Circuit Court for Prince George's County
Case Nos. CT180789A, CT180614A, CT170240X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1899
September Term, 2019

KRISTI HEFFINGTON

v.

STATE OF MARYLAND

Reed,
Friedman,
Gould,

JJ.

Opinion by Friedman, J.

Filed: July 1, 2021

Appellant Kristi Heffington appeals from the revocation of her probation. She argues on appeal that the revocation court's decision was error and the amendment of the conditions of her probation was unconstitutional. We disagree and affirm.

BACKGROUND

In 2018, Kristi Heffington pleaded guilty to identity fraud, insurance fraud, and conspiracy for using electronic communications to steal thousands of dollars from her employer, Dr. Ron Moser's Maryland-based dental practice. The Court of Appeals previously described Heffington's scheme in a different case involving her and the Mosers:

> In April 2015, Dr. [Ron] Moser fired Mrs. Heffington for stealing money from the practice. [Dr. Ron Moser and his wife, Anne,] accused her of using the Visa terminal at the practice to process and later refund to herself charges on medical credit cards she obtained in her name and in the names of family members—without their knowledge or consent. Dr. [Ron] Moser reported Mrs. Heffington's thefts to the City of Bowie Police Department and to the practice's insurer.

Moser v. Heffington, 465 Md. 381, 388-89 (2019). The circuit court sentenced her to ten years' incarceration (with all but nine months suspended) and five years' probation. The conditions of Heffington's probation included paying restitution and following a "no contact" condition, which required Heffington to "[h]ave no contact with Anne Moser [or Dr.] Ron Moser … including no harassing contact or through third parties."

Four months later, Heffington filed a motion to terminate her restitution obligation. Her motion alleged that the victims of her crimes, Dr. Ron Moser and his wife, Anne, were harassing her in several ways, most notably by sending an anonymous text message to Heffington's husband that read "YOUR WIFE WILL DIE IN PRISON." Attached to

Heffington's motion was a copy of the message, which had been sent through a messaging service called SENDaTEXT. The circuit court denied Heffington's motion to terminate restitution.

The State thereafter filed a petition to revoke Heffington's probation. The petition alleged, among other things, that Heffington had violated the conditions of her probation by sending the threatening text message herself and then framing the Mosers for having sent the message. The petition laid out this theory in its "Summary" on the first page:

> [Heffington] *violated her probation by engaging in a continuing pattern of harassment against the victims*, [Dr. Moser and his wife, Anne], *in direct violation of the instructions of the court and terms of her release*. This includes deliberate efforts [by Heffington] to make it appear [that] the victims were harassing her and to hide her actions. *As part of this continuing course of conduct,* [*Heffington*] *fabricated a threatening email to her husband that she then falsely claimed was from Anne Moser*. In reality, the email was generated by [Heffington] out of a dental office located in Colorado for which she was working remotely. [Heffington] also posted numerous items on social media that appeared to come from family members and friends, but were, in fact, generated by [Heffington] with the intent of threatening and harassing the victims, who remain in fear.

(emphasis added).

After the petition to revoke's "Summary," there was a "Background" stating the facts of Heffington's guilty plea, and then four substantive allegation sections each detailing a different set of Heffington's actions that the State alleged violated her

probation.[1] The first of the four substantive allegation sections alleged that Heffington fabricated the threatening text message, attached it to her motion to terminate restitution, and in doing so violated computer access law, committed forgery, and obstructed justice. That section did not, however, mention the "no contact" condition of Heffington's probation. In fact, only the third substantive allegation section mentioned the "no contact" condition, which it did in the course of alleging that Heffington was harassing the Mosers by posting about them on social media websites.

The revocation court held a hearing on the State's petition. The State presented evidence that Heffington fabricated the threatening text message by remotely logging into the computer of a Colorado dental practice, Relaxation Dental Specialties ("Relaxation"), and using Relaxation's computer to send the threatening text message through SENDaTEXT. The State established this through the testimony of Relaxation's business manager, Jessie Brown.

Brown testified that she hired a Nevada dental billing company, Dental Accounts at Ease ("Ease"), to process insurance billing for Relaxation. This work was done remotely by an Ease employee named "Kris Dixon," who could access Relaxation's computers whenever she wanted. Brown testified that eventually she realized that "Kris Dixon" was actually an alias being used by Heffington.

[1] The four substantive allegation sections were (1) that Heffington fabricated the threatening text message in violation of multiple laws; (2) that Heffington had lied to the circuit court about the Mosers contacting her new employers and costing her jobs; (3) that Heffington had harassed the Mosers in violation of the "no contact" order; and (4) that Heffington made false claims about her restitution obligations and also changed documents in an attempt to mislead the circuit court.

Brown further testified that the threatening text message to Heffington's husband had been sent from Relaxation's computer on a Saturday evening when no one would have been in Relaxation's locked office. Brown stated that she did not know Heffington's husband, Matt, nor, to the best of her knowledge, did anyone else at Relaxation.

Brown also testified that no one had been authorized to send the threatening text message, and that the only authorization she had given Dixon/Heffington for using the Relaxation computers was to process insurance billing. Brown cut off this authorization and access after learning that Heffington had sent the threatening text message.

The State supported Brown's testimony by introducing the responses to two subpoenas: one from Comcast and another from SENDaTEXT. Together, the responses showed that the threatening text message was sent from a computer with an IP address of 98.245.51.205, and that the IP address belonged to one of Relaxation's Colorado-based computers. Heffington objected to the email chain received from SENDaTEXT in response to the subpoena as hearsay not within the scope of the business record exception to the hearsay rule. MD. R. 5-803(b)(6).

The SENDaTEXT email chain reads in reverse chronological order:

> **From:** SendaText Team <hello@sendatext.co>
> **Sent:** Sunday, December 16, 2018 8:55 PM
> **To:** Lynette Kizito <[email address redacted]>
> **Cc:** Terrell Roberts, III <[email address redacted]>
> **Subject:** Re: State v. Kristi Heffington – Subpoena
>
> We were able to track the communication.
>
> It was sent by an unregistered (not having an account with us) user from IP: 98.245.51.205. The text was sent on 2018-10-20 14:51:20 PST.

Let us know if you have any other questions.

Regards,
SENDaTEXT Team

On Tue, Dec 11, 2018 at 12:25 PM Lynette Kizito [email address redacted] wrote:

Good Afternoon,

We are not sure of the phone number the text was sent to but it might [have] been (667) 214-[redacted].

Kindest regards,
Lynette Kizito
Legal Secretary
Roberts & Wood Attorney at Law
[redacted contact information]

From: SendaText Team <hello@sendatext.co>
Sent: Monday, December 10, 2018 11:25 PM
To: Lynette Kizito <[email address redacted]>
Cc: Terrell Roberts, III <[email address redacted]>
Subject: Re: State v. Kristi Heffington – Subpoena

Can you please provide us with the phone number the text was sent to? The phone number mentioned in the subpoena is owned by SENDaTEXT and ALL outgoing texts go from that number. If you provide us with the phone number the text was sent to, we can then provide more meaningful information to you.

On Fri, Dec 7, 2018 at 8:42 AM Lynette Kizito <[email address redacted]> wrote:

Good Morning,

Attached please find a subpoena requesting documents in the case State of Maryland v. Kris[ti] Heffington, CT17-0240X. Please forward all requested documents to our office by January 16, 2019. If you should have any questions or need any

> more information, please feel free to contact our office. Thank you.

The revocation court admitted the SENDaTEXT email chain into evidence over Heffington's objection.

The revocation court ultimately found that Heffington had fabricated the threatening text message and used it to harass the Mosers in violation of the "no contact" condition of Heffington's probation. The revocation court rescinded Heffington's probation; resentenced her to a term of 10 years' imprisonment, with all suspended but 18 months and time served credit for 9 months; and imposed a new condition on Heffington's probation, that she was to make no social media post directed at or involving the victims.

Heffington filed a motion for leave to appeal to this court, which we granted.[2] She now asks us to decide three questions: (1) whether the State's petition to revoke probation put Heffington on notice of the probation condition she was alleged to have violated;[3] (2) whether the revocation court had sufficient evidence to find Heffington in violation of her probation; and (3) whether the new social media condition of Heffington's probation is constitutional. We answer yes to all three questions and affirm the revocation court.

[2] There is no automatic right of appeal from the revocation of a probation. Instead, Heffington was required to file an application for leave to appeal. MD. CODE, CTS. & JUD. PROC. ("CJ") § 12-302(g); MD. R. 8-204.

[3] Both the State and Heffington have made waiver arguments related to this issue. The State argued in its brief that Heffington waived this argument by not challenging the sufficiency of the notice before the revocation court. Heffington responded at oral argument in this Court that, in fact, the State had waived its own waiver argument by not previously arguing that Heffington's notice argument had been waived. Because we decide the matter on the merits, however, that Heffington had proper notice, we conclude that we need not wade into the fray of who may have waived what arguments and when.

DISCUSSION

I. NOTICE OF THE ALLEGED VIOLATION OF PROBATION

Heffington's first challenge is that the State's petition did not give her proper notice of the condition of her probation that she was alleged to have violated.[4] We disagree.

Due process requires that probationers be given written notice of the alleged violations of their probation. *Baldwin v. State*, 324 Md. 676, 683 (1991) (quoting *Black v. Romano*, 471 U.S. 606, 612 (1985)). The Maryland Rules require it as well:

> Proceedings for revocation of probation shall be initiated by an order directing the issuance of a summons or warrant. The order may be issued … on a verified petition of the State's Attorney … The petition … *shall state each condition of probation that the defendant is charged with having violated and the nature of the violation*.

MD. R. 4-347(a) (emphasis added). A petition to revoke probation satisfies due process and provides sufficient notice when there is a "focused formal notification of the State's reliance" on a condition of the probation. *Baldwin*, 324 Md. at 683. We review a revocation court's determination that a probationer had notice of alleged violations of probation for abuse of discretion. *Mitchell v. State*, 58 Md. App. 113, 115-17 (1984).

[4] Heffington also argues that filing her motion to terminate restitution could not have been contact that violated the "no contact" condition, because the "no contact" condition of her probation specifically permitted the filing of motions in a separate civil case between Heffington and the Mosers, and, by extension, she argues, all legal filings must be permitted. Even assuming the truth of Heffington's premise, the problem is not that Heffington filed a motion, but rather that she filed a motion with a fabricated message attached to it, that framed the Mosers for harassment that Heffington had created and sent. Those actions are harassing contact in a way that merely filing a legal filing is not.

Heffington argues that the State's petition did not give her notice because it did not explicitly say that sending the threatening text message and attaching it to her motion to terminate restitution was a violation of the "no contact" condition. She argues in support of that theory that the State knew how to allege a violation of the "no contact" condition, because it did so in the petition to revoke's third substantive allegation when alleging that her social media posting was a violation of her probation. Thus, her argument goes, the State must not have meant the "Summary" to allege a violation of the "no contact" condition, because if it had meant to do so then it would have.

We see no abuse of discretion. The first page of the State's "Petition to Revoke Probation" alleges that Heffington harassed the Mosers in violation of the conditions of her probation by fabricating a threatening text message and claiming it had been sent by the Mosers. Heffington, by harassing the Mosers in the way she did, engaged in contact with them—contact that violated the "no contact" condition of her probation. It was clear from the petition's first page that the State was alleging that Heffington violated the "no contact" condition by harassing the Mosers.

Heffington is correct that the State did not explicitly allege that the threatening text message violated the "no contact" condition in the first substantive allegation of the petition to revoke, but the standard for reviewing the petition is not whether Heffington was given perfect notice, but rather whether she was given "focused formal notification" of the allegations against her. *Baldwin*, 324 Md. at 683. If a petition to revoke provides such notice, it does not matter if it could have been written better or more clearly. We agree that the petition might have been more precise if it had used the phrase "'no contact' condition"

in the "Summary" and the petition to revoke's first substantive allegation, as it did later in the petition's third substantive allegation. But a reasonable person reading the petition would have understood that the allegation of harassment in the "Summary" was an allegation of violating the "no contact" condition. We hold that it was not an abuse of discretion for the revocation court to find that the "Summary" gave Heffington "focused formal notification" notice of her violation of her "no contact" condition and satisfied both due process and Rule 4-347(a).

II. SUFFICIENCY OF THE EVIDENCE

Heffington next challenges the sufficiency of the evidence supporting the revocation court's finding that she violated a condition of her probation. Her argument is three-fold. *First*, she argues that the revocation court improperly admitted and relied upon the SENDaTEXT email chain because it was inadmissible hearsay evidence. *Second*, she argues that the State did not present enough evidence to rule out the possibility that someone other than her sent the threatening text message. *Third*, she argues the revocation court improperly credited the testimony of one of the State's witnesses, while discrediting one of her witness's testimony. None of these arguments are persuasive.

A. The Revocation Court Properly Admitted and Relied on the SENDaTEXT Email Chain

Heffington first challenges that the revocation court erred in admitting the emails from SENDaTEXT because they are hearsay not properly subject to an exception. We disagree.

Hearsay evidence can be admitted under the business record exception to the hearsay rule, when it is:

> A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record or data compilation. A record of this kind may be excluded if the source of information or the methods or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

MD. R. 5-803(b)(6). In short, otherwise inadmissible hearsay evidence can be admitted under the business record exception when the document was made by someone at the business with knowledge of the document's subject, and when the business normally produces such a document as part of its normal business.

At a hearing for the revocation of probation, evidence may be admitted under a less strict application of the formal rules of evidence. MD. R. 4-347(e)(2) ("[t]he court … in the interest of justice, may decline to require strict application of the rules [of evidence]"). Hearsay evidence can therefore be admissible at a revocation hearing if it is determined to be trustworthy and "reasonably reliable."[5] *Beach v. State*, 75 Md. App. at 436 (quoting

[5] The parties both briefed this as a challenge under the confrontation clause, but because it was preserved solely under the business records exception to the hearsay rule, we can only review it on that basis. *See Beach v. State*, 75 Md. App. 431, 436 (1988) (reviewing admission of hearsay evidence only under business record exception

State v. Fuller, 308 Md. at 553). We review the revocation court's decision to admit the hearsay evidence for clear error. *Id.*

The revocation court found:

> 1. The email providing the IP address was a "memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses";
>
> 2. That emails in the email chain responded to preceding emails in the chain, indicating a SENDaTEXT employee had received the emails and was using them to search the SENDaTEXT database;
>
> 3. That it could infer that the email was made by a person with knowledge and was kept in the regular course of business because the email writer responded as a person who had knowledge of the company and its records would, and that they asked for additional information that would allow them to do their job and identify the correct records to respond to the subpoena with;
>
> 4. The SENDaTEXT employee did work to track the communication to find the information to comply with the subpoena; and
>
> 5. The exhibit complied with the business records exception and that it was in the interest of justice for the revocation court to consider evidence central to establishing the alleged violation.

because no constitutional challenge was made at probation revocation hearing). At the revocation hearing, Heffington did not identify her objection as a constitutional challenge. Rather, Heffington's counsel presented the objection solely under the business record exception. That is, after the State moved to admit the SENDaTEXT email chain into evidence Heffington's counsel objected to the SENDaTEXT email chain as hearsay and preemptively stated that she believed the State was relying on the business record exception, for which there was no support. We generally do not review unpreserved issues, even constitutional ones. *See* MD. R. 8-131(a); *Taylor v. State*, 381 Md. 602, 612-15 (2004) (declining to review unpreserved federal constitutional claim).

There is no clear error with these conclusions.[6] In fact, we think the email chain meets the requirements to be admitted under the standard application of the business record exception. Moreover, even if the revocation court erred in admitting the email chain under the business record exception, we hold it would still not be reversible error. Error in the admission of evidence is not reversible on appeal when the essential contents of the objected to evidence have already been established and presented through prior, unobjected to evidence. *Yates v. State*, 429 Md. 112, 120 (2012) (quoting *Grandison v. State*, 341 Md. 175, 218-19 (1995)). The SENDaTEXT email chain identified Relaxation's computer's IP address. Immediately prior to moving to admit the email chain, however, the State had established through witness testimony the same IP address as being the one from which the threatening text message had been sent. Thus, the essential content of the SENDaTEXT email chain—the IP address—was already admitted into evidence and we would not reverse the revocation court even if it had erred in admitting the email chain.

B. The Revocation Court had Sufficient Evidence to Find by a Preponderance of the Evidence that Heffington Sent the Threatening Text Message

Heffington next challenges whether the State presented sufficient evidence to establish by a preponderance that Heffington sent the threatening text message. The existence of a violation of probation must be established by a preponderance of evidence.

[6] Because the email chain was admissible under a standard application of the business record exception, it was also admissible under the "less strict" application of the rules of evidence that is in effect for probation revocation hearings. MD. R. 4-347(e)(2).

State v. Dopkowski, 325 Md. 671, 677 (1992). We review the revocation court's determination for clear error. *Id.*

As described above, the State relied on the testimony of Jessie Brown, as well as the Comcast and SENDaTEXT subpoena responses, to establish that Heffington was likely the person who sent the threatening text message from Relaxation's computer.

Heffington complains that this evidence was insufficient to support a violation of probation because it did not rule out the possibility that another person actually sent the threatening text message. She specifically argues that the State should have conducted a forensic investigation on the computer from which the threatening text message was sent.

The State didn't need to prove the allegations to a certainty or beyond a reasonable doubt. It only had to prove it was more likely than not that Heffington sent the threatening text message. The evidence presented by the State was sufficient to establish that it was more likely than not that Heffington authored the threatening text message. Heffington lives in Maryland but worked remotely at Relaxation in Colorado. Few people, if any at all besides Heffington, had both access to Relaxation's computers from over 1,500 miles away and knowledge of her Maryland-residing husband's cellphone number. Brown's testimony, as well as the Comcast and SENDaTEXT subpoena responses, established that the threatening text message was sent from Relaxation's Colorado-based computer to the cell phone of a Maryland resident that no one at Relaxation, other than Heffington, knew. There is no clear error in the revocation court's conclusion.

C. The Revocation Court Permissibly Weighed the Reliability of Conflicting Testimony in Finding Heffington Violated Her Probation

Heffington next argues the revocation court improperly gave more credence to the testimony of Brown than to the testimony of her witness, Markia Hood.

Assessing a witness's credibility and weighing conflicting evidence are the jobs of the revocation court. MD. R. 8-131(c). We review a revocation court's assessment for clear error. *Id.* We will not find clear error "if any competent material evidence exists in support of the trial court's factual findings." *MAS Associates, LLC v. Korotki*, 465 Md. 457, 474 (2019).

The revocation court clearly believed Brown. It also clearly disbelieved Hood. Under the standard of proof, however, none of that matters. The revocation court had sufficient evidence from which to find that Heffington sent the threatening text message. Thus, competent material evidence existed in support of the revocation court's factual finding. As a result, we hold it was not clear error for the revocation court to find that Heffington violated her probation.

III. CONSTITUTIONALITY OF THE AMENDED CONDITION OF PROBATION

After finding Heffington in violation of her probation, the revocation court resentenced her and added another condition to her probation: that she was to "refrain from any social media postings directed at or involving the victims in this case." Heffington challenges that the revised conditions of her probation are overbroad and unconstitutional.

Granting probation is an act of clemency. *Henson v. State*, 212 Md. App. 314, 327 (2013). As a result, courts have broad discretion to set the conditions and scope of

probation. *Id.* We generally review conditions of probation under an abuse of discretion standard. *Meyer v. State*, 445 Md. 648, 663 (2015). For conditions of probation affecting a probationer's free speech rights to be constitutional, however, they must also be reasonable, related to the offense of conviction, and have a reasonable relation to the ends of rehabilitation and protecting the public from further criminal conduct. *Allen v. State*, 449 Md. 98, 112-13 (2016); *Henson*, 212 Md. App. at 327-28.

Here, Heffington's underlying conviction was for using electronic communications to perpetrate a fraud. She then violated her probation by using a fabricated electronic communication to harass the victims of her previous offense. The condition to refrain from social media posting directed at or involving the Mosers was reasonable, directly related to Heffington's offense, and reasonably directed at protecting the Mosers from further harassment. Thus, the condition was constitutional and adding it to Heffington's probation was not an abuse of the revocation court's discretion.

CONCLUSION

We hold that the State's petition put Heffington on notice of her alleged violation of probation, and that the revocation court had sufficient evidence to find that Heffington violated her probation. We further hold that the new condition of probation was constitutional.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.