannot conclude that the district court abused its discretion by determining that the State proved by a preponderance of the evidence that Frederick violated conditions 30 and 34 by going within 1000 feet of a school and by having unsupervised contact with a minor. Accordingly, we must overrule Frederick's third issue on appeal.

CONCLUSION

Having overruled Frederick's second and third issues on appeal, we affirm the district court's judgment adjudicating his guilt.

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David Puryear, Justice

Before Justices Puryear, Pemberton, and Goodwin

Affirmed

Filed: February 16, 2017

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