No. 14-24-00314-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

AARON PAUL SMITH
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause No. 1625400
From the 177th District Court of Harris County, Texas

BRIEF FOR APPELLANT

Oral Argument Requested

Alexander Bunin
Chief Public Defender

Sunshine L. Crump
Assistant Public Defender
Harris County, Texas
SBOT: 24048166
1310 Prairie St., 4th Floor
Houston, Texas 77002
Ph: 713.274.6700
Fax: 713.368.9278
sunshine.crump@pdo.hctx.net

IDENTITY OF PARTIES AND COUNSEL

APPELLANT:	Aaron Paul Smith SPN# 02738634 Harris County Jail 701 N. San Jacinto St. Houston, Texas 77002
PRESIDING JUDGE:	Hon. Robert Johnson 177th District Court Harris County, Texas 1201 Franklin St., 19th Floor Houston, Texas 77002
DEFENSE TRIAL COUNSEL:	William Gifford SBOT: 07894500 1302 Waugh Dr. Houston, Texas 77019
DEFENSE COUNSEL ON APPEAL:	Sunshine L. Crump SBOT: 24048166 Assistant Public Defender Harris County, Texas 1310 Prairie St., 4th Floor Houston, Texas 77002
PROSECUTORS AT TRIAL:	Heather Axline SBOT: 24099789 Billie Fair SBOT: 24123050 Assistant District Attorneys Harris County, Texas 1201 Franklin St., Ste. 600 Houston, Texas 77002

PROSECUTOR ON APPEAL:

Jessica Caird
SBOT: 24000608
Assistant District Attorney
Harris County, Texas
1201 Franklin St., Ste. 600
Houston, Texas 77002

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Statement of the Case

On January 15, 2020, Aaron Smith was charged by indictment with a robbery alleged to have occurred on February 19, 2019, in Cause No. 1625400. (C.R. at 20). On November 4, 2021, he entered a guilty plea, and on December 21, 2021, was placed on deferred adjudication for a period of five (5) years. (C.R. at 55, 69; R.R. at 7, 15). On March 13, 2023, the State filed a Motion to Adjudicate Guilt. (State Ex. 4). On April 25, 2024, the trial court held a hearing on the State's Motion to Adjudicate Guilt and adjudicated him guilty, assessing punishment at five years in the Institutional Division of the Texas Department of Criminal Justice. (State Ex. 4; C.R. at 88; R.R. at 69). The trial court certified Mr. Smith's right of appeal and he timely filed his Notice of Appeal on April 25, 2024. (C.R. at 93, 96-97). The Harris County Public Defender's Office was appointed to represent him. (C.R. at 97). No motion for new trial was filed.

STATEMENT REGARDING ORAL ARGUMENT

Undersigned counsel requests oral argument.

ISSUES PRESENTED

Issue One: The evidence is insufficient to support the adjudication of Mr. Smith's guilt based on the trial court's finding that he committed "AN OFFENSE AGAINST THE STATE OF TEXAS PER COURT ORDER."

Issue Two: The $515 in court costs and fees included in the judgment are erroneous and should be reformed accordingly.

Statement of Facts

The instant case was called, and the State read aloud the alleged violations. (R.R. at 8-11). Mr. Smith entered a plea of "not true." (R.R. at 11). State's Exhibits 1-4 were admitted without objection. (R.R. at 13). They include the indictment, the plea agreement, the Order of Deferred Adjudication and the Motion to Adjudicate Guilt. (R.R. at 12-13; State Exhibits 1 through 4). The Court took judicial notice of its own file and of Mr. Smith's probation file. (R.R. at 13).

Aneishia Mitchell—Supervision Officer

Mr. Smith's Community Supervision Officer, Aneishia Mitchell, was the first witness offered by the State. (R.R. at 14). She indicated that her office maintains care, custody and control of Harris County Community Supervision and Corrections probation files, keeping the records in the regular course of business. (R.R. at 14). She brought Aaron Smith's probation file to court and identified him for the record. (R.R. at 15). She stated the trial court placed Mr. Smith on Deferred Adjudication probation for robbery on December 21, 2021, for a period of five years. (R.R. at 15-16). She also indicated that the terms and conditions of Mr. Smith's Deferred Adjudication were explained to him before he signed them. (R.R. at 16-17; State Ex. 3). It was Ms. Mitchell's testimony, however, that Mr. Smith did not comply with those terms and conditions, as documented in the probation file. (R.R. at 17). She stated he violated the condition "to commit no offense against the laws of this

or any other state or of the United States" by committing four new law violations in Fort Bend County: "an assault charge, a criminal mischief, tampering with physical evidence and fraud use possession of identification information." (R.R. at 18). She was not aware of whether Mr. Smith had been indicted for any of those alleged violations. (R.R. at 19).

Ms. Mitchell further indicated that Mr. Smith tested positive for "THC" in violation of his probation conditions. (R.R. at 19, 21). He enrolled in treatment but could not continue due to a lack of transportation. (R.R. at 22). She stated he did not report the Fort Bend County arrests to her, as required. (R.R. at 20). He twice failed to report to the Community Supervision Officer. (R.R. at 22). On one occasion, Mr. Smith did not submit a urine sample when it was requested. (R.R. at 25). Ms. Mitchell testified that Mr. Smith was behind in paying supervision fees, court costs and fines, the assessment fee and drug testing fees with a total of $2,270.00. (R.R. at 26-27).

Cross Examination

On cross-examination, Ms. Mitchell stated Mr. Smith is a "nice guy." (R.R. at 29). She knew nothing of the charges pending in Fort Bend County. (R.R. at 29). She never spoke with Mr. Smith's mother or grandmother. (R.R. at 30). She affirmed that Mr. Smith was working at a job and had a baby to provide for. (R.R. at 31).

Warrants Entered Into Evidence

During the hearing, the State presented evidence in the form of alias capias warrants from Fort Bend County. (R.R. at 32-33; State Ex. 5, 6, and 7). These were admitted with no objection from Mr. Smith. (R.R. at 35-36). After the admission of State Exhibits 5-7, the State rested. (R.R. at 36).

Mr. Smith Testifies in His Defense

At the time of the hearing, Mr. Smith was twenty-seven years old and worked for Jack in the Box and a food truck. (R.R. at 36). He has a two-year-old child for whom he is responsible. (R.R. at 37). It was his belief that the Fort Bend County cases had been dismissed, and that the active warrants were invalid. (R.R. at 37-38). Regarding the missed probation appointments, Mr. Smith stated he and his family were "going through Covid" at that time. (R.R. at 38). He asked that the court continue his probation: "So I can take care of my family and do what I need to do to do the right thing and just change everything around." (R.R. at 39). He also stated he would catch up on the overdue court costs and fees. (R.R. at 39).

Cross Examination

Mr. Smith admitted pleading guilty to the underlying robbery charge, but said, "I only pled guilty because my attorney at the time said that if I plead guilty that I would be able to be out of jail before my son was born." (R.R. at 40-41). He stated the complainant and co-defendants lied. (R.R. at 41). He also testified that the

complainant from the Fort Bend County assault family member and criminal mischief cases was present with him in court on the day of the hearing. (R.R. at 42). He testified that he was in custody in Harris County when scheduled to appear in Fort Bend County on the new allegations. (R.R. at 43, 44).

Rodgers' Friend Pulls Gun on Smith Near Baby, but Smith Goes to Jail

Mr. Smith indicated that Shataya Rodgers is his girlfriend of four years. (R.R. at 44.) They live together and have a child together. (R.R.at 44). Referring to the Fort Bend County allegations, Mr. Smith stated all the charges stem from a single incident at Ms. Rodgers' home. (R.R. at 50). He said the underlying reason for the disagreement was "there was somebody else in the house who was not supposed to be allowed in the house." (R.R. at 45). That someone was Rodgers' friend: Darien Barefield. (R.R. at 44-45). It was Mr. Smith's testimony that he told police he was upset because Mr. Barefield was in the home with his child. (R.R. at 46). He stated he also told police that during the altercation, Mr. Barefield pointed a handgun at him, Ms. Rodgers threw a cup of water at him, and he pushed her back. (R.R. at 46). He denied biting Rodgers or pulling her hair and said he was unaware Rodgers had reported that to police. (R.R. at 46). The State peppered its questions with supposed case facts couched in multiple levels of hearsay: "So Officer Vela from the Rosenberg Police Department didn't tell you that's what he what he said you did?" (R.R. at 47). Mr. Smith was arrested during this incident while holding his baby.

(R.R. at 47). While police were arresting him, they handed Mr. Smith's baby to Mr. Barefield. (R.R. at 48). Mr. Smith tried to grasp his infant son and police "took [him] to the ground." (R.R. at 48).

After Mr. Smith's ride in the patrol car, police found Mr. Barefield's debit cards in the back seat. (R.R. at 49). He stated he did not realize that he'd grabbed Mr. Barefield's items because the house was messy, and they had the same debit card. (R.R. at 49-50).

Nadine Dungy—Mr. Smith's Mother

Mr. Smith lived with his mother, Nadine Dungy, for most of his life. (R.R. at 51). She stated he is a good person who stands up for others. (R.R. at 51-52). He is a good father. (R.R. at 52). During the time of the hearing, Mr. Smith was attending church and working two jobs to take care of his family. (R.R. at 53). He also worked to fix and maintain their home. (R.R. at 53). Ms. Dungy believed her son should be allowed to stay on probation. (R.R. at 53).

Diana K. Dungy—Mr. Smith's Grandmother

Throughout the instant proceedings, Ms. Diana Dungy, Mr. Smith's grandmother, attended almost every court setting. (R.R. at 54). "He's an awesome guy," Ms. Diana said. "Not just because he's my grandson, but just the type of person he is or I wouldn't support him." (R.R. at 54). With the support his large family behind him, she believed Mr. Smith would be successful if allowed to

continue probation. (R.R. at 55). To that end, she indicated that in addition to Mr. Smith's wife and mother, the following family members were present to show their support: "My grandson, my youngest grandson. I see another one of my daughters. I see his father, his brother, his mother and he has two brothers here." (R.R. at 55). She stated the family had discussed how to better support each other—including Mr. Smith. (R.R. at 55).

Ms. Dungy confirmed that the missed probation appointments coincided with Mr. Smith and his family's COVID infections. (R.R. at 56) She was unaware of any cannabis use until it came up in court. (R.R. at 56). She was aware of the Fort Bend County incident and understood that things got out of hand because Mr. Barefield had a firearm in the home around the children. (R.R. at 57). Regarding the overdue costs and fees, Ms. Dungy stated that she was not able to help financially because she is on disability: "But we are reaching out to family members and asking for assistance and we're all trying to pull together what we can, our resources to help him." (R.R. at 57-58). She did not believe that going to the penitentiary would help her grandson succeed. (R.R. at 58).

Shataya Rodgers—Mr. Smith's Girlfriend

Ms. Rodgers and Mr. Smith live together and are parents to a two-year-old child. (R.R. at 59). She confirmed that he was working two jobs—at Jack in the Box and a food truck in Katy—to support them. (R.R. at 59). They share childcare

responsibilities: "If we're both at work my mom. If I'm at work he has him and if he's at work I have him." (R.R. at 60).

She confirmed that the Fort Bend County charges stem from the incident where a man was around their son at the house. (R.R. at 60). She did not want to see Mr. Smith sent to prison. (R.R. at 61). She stated they were together "all the time," and that Mr. Smith is a good person who takes care of their family. (R.R. at 61).

Cross Examination

Regarding the incident that led to the Fort Bend County allegations, Ms. Rodgers testified that she, herself, did not call police, and she did not know who called them. (R.R. at 62). She also said there was "no commotion" between them: "No commotion. He was coming to get our child and he saw there was a gentleman over there and when Aaron walked through the door the gentleman pulled a gun on him." (R.R. at 62). Ms. Rodgers denied all allegations raised through the prosecution's cross-examination questions about what was allegedly written in the incident's offense report. (R.R. at 63-64). "And, so, everything that I just walked through the report with you on you're saying that the officer made—was lying throughout the whole report?" the prosecution asked. (R.R. at 64). "Yes, sir." Mr. Rodgers replied. (R.R. at 64).

Hearing's Conclusion

Defense counsel asked the trial court to continue Mr. Smith's probation noting, "he doesn't feel that the penitentiary will help him any." (R.R. at 65). After recounting the allegations from the State's Motion to Adjudicate Guilt, the prosecution asked the trial court to find Mr. Smith guilty of robbery and sentence him to five years in the Institutional Division of the Texas Department of Criminal Justice. (R.R. at 65-69). It did. (R.R. at 69; C.R. at 88).

The written order adjudicating guilt in this case states verbatim that:

> "While on deferred adjudication community supervision, Defendant violated the conditions of community supervision, as set out in the State's **ORIGINAL** Motion to Adjudicate Guilt, as follows: THE STATE WOULD FURTHER SHOW THE SAID DEFENDANT DID THEN AND THERE VIOLATE TERMS AND CONDITIONS OF COMMUNITY SUPERVISION BY COMMITTING AN OFFENSE AGAINST THE STATE OF TEXAS PER COURT ORDER."

(C.R. at 88-89).

SUMMARY OF ARGUMENT

The court abused its discretion in adjudicating Mr. Smith guilty because the evidence is legally insufficient to support such an adjudication. Based on the trial court's written order, it is impossible to determine what it meant by its finding that Mr. Smith committed "AN OFFENSE AGAINST THE STATE OF TEXAS PER COURT ORDER." Further, the testimony presented does not support the notion that he committed a new crime, but rather that a crime was committed against him in the

presence of his infant son. In addition, the court costs are erroneous and should be reformed.

ARGUMENT

Issue One: The evidence is insufficient to support the adjudication of Mr. Smith's guilt based on the trial court's finding that he committed "an offense against the State of Texas Per Court Order."

A. Applicable Law and Standard of Review

An order revoking community supervision must be supported by a preponderance of the evidence, meaning that the greater weight of the credible evidence would create a reasonable belief that the defendant has violated a condition of his community supervision. *Rickels v. State*, 202 S.W.3d 759, 763-64 (Tex. Crim. App. 2006); *see also Hacker v. State*, 389 S.W.3d 860, 864-65 (Tex. Crim. App. 2013) and *Black v. State*, 411 S.W.3d 25, 28 (Tex. App. — Houston [14th Dist.] 2013, no pet.). An order revoking community supervision is reviewed under an abuse of discretion standard. *Hacker*, 389 S.W.3d at 865; *Rickels*, 202 S.W.3d at 763; *Black*, 411 S.W.3d at 28. In conducting this review, the Court views the evidence in the light most favorable to the trial court's order. *Moore v. State*, 11 S.W.3d 495, 498 (Tex. App. — Houston [14th Dist.] 2000, no pet.); *Greer v. State*, 999 S.W.2d 484, 486 (Tex. App. — Houston [14th Dist.] 1999, pet. ref'd). The trial court is the sole trier of fact and determines the credibility of the witnesses and the

weight to be given their testimony. *Bell v. State*, 566 S.W.3d 398, 401-02 (Tex. App. — Houston [14th Dist.] 2018, no pet.); *Moore*, 11 S.W.3d at 498.

Violation of a single condition of community supervision will support the trial court's decision to adjudicate guilt. *Davis v. State*, 591 S.W.3d 183, 189 (Tex. App. — Houston [1st Dist.] 2019, no pet.). "When [an appellate court is] faced with a record supporting contradicting inferences, [it] must presume that the fact finder resolved any such conflict in factor of its findings, even if it is not explicitly stated in the record." *Id*. "The test for abuse of discretion is not whether, in the opinion of the appellate court, the facts present a suitable case for the trial court's action, but rather, whether the trial court acted without reference to any guiding rules or principles." *Id*. "A trial court abuses its discretion if the decision is so clearly wrong as to lie outside the zone within which reasonable persons might disagree." *Armstrong v. State*, 82 S.W.3d 444, 448 (Tex. App. — Austin 2002, pet. ref'd), citing *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992) (en banc).

"A written order revoking community supervision controls over an oral pronouncement by the trial judge." *Ex parte Bolivar*, 386 S.W.3d 338, 345-46 (Tex. App. — Corpus Christi 2012, no pet.) (citing *Clapper v. State*, 562 S.W.2d 250, 251 (Tex. Crim. App. [Panel Op.] 1978); *Ablon v. State*, 537 S.W.2d 267, 269 (Tex. Crim. App. 1976); *Henderson v. State*, 681 S.W.2d 173, 174 (Tex. App. – Houston [14th Dist.] 1984, pet. ref'd)).

It should also be noted that "a docket entry made the same day as the oral pronouncement merely memorializes the oral pronouncement and is not a judgment. *Ex parte Bolivar* at 345-46. (citing *State v. Garza*, 931 S.W.2d 560, 561–62 (Tex. Crim. App. 1996); *Garcia v. State*, 45 S.W.3d 733, 736 (Tex. App. — Corpus Christi 2001, no pet.); *Gomes v. State*, 9 S.W.3d 170, 172 n. 2 (Tex. App. — Houston [14th Dist.] 1999, no pet.) (en banc)).

Analysis

The trial court's oral pronouncement of Mr. Smith's sentence, while not controlling, makes a blanket reference to the State's Motion to Adjudicate Guilt. "Mr. Smith, please stand," began the Court. "The State's Motion to Adjudicate is granted. This Court assesses your punishment at five years in the Texas Department of Criminal Justice. You will receive credit for any time you have served thus far." (R.R. at 69).

In addition to seven technical violations, there were four new law violations alleged in the State's Motion to Adjudicate Guilt: "Assault," Criminal Mischief," Tamper with physical evidence," and "Fraudulent Use/Poss ID information." (State Ex. 4; R.R. at 9-10).

While the proceedings in this case contain discussions to support additional, separate grounds for revocation, the written judgment contains only a reference to a finding that Mr. Smith did "VIOLATE TERMS AND CONDITIONS OF

COMMUNITY SUPERVISION BY COMMITTING AN OFFENSE AGAINST THE STATE OF TEXAS PER COURT ORDER." (C.R. at 89). The simultaneous docket entry states: "The Court found from the evidence that the Defendant VIOLATED the conditions of community supervision." (C.R. at 126). Which offense? "Per court order?" Did the court order him to commit an offense?

At the adjudication hearing, the State offered three Alias Capias warrants from Fort Bend County. State's Exhibit 5 is for Cause No. 23-CCR-232374 indicating Mr. Smith was charged with the offense of "ASSAULT CAUSES BODILY INJURY FAMILY VIOLENCE CLASS A." (State Ex. 5). State's Exhibit 6 is for Cause No. 23-CCR-32369 indicating Mr. Smith was charged with the offense of "CRIMINAL MISCHIEF >=$100 < $750 CLASS B." (State Ex. 6). State's Exhibit 7 is for Cause No. 23-CCR-232368 indicating Mr. Smith was charged with the offense of "CRIMINAL MISCHIEF >= $100 < $750 CLASS B." (State Ex. 7).

Offenses Alleged in Motion to Adjudicate Guilt

Though the trial court did not recite which alleged offense it believed the state proved by a preponderance, for argument's sake Mr. Smith will briefly discuss each crime alleged and why it was not proven by a preponderance. First, not only did the State not prove any bodily injury whatsoever, but it failed to overcome Mr. Smith's assertion of self-defense.

Assault Bodily Injury is codified as follows:

> "(a) A person commits an offense if the person:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse."

Tex. Penal Code Ann. § 22.01.

The language in the State's motion (State Ex. 4) does not allege bodily injury, but the Alias Capias for the assault charge does. (State Ex. 5). "Bodily injury" is defined as: "physical pain, illness, or any impairment of physical condition."[1]

When reviewing a fact-finder's decision to reject a self-defense theory in the context of a Motion to Adjudicate Guilt, an appellate court must determine whether any rational factfinder would have found, by a preponderance, against the appellant on the self-defense issue. As is noted in the Texas Criminal Practice and Procedure Guide:

> It would be intolerable if, for example, the State were permitted to allege and prove the criminal offense of assault as a community supervision violation, but the defendant was not permitted to produce evidence of acting in self-defense. Thus, a claim of self-defense or defense of third persons, or any other exception, defense, or affirmative defense, should be recognized as a defense in a revocation proceeding.

G. Dix & J. Schmolesky, Exceptions, defenses, and affirmative defenses, 43A *Tex. Prac., Criminal Practice And Procedure* § 48:69 (3d ed.) (internal citations omitted.)

The self-defense statute reads, in pertinent part:

[1] Texas Penal Code § 1.07.

> (a) Except as provided in Subsection (b), a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force. The actor's belief that the force was immediately necessary as described by this subsection is presumed to be reasonable if the actor:
> (1) knew or had reason to believe that the person against whom the force was used:
> (A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;
> (B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or
> (C) was committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery;
> (2) did not provoke the person against whom the force was used; and
> (3) was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used.

Tex. Penal Code Ann. § 9.31 (West).

Both Mr. Smith and Ms. Rodgers testified that there was a disagreement on the night of the incident (1 R.R. at 45-46; 60; 62-64). Mr. Smith conceded he was upset because there was a man in the home with his infant son who was "not supposed to be allowed in the house—…Darien Barefield". (1 R.R. at 45-46). Mr. Smith stated Mr. Barefield pointed a handgun at him, Ms. Rodgers threw a cup of water, and he pushed her. (1 R.R. at 46). The prosecution asked him, "Would you describe it as a soft push or a hard push?" (1 R.R. at 46). Mr. Smith responded, "It really wasn't—" (R.R. at 46). But the State interrupted before he could answer to

ask whether he bit her or pulled her hair. (1 R.R. at 46). "No, sir," he replied. (1 R.R. at 46).

Ms. Rodgers corroborated Mr. Smith's recitation of events. She testified that Mr. Smith was angry on the night of the incident because there was a man around their son at the house. (1 R.R. at 60). Ms. Rodgers did not call the police and was not aware who did. (1 R.R. at 62). She also stated there was no commotion between herself and Mr. Smith, and that the visitor had pulled a gun on him. (1 R.R. at 62).

Next, the prosecution asked a series of questions about various potentially incriminating things an unidentified police officer may have put in his or her unidentified police report. Ms. Rodgers denied these accusations. (1 R.R. at 63-64). There was no additional eyewitness testimony, no 911 call, no investigating officer, no photographs, no body camera footage, no medical records. The two people who *were* present during the incident in question testified that Mr. Smith committed no crime. (1 R.R. at 46, 62). There was no evidence regarding bodily injury. The State's questions, however, contained unobjected-to hearsay suggesting there was something more afoot.

Hearsay still needs context

Regarding the "evidence" suggested by the State's cross-examination questions, Texas Rule of Evidence 802 establishes that "Inadmissible hearsay admitted without objection may not be denied probative value merely because it is

hearsay." But there must be some context, or some other evidence to put that hearsay into perspective. *Lamerand v. State*, 540 S.W.3d 252, 259 (Tex. App. — Houston [1st Dist.] 2018, pet. ref'd.) (Erroneous admission of hearsay is not reversible error if other evidence proving same fact is properly admitted elsewhere.); *Infante v. State*, 404 S.W.3d 656, 663 (Tex. App. — Houston [1st Dist.] 2012, no pet.) (quoting *Land v. State*, 291 S.W.3d 23, 28 (Tex. App. — Texarkana 2009, pet. ref'd)) (brackets omitted) (The erroneous admission of hearsay does not constitute reversible error "if other evidence proving the same fact is properly admitted elsewhere."); *see also Josey v. State*, 97 S.W.3d 687, 698 (Tex. App. — Texarkana 2003, no pet.) ("If the same or similar evidence is admitted without objection at another point during the trial, improper admission of the evidence will not constitute reversible error."). Even with the State's lowered burden in an adjudication hearing, the key consideration here is the lack of "other evidence." *See also Zarco v. State*, 210 S.W.3d 816, 833 (Tex. App. — Houston [14th Dist.] 2006, no pet.). (Hearsay harmless if same evidence admitted elsewhere without objection.)

Consider *Forrest v. State*, 805 S.W.2d 462 (Tex. Crim. App. 1991) (en banc). In *Forrest*, the appellant's probation was revoked after the trial court found he had violated the terms and conditions of probation by committing an aggravated assault. (*Forrest* at 462). The trial court also found he violated the terms by drinking excessive amounts of alcohol. *Id.* The First Court of Appeals reversed the trial court,

basing its reversal "on its ruling that unobjected to hearsay which has been contradicted in court by the declarant does not have probative value and, consequently, cannot sustain an order of revocation." *Id.* at 463.

The Court of Criminal Appeals then weighed unobjected-to hearsay testimony by an investigating police officer against the complainant's admissions and the officer's own observations at the scene. *Forrest* at 463. It reversed the Court of Appeals because it found that the trial court did not abuse its discretion in allowing the hearsay testimony. The CCA opined: "For the Court of Appeals in the instant case to say that [the officer's] hearsay testimony has no probative value in light of the declarant's contradictory in-court testimony is an improper attempt to reweigh the evidence to conform to their own opinion of the credibility of the hearsay and their own belief of the probative value of that testimony." *Forrest* at 464. But to get there, the Court of Criminal Appeals considered "other evidence"—not the least of which being the officer's on-scene observations of the complainant's large head wound. *Forrest* at 463.

§ 32.51 "Fraudulent Use/Poss ID Information"

> (b) A person commits an offense if the person, with the intent to harm or defraud another, obtains, possesses, transfers, or uses an item of:
>
> (1) identifying information of another person without the other person's consent or effective consent;

Tex. Penal Code Ann. § 32.51 (West).

The State did not offer an active warrant as evidence that this was a pending charge against Mr. Smith. Testifying in his own defense, Mr. Smith conceded to a brief possession of Mr. Barefield's credit or debit cards and raised his lack of intent to harm or defraud another.

> State: So after he pointed the gun he said you can take my debit and credit cards?
>
> Smith: No
>
> State: So he did not?
>
> Smith: No. I didn't know it was his. It was junky in the house and I grabbed the stuff, but I didn't know it was his, because we have the same card.
>
> State: So why were you trying to leave them in the back of the patrol car?
>
> Smith: When I seen that they was his that's when I dropped them on the ground, because they wouldn't let me take them out of my pocket.

(1 R.R. at 49-50).

A person acts with intent when it is his conscious objective or desire to engage in the conduct or cause the result.[2] Intent to harm or defraud may be proven by circumstantial evidence. *Williams v. State*, 688 S.W.2d 486, 488 (Tex. Crim. App. 1985). The totality of the circumstances here, however, falls short of those that have supported such an inference in other cases. The State merely proved that Mr. Smith

[2] Texas Penal Code § 6.03.

possessed the items found. It is unclear precisely where the items were found or what they were. There was no evidence, circumstantial or otherwise, tending to establish that Mr. Smith had the intent to defraud or harm the complainant or any other person. *See Pfleging v. State*, 572 S.W.2d 517, 520 (Tex. Crim. App. 1978). By all appearances, he made a mistake during a heated emergency.

Even considering the State's lowered burden of proof in this instance, surely such a simple human error moments after someone pointed a gun at him in front of his baby is an understandable innocent mistake to make. There was no evidence presented of any intent to harm or defraud. What was established, however, is that Mr. Smith was a gainfully employed responsible parent and loving family member with a whole lot to lose. (1 R.R. at 31; 36-37; 52-53; 55; 59-61).

§ 28.03 Criminal Mischief

(a) A person commits an offense if, without the effective consent of the owner:

(1) he intentionally or knowingly damages or destroys the tangible property of the owner;

(2) he intentionally or knowingly tampers with the tangible property of the owner and causes pecuniary loss or substantial inconvenience to the owner or a third person; or

(3) he intentionally or knowingly makes markings, including inscriptions, slogans, drawings, or paintings, on the tangible property of the owner.

Tex. Penal Code Ann. § 28.03 (West).

Again, Mr. Smith conceded mistaken possession of another's personal items without his effective consent. (1 R.R. at 49). Even with these concessions, however, there was zero evidence of intentional or knowing destruction, damage, pecuniary loss or substantial inconvenience as the code requires. There was no evidence that he vandalized the items with graffiti. Other than Mr. Smith's testimony, there was no evidence of what the items were—not the items themselves or photographs of them. For all the court knew, they could have been completely valueless unsolicited junk mail with someone's name on it. Criminal Mischief is a different level of offense depending on the severity of the damage/inconvenience and the type of property involved. It can be anywhere from a Class C Misdemeanor to a First Degree Felony.[3] There is no proof here of either a *mens rea* or any amount of loss or damage suffered.

§ 37.09 Tampering With or Fabricating Physical Evidence

(a) A person commits an offense if, knowing that an investigation or official proceeding is pending or in progress, he:

(1) alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; or

(2) makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent to affect the course or outcome of the investigation or official proceeding.

Tex. Penal Code Ann. § 37.09 (West).

[3] Texas Pen. Code § 28.03(b).

The instant facts could not support a conviction for this offense, even by a preponderance. There was no evidence presented that Mr. Smith altered, destroyed, made, or presented something in relation to the remaining statutory elements. If the State intended a conviction because Mr. Smith dropped the mistaken items in the patrol car when he was not allowed to return them, that logic fails. Leaving items in a very public patrol car that likely had at least one camera always recording, cannot in any way be considered an act of concealment to impair its availability as evidence. If anything, it shows the items were intended to be found and recovered.

The Court of Criminals appeals has established that in a conviction relying on concealment, actual concealment is required. *See Stahman v. State*, 602 S.W.3d 573, 581 (Tex. Crim. App. 2020) (evidence was insufficient to prove tampering by concealment when two witnesses saw the defendant throw a pill bottle out of his car, and, as soon as the officer arrived, showed him where the bottle landed). In *Stahman*, the Court of Criminal Appeals expressly rejected the State's argument that a defendant can be convicted of tampering even if his attempt to conceal evidence is unsuccessful: "[W]e agree with the court of appeals that '[a]ctual concealment requires a showing that the allegedly concealed item was hidden, removed from sight or notice, or kept from discovery or observation.' " *Stahman*, 602 S.W.3d at 581.

Guessing is inappropriate

With no finding from the trial court about what offense was proven by a preponderance, and no finding regarding technical violations, this Court should find the evidence insufficient to support a conviction. While it is true that modifications of court orders are sometimes proper for clerical errors, that is not the case for Mr. Smith. "[A]ppellate court[s] ha[ve] the power to correct and reform a trial court judgment 'to make the record speak the truth when [they] ha[ve] the necessary data and information to do so, or make any appropriate order as the law and nature of the case may require.' " *Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App. – Houston [1st Dist.] 2001, no pet.) (quoting *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App. – Dallas 1991, pet ref'd)); *see also* TEX. R. APP. P. 43.2(b). "The authority of an appellate court to reform [an] incorrect judgment[ ] is not dependent upon the request of any party, nor does it turn on the question of whether a party has or has not objected in the trial court." *Asberry*, 813 S.W.2d at 529–30.

In *Nolan*, the First Court of Appeals reformed clerical errors in the judgment. It deleted an obviously superfluous word from the offense of conviction, corrected the appellant's name and the sentence received.[4] In *Asberry*, the appellate court reformed a judgment after determining that the omission of a deadly weapon finding was a clerical error because the jury had made a finding on the special issue that a

[4] *Nolan* at 699.

deadly weapon was used to commit murder. *Asberry* at 531. Counsel submits that in Mr. Smith's case, unlike *Nolan* and *Asberry,* the error is substantive, not clerical. Coupled with the lack of proof, the judgment provides this court with nothing more than a vague notion that evades interpretation.

Other than the fact of the arrest and the existence of warrants, the state presented no independent evidence to support its allegations that Mr. Smith committed any newly alleged crimes. And when Mr. Smith was trying to explain the physical contact he did have with Ms. Rodgers during the incident—providing critical context to support potential defenses—the State interrupted him and changed the subject.

Since both Mr. Smith and Ms. Rodgers testified negatively regarding the State's assault allegations, and there was no other proof offered, if the trial court found that the State proved by a preponderance that Mr. Smith committed assault against Ms. Rodgers, that finding would be reversible error. The same goes for the remaining allegations.

For illustration purposes only, this Court addressed a similar, but distinguishable situation in *Moody v. State*, No. 14-10-00582-CR, 2011 WL 3667856 (Tex. App. — Houston [14th Dist.] (2011) (mem. op.) (not designated for publication). In *Moody*, the accused challenged his adjudication of guilt based on insufficiency of the evidence. *Id*. at *1. This Court found the appeal to be meritless

because "the trial court's revocation order was also grounded in Troy's possession of a firearm, failure to pay supervisory and lab-processing fees, and failure to participate in an anger-management course. Troy does not take issue with the trial court's findings on any of these violations…" *Id.* at *3. The *Moody* court assessed insufficiency as to the alleged new law violation after the trial court made additional findings regarding technical violations of community supervision. That is not the case here.

What the lawyers say is not evidence

Finally, language from Texas Criminal Jury Charges illustrates the fundamental importance of the fact-finder's mission: "As you determine the facts, you must consider only the evidence presented during the trial, including the sworn testimony of the witnesses and the exhibits. Remember that any statements, objections, or arguments made by the lawyers are not evidence…What the lawyers say is not binding upon you." Elizabeth Berry & George Gallagher, § 1:415 PLAIN LANGUAGE GENERAL INSTRUCTION: OPENING, Texas Crim. Jury Charges § 1:415 (2023). The Texas Criminal Pattern Jury Charges contain similar language: "Statements made by the lawyers are not evidence. The questions asked by the attorneys are not evidence." *See* State Bar of Texas, *CPJC* § 2.1 *Instruction—General Charge*, TEXAS CRIMINAL PATTERN JURY CHARGES ONLINE, at https://www.texasbarpractice.com/texas-bar-books/. While these charges may not

be binding on the courts,[5] they do present a guide to applicable top of mind legal principles to which trial courts are beholden.[6] *Madden v. State*, 242 S.W.3d 504, 513 (Tex. Crim. App. 2007) (In the context of jury Article 32.23 jury instructions, cross-examiner's questions are not evidence, though witness answers might be.)[7]

Whether it is twelve factfinders or one, the evidence must be legally sufficient. No rational trier of fact could have found the essential elements of the alleged offenses proven by a preponderance of the evidence. When the State fails to meet its burden of proof, the trial judge abuses his discretion in issuing an order to revoke probation. *Walkovak v. State*, 576 S.W.2d 643, 644–45 (Tex. Crim. App. 1979). As the First Court of Appeals noted in *Torres v. State*,[8] issues of proof go to the heart of whether the accused was afforded due process of law. *See also Leonard v. State*, 385 S.W.3d 570, 577 (Tex. Crim. App. 2012) (Evidence insufficient to support adjudication where only evidence supporting it was inadmissible. "Revocation involves the loss of liberty and therefore implicates due process. "The

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[5] *Keetch v. Kroger Co.*, 845 S.W.2d 276, 281 (Tex. App.—Dallas 1990).

[6] "In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions. It is equally routine for them to instruct juries that no adverse inference may be drawn from a defendant's failure to testify; surely we must presume that they follow their own instructions when they are acting as factfinders." *Harris v. Rivera*, 454 U.S. 339, 346, 102 S. Ct. 460, 465, 70 L. Ed. 2d 530 (1981).

[7] *See also Madden* at 513 n.23: "*See, e.g., Garza,* 126 S.W.3d at 86–87 & n. 3 (defense cross-examination of police officers who consistently denied defense suggestion of impropriety did not raise factual dispute); *Wells v. State,* 730 S.W.2d 782, 786 (Tex.App.-Dallas 1987) (noting that "remarks by counsel are not evidence" and "[q]uestions put to a witness are not evidence. The answers and not the questions are determinative")."

[8] 617 S.W.3d 95, 104. (Tex. App.—Houston [1st Dist.] 2020).

central issue to be determined in reviewing a trial court's exercise of discretion in a [community supervision] revocation case is whether the [defendant] was afforded due process of law.") (internal citations omitted).

In *Walkovak*, the Court of Criminal Appeals held that the trial court had abused its discretion in revoking probation because there was insufficient evidence to support his stated ground for revocation. The Court reversed, stating, "Although it would appear that there was ample evidence available to prove that appellant had violated conditions of probation, there is no evidence that he breached the condition which the court found had been breached." *Id.* at 644. Likewise, the evidence is insufficient to support the condition the court found in writing to have been breached in this case and so the conviction should be reversed.

Issue Two: The $515 in court costs and fees included in the judgment are erroneous and should be reformed accordingly.

At the conclusion of the hearing on the motion to adjudicate, the trial court pronounced a sentence of five years in prison but did not mention the assessment of any court costs or fees. (R.R. at 69).

Here, the original deferred adjudication order includes $290 in Court Costs and $40 in reimbursement fees for a total of $330. (State Ex. 3). The Judgment Adjudicating Guilt states there are $290 in Court Costs and $225 in reimbursement fees for a total of $515. (C.R. 88, 91).

The trial court's judgment should be modified to reflect the amount of $133.00 for the State Consolidated Court Cost instead of $185.00, the amount assessed. "Section 133.102 [of the Texas Local Government Code] authorizes imposition of certain costs and fees against a person convicted of an offense." *Wiggins v. State*, 622 S.W.3d 556, 561 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd). Under the current version of this provision, the state consolidated court cost is $185.00 for a person convicted of a felony. TEX. LOCAL GOV'T CODE § 133.102(a)(1) (2022). Appellant was assessed this cost. (C.R. at 247). However, the current version of Section 133.102 applies only to a cost, fee, or fine on conviction for an offense committed on or after the effective date of the act, which was January 1, 2020. *Wiggins,* 622 S.W.3d at 561, citing Act of May 23, 2019, 86th Leg., R.S., ch. 1352, §§ 5.01, 5.04. Appellant allegedly committed this offense on February 4, 2019, which was prior to the effective date of the legislative changes to Section 133.102. The prior version of Section 133.102 which imposed a court cost of $133.00 should have been assessed instead of $185.00. *See* TEX. LOCAL GOV'T CODE § 133.102(a)(1) (2016). Therefore, undersigned counsel believes that that this Court should modify the judgment to reduce the assessed court costs by $52.00. *See Wiggins*, 522 S.W.3d at 561 (modifying trial court's judgment to reduce $52 in court costs). In addition, the $105.00 for "Consolidated Court Cost – Local was added by amendment in 2019 and applies only to offenses committed on or after January 1,

2020. TEX. LOCAL GOV'T CODE § 134.101. This Court should modify or order that the Bill of Costs be modified by deleting the Consolidated Court Cost – Local. *See Rhodes v. State*, 676 S.W. 3d 228, 233 (Tex. App.—Houston [14th Dist.] 2023, no pet. h.) (in *Anders* context, modifying trial court's judgment to remove certain erroneous court costs).

PRAYER

Appellant, Aaron Smith, prays that this Court reverse the trial court's adjudication of guilt and remand this case so that he can continue his deferred adjudication term. Alternatively, without waiving the foregoing request for relief, he prays that this Court modify the judgment to reflect the appropriate amount of court costs. Appellant also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

ALEXANDER BUNIN
Chief Public Defender
Harris County, Texas

/s/ Sunshine L. Crump
Sunshine L. Crump
Assistant Public Defender
Harris County, Texas
SBOT: 24048166
1310 Prairie St., 4th Floor
Houston, Texas 77002
Ph: 713.274.6700
Fax: 713.368.9278
sunshine.crump@pdo.hctx.net

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A true and correct copy of the foregoing brief was e-filed with the Fourteenth Court of Appeals and was served electronically upon the Appellate Division of the Harris County District Attorney's Office on October 21, 2024.

/s/ Sunshine L. Crump
Sunshine L. Crump

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Sunshine L. Crump

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Bar No. 24048166
Enkhjin.Usukhbayar@pdo.hctx.net
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Associated Case Party: AARONSMITH

Name	BarNumber	Email	TimestampSubmitted	Status
Sunshine Crump	24048166	Sunshine.Crump@pdo.hctx.net	10/21/2024 7:45:51 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jessica Caird	24000608	caird_jessica@dao.hctx.net	10/21/2024 7:45:51 AM	SENT