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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. GEORGE PARKER, Defendant and Appellant.	B281308 (Los Angeles County Super. Ct. No. MA066061)

APPEAL from an order of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Affirmed.

Christine Dubois, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Kenneth C. Byrne and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant George Parker appeals from a March 2, 2017 order revoking his probation and sentencing him to prison. Defendant argues the trial court violated his due process right to an unbiased fact finder and improperly admitted hearsay and opinion evidence. We conclude defendant forfeited his due process argument; on the merits, there was no due process violation; and although there was evidentiary error, it was harmless. Accordingly, we affirm the order.

II. BACKGROUND

On June 1, 2015, defendant pled no contest to willfully inflicting corporal injury on a girlfriend. (Pen. Code, § 273.5, subd. (a).)[1] He admitted he inflicted great bodily injury. (§ 12022.7, subd. (e).) On June 22, 2015, the trial court imposed but suspended a six-year prison sentence and placed defendant on formal probation for five years. The court imposed a number of conditions on probation, including that defendant complete a 52-week domestic violence counseling program and pay fines, fees, and probation costs based on a schedule as determined by a financial evaluator.

On October 19, 2015, the court revoked probation and issued a bench warrant because it had received a report that defendant had been dismissed from his domestic violence

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[1] Further statutory references are to the Penal Code unless otherwise noted.

counseling program. On October 28, 2015, the court reinstated probation and ordered defendant to re-enroll in counseling.

On December 3, 2015, defendant appeared in court, provided proof of re-enrollment, and admitted that he had violated the terms and conditions of probation by failing to enroll in and timely complete his domestic violence counseling classes. The court revoked and reinstated probation.

On June 3, 2016, defendant appeared in court for a progress report and provided proof that he had completed 18 of 52 required classes. As defendant had been on probation for nearly a year, he should have been close to completing his 52 domestic violence counseling classes. The court therefore reminded defendant to "make better effort" in his classes, and ordered that if defendant were kicked out of his classes for an absence, he was to return to court the next business day.

On August 30, 2016, defendant appeared in court for another progress report and provided proof that he had completed 22 of 52 domestic violence counseling classes. The court ordered defendant to return to court on November 30, 2016, at 8:30 a.m.

On November 30, 2016, at 10:40 a.m., defendant had not appeared in court. The court therefore revoked defendant's probation and issued a bench warrant for defendant's arrest. Defendant later appeared in court at 1:30 p.m. The court noted that according to the probation officer's report, defendant had completed only 23 of his 52 required domestic violence counseling sessions and had not made a single payment toward his financial obligations. Defendant requested to be heard and stated that he earned approximately $200 to $300 a month. When asked by the court whether he could pay $10 a month, defendant stated, "I

mean, I can pay that." He stated he had not made the payments because he had been paying his mother's bills for her.

On March 2, 2017, the court conducted a probation violation hearing. Three witnesses testified: a superior court financial evaluator, Gina L. Rogers; defendant; and defendant's mother, Mary Parker. The trial court asked questions of all three witnesses, which will be described further below. The trial court also considered a statement by an office manager at a domestic violence counseling program, which was included in a probation report.

Following the hearing, the court concluded that defendant had failed to comply with the trial court's order that he complete a domestic violence counseling program. By March 2, 2017, 20 months into his probation term, defendant had completed only 23 of 52 sessions. Defendant was twice dismissed from the program, once for nonpayment of the $25 per session fee (September 2015) and once for poor attendance (September 2016). On both occasions, defendant failed to promptly re-enroll.

Defendant also failed to comply with the court's order that he pay specified fines and fees and the cost of probation services. Defendant made no payments toward those financial obligations, even after his monthly payment was reduced from $25 to $10. The trial court found defendant had the ability to pay both the $25 per session cost of the domestic violence counseling program and the $10 per month installment toward his financial obligations.

The trial court also found that defendant had violated the conditions of probation by: failing to obey a court order requiring him to appear in court on the next business day after being dismissed from his domestic violence counseling program; failing

to keep the probation department advised of his current contact information; being dishonest with a financial evaluator about his income; and failing to appear in court as ordered on November 30, 2016 at 8:30 a.m. Substantial evidence supported the trial court's noncompliance findings. Defendant does not challenge the sufficiency of the evidence.[2]

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[2] Although defendant does not challenge the sufficiency of the evidence to support the violation findings, he does not concede that the evidence was sufficient as to all of the trial court's findings. In the introduction to his "points and authorities," defendant asserts: "While the evidence at [defendant's] formal probation violation hearing did establish some technical violations of probation (appearing at 1:30 p.m. on a scheduled court date instead of 8:30 a.m., a failure to come to court immediately to get reinstated after being kicked out of his [domestic violence counseling] program for non-payment and a miscommunication with probation as to a new telephone number) [defendant] argues that it is unlikely a neutral and unbiased tribunal would have executed his six-year prison sentence[] if those were his only violations. [Defendant] had otherwise complied with the terms of this probation . . . . However, [defendant's] attendance at the mandatory domestic-violence counseling program had been sporadic and he had paid nothing on his fines and fees. The issue at the formal hearing was whether this was deliberate, and therefore a violation of an important term of his probation or whether it [was] not a violation because his failure to regularly attend the [domestic violence] program and pay his fines and fees was based solely on an inability to pay. [Citations.]"

III. DISCUSSION

A. *Neutral and Unbiased Fact Finder*

Defendant argues that during the evidentiary hearing, the trial court demonstrated bias, prejudged the outcome, assumed the prosecutor's role, and cast aspersions and ridicule upon defendant. We conclude defendant forfeited this argument. On the merits, we have carefully reviewed the probation revocation hearing transcript and conclude there was no due process violation.

1. Defendant Forfeited this Argument

Defendant forfeited his judicial misconduct claims by failing to raise them in the trial court. (*People v. Houston* (2012) 54 Cal.4th 1186, 1220; *People v. Blacksher* (2011) 52 Cal.4th 769, 825.) Defendant argues any objection would have been futile, hence there was no forfeiture. Defendant asserts, "Not only would an objection be futile, an objection under these circumstances would be taken as a challenge to the court's authority and the result would be to push the court even further into an adverse position *vis a vis* [defendant]." We disagree. An objection would have alerted the trial court to defendant's concerns and given the court an opportunity to respond. (*People v. Houston, supra*, 54 Cal.4th at p. 1220.) This is not a case where the trial court was clearly hostile or made extensive, numerous disparaging remarks such that an objection would have been pointless. (*Ibid.*; *People v. Williams* (2017) 7 Cal.App.5th 644, 693.)

2. There was no Due Process Violation

a. applicable law

"'A criminal defendant has due process rights under both the state and federal Constitutions to be tried by an impartial judge.' [Citations.]" (*People v. Peoples* (2016) 62 Cal.4th 718, 788; accord, *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 242.) This right extends to probation revocation hearings. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 441.) A trial court may not advocate for either party, undertake the prosecutor's role, or cast aspersions or ridicule on witnesses. (*People v. Cook* (2006) 39 Cal.4th 566, 597; *People v. Cummings* (1993) 4 Cal.4th 1233, 1305, disapproved on another point in *People v. Merritt* (2017) 2 Cal.5th 819, 831.) A trial court must treat litigants and witnesses with appropriate respect. (*People v. Carlucci* (1979) 23 Cal.3d 249, 258.) A court must "refrain from advocacy and remain circumspect in its comments on the evidence, treating litigants and witnesses with appropriate respect and without demonstration of partiality or bias. [Citations.]" (*Ibid.*)

A trial judge in a court or jury trial also has the duty and the discretion to control his or her courtroom. (*People v. Snow* (2003) 30 Cal.4th 43, 78; *People v. Fudge* (1994) 7 Cal.4th 1075, 1108.) That duty and discretion includes the undisputed right to examine witnesses in order to elicit material facts or to clarify confusing or unclear testimony. (*People v. Cook, supra*, 39 Cal.4th at p. 597; *People v. Carlucci, supra,* 23 Cal.3d at p. 255;

see Cal. Const., art VI, § 10.[3]) As the court in *Carlucci* explained: "'[A] judge is not a mere umpire presiding over a contest of wits between professional opponents, but a judicial officer entrusted with the grave task of determining where justice lies under the law and the facts between the parties who have sought the protection of our courts. Within reasonable limits, it is not only the right but the duty of a trial judge to clearly bring out the facts so that the important functions of his office may be fairly and justly performed." [Citation.]'" (*People v. Carlucci, supra*, 23 Cal.3d at p. 256.) It is not misconduct merely to examine witnesses at considerable length. (*People v. Rigney* (1961) 55 Cal.2d 236, 243; *People v. Corrigan* (1957) 48 Cal.2d 551, 559.) Moreover, a judge may elicit evidence unfavorable to a defendant so long as the judge's questions are designed to fairly and impartially establish the truth. (*People v. Rigney, supra*, 55 Cal.2d at pp. 243-244.)

b. standard of review

The question before this court is whether, considering the entire record, defendant received a fair hearing. (*People v. Snow, supra*, 30 Cal.4th at pp. 78, 81; see *People v. Peoples, supra*, 62

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[3] Pursuant to Article VI, section 10 of the California Constitution, "The court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." "The purpose of this provision is to allow the court 'to utilize its experience and training in analyzing evidence to assist the jury in reaching a just verdict. [Citations.]' [Citation.]" (*People v. Proctor* (1992) 4 Cal.4th 499, 542.)

Cal.4th at p. 789 ["we review claims of judicial misconduct on the basis of the entire record"].) Our role "'is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid, [but] . . . whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.' [Citation.]" (*People v. Snow, supra*, 30 Cal.4th at p. 78.) Because this was a bench hearing, we are not concerned with the effect on a jury of the trial court's conduct or comments.

c. application to the present case

On the merits, we find no judicial misconduct amounting to a due process violation. The trial court asked questions of all three witnesses. The court properly did so to elicit and clarify testimony. The court attempted to draw out the evidence relevant to the question whether defendant was in violation of probation.

Defendant cites the trial court's reference to his likely appeal as evidence the court had predetermined the outcome of the hearing. During the financial evaluator's testimony, defense counsel commented that the court seemed to be having a conversation with the prosecutor. The trial court responded: "It wasn't [conversing]. I'm trying to get the actual numbers. I mean, clearly [defendant has] got more than enough money to pay [for] the [domestic violence] classes. *I know he's going to take this on appeal [and] I want [the record] to be accurate*." (Italics added.) Defendant had appeared before the court on prior occasions. The court was familiar with defendant's performance on probation and had reason to know defendant's ability to meet

his financial obligations was central to the violation question. In addition, the court had previously found "reason to believe" defendant had violated his probation conditions. (§ 1203.2, subd. (a).) Moreover, the evidence to that point appeared not to support defendant's inability to pay claim. Defendant had admitted in November 2016 that he could pay $10 a month toward his financial obligations. Rogers had testified defendant was able to pay for his domestic violence counseling sessions. In this context, the court properly expressed the need to create a clear and accurate record of defendant's finances. The court's comments reflected the existing evidence and were not an indication it had predetermined the outcome.

The United States Supreme Court has explained in the related context of a judicial recusal motion: "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, *or their cases*, ordinarily do not support a bias or partiality challenge." (*Liteky v. United States* (1994) 510 U.S. 540, 555, italics added.) Here, the trial court's comment defendant was likely to appeal did not amount to bias or partiality rendering defendant's probation violation hearing unfair.

Defendant also cites the trial court's response to his attorney's evidentiary objections as an example of the court's bias. Defense counsel objected on foundation and hearsay grounds to "every exhibit" including probation department and

counseling program reports and excepting only transcripts of court proceedings and a letter defendant had written to the court. When the trial court inquired about a document defendant filed "as being true and accurate as to his domestic violence classes," defense counsel objected "to any statements made by any other party within that document on hearsay and foundation grounds." The trial court and counsel further discussed the objection: "The Court: So when they said he was actually attending, I shouldn't accept that? 'Cause that's what they were saying. They gave me dates of attendance. I shouldn't accept that? [¶] [Defense Counsel]: I'm objecting to any statements contained therein. [¶] The Court: Submitted by your client. [¶] [Defense Counsel]: That's correct. [¶] The Court: So then I have no evidence that he's done any. Okay. That's fine. If you don't want me to accept that he's done any programs, 'cause that's all I have, which is what he submitted to the court, I guess we're stuck. [¶] [Defense Counsel]: He can testify to that. [¶] The Court: Pardon me? [¶] [Defense Counsel]: He can testify to that. [¶] The Court: Okay. That's fine. You can let him do that." The trial court's concern about defense counsel's objection to evidence documenting defendant's attendance at domestic violence counseling sessions was reasonable. Whether and how often defendant had attended counseling sessions was significant to the question whether defendant was in violation of his probation conditions. We do not find that, as defendant asserts, the trial court displayed sarcasm or a "denigrating attitude."

Defendant asserts, "[T]he court examined the People's [financial evaluation] witness using leading questions to obtain evidence that pointed against appellant." There was nothing improper about the trial court's questioning of the financial

evaluator. If her responses "pointed against appellant" it was because that was what her financial evaluation showed, not due to the nature of the trial court's questions. As noted above, there was nothing improper about the trial court eliciting evidence unfavorable to defendant so long as the questions posed were designed to establish the facts. (*People v. Rigney, supra*, 55 Cal.2d at pp. 243-244.)

Defendant argues the trial court made "a comment that approached an implied witness intimidation" when it inquired whether testimony by defendant's mother might negatively impact her. At issue was whether defendant had additional disposable income in the form of rental receipts. Defense counsel argued it could not be assumed the rental receipts were income to defendant because defendant's mother might be "pocket[ing]" that money. The court commented: "You have the mother. You can put her on the stand and have her tell us what the situation is. [¶] [Defense Counsel]: Sure. [¶] The Court: Is she here? [¶] [Defense Counsel]: She is here. [¶] The Court: And she's going to say she received this income? And she's going to testify under oath that she received this income and that she's claiming that income? [¶] [Defense Counsel]: You know, I don't know what she's going to say, your honor. I don't want to misrepresent what she's going to say. [¶] The Court: Yeah, because she's going to have to testify under oath that she's receiving income. I'm wondering if that, in fact, she is receiving that income, if that has been disclosed because she's receiving aid. *And if she's getting that much income that she's not claiming, that could be a problem for her.* [¶] [Defense Counsel]: Maybe she can sort it out for the court. I'd like to call her to the stand. Thank you." (Italics added.) These comments do not constitute witness intimidation.

First, there is no indication the witness, defendant's mother, was present in the courtroom at the time the court made the comment. Indeed, this exchange occurred during the financial evaluator's testimony and appears in the transcript six pages before defense counsel called defendant's mother as a witness. Even if the witness had been present, the court's comment cannot fairly be characterized as an effort to intimidate her. Rather, the court was expressing a concern that the witness might incriminate herself. (Cf. *People v. Schroeder* (1991) 227 Cal.App.3d 784, 788 ["when it appears that a witness may give self-incriminating testimony, the court has a duty to ensure that the witness is fully apprised of his or her Fifth Amendment rights"].) More importantly, the court's comments did not intimidate the witness since she testified at the hearing that she and defendant received rental revenue from sublessees, which exceeded the amount of rent due on the residence, and she and defendant used the excess rental revenue for bills. Defendant had not disclosed to the financial evaluator that he was receiving rental revenue from sublessees.

Defendant takes exception to questions the trial court posed to him, describing the court's style as "aggressive" and "untoward." It is true the trial court cut short some of defendant's responses once the question posed had been answered. For example: "[The Court]: Were you here at 8:30 a.m.? [¶] [Defendant]: No, I wasn't, but I— [¶] [The Court]: I don't want to hear anything. I just want to know if you were [here]." Defense counsel was free to draw defendant's testimony out on redirect examination. The trial court also asked defendant three times whether defendant had evidence to support his position. But there is no support for defendant's claim this was

an "improper humiliation tactic" intended to "belittle" and "demean." The court's question was in response to defendant's testimony he had complied with the court order requiring him to return to court the next business day after any dismissal from his counseling program. In light of the undisputed record of defendant's nonappearance, the court reasonably inquired whether defendant had any evidence to support his testimony. The court also inquired whether defendant had any evidence to support his claim he had attended more than 23 domestic violence counseling sessions. There was no evidence to that effect before the court. Hence the inquiry was appropriate and designed to develop an accurate factual record. Even if the trial court expressed incredulity, there was nothing improper about the trial court's questions, and the court's manner did not render defendant's hearing unfair.

We have carefully reviewed the entire transcript of the probation revocation hearing. We conclude defendant received a fair hearing. There was no due process violation.

3. Defendant's Ineffectiveness Claim Fails

Defendant claims his attorney was ineffective because he failed to object to the trial court's questioning of witnesses or other alleged misconduct. As discussed above, however, we conclude defendant received a fair hearing. Therefore, we need not consider whether his attorney was ineffective. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient

prejudice, . . . that course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697; accord, *People v. Carrasco* (2014) 59 Cal.4th 924, 982.)

B. *Evidentiary Objections*

Defendant argues the trial court improperly relied on hearsay and opinion evidence to the effect he manipulated his excuses for not attending domestic violence counseling sessions and tampered with records.[4] The probation department's November 30, 2016 report states: "On 10/31/2016, Joyce, the office manager at Cedarwood Counseling confirmed the defendant's poor attendance. *She strongly believes the defendant has been manipulating his attendance via medical excuses.*" (Italics added.) The counseling program's August 30, 2016 progress report discusses defendant's poor attendance and notes the following: "4/18/16 [s]howed client the dates on paperwork how they appear that someone is writing over them. Office manager let him know that we will not accept any more that appear tampered with. JK."[5]

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[4] As noted above, defendant's attorney objected in the trial court to hearsay statements in probation department and counseling program reports. Counsel renewed the objection at the conclusion of the probation revocation hearing stating, "I ask the court to give appropriate consideration to any statements contained within domestic violence counseling reports of people who did not testify here in court."

[5] During his testimony, defendant admitted having this exchange with the office manager.

Hearsay evidence is admissible in probation revocation proceedings provided it bears sufficient indicia of reliability. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 489; *People v. Maki* (1985) 39 Cal.3d 707, 709, 716-717.) Certain documentary hearsay evidence is deemed trustworthy and admissible—on a case-by-case basis. (*People v. Maki, supra*, 39 Cal.3d at p. 717 [car rental invoice bearing defendant's signature]; *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1412-1413 [laboratory report analyzing rock cocaine].) Documentary evidence that is a substitute for live testimony, however, is generally inadmissible at probation revocation hearings. (*People v. Arreola* (1994) 7 Cal.4th 1144, 1160-1161 [preliminary hearing transcript]; *People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1197-1202 [out-of-court statement by program administrator that defendant violated probation by consuming alcohol].)

Our colleagues in Division Eight summarized the applicable standards in *People v. Abrams* (2007) 158 Cal.App.4th 396, 405: "Evidence that is properly viewed as a substitute for live testimony, such as statements to a probation officer by victims or witnesses, likely [is inadmissible]. [Citations.] . . . [T]he rule is otherwise where the evidence involves more routine matters such as the making and keeping of probation appointments, restitution and other payments, and similar records of events of which the probation officer is not likely to have personal recollection and as to which the officer 'would rely instead upon the record of his or her own action.'"

We review the trial court's trustworthiness determination and its decision to admit hearsay evidence for an abuse of discretion. (*People v. Abrams, supra*, 158 Cal.App.4th at p. 400; *People v. Shepherd, supra*, 151 Cal.App.4th at pp. 1197-1998.)

"The determination whether hearsay evidence is trustworthy rests with the trial court and will not be disturbed on appeal absent an abuse of discretion. [Citation.]" (*People v. Buell* (2017) 16 Cal.App.5th 682, 689.)

Here, the court impliedly admitted statements a counseling program staff member made about defendant's conduct and honesty. The staff member described defendant as manipulative and accused him of falsifying documents. The statements were quoted in written probation and counseling reports. This evidence does not fall into the category of reports on routine matters such as counseling program attendance or restitution payments. The statements instead reflect the speaker's opinion defendant was being manipulative and dishonest. The challenged evidence was a substitute for live testimony. Under these circumstances, the trial court abused its discretion when it admitted and relied on the statements bearing on defendant's honesty.[6]

Although there was error, the failure to have the counseling program staff member testify was harmless under either the *Watson* standard (*People v. Watson* (1956) 46 Cal.2d. 818, 836) or the *Chapman* standard (*Chapman v. California* (1967) 386 U.S. 18, 24). The hearsay statement did not serve as a basis for violating probation; the court did not conclude that defendant violated the terms of probation by falsifying documents. Instead, the court concluded that the hearsay statement was consistent with its own observations and

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[6] The Attorney General does not argue that there was a showing of unavailability such that the statement should have been admitted. (See *People v. Arreola, supra*, 7 Cal.4th at p. 1160; *In re Kentron D.* (2002) 101 Cal.App.4th 1381, 1393).

demonstrated defendant was not credible. But there was other evidence demonstrating defendant's lack of credibility, including a description of paystubs that contradicted defendant's statement to the court that he earned approximately $200 to $300 a month, and defendant's mother's testimony and letter to the court, which described excess rental revenue that defendant had not disclosed to the financial evaluator. Moreover, the trial court's probation violation finding rested on substantial evidence unaffected by defendant's credibility—the probation department's nonpayment record, the counseling program's attendance record, and evidence of defendant's financial condition independent of his testimony. There is no possibility the trial court would have concluded defendant was not in violation of his probation absent the hearsay evidence accusing defendant of dishonesty. (See *People v. Arreola, supra*, 7 Cal.4th at p. 1161.) The non-hearsay evidence established defendant had failed to comply with his court-ordered domestic violence counseling condition and, over the course of 20 months, had made not one payment toward his financial obligations.

IV. DISPOSITION

The March 2, 2017 order revoking defendant's probation and imposing sentence is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.