

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

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

5 **GEORGE NAYMAN,**

6 Defendant-Appellant.

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

8 **Jared Kallunki, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 Walter Hart, Assistant Solicitor General

12 Albuquerque, NM

13 for Appellee

14 Bennett J. Baur, Chief Public Defender

15 Mallory E. Harwood, Assistant Appellate Defender

16 Santa Fe, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **HANISEE, Judge.**

20 {1} Defendant George Nayman appeals from the district court's order revoking

21 his probation. Defendant challenges his probation revocation on grounds of

22 insufficient evidence and urges this Court to reverse and remand for further

Court of Appeals of New Mexico

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Mark Reynolds

No. A-1-CA-40680

1 proceedings in district court. Concluding that the district court had sufficient
2 evidence to revoke Defendant's probation, we affirm.

3 **BACKGROUND**

4 {2} Defendant was married to Cynthia Boles (Victim) for six years. After their
5 divorce, Defendant violated a restraining order when he appeared outside of
6 Victim's home brandishing a firearm. The State filed a criminal information against
7 Defendant for aggravated stalking in violation of a protection order, contrary to
8 NMSA 1978, Section 30-3A-3.1 (1997), to which Defendant pleaded no contest and
9 was ordered to serve a sentence of eighteen months, which was suspended, and one
10 year of incarceration based on Defendant's status as a habitual offender, followed
11 by one year of parole and eighteen months of probation.

12 {3} In pertinent part, the district court imposed the following conditions of
13 probation:

14 Defendant shall comply with all rules, regulations and orders of
15 the [p]robation[o]fficer.

16 [Defendant] shall not have contact with [Victim]. Must stay away
17 from the property of 3308 North Main, Roswell, NM while on
18 probation.

19 Two days after his release, Defendant had his initial probation intake and met with
20 his probation officer, Stefan Najar (Officer Najar). At this initial intake, Defendant
21 was provided with a GPS monitor to wear and was told by Officer Najar to not go
22 near Victim's home address at 707 S. Aspen or her place of work at 3308 N. Main.

1 {4} The morning following his initial probation intake, Officer Najjar was notified
2 via Defendant's GPS monitor that Defendant was inside of Victim's home at 707
3 S. Aspen. Officer Najjar subsequently filed a notification of arrest and a report
4 regarding Defendant's violations. At Defendant's probation violation hearing,
5 Victim testified that she had been gone from her home for almost a week but returned
6 the same day Defendant had entered her home. Victim testified that she noticed a
7 few things out of place in her home and had been notified by her neighbors that her
8 "backyard light was off the night before and the dogs were barking a lot" and that
9 they had seen Defendant and she needed to be careful. Officer Najjar also testified to
10 the information he received from Defendant's GPS monitor, as well as answering
11 "yes" to a question about whether Defendant "was prohibited from going to any
12 particular address as part of his probation." Officer Najjar explained that he
13 "informed [Defendant] to stay away from 707 S. Aspen, which is [Victim's]
14 address."

15 {5} At the conclusion of the hearing, the district court found that the testimony of
16 both Victim and Officer Najjar were credible and that the State proved to a reasonable
17 certainty that Defendant had violated conditions of his probation. Defendant's
18 probation was consequently revoked, and he was sentenced to a two-year-and-six-
19 month period of further incarceration, less credit for time served. This appeal
20 followed.

1 **DISCUSSION**

2 {6} Defendant contends on appeal that the district court abused its discretion when
3 it revoked his probation because the State failed to prove by a reasonable certainty
4 that he violated his probation. Defendant contends revocation was improper because
5 the State failed to present sufficiently reliable proof that (1) he went to Victim’s
6 home and (2) even if he had gone to Victim’s home, he knew about this condition of
7 his probation such that his presence amounted to a willful violation of his conditions
8 of probation.

9 {7} “We review a district court’s revocation of a defendant’s probation for an
10 abuse of discretion.” *State v. Leon*, 2013-NMCA-011, ¶ 36, 292 P.3d 493. “To
11 establish an abuse of discretion, it must appear the [district] court acted unfairly or
12 arbitrarily, or committed manifest error.” *State v. Martinez*, 1989-NMCA-036, ¶ 5,
13 108 N.M. 604, 775 P.2d 1321.

14 {8} A district court may revoke a defendant’s probation if, after a hearing, it is
15 established that they failed to comply with a condition of probation. *State v. Parsons*,
16 1986-NMCA-027, ¶ 19, 104 N.M. 123, 717 P.2d 99. “A violation of the conditions
17 of probation must be established with such reasonable certainty as to satisfy the
18 conscience of the court of the truth of the violation. It does not have to be established
19 beyond a reasonable doubt.” *State v. Guthrie*, 2011-NMSC-014, ¶ 14, 150 N.M. 84,
20 257 P.3d 904 (alteration, internal quotation marks, and citation omitted). In

1 reviewing the sufficiency of the evidence, “we view the evidence in a light most
2 favorable to the prosecution, indulging all reasonable inferences and resolving all
3 conflicts to uphold the [district] court’s decision.” *In re Bruno R.*, 2003-NMCA-057,
4 ¶ 9, 133 N.M. 566, 66 P.3d 339.

5 {9} Defendant asserts that Victim’s and Officer Najar’s testimony were
6 insufficient proof to show that Defendant entered Victim’s home, and that Officer
7 Najar’s testimony was insufficient to prove that Defendant knew he was not
8 permitted to go to Victim’s home as a condition of his probation. Defendant argues
9 that Victim’s statements regarding the condition of the outside and inside of her
10 home only establish that at some time while she was gone, *someone* entered her
11 home. Defendant also argues that Victim’s statement about what her neighbors saw
12 as well as the fact that Defendant lived near Victim only presents reasonable
13 suspicion that he entered Victim’s home rather than a reasonable certainty.

14 {10} Defendant also argues that Officer Najar is not an expert on GPS technology,
15 is unfamiliar with analyzing GPS data, and the GPS evidence was hearsay. In
16 advancing his argument, Defendant cites federal and out-of-state authority. *See*
17 *Channel v. State*, 200 So. 3d 247, 249 (Fla. Dist. Ct. App. 2016); *United States v.*
18 *Espinal-Almeida*, 699 F.3d 588 (1st. Cir. 2012).

19 {11} Although a defendant generally need not preserve a challenge to the
20 sufficiency of the evidence, *see State v. Sotelo*, 2013-NMCA-028, ¶ 30, 296 P.3d

1 1232 (reiterating that challenges to the sufficiency of the evidence may be raised at
2 any time, including for the first time on appeal), the State aptly points out that
3 Defendant did not contest Victim’s testimony at the probation revocation hearing,
4 did not cross-examine Victim, did not contest Officer Najar’s testimony regarding
5 his location, and did not contest that he had gone to Victim’s home. At no point in
6 his probation revocation hearing did Defendant mount any challenge to the
7 identification of his location by use of the GPS evidence. Only on appeal does
8 Defendant assert that “no foundation at all was laid for [Officer] Najar’s testimony
9 about the GPS evidence.” To the extent that Defendant attempts to assert his
10 challenge of the foundation needed for Officer Najar’s testimony regarding GPS, the
11 New Mexico Rules of Evidence do not apply at a revocation hearing consistent with
12 Rule 11-1101(D)(3)(d) NMRA (identifying proceedings “granting or revoking
13 probation” as excepted from application of the rules of evidence). *See State v. Green*,
14 2015-NMCA-007, ¶ 30, 341 P.3d 10. Thus, while we assess the sufficiency of the
15 evidence for the first time on appeal, we do so here in light of the evidence admitted,
16 including the GPS evidence.

17 {12} Additionally, proof of a probation violation need not be established beyond a
18 reasonable doubt, but instead only with reasonable certainty, such that a reasonable
19 and impartial mind would believe that the defendant violated the terms of probation.
20 *Martinez*, 1989-NMCA-036, ¶ 4; *State v. Sanchez*, 2001-NMCA-060, ¶ 13, 130

1 N.M. 602, 28 P.3d 1143. Here, Victim’s testimony in tandem with Officer Najar’s
2 testimony were sufficient to allow the district court to find with reasonable certainty
3 that Defendant violated his probation by entering Victim’s home knowing he was
4 forbidden to do so. *See State v. Ocon*, 2021-NMCA-032, ¶ 22, 493 P.3d 448 (“We
5 do not reweigh the evidence or substitute our judgment for that of the fact[-]finder
6 as long as there is sufficient evidence to support the verdict.” (internal quotation
7 marks and citation omitted)).

8 {13} To the extent that Defendant asserts that there is no evidence to corroborate
9 that he was informed by Officer Najar regarding the condition of his probation that
10 he was to not go to Victim’s home, and therefore his actions were not willful, we
11 disagree further evidence is necessary. Defendant argues that if a violation of
12 probation is not willful, but rather resulted from factors beyond a probationer’s
13 control, probation may not be revoked. *See In re Bruno R.*, 2003-NMCA-057, ¶ 13.
14 However, in a probation revocation hearing, if a defendant fails to present evidence
15 to excuse their noncompliance with conditions of probation to which they must
16 adhere, evidence establishing such noncompliance is sufficient to justify a finding
17 that their failure was willful or without lawful excuse. *Parsons*, 1986-NMCA-027,
18 ¶ 25.

19 {14} Here, Defendant offered no evidence to excuse his noncompliance with the
20 directive of his probation officer that he not be present at Victim’s home address. He

1 therefore failed to show that the failure to comply with the challenged condition of
2 probation was not willful. *See Leon*, 2013-NMCA-011, ¶ 36 (“Once the state offers
3 proof of a breach of a material condition of probation, the defendant must come
4 forward with evidence to excuse non[]compliance.” (internal quotation marks and
5 citation omitted)). Defendant also does not provide this Court with any support that
6 there must be corroboration in writing to support the district court’s finding that
7 Officer Najar informed Defendant not to go to Victim’s home. *See Lee v. Lee (In re*
8 *Adoption of Doe)*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (“We assume
9 where arguments in briefs are unsupported by cited authority, counsel after diligent
10 search, was unable to find any supporting authority.”).

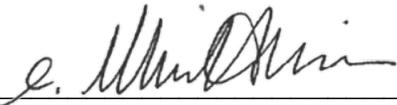
11 {15} We decline to second guess the district court and conclude that the testimony
12 of both Victim and Officer Najar supplies adequate support for the district court’s
13 determination that Defendant violated his probation. *See State v. Salas*, 1999-
14 NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482 (recognizing that appellate courts
15 defer to the fact-finder on witness credibility and the resolution of conflicts in
16 witness testimony). Therefore, based on the evidence the State presented to the
17 district court, we conclude that the State met its burden of proving a probation
18 violation with reasonable certainty.

19 **CONCLUSION**

20 {16} For the foregoing reasons, we affirm.

1 {17} IT IS SO ORDERED.

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J. MILES HANISEE, Judge

4 WE CONCUR:

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JANE B. YOHALEM, Judge

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GERALD E. BACA, Judge