

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

Court of Appeals of New Mexico
Filed 2/6/2024 8:05 AM

3 Plaintiff-Appellee,



Cynthia A. Hernandez-Madrid
Acting Chief Clerk

4 v.

No. A-1-CA-40653

5 **WESLEY T. FLORES,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY**

8 **Drew D. Tatum, District Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 Kimberly Chavez Cook, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **DUFFY, Judge.**

18 {1} Defendant appeals the revocation of his probation. [MIO 1] This Court issued
19 a notice of proposed disposition, proposing to affirm. [CN 1, 4] Defendant has filed
20 a memorandum in opposition, which we have duly considered. For the following
21 reasons, we affirm.

1 {2} Defendant now contends that there was insufficient evidence to support the
2 revocation of his probation on Count 1 (failure to report), Count 6 (violation of state
3 law—trespass), and Count 7 (failure to report). [MIO 9] Defendant does not contest
4 the sufficiency of the evidence supporting the two remaining counts the district court
5 found he violated—Count 4 (consuming a controlled substance) and Count 5
6 (consuming a controlled substance).

7 {3} Proof of a probation violation “must be established with a reasonable
8 certainty, such that a reasonable and impartial mind would believe that the defendant
9 violated the terms of probation.” *State v. Green*, 2015-NMCA-007, ¶ 22, 341 P.3d
10 10. “The burden of proving a violation with reasonable certainty lies with the
11 [s]tate.” *Id.* “Once the state offers proof of a breach of a material condition of
12 probation, the defendant must come forward with evidence to excuse
13 non[]compliance.” *State v. Leon*, 2013-NMCA-011, ¶ 36, 292 P.3d 493 (internal
14 quotation marks and citation omitted). On appeal, we “view[] the evidence in a light
15 most favorable to the [s]tate and indulg[e] all reasonable inferences in favor of the
16 [district] court’s judgment.” *State v. Erickson K.*, 2002-NMCA-058, ¶ 21, 132 N.M.
17 258, 46 P.3d 1258. As explained in our calendar notice, we will affirm if even one
18 of the counts is supported by sufficient evidence. [CN 2] *See Leon*, 2013-NMCA-
19 011, ¶ 37, (“[A]lthough [the d]efendant challenges the sufficiency of the evidence

1 supporting each of his probation violations, if there is sufficient evidence to support
2 just one violation, we will find the district court’s order was proper.”).

3 {4} Relevant to Count 1, Defendant was ordered to report to the probation office
4 in Clovis, New Mexico upon his arrival, after he informed his probation officer that
5 he had been asked to leave the transitional living facility he was staying at in
6 Albuquerque, New Mexico. [MIO 11] Defendant does not dispute that he failed to
7 check in for more than a month after notifying his PO that he was moving out of the
8 transitional living facility, but nonetheless argues “[w]ithout a particular reporting
9 date set, this is insufficient to establish that [Defendant] willfully failed to report to
10 probation after arriving in Clovis.” [MIO 11] We disagree. *See State v. Martinez*,
11 1989-NMCA-036, ¶ 9, 108 N.M. 604, 775 P.2d 1321 (concluding that revocation
12 was appropriate when the defendant made an unsuccessful attempt to report to
13 probation as required and then made no subsequent attempt to report later on because
14 he believed it was “already too late”). Moreover, Defendant has cited no authority
15 supporting the contention that it was improper for the probation officer to order
16 Defendant to check in as soon as he arrived in Clovis, as opposed to being ordered
17 to report on a specific date. *See State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327
18 P.3d 1129 (“[A]ppellate courts will not consider an issue if no authority is cited in
19 support of the issue and that, given no cited authority, we assume no such authority
20 exists.”). Because the evidence established that Defendant never complied with the

1 order to report, we conclude that there is sufficient evidence to support the
2 revocation premised on Count 1.

3 {5} Given that Defendant is not challenging either drug-related admission as
4 found in Counts 4 and 5, and we have concluded that sufficient evidence supports
5 the district court’s conclusion as to Count 1, we conclude that there is sufficient
6 evidence of noncompliance established by these violations to support the district
7 court’s revocation of Defendant’s probation. *See Leon*, 2013-NMCA-011, ¶ 37.

8 {6} Defendant also maintains that at his probation revocation hearing, Jose
9 Arviso, who was an employee at the transitional facility where Defendant resided
10 while on probation, impermissibly testified to hearsay statements. [MIO 14] Mr.
11 Arviso testified that Defendant “was doing well at Transitions for Living but was
12 told he had to leave because he had completed parole.” [MIO 6] Mr. Arviso also
13 testified over Defendant’s objection that “an unnamed PO told him [Defendant] was
14 off supervision, and that [Defendant] had picked up new charges and was therefore
15 likely to be back on supervision soon.” [MIO 6, 18] Defendant argues this testimony
16 “presented undue complication to the willfulness of [Defendant’s] departure from
17 [the transitional living facility] and unduly vouched for the new trespass allegations,
18 and prejudiced his defense.” [MIO 18]

19 {7} Defendant correctly notes that the rules of evidence do not apply in adult
20 probation revocation proceedings and a defendant is required to establish prejudice

1 in order to establish a due process violation. [MIO 17] *See State v. Neal*, 2007-
2 NMCA-086, ¶¶ 36-42, 142 N.M. 487, 167 P.3d 935. As for Defendant’s contention
3 that Mr. Arviso’s testimony “presented undue complication to the willfulness of
4 [Defendant’s] departure from [the transitional living facility],” [MIO 18] this
5 argument appears to relate to Count 2 of the State’s motions to revoke his probation.
6 Count 2 alleged that Defendant had violated standard condition #3, which required
7 Defendant to obtain permission from his PO before leaving the county where he was
8 supervised or changing residence, among other things. [RP 289, 351] The district
9 court did not find a violation on Count 2. [RP 395] Consequently, even if the
10 admission of Mr. Arviso’s testimony was in error, Defendant has not demonstrated
11 how it was prejudicial.

12 {8} Likewise, to the extent Defendant argues that Mr. Arviso’s testimony “unduly
13 vouched for the new trespass allegations, and prejudiced his defense,” [MIO 18] we
14 fail to see how this brief testimony amounts to vouching, which traditionally
15 involves a comment on the credibility or truthfulness of a witness. *See, e.g., State v.*
16 *Salazar*, 2006-NMCA-066, ¶ 13, 139 N.M. 603, 136 P.3d 1013; *State v. Pennington*,
17 1993-NMCA-037, ¶ 27, 115 N.M. 372, 851 P.2d 494. In this case, it is undisputed
18 that Defendant was charged with trespass, and the trespass charge formed the basis
19 for Count 6 of the State’s motion, which alleged that Defendant had violated
20 standard condition #1 prohibiting Defendant from “violating any of the laws or

1 ordinances of the State of NM, or . . . endanger[ing] the person or property of
2 another.” [RP 351, 346] To establish a violation under Count 6, the State called two
3 police officers to testify regarding the factual basis for the underlying trespass
4 charge. [RP 383] The State also called Defendant’s probation officer, who testified
5 that he spoke with Mr. Arviso and presumably could have been questioned about the
6 alleged hearsay statements at issue. [RP 384] With this context in mind, we see no
7 due process violation. There is no indication that Mr. Arviso’s brief, isolated
8 comment, i.e., that he had been told by Defendant’s probation officer that Defendant
9 had pending charges, prejudiced his defense or that Defendant was denied the ability
10 to confront and cross-examine the declarant. *See State v. Guthrie*, 2011-NMSC-
11 014, ¶ 12, 150 N.M. 84, 257 P.3d 904.

12 ¶ As for the district court’s decision to allow Mr. Arviso to testify by video, our
13 Supreme Court has said that the admission of live two-way video testimony during
14 a criminal trial may result in a Confrontation Clause violation unless an exception is
15 justified under the standard set forth in *State v. Thomas*, 2016-NMSC-024, ¶ 29, 376
16 P.3d 184. In probation revocation proceedings, however, “the full panoply of rights
17 due a defendant in a criminal trial do not apply.” *State v. Castillo*, 2011-NMSC-014,
18 ¶ 10, 290 P.3d 727 (alterations, internal quotation marks, and citation omitted).
19 “[T]he right protected in probation revocation cases is not the Sixth Amendment
20 right to confrontation, guaranteed every accused in a criminal trial, but rather the

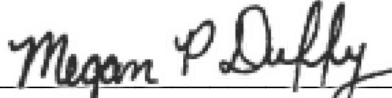
1 more generally worded right to due process of law secured by the Fourteenth
2 Amendment.” *Id.* ¶ 12 (alterations, internal quotation marks, and citation omitted).
3 Among the components of due process is the right to confront and cross-examine
4 adverse witnesses, unless there is good cause for not allowing confrontation within
5 the meaning of the Fourteenth Amendment. *See id.* Our analysis of good cause for
6 not allowing confrontation is “a kind of spectrum or sliding scale,” *State v. Guthrie*,
7 ¶ 40, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904, that balances competing
8 interests in deciding whether confrontation is a procedural protection that the
9 particular situation demands to achieve the truth-finding goal of evaluating contested
10 relevant facts. *See id.* ¶¶ 12, 33, 40. Specifically, our inquiry considers whether: (1)
11 “the assertion [is] central to the reasons for revocation[] or . . . collateral”; (2) “the
12 assertion [is] contested by the probationer, or . . . the state [is] being asked to produce
13 a witness to establish something that is essentially uncontroverted”; and (3) the
14 assertion is “inherently reliable.” *Id.* ¶¶ 34, 36.

15 {10} We discern no reversible error in the district court’s decision to permit Mr.
16 Arviso to testify via video. Under *Guthrie*, the assertions made were not ultimately
17 central to the reasons for revocation because Defendant’s probation was not revoked
18 based on any of the Counts related to the transitional facilities manager’s testimony.
19 In addition, the testimony was made by a seemingly-neutral third party with no
20 apparent, nor argued, motive to fabricate. *See id.* ¶ 40 (“On one end of the spectrum,

1 where good cause for not requiring confrontation is likely, we would include
2 situations in which the state’s evidence is uncontested, corroborated by other reliable
3 evidence, and documented by a reliable source without a motive to fabricate, . . .
4 making the demeanor and credibility of the witness less relevant to the truth-finding
5 process.”). While Defendant does cite authority discussing generally the policy
6 considerations underlying our general preference for live, in-person testimony, we
7 conclude that the balance struck by our Supreme Court in *Guthrie* weighs in favor
8 of “good cause” and does not require confrontation. Consequently, we conclude that
9 Defendant’s due process rights were not violated by the allowance of the video
10 testimony.

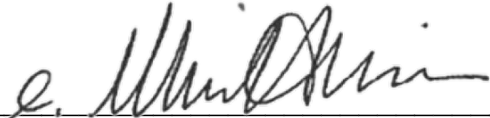
11 {11} For the reasons outlined above and those contained in our notice of proposed
12 disposition, we affirm the revocation of Defendant’s probation.

13 {12} **IT IS SO ORDERED.**

14 
15 _____
MEGAN P. DUFFY, Judge

16 **WE CONCUR:**

17 
18 _____
JENNIFER L. ATTREP, Chief Judge

19 
20 _____
J. MILES HANISEE, Judge