NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

FRANK DAVID BERRY III, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D19-2340

Opinion filed November 13, 2020.

Appeal from the Circuit Court for DeSoto County; Don T. Hall, Judge.

Howard L. Dimmig, II, Public Defender, and Robert D. Rosen, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Donna S. Koch, Assistant Attorney General, Tampa, for Appellee.

BLACK, Judge.

Following a jury trial in DeSoto County, Frank Berry was convicted of insurance fraud (less than $20,000) in violation of sections 817.234(1)(a)(1) and

817.234(11)(a), Florida Statutes (2017), a third-degree felony, and unlawful use of a two-way communications device in violation of section 934.215, Florida Statutes (2017), also a third-degree felony. He was sentenced to concurrent five-year prison terms. On appeal, Berry challenges only his conviction and sentence for unlawful use of a two-way communications device, arguing that the trial court erred in denying his motion for judgment of acquittal because the State failed to prove that Berry committed the crime in DeSoto County as charged in the third amended information. We agree and reverse Berry's conviction and sentence for unlawful use of a two-way communications device.

The third amended information charged Berry with violating section 934.215 based on his use of "a portable two-way wireless communications device" on or about December 7, 2017, in DeSoto County. To prove a violation of section 934.215, the State was required to establish that Berry used a two-way communications device for the purpose of facilitating or furthering the commission of a felony. See § 934.215; Sanchez v. State, 270 So. 3d 515, 520 (Fla. 2d DCA 2019) ("As is clear from the statutory language, [section 934.215] has two elements: '(1) the use of a two-way communications device (2) for the purpose of facilitating or furthering the commission of any felony offense.' " (quoting Holt v. State, 173 So. 3d 1079, 1082 (Fla. 5th DCA 2015))). "Critical to this offense is that the statute criminalizes the use of the communications device to further or facilitate a felony . . . ." Sanchez, 270 So. 3d at 520. And because the State alleged venue in DeSoto County, the State was required to prove that the crime had been committed there. See Jackson v. State, 37 So. 3d 370, 372 (Fla. 2d DCA 2010); McClellion v. State, 858 So. 2d 379, 381 (Fla. 4th DCA 2003).

The evidence presented at trial established that a car accident involving

Berry's vehicle had occurred on December 1, 2017, in DeSoto County. Berry had not been in his vehicle, which was parked in a parking lot, at the time of the accident. Nonetheless, on December 7, 2017, Berry called United Automobile Insurance Company, which is based in Miami-Dade County, claiming that he had been in his vehicle at the time of the accident and had been injured. The recording of the call to the insurance company, which was played for the jury, established that Berry was driving while on the phone with the insurance company representative. During the call, Berry provided the representative with a DeSoto County P.O. Box mailing address and informed the representative that he had sought medical care at a hospital in DeSoto County on December 1 following the car accident. Berry did not tell the representative where he was located while on the call, and the State did not introduce any other evidence to establish that Berry was in DeSoto County while he was on the phone with the representative. At the close of the State's case, Berry moved for a judgment of acquittal, arguing that the State had failed to prove venue. The motion was renewed at the close of all the evidence. The trial court denied the motion.

We review the denial of a motion for judgment of acquittal de novo and will uphold a conviction that is supported by competent substantial evidence. Johnson v. State, 238 So. 3d 726, 739 (Fla. 2018). In this case, the State failed to present any evidence establishing that Berry used a cell phone in DeSoto County to facilitate the commission of insurance fraud. Nonetheless, the State contends that affirmance is required because Berry waived his right to challenge venue or, alternatively, that it proved venue by the preponderance of the evidence because the car accident occurred in DeSoto County and it presented evidence that Berry's actions relating to the

insurance fraud—the crime facilitated by the phone call—following the car accident had occurred in DeSoto County.

Because venue is not an element of the crime, it need only be proven by a preponderance of the evidence. Monroe v. State, 14 So. 3d 1205, 1209 (Fla. 4th DCA 2009). Moreover, "[v]enue is not a jurisdictional prerequisite and does not affect the power of a court to hear a case, but is a privilege which may be waived." McClellion, 858 So. 2d at 381 (citing Tucker v. State, 459 So. 2d 306, 308 (Fla. 1984)).

The State argues that Berry waived the venue issue because he failed to raise it prior to trial. To the extent possible, raising the issue of venue prior to trial is preferred. See McClellion, 858 So. 2d at 382. Nonetheless, this issue is commonly raised when moving for a judgment of acquittal, see Johnson, 238 So. 3d at 739; Jackson, 37 So. 3d at 372; State v. Dreyer, 594 So. 2d 327, 328 (Fla 2d DCA 1992); State v. Crider, 625 So. 2d 957, 958 (Fla. 5th DCA 1993), and doing so is generally sufficient to preserve the issue, see Lee v. State, 260 So. 2d 878, 878 (Fla. 1st DCA 1972) (holding that the defendant preserved the claim that the State presented insufficient proof of venue by timely filing a motion for judgment of acquittal); cf. Monroe, 14 So. 3d at 1208, 1210 ("Defendant did not raise venue either during or after the trial. He did not raise the issue in his motion for judgment of acquittal. He filed no motion for a new trial based on the failure to prove venue as charged. He did nothing in the trial court to alert the Judge or the State that he had any issue regarding venue. . . . [H]e [therefore] waived the issue by failing to raise it in the trial court." (footnote omitted)). Moreover, there are no other circumstances present in this case evincing waiver. See, e.g., State v. Kotecki, 82 So. 3d 1150, 1152 (Fla. 2d DCA 2012) ("When a defendant

requests and obtains a change of venue, he waives the right to be tried in the transferring county even if this was where the crime was committed."); Dean v. State, 414 So. 2d 1096, 1098-99 (Fla. 2d DCA 1982) (holding that the plea colloquy indicated that the defendants had waived the right to challenge venue); Kitchen v. State, 965 So. 2d 252, 253 (Fla. 4th DCA 2007) ("We find that defense counsel's explicit acceptance of the trial's location in St. Lucie County constituted an express waiver of the issue, precluding Kitchen from raising the issue on appeal. Where crimes occur in two counties, a defendant can waive an objection to a venue issue by agreeing to a trial of all issues in one county." (citing McClellion, 858 So. 2d at 382)). See generally Braddy v. State, 111 So. 3d 810, 835-36 (Fla. 2012) (holding that defendant was not entitled to relief on his untimely claim that there was insufficient proof of venue—an issue that was first raised more than two months after trial—where there was no justification for the delay in raising the issue in light of the fact that he had failed to object to the indictment at his arraignment despite his counsel's express recognition that "[t]here are three jurisdictions" involved and failed to object to the State's statement of particulars indicating that the offence occurred in one of three locations (alteration in original)). Thus, we find no merit in the State's assertion that the venue issue has been waived.

The State's alternative argument in support of affirmance is also without merit. The fact that the car accident occurred in DeSoto County, that Berry provided the insurance company representative with a P.O. Box mailing address in DeSoto County, or that Berry sought medical care at a hospital in DeSoto County in no way proved by a preponderance of the evidence that Berry used a cell phone while in DeSoto County to facilitate insurance fraud on December 7. Cf. Powell v. State, 181 So. 901, 901 (Fla.

1938) (holding that testimony establishing that both the defendant and the owner of the stolen bull lived in Holmes County was insufficient to prove that the theft of the bull occurred in that county); State v. Cisneros, 106 So. 3d 42, 44-45 (Fla. 2d DCA 2013) (affirming the dismissal of the charges of violating the Racketeer Influenced and Corrupt Organization Act (RICO), conspiracy to commit RICO, and conspiracy to traffic in cocaine based on improper venue where the State "failed to prove that the ringleader was in any of the counties alleged in the informations at the time he spoke with Cisneros or that Cisneros travelled through any of the counties alleged prior to her apprehension"); Jackson, 37 So. 3d at 372 ("[T]he evidence showed that Jackson possessed a trafficking amount of cocaine, but there was no proof that he possessed it in Hillsborough County [as charged]."); Pennick v. State, 453 So. 2d 542, 544 (Fla. 3d DCA 1984) ("[E]vidence that the victim of the shooting was treated at a hospital located in Dade County hardly serves to prove the venue of the crime.").

Because the State failed to prove that Berry unlawfully used his phone in DeSoto County as charged in the third amended information, the trial court erred in denying his motion for judgment of acquittal. See Jackson, 37 So. 3d at 373. We therefore reverse Berry's conviction and sentence for unlawful use of a two-way communications device. Berry may, however, be retried for this offense in the proper venue—even if it turns out to be DeSoto County. See Powell, 181 So. at 901; McKinnie v. State, 32 So. 786, 786 (Fla. 1902); Jackson, 37 So. 3d at 372-73; Monroe, 14 So. 3d at 1208 n.1; McClellion, 858 So. 2d at 382 & n.2.

Affirmed in part; reversed in part.

NORTHCUTT and SLEET, JJ., Concur.