

**Affirmed and Opinion filed December 9, 1999.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-98-00653-CR**  
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**JIMMY ROY MERCER, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 338<sup>th</sup> District Court  
Harris County, Texas  
Trial Court Cause No. 673, 371**

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**OPINION**

In one point of error, appellant Jimmy Roy Mercer appeals that there was insufficient evidence of theft for the trial court to revoke his probation. Because there was factually sufficient evidence to support revocation of his probation, we affirm.

After pleading guilty to burglary, Mercer received eight years' probation. After four and a half years passed, the State filed a motion to revoke, claiming that Mercer had violated his probation by committing an offense against the laws of Texas or of the United States. Specifically, the State alleged a robbery: Mercer had choked the complainant, Denton Fortenberry, while in the course of committing theft. At the hearing, Mercer conceded that he choked Fortenberry to unconsciousness while the two were fighting. However, he specifically contested committing theft. The trial court nonetheless revoked his probation and sentenced him to eight years'

imprisonment. On appeal, Mercer contends that there was insufficient evidence that he committed theft. Without proof that he committed theft, Dorsey maintains that revocation of his probation was error.

Where an appellant challenges the sufficiency of the evidence to support the trial court's order, we review the evidence in the light most favorable to the trial court's findings. *Jackson v. State*, 645 S.W.2d 303, 305 (Tex. Crim. App. 1983). Our review is limited to a determination of whether the trial court abused its discretion. *Id.* In a probation revocation proceeding, the State's burden of proof is a preponderance of the evidence. *Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993); *Jenkins v. State*, 740 S.W.2d 435, 437 (Tex. Crim. App. 1983). When an offense is the basis for a revocation of probation, the State must prove every element of the offense by a preponderance of the evidence. *See Grant v. State*, 566 S.W.2d 954, 956 (Tex. Crim. App. 1978); *Wilson v. State*, 671 S.W.2d 120, 121 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, pet ref'd). Where the State has failed to meet its burden of proof, the trial court abuses its discretion in issuing an order to revoke probation. *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984).

The evidence most favorable to the revocation order shows that Fortenberry had cashed his income tax refund check on the day that Mercer choked him. After he cashed his check, Fortenberry went to his friend Chuck McDaniel's house, pulled out his money, and repaid McDaniel for a twenty-dollar loan. Later, several other men, including Mercer, came to McDaniel's house. All the men drank beer together and eventually drove in separate vehicles to some nearby dirt trails. After walking around the trails, Fortenberry decided to go to the store and started walking towards his car. Suddenly and without provocation, Mercer hit him from behind, busted his lip, and bloodied his nose. Then Mercer choked him until he was unconscious. Mercer was only person who attacked him and was the last person that Fortenberry recalled touching him before he lost consciousness. When Fortenberry awoke, his wallet with the \$885 tax refund was gone, and the three other men were standing nearby laughing. This is sufficient circumstantial evidence to support the conclusion that Mercer took the wallet after incapacitating Fortenberry.

Mercer, however, contends that this evidence only proves a fight between Fortenberry and him. At the revocation hearing, Mercer testified that he did not take Fortenberry's money, but McDaniel did. After they left the dirt trails, McDaniel tossed the empty wallet out his car's window and told Mercer that Fortenberry owed him over \$500. Mercer denied knowing that Fortenberry had a large amount of money with him, and he denied planning the theft with the other men. Thus, he submits there is no evidence that he stole the money, that he intended to steal the money, or that he acted as a party to another's theft. Mercer argues that evidence showing

an equal likelihood of innocence and guilt is not sufficient to revoke probation, citing *Allen v. State*, 786 S.W.2d 738, 740-41 (Tex. App.—Fort Worth 1990), *pet. dismiss'd, improvidently granted*, 841 S.W.2d 7 (Tex. Crim. App. 1992).

We disagree that the evidence showed an equal likelihood of innocence because Mercer attacked Fortenberry with the purpose of incapacitating him. Additionally, the trial court is the sole judge of the credibility of the witnesses and the weight to give each's testimony. *Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App. [Panel Op.] 1981). The trial court also has the exclusive province to reconcile conflicting evidence. *Amado v. State*, 983 S.W.2d 330, 332 (Tex. App.—Houston [1st Dist.] 1998, *pet. ref'd*). Thus, the trial court was free to find the State's circumstantial evidence more credible and to reconcile the evidence in favor of the State.

Because there is sufficient evidence that Mercer choked Fortenberry while committing theft, we overrule point of error one and affirm the trial court's judgment.

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Norman Lee  
Justice

Judgment rendered and Opinion filed December 9, 1999.

Panel consists of Justices Robertson, Cannon, and Lee.\*

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\* Senior Justices Sam Robertson, Bill Cannon, and Norman Lee sitting by assignment.