

NOT DESIGNATED FOR PUBLICATION

No. 125,242

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

RUDY MONTEMAYOR,
Appellant.

MEMORANDUM OPINION

Appeal from Haskell District Court; CLINT B. PETERSON, judge. Opinion filed July 7, 2023.
Affirmed.

Derek W. Miller of Miller & French, LLC, of Liberal, for appellant.

Natalie Chalmers, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before GARDNER, P.J., HILL and PICKERING, JJ.

PER CURIAM: Rudy Montemayor appeals the district court's decision revoking his probation. He claims that the State failed to show sufficient evidence to prove he violated the conditions of his probation. He is wrong. We affirm.

Misdeeds lead to probation revocation.

Montemayor, convicted of aggravated domestic battery, received a 21-month prison sentence and was released on 24-months' probation. The State later moved to revoke Montemayor's probation, alleging that Montemayor furnished alcohol to minors and engaged in

disorderly conduct. In fact, the State had filed new criminal charges against Montemayor based on those allegations.

At the hearing on the motion to revoke probation, the evidence revealed that in April 2021, Montemayor had come to the U Pump It where he was a manager. Three other U Pump It employees—James Credway, Brandon Jones, and Jesse Richards—were present and working. Jones and Richards were both under the age of 21. According to Jones, when Montemayor showed up, he was intoxicated and smelled like alcohol. Jones described Montemayor as "kind of aggressive" and said that Montemayor forcefully grabbed him and took him to another area of the building. Montemayor then got a bottle of Fireball whiskey from his pocket and offered it to Jones and Richards. Jones testified that Montemayor did not ask him whether he wanted a drink. Instead, Montemayor grabbed the back of Jones' head, tilted it, and poured the alcohol in. Montemayor left U Pump It shortly thereafter.

Jones and Richards reported the encounter to Credway who called the police. Deputy Fredrick Mata with the Haskell County Sheriff's Department responded. Deputy Mata spoke with Jones and Richards about what happened. He then administered a preliminary breath test on Richards, which showed a blood alcohol content of 0.00. A couple days after the incident, Deputy Mata obtained a video from U Pump It's owner. The video showed Montemayor enter the U Pump It and approach Jones and Richards. Jones and Richards then each took a drink of something, though Deputy Mata could not see what it was. The video did not show where the bottle came from.

The district court found that this was sufficient evidence to show that Montemayor violated the terms of his probation by committing new criminal offenses. Specifically, the court found that Montemayor committed battery when he grabbed Jones and forced him to take a drink from the Fireball bottle. Montemayor also furnished alcohol to minors. The district court revoked Montemayor's probation on the basis that he committed new crimes.

Before the probation revocation hearing, the State charged Montemayor with two counts of furnishing alcohol to a minor and one count of disorderly conduct. After the revocation hearing, the State dismissed the new criminal charges.

Montemayor appeals the order revoking his probation.

In this direct appeal, Montemayor contends there was insufficient evidence to prove that he committed a new crime while on probation. He notes that the State dismissed the charges that formed the basis for the district court's finding that he committed a new crime and the court therefore erred in revoking his probation.

A fundamental point of law controls our ruling in this appeal. The burden of proof in a probation revocation motion is to prove the violation by a preponderance of the evidence. It is less stringent than the beyond a reasonable doubt burden when proving a criminal conviction. Recognizing this difference, our court has consistently held that a criminal conviction for the act which allegedly violated the conditions of probation is not required. *State v. Lloyd*, 52 Kan. App. 2d 780, 782, 375 P.3d 1013 (2016). It follows then that our question in this appeal is whether the State presented sufficient evidence at the hearing to show that it was more probable than not that Montemayor violated the conditions of his probation.

This record shows that the State presented sufficient evidence to meet its burden of proof. Jones testified that Montemayor provided alcohol to him and Richards, both of whom were under the age of 21. K.S.A. 2022 Supp. 21-5607 prohibits furnishing alcohol to a minor and defines minor as any person under 21 years of age. See K.S.A. 2022 Supp. 21-5607(a), (d); K.S.A. 2022 Supp. 41-102(u).

Jones' testimony also provided the district court with a basis to find by a preponderance of the evidence that Montemayor committed a battery. Battery is "knowingly causing physical contact with another person when done in a rude, insulting or angry manner." K.S.A. 2022 Supp. 21-5413(a)(2). Jones said that Montemayor was acting aggressively and that Montemayor forcefully grabbed him and made him drink the Fireball.

Jones' testimony shows that Montemayor knowingly caused physical contact with Jones. A reasonable person could agree that such contact was done in a rude, insulting, or angry manner, especially when considering it was done at Jones' workplace. See *State v. Cooper*, No. 113,401, 2016 WL 4585096, at *3 (Kan. App. 2016) (unpublished opinion) ("[W]e apply an objective standard that looks to the manner in which the defendant acted, as perceived by a reasonable onlooker.").

Because the State proved by a preponderance of the evidence that Montemayor committed a new crime, the district court had the discretion to revoke Montemayor's probation. See K.S.A. 2022 Supp. 22-3716(c)(7)(C).

Affirmed.