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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

FULVIO FRANCISCO PALACIOS,

Defendant and Appellant.

G049365

(Super. Ct. No. P00243)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Richard M. King, Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

Fulvio Francisco Palacios appeals from the order revoking his parole (Pen. Code, §§ 1203.2, 3000.8)<sup>1</sup> for violating the parole condition that he violate no law after he was arrested for new offenses. He contends his due process rights were violated by admission of hearsay testimony to establish the parole violation. We find no reversible error and affirm the order.

#### FACTS AND PROCEDURE

In 2009, Palacios was convicted of violating sections 459 and 460, subdivision (a) (burglary), section 245, subdivision (a)(1) (assault with a deadly weapon), and section 186.22, subdivision (a) (participation in a criminal street gang), and sentenced to five years in prison. He was released on parole on November 3, 2012.

Palacios's performance on parole was poor—he had numerous parole violations including for failure to report, absconding from parole supervision, using methamphetamine, and committing a first degree burglary. A petition to revoke parole under section 3000.08 was filed on September 16, 2013, alleging Palacios violated the parole condition that he violate no law. Specifically, it alleged that on September 6, 2013, Palacios was arrested for second degree burglary and possession of stolen property (§§ 459, 496), and formally charged with those two offenses in Orange County Superior Court (Case No. 13NF3097).

Over defense counsel's hearsay objections, the trial court permitted a police officer to testify at the parole revocation hearing as to statements made by the victim of the new offenses. The victim had been subpoenaed by the prosecution, but she did not appear. The prosecution's investigator testified to the difficulty he had serving the victim with the subpoena in the first place. Following service of the subpoena, he several times confirmed with the victim that she would appear. The day before the hearing, the victim told the investigator she would not appear because she did not ask for permission to miss work. The victim seemed hesitant to cooperate further and refused to give the investigator

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<sup>1</sup> All further statutory references are to the Penal Code.

her current home or work address. The trial court concluded the prosecution had shown good cause for its inability to produce the victim and her statements to the arresting officer were sufficiently reliable to be admitted.

Anaheim Police Officer William Martinez testified that on the morning of September 6, 2013, he responded to a report of a car burglary. The victim told Martinez she had parked her car in front of her residence at approximately 2:30 a.m., with the doors locked and the windows closed. Around 9:00 a.m., the victim discovered her car's doors and trunk were open and the car had been ransacked. The victim told Martinez her wallet was gone and it contained her social security card, school identification card, and various credit cards belonging to her and her mother.

Martinez inspected the victim's car and saw papers strewn about and several interior compartments were open. Martinez found Palacios about 150 feet away from the victim's residence. Palacios had in his possession the victim's social security card, credit card and school identification card, and her mother's credit card.

Based on the foregoing, the trial court found by a preponderance of the evidence Palacios violated his parole by having stolen property in his possession. The court ordered Palacios to serve 180 days in jail. Palacios appeals from the order.

On August 8, 2014, we granted the Attorney General's unopposed request for judicial notice of the abstract of judgment in Case No. 13NF3097, and Palacios's inmate history record. Palacios's inmate history record indicates he completed the incarceration term for his parole violation on December 3, 2013. The abstract of judgment indicates that on March 12, 2014, Palacios pled guilty in Case No. 13NF3097 to one count of second degree burglary and one count of receiving stolen property and was sentenced to two years and eight months in prison.

## DISCUSSION

Palacios contends the trial court erred by permitting Martinez to testify as to the victim's statements about the car burglary. He contends the evidence was inadmissible hearsay and its admission violated his due process rights.

Section 3000.08, subdivision (f), provides for filing a section 1203.2 petition to revoke parole due to a supervisee's violation of law or conditions of parole when the supervising parole agency determines lesser intermediate sanctions are not appropriate. The prosecution proves a parole violation by the preponderance of the evidence standard, as opposed to the beyond a reasonable doubt standard applicable to criminal trials. (See § 3044, subd. (a)(5) ["Parole revocation determinations shall be based upon a preponderance of evidence admitted at hearings including documentary evidence, direct testimony, or hearsay evidence offered by parole agents, peace officers, or a victim"].)

Although a parole revocation hearing is not a criminal proceeding, Palacios cites *Morrissey v. Brewer* (1972) 408 U.S. 471, 489 (*Morrissey*); *People v. Arreola* (1994) 7 Cal.4th 1144, 1147-1148 (*Arreola*); and *People v. Winson* (1981) 29 Cal.3d 711, 713-714 (*Winson*)), for the proposition that minimum due process requirements apply, which include the right to confront and cross-examine adverse witnesses absent good cause for not allowing confrontation. (*Arreola, supra*, 7 Cal.4th at pp. 1157-1158; *Winson, supra*, 29 Cal.3d at pp. 713-714.) Palacios contends these minimal due process rights preclude the use of testimonial hearsay evidence to prove the parole violation unless (1) good cause has been demonstrated for excusing the right to confront and cross-examine the witness, and (2) the hearsay evidence bears sufficient indicia of reliability. (*Arreola, supra*, 7 Cal.4th at pp. 1159-1160; accord, *In re Kentron D.* (2002) 101 Cal.App.4th 1381, 1392.)

We need not decide whether admission of the hearsay evidence violated Palacios's due process rights. The Attorney General and Palacios agree federal constitutional errors are subject to federal harmless error analysis under *Chapman v.*

*California* (1967) 386 U.S. 18, 24. The Attorney General argues that even if there was error, Palacios’s conviction on the offenses render any error harmless. We agree.

*Arreola, supra*, 7 Cal.4th at page 1160, is on point. In *Arreola*, the prosecution attempted to establish defendant violated the terms of his probation by committing a new offense. At the revocation hearing, the prosecution submitted the transcript of the preliminary hearing for the new offense. (*Id.* at p. 1149.) The Supreme Court held the trial court erred by admitting the transcript into evidence without a showing the adverse witness was unavailable. (*Id.* at pp. 1160-1161.) However, the court also held the error was harmless because while the matter was on appeal, defendant was convicted of the new offense. Accordingly, it affirmed the order revoking defendant’s probation. It reasoned, “although at the time of the revocation hearing the alleged probation violation of driving under the influence of alcohol was not supported by evidence *properly* admitted at the hearing, defendant’s subsequent conviction of that offense now validly establishes that particular violation of probation, and has rendered the error harmless. [¶] Defendant, in seeking to challenge the revocation of his probation, is barred from relitigating the issue of his latest commission of the offense of driving under the influence of alcohol. As stated in *Morrissey*, ‘a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime.’ (*Morrissey*[,] *supra*, 408 U.S. at p. 490 . . . .)” (*Arreola, supra*, 7 Cal.4th at pp. 1161-1162.) “Thus, affording defendant a new probation revocation hearing would be a futile act because, on remand, the trial court would have before it defendant’s conviction of the offense whose circumstances formed the basis for that court’s previous action revoking probation. . . .” (*Id.* at p. 1162.) In short, Palacios’s conviction on the offenses underlying the parole revocation validates the parole violation, and thus reversal is not warranted.<sup>2</sup>

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<sup>2</sup> In view of this conclusion, we need not address the Attorney General’s argument completion of the incarceration term for the parole violation renders the appeal moot. (See *People v. Nolan* (2002) 95 Cal.App.4th 1210, 1213 [rejecting mootness challenge to probation revocation order because “[t]he probation violation finding is part of

Palacios responds the alleged error is not harmless because revocation of his parole essentially compelled him to plead guilty in Case No. 13NF3097. He asserts that “having already had his parole revoked, [he] had no reason to contest the [new] offense[,]” and revocation of his parole based on erroneous admission of hearsay evidence “rendered his subsequent guilty plea involuntary.” We reject the contention. Palacios cites no authority for his novel proposition and Palacios had every reason to contest the new charges—they were felony offenses that resulted in significant penalties beyond the period of incarceration imposed for the parole revocation. Indeed, Palacios’ guilty plea came some three months *after* he completed his incarceration term for the parole violation and resulted in his further incarceration.

#### DISPOSITION

The order is affirmed.

O’LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

THOMPSON, J.

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[defendant’s] permanent record [and] the appeal affords the opportunity to erase the ‘stigma of criminality’”).)