NUMBERS 13-15-00272-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

ALEJO DANIEL LUGO, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 398th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Benavides and Perkes
Memorandum Opinion by Justice Perkes

Appellant Alejo Daniel Lugo appeals his conviction for aggravated assault, a second-degree felony. *See* TEX. PENAL CODE ANN. § 22.02(a)(2) (West, Westlaw through 2015 R.S.). Pursuant to a plea-bargain agreement, appellant pleaded guilty to the offense and was placed on deferred-adjudication community supervision for a period of eight years. The State subsequently filed a motion to adjudicate guilt, alleging appellant

violated his community-supervision conditions by committing the offense of aggravated sexual assault and by failing to pay fines and fees. *See id.* § 22.021(a)(1) (West, Westlaw through 2015 R.S.). The trial court found the violations to be true, adjudicated appellant guilty of the original offense, and assessed punishment at fifteen years' confinement in the Institutional Division of the Texas Department of Criminal Justice. By a single issue, appellant argues the State did not prove that he violated his community supervision conditions by a preponderance of the evidence. We affirm.

I. BACKGROUND

The State filed a motion to adjudicate guilt alleging that appellant committed the following violations of his community supervision: (1) committing a subsequent criminal offense—aggravated sexual assault; (2) failure to pay a fine; (3) failure to pay the crime stoppers fee; (4) failure to pay the monthly community supervision fee; and (5) failure to pay court costs.

At the hearing on the motion to adjudicate guilt, J.M., the complainant of the alleged assault,[1] testified that she was sexually assaulted by appellant. She stated that the sexual abuse began when she was nine years old, and continued for a couple of months. J.M.'s mother, T.M., was dating appellant at the time, and appellant resided with the family. J.M. stated that appellant abused her while T.M. was not home. J.M. testified that appellant placed his "private part" inside of her "private part," buttocks, and mouth. J.M.'s answers fluctuated as to how many times these sexual acts would occur; her estimation ranged from a "couple of times" to "six or seven" times. She also stated that

[1] We refer to the complainant and her family by their initials to protect their identities.

appellant threatened to harm her and her family if she told anyone. J.M. did not immediately tell anyone about the abuse because she was scared by appellant's threat. J.M. further testified that the sexual assaults caused bleeding in the areas of her body that were penetrated by appellant. She stated that the bleeding was noticeable in her underwear.

T.M. testified that she found explicit notes written by J.M. under her bed. These notes were admitted into evidence at the adjudication hearing. T.M. stated that the notes prompted her to confront J.M. who then described to her the details of the sexual assaults, which were consistent with J.M.'s testimony at the hearing. T.M. testified that J.M. described vaginal, oral, and anal penetration to her. T.M. testified that her daughter divulged the following information:

> She said it started off with the kissing and the touching.
>
> . . . .
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> That he would be touching her between her legs, and then after she started, like, letting herself more and more, that when I would be asleep, he would go and he would start doing things to her . . . . She started telling me about his penis and how he would make her go and put her mouth on his penis and go down on him. I mean, she gave me details, details that—that disgusted me, on how he would make her get on top of him and how she had to moan and how she had to go up and down and—and how she had to be bent over.

At the time J.M. made the outcry, she was twelve years old, and appellant was no longer living with J.M. and her mother. T.M. testified J.M. told her that she did not speak up about the assaults until three years later because she was scared. After this discovery, J.M. and T.M. went to the police department and filed a report.

T.M. further testified that, prior to J.M.'s outcry, she was told by someone from the complainant's school that J.M. had trouble holding her bowels. T.M. stated that she did not notice any bloody underwear in the laundry.

Investigator Illena Pena from the Edinburg Police Department stated that J.M. was seen by a sexual assault nurse examiner (SANE) who made "positive findings" of sexual activity. The SANE report was admitted at the hearing and concluded by way of a "diagnostic impression" that the J.M's physical examination was consistent with the types of sexual acts described.

Dr. Juana Cantu-Cabrera, a nurse practitioner specializing in SANE examinations, was called as a witness by appellant. She stated that some common injuries from sexual assault are urinary tract infections and issues with bowel movements. Dr. Cantu-Cabrera also reviewed the report of J.M.'s SANE examination. She testified that the report indicated that J.M. showed signs of past sexual activity. Dr. Cantu-Cabrera stated there were no findings of scarring that would support evidence of anal penetration, but conceded that there are cases where such injuries could have healed without scarring or leaving physical findings. The SANE examination was performed approximately three years after the alleged sexual assaults.

The trial court found by a preponderance of the evidence that appellant committed the aggravated sexual assault. The court revoked appellant's community supervision and adjudicated him guilty of the offense of aggravated assault. This appeal followed.

II. STANDARD OF REVIEW AND APPLICABLE LAW

We review a trial court's order revoking community supervision for an abuse of discretion. *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006) (citing *Cardona v. State*, 665 S.W.2d 492, 493) (Tex. Crim. App. 1984) (en banc)). At a probation-revocation proceeding, the State bears the burden of showing by a preponderance of the evidence that the defendant committed a violation of his community-supervision conditions. *Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993) (en banc); *Jones v. State*, 112 S.W.3d 266, 268 (Tex. App.—Corpus Christi 2003, no pet.). If the State does not meet its burden of proof, the trial court abuses its discretion in revoking the community supervision. *Cardona*, 665 S.W.2d at 493–94. The State satisfies its burden of proof 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 his community supervision. *Rickels*, 202 S.W.3d at 763. A single violation is sufficient to support revocation. *Sanchez v. State*, 603 S.W.2d 869, 871 (Tex. Crim. App. 1980).

The trial court is the trier of fact in a revocation proceeding and is the sole judge of the credibility of the witnesses and the weight to be given to the testimony. *Canseco v. State*, 199 S.W.3d 437, 439 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). Inconsistencies in the testimony at the revocation hearing merely raise credibility issues for the trial court, which is free to accept or reject any or all of the witnesses' testimony. *Miles v. State*, 343 S.W.3d 908, 913–14 (Tex. App.—Fort Worth 2011, no pet.). We examine the record of the revocation proceeding in the light most favorable to the trial court's ruling. *Id*. at 914.

III. DISCUSSION

By one issue, appellant argues the trial court erred in finding by a preponderance of the evidence that appellant committed the offense of aggravated sexual assault. Appellant also maintains the State did not seek a ruling from the trial court concerning his failure to pay fees, fines, and costs, and, therefore, has waived any argument that the record supports such a finding as a basis for adjudicating guilt.[2]

Appellant's argument challenges the credibility of the witnesses and asserts that the purported contradictions in the testimony and lack of physical evidence make a preponderance of the evidence finding by the trial court an abuse of discretion. In support of his argument appellant cites the following: (1) T.M. never noticed blood on J.M's underwear; (2) J.M.'s inconsistent testimony; (3) the lack of medical records to support J.M.'s timeframe of the assault; (4) evidence that complainants of sexual assault will develop a urinary tract infection or have issues with bowel movements; and (5) testimony by the principal of J.M's elementary school that they suspected J.M. was being abused in 2013 by T.M.'s boyfriend, while T.M. and the appellant ceased living together "somewhere about 2010."

In our review, the general standards for legal and factual sufficiency challenges on appeal do not apply. *See Miles*, 343 S.W.3d at 913; *Cherry v. State*, 215 S.W.3d 917, 919 (Tex. App.—Fort Worth 2007, pet. ref'd). Instead, we determine whether the trial court abused its discretion in finding, by a preponderance of the evidence, that appellant violated a term or condition of his community supervision. *See Miles,* 343 S.W.3d at

[2] We note the judgment adjudicating guilt makes a finding of true as to each alleged violation in the State's motion.

911-914. The State alleged appellant violated a condition of his community supervision by committing aggravated sexual assault. A person commits the offense of aggravated sexual assault if he:

> intentionally or knowingly . . . causes the penetration of the anus or sexual organ of a child by any means; causes the penetration of the mouth of a child by the sexual organ of the actor; causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or causes the mouth of a child to contact the anus or sexual organ of another person, including the actor; [and] . . . the victim is younger than 14 years of age.

TEX. PENAL CODE ANN. § 22.021(a)(1)(B), (a)(2)(B).

Viewing the evidence in the light most favorable to the trial court's ruling, we conclude the trial court did not abuse its discretion in finding appellant committed a violation by a preponderance of the evidence. *See Miles*, 343 S.W.3d at 913. J.M. testified in detail how appellant sexually assaulted her when she was nine years-old. Her testimony is consistent with T.M.'s testimony regarding J.M.'s outcry and the SANE report's finding that J.M. showed physical signs of past sexual activity. Also, T.M. testified J.M. had issues controlling her bowel movements, another possible indication of sexual abuse according to Dr. Juana Cantu-Cabrera. Although appellant points to inconsistencies and contradictions in the evidence, the trial court was free to accept or reject any or all of the witnesses' testimony. *See Id*. We defer to the trial court as the sole judge of the credibility of the witnesses and the weight to be given to the testimony. *Id.* at 912; *Canseco*, 199 S.W.3d 439.

Because we find sufficient evidence to support this violation, we need not address the remaining alleged violations. *See Sanchez*, 603 S.W.3d at 871 (explaining that a single violation is sufficient to support revocation). We overrule appellant's sole issue.

IV. CONCLUSION

We affirm the trial court's judgment.

GREGORY T. PERKES
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed
30th day of June, 2016.