Opinion issued July 23, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00345-CR

RICARDO CAZAREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Case No. 1562149

O P I N I O N

Appellant Ricardo Cazarez appeals the trial court's revocation of his community supervision in connection with his conviction for aggregate theft.[1]

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[1] *See* TEX. PENAL CODE § 31.09 (allowing aggregation of amounts involved in theft under Chapter 31 when amounts are obtained "pursuant to one scheme or continuing course of conduct").

Cazarez argues that (1) the evidence was insufficient to support his guilty plea in the underlying conviction due to "a material variance between the evidence the trial court accepted as the basis for the judgment and the judgment of conviction"; (2) the trial court abused its discretion in revoking his community supervision on the basis of his failure to pay restitution because the State failed to prove that he had the ability to pay the fees; (3) the trial court's order incarcerating him for failure to pay supervision fees and restitution violated the Fourteenth Amendment "when it failed to consider alternatives to imprisonment as the evidence demonstrated that despite [his] best efforts, [Cazarez] was unable to pay his restitution in full"; and (4) the cumulation of his five-year sentence on his aggregate theft charge with a five-year sentence assessed in connection with another conviction for theft from the elderly was improper and renders the judgment void. The State argues that none of these grounds is meritorious, but it notes that the judgment of conviction should be reformed to identify the crime for which he was convicted as theft in the aggregate.

We modify the judgment to reflect Cazarez's conviction for the offense of aggregate theft and to delete the cumulation order, and we affirm as modified.

Background

In March 2017, Cazarez was charged with theft from an elderly person. The indictment in that case asserted that, pursuant to one scheme or course of conduct occurring between October 16, 2013 and November 6, 2013, he unlawfully

appropriated money in an amount of more than $1,500 and less than $20,000 from a complainant who was at least sixty-five years of age. This charge resulted in trial court cause number 1544042, which was appealed to this Court in appellate cause number 01-18-00344-CR.[2]

In August 2017, Cazarez was charged in the underlying offense for theft in the aggregate of more than $20,000 but less $100,000. The indictment alleged:

> [O]n or about September 20, 2010 Continuing Through February 13, 2017, [Cazarez] did then and there unlawfully, pursuant to one scheme and continuing course of conduct, . . . acquire and otherwise exercise control over property, namely, Money, which was owned by one or more of the below listed Complainants, with the intent to deprive the Complainants of the property, and without the effective consent of the Complainants, by deception, by creating or confirming by words or conduct a false impression of law or fact that affected the judgment of another in the transaction and that [Cazarez] did not believe to be true and or by failing to correct a false impression of law or fact that affected the judgment of another in the transaction, that [Cazarez] previously created or confirmed by words or conduct, and that [Cazarez] does not now believe to be true, and or by promising performance that affected the judgment of another in the transaction and that [Cazarez] did not intend to perform or knew would not be performed and the aggregate amount and value of property appropriated was more than twenty thousand dollars and less than one hundred thousand dollars.

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[2] Cazarez's originally appointed appellate counsel filed a single brief addressing both offenses and appeals pursuant to *Anders v. California*, 386 U.S. 738 (1967). This Court affirmed Cazarez's conviction in 01-18-00344-CR, *see Cazarez v. State*, No. 01-18-00344-CR, 2019 WL 2528190 (Tex. App.—Houston [1st Dist.] June 20, 2019, no pet.) (mem. op., not designated for publication), but we struck the *Anders* brief with respect to cause number 01-18-00345-CR because it did not address the discrepancy regarding "the offense for which appellant was convicted." *See* No. 01-18-00345-CR, Slip Op. at 1 (June 20, 2019, order of abatement).

The indictment named six specific complainants, and it referred to the theft from the elderly charge in cause number 1544042 as a "related case." It resulted in trial court cause number 1562149 and this appeal in appellate cause number 01-18-00345-CR.

Cazarez pleaded guilty to both offenses pursuant to a plea deal with the State.[3] Relevant to this appeal arising out of the aggregate theft charge, Cazarez signed a "waiver of rights, agreement to stipulate, and judicial confession" tracking the language of the indictment for aggregate theft, naming the same six complainants identified in the complaint, and stating, "I understand the above allegations [tracking the allegations from the indictment] and I confess that they are true and that the acts alleged above were committed on September 10, 2010 continuing through February 13, 2017." The documents also described his intent to plead guilty pursuant to the agreed punishment recommendation of "5 years TDCJ probated 5 years/restitution (within 30 days) to: [each of the six complainants, in the amounts specified]." These documents, including his judicial confession and admonishments, identified the offense as "Aggregate Theft - $20,000-$100,000."

The trial court rendered the judgment of conviction on September 18, 2017, assessing Cazarez's punishment at five years' confinement but suspending the

[3] Two case reset forms—one in which Cazarez's trial counsel agreed to reset the case for plea proceedings and one in connection with revocation proceedings—appear in the record in this case and identify both trial court cause numbers 1562149 (aggregate theft) and 1544042 (theft from the elderly) in the blank for "Cause No."

sentence and placing him on community supervision for five years. The judgment of conviction referred to the cause number and indictment for the aggregate theft charge, but the judgment erroneously stated that the offense for which Cazarez was convicted was "THEFT F/ELDERLY 1,500 – 20,000." The judgment also contained the statement, "This sentence shall run CONCURRENTLY," but it did not identify any other concurrent offense or sentence.

The conditions of his community supervision, incorporated into the judgment by reference, likewise misidentified the offense as "THEFT F/ELDERLY 1,500-20,000." However, the conditions of community supervision referenced the correct cause number, and it named the complainants listed in the aggregate theft indictment and judicial confession. The trial court ordered Cazarez to pay restitution to each complainant, listing the full amount owed to each complainant. For example, the conditions of his community supervision required that he "Pay $12,700.00 Restitution at the rate of $12,700.00 per MONTH beginning 10/18/17 through HCCS&CD to: Markus Osterberg." It contained similar statements for the other five complainants, ordering a total of $46,812 in restitution to be paid in the month "beginning 10/18/17." Finally, the conditions of community supervision stated, "You will report to Court on 10/30/2017 at 09:00 AM for the purpose of the Court reviewing Restitution payments. Please bring receipt[s] with you."

Finally, the record for the underlying conviction contained a certification of his right to appeal the conviction stating that Cazarez "has waived the right of appeal" that was signed by the trial court, Cazarez, and his counsel.

In January 2018, the State moved to revoke Cazarez's community supervision, asserting that he had failed to pay the required restitution to the six aggregate theft complainants, stating that he "has never made a payment." The State then amended the motion to revoke, adding the assertion that Cazarez "fail[ed] to report to the 208th District Court for a court review on October 30, 2017," as required by the conditions of his community supervision.

Cazarez pleaded true to all the allegations in the State's motion to revoke. He signed a Stipulation of Evidence acknowledging his previous conviction for "the felony offense of Theft – Aggregate." He initialed statements, acknowledging that he "understand[s] the allegations against [him] set out in the attached State's [Amended Motion to Revoke Community Supervision]" and that he "judicially confess[es] that it is TRUE that [he] violated the terms and conditions of [his] probation and that the allegations in the attached State's Motion are TRUE." These documents included a statement that Cazarez did "not desire to contest this stipulation of evidence," that he "waive[d] any further time to prepare for trial," and that he was pleading true without an agreed recommendation on punishment.

The trial court held a hearing on the motion to revoke in which both the underlying aggregate theft and the theft from the elderly convictions were discussed. The trial court confirmed that Cazarez intended to enter a plea of true to all of the State's allegations, and pointed out to him that, "[y]ou have a right to a hearing in each of these matters. We were set for a hearing today on both of these matters; and, I think, the witnesses are here." Trial counsel confirmed that witnesses were present, but Cazarez confirmed on the record that he "want[ed] to give up [his] right to a hearing in each of these cause numbers and enter a plea of true." The trial court expressly addressed both cause number 1544042 (the theft from the elderly offense) and cause number 1562149 in which Cazarez "received five years for aggregate theft." Cazarez pleaded true on the record to failing to pay the required restitution to the six complainants in the aggregate theft offense, as listed in the conditions of his community supervision,[4] and he likewise pleaded true to failing "to report for a court review on October 30th, 2017."

The trial court revoked his community supervision. The Judgment Revoking Community Supervision, signed by the trial court on April 23, 2018, again mistakenly identified his offense as "THEFT F/ELDERLY 1,500-20,000." The

[4] The record indicated that Cazarez did make some payments totaling $218.04 prior to the hearing to three of the complainants. Cazarez also pleaded true to the allegations that he failed to pay restitution to the complainant in the theft from the elderly offense.

judgment of revocation included a finding by the trial court that Cazarez had violated the conditions of his community supervision by failing to pay restitution. The trial court assessed his punishment at five years' imprisonment and ordered that it run consecutively to his sentence in the theft from the elderly case: "The Court orders that the sentence in this conviction shall run consecutively and shall begin only when the judgment and sentence in the following case has ceased to operate: Cause Number 1544042, a judgment dated 4/23/2018 ordering a sentence of 5 years TDCJ for the offense of theft f/elderly 1,500-20,000, in the 208th Court. Tex. Code Crim. Proc. art. 42.01 §1(19)." The trial court certified Cazarez's right to appeal the judgment of revocation, and this appealed followed.

Challenge to Underlying Conviction

In his first issue, Cazarez challenges the sufficiency of the evidence to support his plea of guilty to aggregate theft. He contends that there is a material variance between the allegations in the indictment and the judgment of conviction. The State, however, argues that Cazarez has waived any right to complain about the evidence supporting his underlying guilty plea. The State asserts that the record clearly reflects that he was convicted for theft in the aggregate and that any error in the judgment regarding the crime for which Cazarez was convicted can be corrected by appellate reformation. We agree with the State.

A. Sufficiency of the Evidence

When a defendant waives his right to a jury trial and pleads guilty, the State is required to introduce evidence showing that the defendant is guilty. TEX. CODE CRIM. PROC. art. 1.15; *see Menefee v. State*, 287 S.W.3d 9, 13 (Tex. Crim. App. 2009). "Evidence offered in support of a guilty plea may take many forms," and such evidence is sufficient "to support the guilty plea so long as it embraces every constituent element of the charged offense." *Menefee*, 287 S.W.3d at 13 (stating that written stipulation of evidence or judicial confession may be offered to support guilty plea); *see also Staggs v. State*, 314 S.W.3d 155, 159 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (holding that, when defendant pleads guilty, "[t]he State . . . is not required to prove the defendant's guilt beyond a reasonable doubt; the supporting evidence must simply embrace every essential element of the charged offense" and that "[a] judicial confession alone is sufficient evidence to sustain a conviction upon a guilty plea under article 1.15" when it addresses each essential element of crime).

Cazarez entered a plea of guilty to the charge of theft in the aggregate, as alleged in the indictment. He also signed a judicial confession setting out the essential elements of that offense tracking the language from his indictment. Cazarez asserts that this judicial confession was insufficient to support his conviction upon his plea of guilty because of a discrepancy between these documents and the

judgment of conviction, which erroneously identified the offense as "THEFT F/ELDERLY 1,500–20,000." He asserts that this creates a material variance between his judgment of conviction and the indictment and supporting judicial confession. *See, e.g.*, *Gollihar v. State*, 46 S.W.3d 243, 246 (Tex. Crim. App. 2001) ("A 'variance' occurs when there is a discrepancy between the allegations in the charging instrument and the proof at trial."); *see also Ramjattansingh v. State*, 548 S.W.3d 540, 547 (Tex. Crim. App. 2018) (holding that only material variance—i.e., one that prejudices defendant's substantial rights—will render evidence insufficient and that such variance occurs when indictment as written either "fails to adequately inform the defendant of the charge against him" or "subjects the defendant to the risk of being prosecuted later for the same crime").

Cazarez is raising these complaints, however, in an appeal from the revocation proceeding. He did not appeal his original conviction.[5] "The general rule is that an attack on the original conviction in an appeal from revocation proceedings is a collateral attack and is not allowed." *Wright v. State*, 506 S.W.3d 478, 481 (Tex. Crim. App. 2016). A criminal defendant "placed on 'regular' community supervision may raise issues relating to the conviction, such as evidentiary sufficiency, only in appeals taken when community supervision is originally

[5] The certification of his right to appeal from the original conviction stated that it was a plea bargain case and that he had waived his right to appeal.

imposed." *Manuel v. State*, 994 S.W.2d 658, 661 (Tex. Crim. App. 1999). Thus, sufficiency challenges, like Cazarez's complaint under article 1.15, cannot be raised on appeal from revocation. *See Wright*, 506 S.W.3d at 481; *Manuel*, 994 S.W.2d at 661-62.

The Court of Criminal Appeals has identified a "void judgment" exception to the general prohibition against collateral attacks on an original conviction:

> The "void judgment" exception requires that the claimed defect be one that renders the original judgment of conviction void. And by void, the exception means a "nullity" that is "accorded no respect due to a complete lack of power to render the judgment in question." In *Nix v. State*, we listed four situations in which a judgment of conviction in a criminal case is void and said, "[w]hile we hesitate to call this an exclusive list, it is very nearly so."

Wright, 506 S.W.3d at 481–82 (quoting *Nix v. State*, 65 S.W.3d 664, 668 (Tex. Crim. App. 2001)). *Nix* provided the following guidance regarding when a judgment of conviction is void:

> A judgment of conviction for a crime is void when (1) the document purporting to be a charging instrument (i.e. indictment, information, or complaint) does not satisfy the constitutional requisites of a charging instrument, thus the trial court has no jurisdiction over the defendant, (2) the trial court lacks subject matter jurisdiction over the offense charged, such as when a misdemeanor involving official misconduct is tried in a county court at law, (3) the record reflects that there is no evidence to support the conviction, or (4) an indigent defendant is required to face criminal trial proceedings without appointed counsel, when such has not been waived, in violation of *Gideon v. Wainwright*.

65 S.W.3d at 668.

Cazarez does not argue that the discrepancy in the underlying judgment makes it void, nor do we find any basis for holding that his conviction is a "nullity" that should be "accorded no respect due to a complete lack of power to render the judgment in question." *See Wright*, 506 S.W.3d at 481. The complaint here satisfies the constitutional requisites of a charging instrument. It invoked the trial court's jurisdiction over Cazarez such that the trial court's exercise of subject-matter jurisdiction over the charged offense was proper. *See Nix*, 65 S.W.3d at 668. Furthermore, Cazarez's argument that the evidence was "insufficient" to support his plea of guilty does not demonstrate that "there is no evidence to support the conviction" such that the underlying judgment is void. *See id.* "For the judgment to be void, the record must show a complete lack of evidence to support the conviction, not merely insufficient evidence." *Id.* at 668 n.14 (citing *Wolfe v. State*, 560 S.W.2d 686, 688 (Tex. Crim. App. 1978)). "And a guilty plea constitutes some evidence for this purpose." *Id.* (citing *Ex parte Williams*, 703 S.W.2d 674, 682 (Tex. Crim. App. 1986)).

Because Cazarez has not established that the "void judgment" exception applies here, we conclude that his attack on the original conviction is a collateral attack and is not allowed on appeal from revocation. *See Wright*, 506 S.W.3d at 481; *Manuel*, 994 S.W.2d at 662.

We overrule Cazarez's first issue.

B. Correction of Judgment

We further observe that the discrepancy Cazarez has identified does not point to a material variance between his charging instrument and the proof adduced in the trial court. "A 'variance' occurs when there is a discrepancy between the allegations in the charging instrument and the proof at trial." *Gollihar*, 46 S.W.3d at 246. Here, there is no discrepancy between the allegations in the charging instrument and the proof supporting Cazarez's guilty plea or the revocation of his community supervision. The indictment, his judicial confession to the underlying offense, and his stipulation of evidence in the revocation proceedings identify the crime with which he was charged as aggregate theft against the same six complainants in an amount more than $20,000 and less than $100,000.

The fact that the judgment of conviction and judgment revoking his community supervision identify the crime of which he was convicted as "THEFT F/ELDERLY 1,500-20,000" does not create a variance between the indictment and the proof. There is no indication that this discrepancy prejudiced a substantial right by failing to adequately inform Cazarez of the aggregate theft charge against him or by subjecting him to the risk of being prosecuted later for the same crime. *See Ramjattansingh*, 548 S.W.3d at 547 (describing "material" variance). Rather, as the State argues, this is a discrepancy that can be corrected by this Court.

This court has the power to modify an incorrect judgment to make the record speak the truth when we have the necessary information to do so. TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Jackson v. State*, 288 S.W.3d 60, 64 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd); *see also Pfeiffer v. State*, 363 S.W.3d 594, 599 (Tex. Crim. App. 2012) ("[W]hen a defendant appeals his conviction, the courts of appeals have the jurisdiction to address any error in that case."). This includes the authority to reform a judgment to reflect the correct offense. *See, e.g.*, *Pfeiffer*, 363 S.W.3d at 599; *Jackson*, 288 S.W.3d at 64 (reforming judgment to reflect that appellant was convicted of aggravated assault and not "aggravated assault against pb servant").

The record here is clear that Cazarez was indicted for aggregate theft in an amount of more than $20,000 and less than $100,000. He pleaded guilty to that offense, signed a judicial confession to that offense, was admonished regarding that offense. On the record at the revocation hearing, Cazarez acknowledged that he pleaded guilty and "received five years for aggregate theft." His stipulation of evidence supporting his plea of true to the allegations in the State's motion to revoke his community supervision likewise reflected that his conviction was for aggregate theft. Accordingly, we modify the judgment revoking community supervision to reflect that Cazarez was convicted of aggregate theft in an amount of more than $20,000 but less than $100,000, not "THEFT F/ELDERLY 1,500-20,000." *See*

Jackson, 288 S.W.3d at 64; *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd) (holding that appellate courts have authority and duty to reform whatever trial court could have corrected by judgment nunc pro tunc where evidence necessary to correct judgment appears in record); *see also French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992) (adopting reasoning set forth in *Asberry*, 813 S.W.2d at 529).

Challenge to Revocation

In his remaining issues, Cazarez challenges the trial court's revocation order.

A. Standard of Review

"[D]efendants are not entitled to community supervision as a matter of right, [but] once a defendant is assessed community supervision in lieu of other punishment, this conditional liberty 'should not be arbitrarily withdrawn by the court. . . .'" *Leonard v. State*, 385 S.W.3d 570, 576 (Tex. Crim. App. 2012) (quoting *DeGay v. State*, 741 S.W.2d 445, 449 (Tex. Crim. App. 1987)). "In a revocation proceeding, the trial court has discretion to revoke community supervision when a preponderance of the evidence supports one of the State's allegations that the defendant violated a condition of his community supervision." *Id.*; *Davis v. State*, 591 S.W.3d 183, 189 (Tex. App.—Houston [1st Dist.] 2019, no pet.). This preponderance-of-the-evidence standard is met "when the greater weight of credible evidence before the trial court supports a reasonable belief that a condition of

community supervision has been violated." *Davis*, 591 S.W.3d at 189 (citing *Rickels v. State*, 202 S.W.3d 759, 763–64 (Tex. Crim. App. 2006)).

When reviewing an order revoking community supervision, the sole question before this court is whether the trial court abused its discretion. *Hacker v. State*, 389 S.W.3d 860, 865 (Tex. Crim. App. 2013); *Davis*, 591 S.W.3d at 188–89. "The central issue to be determined in reviewing a trial court's exercise of discretion in a [community supervision] revocation is whether the defendant was afforded due process of law." *Davis*, 591 S.W.3d at 189 (quoting *DeGay*, 741 S.W.2d at 450).

There are three limits to a trial court's discretion to revoke supervision: (1) the State must prove at least one violation of the terms and conditions of community supervision; (2) an appellate court will review the trial court's decision for an abuse of discretion; and (3) federal due process requires that a trial court consider alternatives to imprisonment before incarcerating an indigent defendant who is unable to pay amounts due under community supervision. *Davis*, 591 S.W.3d at 189 (citing *Lombardo v. State*, 524 S.W.3d 808, 812 (Tex. App.—Houston [14th Dist.] 2017, no pet.)).

Only one sufficient ground is necessary to support a trial court's decision to revoke community supervision. *Smith v. State*, 286 S.W.3d 333, 342 (Tex. Crim. App. 2009); *Davis*, 591 S.W.3d at 189; *see also Garcia v. State*, 387 S.W.3d 20, 26 (Tex. Crim. App. 2012) (stating proof of single violation will support revocation).

And a plea of true, standing alone, is generally sufficient to support revocation. *See Moses v. State*, 590 S.W.2d 469, 470 (Tex. Crim. App. [Panel Op.] 1979); *Perry v. State*, 367 S.W.3d 690, 693 (Tex. App.—Texarkana 2012, no pet.); *Duncan v. State*, 321 S.W.3d 53, 58 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). The trial court abuses its discretion by revoking community supervision if, as to every ground alleged, the State fails to meet its burden of proof. *Davis*, 591 S.W.3d at 189 (citing *Cardona v. State*, 665 S.W.2d 492, 493–94 (Tex. Crim. App. 1984)).

B. Sufficient Grounds to Support Revocation

In his second and third issues, Cazarez argues that the trial court erred in revoking his community supervision for to his failure to pay restitution. He argues that the State failed to show that he was able to pay or that his failure to pay was not intentional or willful, stating that he "cannot be imprisoned because he was too poor to pay." He asserts that his due process rights under the Fourteenth Amendment were violated because the trial court "failed to utilize and consider alternative measures adequate to meet the State's interests in punishment and deterrence."

The record reflects that Cazarez entered into a plea agreement with the State in which he agreed to plead guilty to aggregate theft in exchange for the State's recommending punishment of "5 years TDCJ probated 5 years/restitution (within 30 days) to: [each of the six complainants, in the amounts specified]." The trial court accepted his guilty plea and assessed his punishment in accordance with the agreed

recommendation, suspending his five-year sentence and placing him on community supervision.

As a condition of his community supervision, Cazarez was required to pay restitution to the complainants within the next month, beginning October 18, 2017. He was also required to appear before the trial court on October 30, 2017, for a court review of his restitution payments. He was ordered to "[p]lease bring receipt [of restitution payments] with you." The State alleged in its amended motion to revoke that Cazarez failed to make the required restitution payments and that he failed to appear on October 30, 2017. Cazarez pleaded true to these allegations in this motion to revoke, waived his right to a hearing, and signed a stipulation of evidence acknowledging that he understood the allegations against him set out in the State's amended motion to revoke and that he "judicially confess[ed] that it is TRUE that [he] violated the terms and conditions of [his] probation and that the allegations in the attached State's Motion are TRUE." These documents included a statement that Cazarez did "not desire to contest this stipulation of evidence" and that he "waive[d] any further time to prepare for trial." The record of the revocation hearing likewise confirmed that Cazarez was admonished that he had a right to an evidentiary hearing and that witnesses had appeared to testify at the hearing, but he nevertheless waived his right to an evidentiary hearing. He agreed on the record that he had violated the

terms of his community supervision as alleged in the State's motion to revoke, including that he failed to appear on October 30, 2017.

Cazarez now argues that his plea of true to the State's allegations and stipulation to the facts is insufficient to support his revocation because nothing in the motion to revoke or stipulation indicated that he was able to pay, that his failure to pay was willful, or that the trial court considered alternatives to revocation. He cites Code of Criminal Procedure article 42A.751(i) in support of his argument, which provides,

> In a revocation hearing at which it is alleged only that the defendant violated the conditions of community supervision by failing to pay community supervision fees or court costs or by failing to pay the costs of legal services as described by Article 42A.301(b)(11), the state must prove by a preponderance of the evidence that the defendant was able to pay and did not pay as ordered by the judge.

TEX. CODE CRIM. PROC. art. 42A.751(i); *see also id.* art. 42.037(h) (addressing restitution as condition of community supervision and listing factors that trial court "shall consider" in determining whether to revoke community supervision for failure to comply with restitution order).

We observe, however, that the State did not allege *only* that he failed to pay certain fees or costs—or, in this case, restitution.[6] It also alleged that he failed to

[6] The State argues that Code of Criminal Procedure article 42A.751(i) does not apply to restitution payments, citing *Gipson v. State*, 428 S.W.3d 107, 108–09 (Tex. Crim. App. 2014) (holding that predecessor to article 42A.751(i) did not apply to fines; noting that "[i]f the legislature had wanted fines to be covered [by the statute] it

appear before the trial court on October 30, 2017, as required in his conditions of community supervision. Cazarez pleaded true to this allegation, and this single ground is sufficient to support the trial court's revocation of his community supervision. *See Smith*, 286 S.W.3d at 342 (holding that only one sufficient ground is necessary to support trial court's decision to revoke community supervision); *Duncan*, 321 S.W.3d at 58 (holding that plea of true, standing alone, is generally sufficient to support revocation).

Regarding his complaint that federal due process required that the trial court inquire into the reasons for his failure to pay and consider alternatives to imprisonment before incarcerating him, we conclude that Cazarez failed to preserve this issue for appeal. Cazarez correctly argues that federal due process requirements may serve as a limit on the trial court's authority to revoke community supervision for failure to pay restitution, citing *Bearden v. Georgia*, which holds that "in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay." 461 U.S. 660, 672 (1983); *Davis*, 591 S.W.3d at 189. These due process concerns, however, do not implicate the

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could have easily included the word 'fines' within the text" and that "fines are different from fees and costs because fines are imposed as punishment, like incarceration, and are not remedial in any sense"). Because we conclude that the trial court's revocation order here was based on more than just Cazarez's failure to pay restitution, we need not determine whether article 42A.751(i) applies to the failure to pay restitution.

sufficiency of the evidence, and general preservation rules apply. *See Gipson v. State*, 383 S.W.3d 152, 156 (Tex. Crim. App. 2012) (holding that *Bearden* does not place evidentiary burden on State but rather "sets forth a mandatory judicial directive that requires a trial court to (1) inquire as to a defendant's ability to pay and (2) consider alternatives to imprisonment if it finds that a defendant is unable to pay").

To preserve an error for appellate review, an appellant is required to make a timely request, objection, or motion in the trial court that stated the grounds for the ruling sought with sufficient specificity to make the trial court aware of his complaint. *See* TEX. R. APP. P. 33.1(a)(1)(A); *Saldano v. State*, 70 S.W.3d 873, 889 (Tex. Crim. App. 2002). This is true even if the error of which an appellant complains concerns constitutional rights. *See Saldano*, 70 S.W.3d at 889. Complaints of violations of due process can be waived by failing to object in the trial court. *Anderson v. State*, 301 S.W.3d 276, 280 (Tex. Crim. App. 2009); *see also Gipson v. State*, 428 S.W.3d 107, 110 (Tex. Crim. App. 2014) (Alcala, J., concurring) (observing, in case considering revocation for failure to pay fines, that "[a]lthough appellant presented no objections that he was unable to pay his fine and fees, his sufficiency-of-the-evidence challenge under the ability-to-pay statute may be addressed on appeal, but his complaint under the federal Constitution may not").

Cazarez did not raise an objection in the trial court regarding any failure to consider his reasons for failing to pay or alternatives to imprisonment before incarcerating him. He thus forfeited any ability to complain on appeal on this basis. *See* TEX. R. APP. P. 33.1(a)(1)(A); *Anderson*, 301 S.W.3d at 280; *see also Gipson*, 428 S.W.3d at 111 (Alcala, J., concurring) ("It would be prudent for a defendant who is facing revocation solely for monetary allegations such as failing to pay a fine, restitution, or other fees, to assert an objection under the federal Constitution because the failure to do that may be outcome-determinative, as here."). Furthermore, Cazarez's plea of true to the allegation that he failed to appear is also at least some evidence indicating that the trial court did not imprison him solely because he lacked resources to pay restitution, but because he failed to comply with a required court appearance. *See, e.g.*, *Bearden*, 461 U.S. at 664–65 (discussing cases providing that courts cannot imprison indigent defendants solely because they are too poor pay fines).

We overrule Cazarez's second and third issues.

C. Cumulation of Sentences

In his fourth and final issue on appeal, Cazarez challenges the trial court's cumulation of his aggregate theft sentence with his sentence in the theft from the elderly offense. He asserts that "the original judgment executed when he was placed

on probation correctly ordered the sentences to run concurrently because the sentence[s] are not authorized to be stacked even upon revocation of probation."

1. Relevant facts

The trial court's judgment of conviction in this case, cause number 1562149, stated generally that it was "to run concurrently," but it did not refer to the sentence associated with the theft from the elderly in cause number 1544042 or any other sentence or judgment. At the revocation hearing, Cazarez's attorney argued that his sentences were supposed to run concurrently. The attorney indicated that this was part of the original plea deal. The trial court admitted the proof tendered by Cazarez's attorney—the two judgments of conviction.

The trial court then orally pronounced the revocation of community supervision in both cases, 1544042 (theft from the elderly) and 1562149 (aggregate theft), and it assessed Cazarez's punishment at five years' confinement in each case, with the sentences to run consecutively. The judgment revoking community supervision in the aggregate theft case provides:

> The Court orders that the sentence in this conviction shall run consecutively and shall begin only when the judgment and sentence in the following case has ceased to operate: Cause Number 1544042, a judgment dated 4/23/2018 ordering a sentence of 5 years TDCJ for the offense of theft f/elderly 1,500-20,000, in the 208th Court. Tex. Code Crim. Proc. art. 42.01 §1(19).

2. Relevant law

"'Normally, the trial judge has absolute discretion to cumulate sentences,' so long as the law authorizes the imposition of cumulative sentences." *Byrd v. State*, 499 S.W.3d 443, 446 (Tex. Crim. App. 2016) (quoting *Smith v. State*, 575 S.W.2d 41, 41 (Tex. Crim. App. 1979)). However, "[a] trial court abuses its discretion if it imposes consecutive sentences where the law requires concurrent sentences." *Byrd*, 499 S.W.3d at 446–47. An improper cumulation order "is . . . a void sentence, and such error cannot be waived." *LaPorte v. State*, 840 S.W.2d 412, 415 (Tex. Crim. App. 1992).

Regarding whether a trial court may order cumulative or concurrent sentences, the Code of Criminal Procedure provides:

> When the same defendant has been convicted in two or more cases, judgment and sentence shall be pronounced in each case in the same manner as if there had been but one conviction. Except as provided by Subsections (b) and (c), [which provide exceptions not applicable to this case,] in the discretion of the court, the judgment in the second and subsequent convictions may either be that the sentence imposed or suspended shall begin when the judgment and the sentence imposed or suspended in the preceding conviction has ceased to operate, or that the sentence imposed or suspended shall run concurrently with the other case or cases, and sentence and execution shall be accordingly; provided, however, that the cumulative total of suspended sentences in felony cases shall not exceed 10 years. . . .

TEX. CODE CRIM. PROC. art. 42.08(a). Penal Code section 3.03, however, provides a limit to the trial court's general discretion regarding whether to cumulate sentences:

> When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced. Except as provided by Subsection (b), the sentences shall run concurrently.

TEX. PENAL CODE § 3.03(a); *see id.* § 3.03(b) (setting out limited exceptions not applicable here). The Penal Code defines "criminal episode" as

> the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances:
>
> > (1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or
> >
> > (2) the offenses are the repeated commission of the same or similar offenses.

TEX. PENAL CODE § 3.01.

Thus, if the record establishes that the original offenses that led to community supervision were part of the same criminal episode and the convictions were obtained as part of the same criminal action, then any sentences imposed must run concurrently. *See id.* § 3.03; *Duran v. State*, 844 S.W.2d 745, 746 (Tex. Crim. App. 1992); *Medina v. State*, 7 S.W.3d 876, 879 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

3. Analysis

Cazarez complains that the trial court's cumulation of his sentences is not authorized because "the Code of Criminal Procedure requires that multiple charges

arising out of the same 'criminal episode' that are tried together in a 'single criminal action' must have concurrent sentences." *See* TEX. PENAL CODE § 3.03(a).

We agree with Cazarez that the record demonstrates that his offenses arise out of the same criminal episode as defined in Penal Code section 3.01 because they are "the repeated commission of the same or similar offenses." *See id.* § 3.01(2). The complaints and judgments of the convictions themselves demonstrate that both convictions were for theft of money. The offenses of theft in the aggregate and theft from the elderly share a common gravamen and were perpetrated in a similar fashion. *See* TEX. PENAL CODE § 31.03(a)–(b) (describing offense of theft as unlawful appropriation of property with intent to deprive the owner of property). *Compare id.* § 31.09 (allowing aggregation of amounts involved in theft under chapter 31 when amounts are obtained "pursuant to one scheme or continuing course of conduct") *with id.* § 31.03(f)(3)(A) (providing that offense of theft is increased to next higher category of offense if it is shown that property was owned by elderly individual).

The State points to several distinctions between the two offenses, including that they involved different complainants and occurred during different time periods. However, section 3.01 does not require identical offenses—they must merely be "repeated commissions of the same or similar offenses." *See* TEX. PENAL CODE § 3.01(b); *see also Baker v. State*, 107 S.W.3d 671, 673 (Tex. App.—San Antonio

2003, no pet.) (holding that multiple offenses occurring on different dates, in different places, against different complainant may nevertheless be characterized as "a single criminal episode" if they are "the same or similar," share "a common scheme or plan," or are "repeated in a similar fashion").

The State further argues that the record does not prove that Cazarez's offenses were prosecuted in a single criminal action. "[A] defendant is prosecuted in 'a single criminal action' whenever allegations and evidence of more than one offense arising out of the same criminal episode, as that term is defined in Chapter 3, are presented in a single trial or plea proceeding, whether pursuant to one charging instrument or several. . . ." *LaPorte*, 840 S.W.2d at 415. In *Duran v. State*, the Court of Criminal Appeals cited this language from *LaPorte*, but it concluded that *LaPorte* did not apply because "there is no evidence in the record that a single criminal action occurred." 844 S.W.2d 745, 746 (Tex. Crim. App. 1992). In a concurring opinion, Judge Baird expounded on the meaning of "criminal action," and he concluded that "Criminal action" includes "not only appellant's pleas of guilty but also the hearings on the State's motions to revoke his probation." *Id.* at 747–48 (Baird, J., concurring). He concluded, "[T]o be entitled to concurrent sentences under §3.03 appellant must establish that the offenses were consolidated at the time of his pleas as well as the hearings on the motions to revoke his probation." *Id.* at 748.

The Court of Criminal Appeals later rejected the reasoning from Judge Baird's *Duran* concurrence in *Robbins v. State*. 914 S.W.2d 582 (Tex. Crim. App. 1996). In *Robbins*, the trial court "conducted two separate plea proceedings, but one consolidated punishment hearing." 914 S.W.2d at 583; *see also McCullar v. State*, 676 S.W.2d 587, 588 (Tex. Crim. App. 1984) (noting that sentence is suspended when probation is granted and, upon revocation, court may dispose of case as if there had been no probation). The *Robbins* court reasoned that "[a] plea proceeding is not complete until punishment has been assessed" and that the "consolidated punishment hearing defeated the State's and trial court's attempts to comply with provisions of § 3.03." 914 S.W.2d at 583–84. It thus determined that the cumulation order was void. *Id.* at 584; *see also id.* (Baird, J., dissenting "for the reasons stated" in his concurrence in *Duran v. State*, 844 S.W.2d 745, 746).

Although there is no consolidation order or reporter's record of the original plea proceedings, the record here demonstrates that the plea proceedings for both offenses occurred together. The case reset form setting the plea hearing identified cause numbers 1544042 (theft from the elderly) and 1562149 (aggregate theft). The trial court rendered Cazarez's judgments of conviction for aggregate theft and theft from the elderly on the same day. The sentences assessed and terms of community supervision were identical for both offenses except for the complainants identified and the amounts of restitution involved. Furthermore, the judgment of conviction

and conditions of community supervision in the aggregate theft case erroneously identified the offense as theft from the elderly.

The State filed substantively identical motions to revoke both offenses at the same time. The case reset form again included both cause numbers in setting the revocation hearing. And the trial court held one consolidated revocation hearing. *See, e.g.*, *Martin v. State*, 143 S.W.3d 412, 414–15 (Tex. App.—Austin 2004, no pet.) (relying on *LaPorte* and *Robbins* in concluding that defendant has been prosecuted in single criminal proceeding when multiple offenses arising out of same criminal episode are tried jointly at any phase); *see also Green v. State*, 242 S.W.3d 215, 220 (Tex. App.—Beaumont 2007, no pet.) (holding that when plea proceedings "are conducted in a manner that they are 'so intertwined that we are left only to conclude they are a single criminal action,' a court may not order consecutive sentences"). Thus, we conclude that, unlike *Duran*, on which the State relies, the record establishes that Cazarez's two theft offenses were prosecuted jointly. *See* 844 S.W.2d at 746.

Because we conclude that the record demonstrates that the original offenses that led to community supervision were part of the same criminal episode and the convictions were obtained as part of the same criminal action, we likewise conclude that the sentences imposed must run concurrently. *See* TEX. PENAL CODE § 3.03; *Robbins*, 914 S.W.2d at 583–84; *Medina*, 7 S.W.3d at 879. When a trial court

erroneously cumulates sentences, the appropriate remedy is to reform the judgment and delete the cumulation order. *Robbins*, 914 S.W.2d at 584.

We sustain Cazarez's fourth issue and modify the judgment accordingly.

Conclusion

We modify the judgment of conviction and the judgment revoking community supervision in trial court cause number 1562149 (the cause number underlying this appeal) by deleting "THEFT F/ELDERLY 1,500-20,000" as the crime for which Cazarez was convicted. We substitute "AGGREGATE THEFT 20,000-100,000" in its place. We further modify the judgment revoking community supervision by deleting the cumulation order, including any language stating that the sentence in this cause is to run consecutive to or after completion of the sentence in cause number 1544042. We affirm the trial court's judgment revoking community supervision as herein modified.

Richard Hightower
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.

Publish. TEX. R. APP. P. 47.2(b).