

NOT DESIGNATED FOR PUBLICATION

No. 125,257

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 April 28, 2023.
Affirmed.

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

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

Before ISHERWOOD, P.J., SCHROEDER, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Rudy Montemayor pleaded guilty to a drug related offense and received a dispositional departure to probation. During the course of that probation, Montemayor committed three new offenses which prompted the district court to revoke his probation and impose his underlying prison term. It is that issue that Montemayor brings to us to resolve. He argues that at the time of his revocation hearing he was merely charged with the crimes and had not yet been convicted, therefore, the evidence was not sufficient to support the district court's conclusion that revocation of his probation was warranted. But a conviction for those new offenses was not required. Following a review of the record, we are satisfied sufficient evidence was presented at the hearing to enable

the court to conclude by a preponderance of the evidence that Montemayor committed the new offenses while on probation. That is all the law requires. Thus, the district court's revocation of Montemayor's probation and imposition of his prison term is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2020, Montemayor pleaded no contest to one count of possession with intent to distribute marijuana and received a 68-month prison sentence but was granted a dispositional departure to probation. Roughly one year later, the State charged Montemayor with two counts of furnishing alcoholic liquor to a minor and one count of disorderly conduct and moved to revoke his probation as a result of the new charges.

At the revocation hearing, the State presented evidence showing that Montemayor provided alcohol to two underage cashiers, Brandon Jones and Jesse Richards, while he was the manager of a gas station. Jones testified that Montemayor showed up to the gas station intoxicated and smelling of alcohol. He pulled a Fireball whiskey bottle from his pocket and offered a drink to both cashiers. According to Jones, Montemayor grabbed him and poured whiskey into his mouth and then subjected Richards to the same treatment. Montemayor then left the gas station, and the two cashiers reported the incident to another employee who contacted law enforcement.

Deputy Fredrick Mata responded to the call, interviewed Jones and Richards, and obtained surveillance footage from the station. Mata testified that the footage revealed Montemayor speaking with Jones and Richards before both young men took a drink from a bottle. He could not ascertain from the video who provided the bottle or the nature of the liquid it contained, but both young men asserted it was Fireball and Montemayor was the source. Neither Jones nor Richards yielded a positive breath test result.

Montemayor's probation officer, Kayla Janko, testified that the terms of his probation required him to refrain from the use of alcohol or illegal drugs and avoid the commission of any new offenses. She explained that she did not initiate a motion to revoke based on the gas station incident because Montemayor had not yet been convicted of any new crimes. Janko also stated that Montemayor submitted a positive urinalysis for methamphetamine before starting inpatient treatment.

The district court found that based on the testimony elicited, there was sufficient evidence to establish Montemayor violated his probation by committing new crimes and using methamphetamine. It revoked Montemayor's probation and ordered him to serve his underlying prison sentence.

Montemayor timely brings the matter to us to analyze the propriety of the district court's decision.

LEGAL ANALYSIS

The district court properly exercised its discretion when it revoked Montemayor's probation and imposed his underlying prison sentence following Montemayor's commission of new crimes and use of narcotics.

Montemayor contends that the district court's ruling cannot be permitted to stand because there was insufficient evidence to support its conclusion that he violated the terms of his probation through the commission of new crimes. As support he highlights two points, that he was merely facing charges for those offenses at the time of the revocation hearing, and that the State ultimately decided not to go forward with a prosecution. He does not advance any claims against the district court's companion conclusion that revocation was also warranted as a result of Montemayor's use of methamphetamine.

In a probation revocation proceeding, the State has the burden to establish any alleged violations by a preponderance of the evidence—or that the violation is more probably true than not true. *State v. Lloyd*, 52 Kan. App. 2d 780, 782, 375 P.3d 1013 (2016). If the district court finds that the State fulfilled its obligation, it must then make a discretionary determination about the appropriate disposition in light of the proved violations. *State v. Skolaut*, 286 Kan. 219, 227, 182 P.3d 1231 (2008).

We review a district court's decision on these matters for an abuse of discretion. *State v. Coleman*, 311 Kan. 332, 334, 460 P.3d 828 (2020). Such abuse occurs when a district court's conclusion is unreasonable or arises out of a legal or factual error. *State v. Farmer*, 312 Kan. 761, 763, 480 P.3d 155 (2021). Montemayor's assertion that the district court's conclusion lacks the requisite evidentiary support places his claim in the last of these three categories. Any factual findings entered by the district court are reviewed to ensure they are supported by substantial competent evidence. *State v. Lyon*, 58 Kan. App. 2d 474, 478, 471 P.3d 716, *rev. denied* 312 Kan. 898 (2020). That designation refers to legal and relevant evidence which a reasonable person could accept as adequate to support a conclusion. *State v. Smith*, 312 Kan. 876, 887, 482 P.3d 586 (2021).

Montemayor's sole argument is that it cannot be said he committed a new crime while on probation because at the time the district court made its determination, he had not yet been convicted of the charged offenses, and the State later opted to dismiss that case. But a conviction was not required to justify revocation of Montemayor's probation under the theory that he violated the law while under supervision. See *In re E.J.D.*, 301 Kan. 790, 795, 348 P.3d 512 (2015); *Lloyd*, 52 Kan. App. 2d at 782. At the revocation hearing, Jones testified that Montemayor forced him and Richards to consume alcohol when they were under the age of 21. Deputy Mata confirmed the surveillance footage showed that Montemayor approached Jones and Richards, after which the two young men drank from a bottle. Thus, there was circumstantial evidence that corroborated Jones' assertion. From our review of the record, there was sufficient evidence adduced at the

hearing to enable the district court to conclude by a preponderance of the evidence that Montemayor violated the law by providing alcohol to minors and that is all that was required.

Even if we were to find Montemayor's argument persuasive, which we do not, it would not impact his case in any appreciable way. Again, the district court relied on two separate bases in revoking Montemayor's probation (1) the commission of a new crime, and (2) the use of methamphetamine. Montemayor raises no issues about the latter of those two and, as such, any claims related to the same are treated as abandoned. See *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021) (issues not adequately briefed are deemed waived or abandoned). Therefore, even if we determined that the evidence to establish that he committed a new crime was lacking, the district court's decision that he violated probation would still remain intact because Montemayor also engaged in the use of unlawful drugs while on probation.

Montemayor has failed to sustain his burden to establish an abuse of discretion occurred when the court revoked his probation and imposed his underlying sentence. To the contrary, the record contains adequate evidence to support the district court's finding that Montemayor committed new crimes while on probation. We see no justification for disturbing the district court's decision.

Affirmed.