Opinion issued August 25, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00239-CR

CHRISTIAN SAUDER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 1
Fort Bend County, Texas
Trial Court Case No. 16-CCR-187341

MEMORANDUM OPINION

A jury convicted appellant, Christian Sauder, of the Class B misdemeanor offense of false identification as a peace officer and assessed his punishment at 180

days' confinement and a $2,000 fine.[1] In two issues, appellant contends that (1) the trial court erred in admitting evidence of appellant's prior criminal history during the punishment phase of trial because the State did not properly authenticate the evidence; and (2) the State failed to present sufficient evidence that venue was proper in Fort Bend County.

We affirm.

Background

Officer J. Edgar worked for the Harris County Constable's Office for several years and then worked for the Milano Police Department, located near College Station. Around the end of 2014 or the beginning of 2015, Edgar met appellant through a mutual friend who decided to introduce them because he thought they were both police officers. Appellant has never been a police officer. Edgar's friend introduced appellant to Edgar as "Jacob Reed Miles," and appellant also stated that this was his name. Appellant told Edgar that he was employed as a reserve peace officer for the Fort Bend County Sheriff's Office, and he showed Edgar an identification card "that resembled a police I.D." and that stated "Fort Bend County." Edgar could not remember if this card stated "Miles" or "Reed" as the last name, but he testified that it "definitely had Jacob for the first name."

[1] *See* TEX. PENAL CODE ANN. § 37.12(a).

Edgar continued meeting up with appellant and "a small group of police officers that would go and hang out after work" approximately three or four times per month. This group accepted appellant and had no reason to question who he was because appellant had police identification, he was familiar with the Penal Code, and he used police terminology. Edgar testified that the group met up in bars in the Montrose area of Houston, which is located in Harris County. Appellant had a social media account under the name "Jacob Miles" and that account had appellant's "pictures on it and pictures of when [appellant, Edgar, and their group of friends] would go out to places."

Edgar testified that he saw appellant wear a badge clipped onto his belt "[n]ot all the time," but perhaps "half the time" he saw appellant. He stated, "It was more towards the end of the times that we were hanging out. Not at the very beginning." When the State asked Edgar how often he saw appellant wear a badge, Edgar stated:

> It was towards the end. I'd say towards the end—beginning of—or middle of 2015. I'm sorry. Middle of 2015 towards the end he always would have it. Every time that we give each other—we would always—everyone would, you know, give each other a hug and everything and you can feel when—you can feel the badge. You can—most of the time you would see it if the shirt got lifted up or something like that.

Edgar stated that he knew that what he felt was a badge because "it's a second nature" to police officers and that "when you give somebody a hug, you can feel either a badge or something else that would be on their belt." Edgar identified a photograph of a badge, which stated "Fort Bend County Sheriff's Office," as the

badge he saw appellant wearing. Edgar stated that the badge was "an exact copy of the Fort Bend County Sheriff's badge. If not an actual badge."

Edgar also testified that he had been to appellant's house on one occasion, on September 6, 2014. Edgar did not recall appellant's address, but he knew that appellant lived in Missouri City, Texas, which is in Fort Bend County. Edgar went inside appellant's house, and, while he was inside, he saw on the kitchen counter a digital "encrypted radio" that can only be acquired from a police department, a firearm that appeared to be police issue, and the badge he had seen appellant wearing on other occasions.[2] On cross-examination, Edgar stated that he almost always met with appellant in Harris County and that he did not know if appellant was arriving from his home in Fort Bend County or if he went home after they got together.

In September 2015, Edgar and appellant attended a funeral for a police officer in Houston, and Edgar saw appellant's badge on his belt. Appellant was wearing a suit, instead of a dress uniform, and Edgar found that suspicious. Appellant said he could not wear his dress uniform because it was torn or worn out, which Edgar also considered strange because officers rarely wear their dress uniforms.

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[2] Edgar testified that he had also seen appellant with all three of these items—the badge, the radio, and the gun—while eating lunch with appellant at a restaurant in Houston. On that occasion, appellant had also been wearing a polo shirt with Fort Bend County Sheriff's Office on it.

Eventually, Edgar learned that appellant's name was not "Jacob Miles" and that he was not a police officer, and he confronted appellant about this via text message. Edgar informed his commanding officer at the Milano Police Department, who instructed him to write a report. Edgar did so, and he sent the report to the Houston Police Department (HPD), the Harris County Sheriff's Office, and, at the direction of HPD, the Fort Bend County Sheriff's Office. Edgar took possession of two badges appellant had in his possession and he gave the badges to the Fort Bend County Sheriff's Office.[3]

Deputy S. Kitchens, with the Harris County Constable's Office, testified that he was also introduced to appellant, who gave his name as "Jacob Miles Reed," by a mutual friend. At the time they met, appellant said that he wanted to be a police officer, but he later said that he was a licensed peace officer. Kitchens, appellant, and others typically met at a bar in the Montrose area every Thursday night, and appellant had a "deputy's badge" that said Fort Bend County on it. Kitchens saw appellant with this badge every time they got together, and appellant wore the badge clipped to his belt, next to a firearm. Kitchens testified that, most of the time, appellant would be coming from his home to the bar, and he stated that he knew this

[3] On cross-examination, Edgar agreed that he could not say for certain whether the badge that he collected from appellant was the same badge that he had previously seen appellant wearing and in appellant's house. He stated that the front of the Fort Bend County badges do not have an identifying mark "that differentiates one from the other."

because appellant would text him and say that "he was home getting ready, showering, getting dressed." At one point, Kitchens sold appellant a firearm, but when he learned appellant's true identity, he took the gun back from appellant.

Lieutenant R. Grimmer, with the Fort Bend County Sheriff's Office, received two badges from Edgar, one of which was a Fort Bend County Sheriff's Office Deputy badge. Grimmer interviewed appellant, and appellant admitted that he had had the badges in his possession. Grimmer testified that appellant was never employed by the Fort Bend County Sheriff's Office.

On cross-examination, Grimmer agreed that he never saw appellant in possession of the badge in Fort Bend County and that the only person who reported that appellant possessed the badge in Fort Bend County was Officer Edgar. He also agreed that appellant "never admitted to displaying the badge in Fort Bend County." Grimmer also testified that, during his investigation, he learned that appellant ordered the badge on September 30, 2014, and had it shipped to an address in Houston, not to his home in Missouri City. He stated that appellant told him that he had the badge for display, but Grimmer had never been to appellant's home, so he did not know if he kept a collection there.

On re-direct examination, Grimmer testified that appellant explained how he obtained the badge and told him that he displayed it "[i]n his house and also on his person."

After the State rested, defense counsel moved for a directed verdict, arguing that the State had failed to prove that venue was proper in Fort Bend County. Defense counsel pointed to Edgar's testimony that he saw the badge in appellant's house in Missouri City on September 6, 2014, but argued that this testimony was contradicted by Grimmer's testimony that appellant did not order the badge until September 30, 2014. The trial court stated, "[A]lthough the links to Fort Bend County may be weak, a scintilla of evidence was presented by the State," and the court denied the motion for directed verdict.

The jury found appellant guilty of the offense of false identification as a peace officer.

During the punishment phase, Deputy D. Turner, with the Fort Bend County Sheriff's Office, fingerprinted appellant in court, and the trial court admitted the card reflecting these fingerprints. The State then showed Deputy Turner Exhibit 8, a business records affidavit from the custodian of records for the Tarrant County Sheriff's Office, which was attached to a fingerprint card and mugshots identifying appellant and purportedly taken in conjunction with a 2006 offense for injury to a child. Defense counsel objected to Exhibit 8, arguing that, while it had a file stamp, there was no proof that it had been on file with the court fourteen days before trial. The trial court and counsel for the parties had the following exchange:

State: Incorrect. It was timely filed. You can see it on the docket sheet.

The Court: May I see the State's Exhibit 8, please? What was the date of filing?

State: I'm double checking that before I—that would be March 6, 2019. May we approach?

The Court: You may.

State: One second, Judge. I'm just clarifying this really quick. March 6th, 2019, which would have been 20 days before trial [which began on March 26, 2019]. Attached to a final amended witness list to include the fingerprint expert from the sheriff's office that we located at the jail.[4] Per our conversation or e-mail yesterday, the prints in the affidavit for business record's use were transported to the sheriff's office for assessment of viability and terms of identification has been notices—filed on the 13th day prior to trial rather than the 14th day and at any rate a copy of both notice and business record use and amended witness list have been included in this e-mail. Sent March 6th. For all intents and purposes, notice was given. It could have not been physically filed on the 13th day because it was being identified by this witness as a viable print as per standard procedure.

Now, as for any other notice issues, I do not see that. We are here solely because of this evidence here, so.

Defense counsel: Judge, that's not her objection. Objection is the answer hasn't been on file with the Court's file 14 days prior to trial. Not that—

[4] The appellate record includes a document entitled "Amended List of Witnesses for Case In Chief/Punishment and Designation of Expert Witnesses" that was filed by the State and file-stamped on March 6, 2019. This filing listed Deputy Turner as a potential witness "regarding fingerprint analysis." The record does not include any attachments—such as Exhibit 8—to this filing. Exhibit 8 appears in the appellate record, but there is no indication on this exhibit when it was served upon defense counsel.

State: And this is our good cause exception.

Defense counsel: Not by e-mail. There's no good cause exception. You have it, or you don't.

State: No.

The trial court overruled defense counsel's objection and admitted Exhibit 8. Deputy Turner compared the fingerprint card contained in Exhibit 8 with appellant's fingerprints taken in court and concluded that they matched.

The trial court also admitted, without objection, Exhibit 10, a certified copy of an order of deferred adjudication from the 372nd District Court in Tarrant County in 2009,[5] reflecting that appellant pleaded guilty to the offense of injury to a child and that the trial court deferred adjudication of guilt and placed appellant on community supervision for ten years. This order reflected that appellant was required to register as a sex offender. Attached to the order of deferred adjudication were appellant's conditions of community supervision, as well as the indictment for that case. The incident number listed on Exhibit 10 matched a number present on Exhibit 8, as did the date of offense, and identifying information about appellant, including his name and date of birth.

The jury assessed appellant's punishment at 180 days' confinement and a $2,000 fine. This appeal followed.

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[5] The order lists the "Date of Offense" as September 29, 2006, but the order was not signed until November 24, 2009.

Admission of Evidence

In his first issue, appellant contends that the trial court erred by admitting, during the punishment phase, a business records affidavit with attached evidence of his prior criminal history because this evidence was not properly authenticated. Specifically, appellant contends that the State did not establish that it served the business records affidavit and the attached records pursuant to the requirements of Rule of Evidence 902(10).

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016); *Henriquez v. State*, 580 S.W.3d 421, 427 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Henley*, 493 S.W.3d at 83. Before we may reverse the trial court's decision admitting evidence, we must find that the ruling was "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Id.* (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008)).

For evidence to be admissible, it must be authenticated, meaning that the proponent of the evidence "must produce evidence sufficient to support a finding that the item is what the proponent claims it is." TEX. R. EVID. 901(a). Rule 902 provides that certain items of evidence are self-authenticating and "require no

extrinsic evidence of authenticity in order to be admitted." TEX. R. EVID. 902. Rule 902(10) provides for the admissibility of

> [t]he original or a copy of a record that meets the requirements of Rule [of Evidence] 803(6) or (7), if the record is accompanied by an affidavit that complies with subparagraph (B) of this rule and any other requirements of law, and the record and affidavit are served in accordance with subparagraph (A). For good cause shown, the court may order that a business record be treated as presumptively authentic even if the proponent fails to comply with subparagraph (A).
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> **(A)** ***Service Requirement.*** The proponent of a record must serve the record and the accompanying affidavit on each other party to the case at least 14 days before trial. The record and affidavit may be served by any method permitted by Rule of Civil Procedure 21a.

TEX. R. EVID. 902(10)(A);[6] TEX. R. EVID. 803(6) (setting out business records exception to hearsay rule). Rule 902(10)(B) sets out suggested language for the affidavit and provides that an affidavit is sufficient if it includes that language. TEX. R. EVID. 902(10)(B). Rule of Civil Procedure 21a provides several permissible methods for service of documents, including service in person, by mail, by commercial delivery service, by fax, by email, through an electronic filing manager, or "by such other manner as the court in its discretion may direct." TEX. R. CIV. P.

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[6] Rule 902(10)(A) was amended in 2013. Prior to 2013, this rule provided that business records could be self-authenticating if the records and a compliant affidavit were filed with the trial court clerk at least fourteen days prior to the start of trial and the other parties were given prompt notice of the filing. TEX. R. EVID. 902(10)(a) (amended 2013). The pre-2013 version of the rule also provided, "Notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule 21a, Texas Rules of Civil Procedure, fourteen days prior to commencement of trial in said cause." *Id.*

21a(a). "A certificate by a party or an attorney of record, or the return of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service." TEX. R. CIV. P. 21a(e).

To preserve a complaint for appellate review, the complaining party must make the complaint to the trial court by timely request, objection, or motion that states the grounds for the ruling sought with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. TEX. R. APP. P. 33.1(a)(1)(A). The complaining party must "let the trial judge know what [he] wants and why [he] thinks [he] is entitled to it," and the party must "do so clearly enough for the judge to understand and at a time when the trial court is in a position to do something about it." *Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014) (quoting *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)). Courts are not "hyper-technical" when determining whether error was preserved, "but the point of error on appeal must comport with the objection made at trial." *Id.*

Here, during the punishment phase of appellant's trial, the State offered Exhibit 8, a business records affidavit attached to appellant's fingerprints and mugshots in connection with a 2006 injury to a child offense. Defense counsel made the following objection: "Judge, I'm going to object to the Business Records Affidavit. All it shows is that there is proof of a file stamp. Not that it has been on

file as per the code 14 days before trial." The State argued that it had filed Exhibit 8 on March 6, 2019, twenty days before trial, and that it emailed an amended witness list to defense counsel on March 6, with Exhibit 8 attached.

Defense counsel's objection at trial was that admission of Exhibit 8 was improper because the business records affidavit and the attached records had not been on file with the trial court for fourteen days. This was a requirement of the pre-2013 Rule 902(10), but it is not a requirement of the current Rule 902(10) in effect at the time of appellant's trial. Instead, the current version of Rule 902(10) requires the proponent of a business record who seeks to make that record self-authenticating with a business records affidavit to serve the record and accompanying affidavit on the opposing party at least fourteen days before trial in a manner authorized by Rule of Civil Procedure 21a. Defense counsel's trial objection, however, did not mention service of the business records and the accompanying affidavit. The entire discussion before the trial court focused on when the exhibit was filed with the court, not on when or how the State served the exhibit on defense counsel. The State mentioned, "Now, as for any other notice issues, I do not see that." Co-defense counsel responded, "Objection is the answer hasn't been on file with the Court's file 14 days prior to trial." We conclude that appellant's argument on appeal that the State did not properly serve Exhibit 8 on defense counsel pursuant to Rule 902(10)(A) does not comport with appellant's objection made at trial, and therefore appellant failed

to preserve this complaint for appellate review. *See* TEX. R. APP. P. 33.1(a)(1)(A); *Bekendam*, 441 S.W.3d at 300.

On appeal, appellant argues that he need not have objected on the basis of improper service of Exhibit 8 in the trial court because issues concerning defects in service can be raised for the first time on appeal. The case appellant cites for that proposition, *Arredondo v. State*, 844 S.W.2d 869 (Tex. App.—Texarkana 1992, no pet.), is inapposite. *Arredondo* was a civil asset forfeiture case, and the issue on appeal was whether Arredondo was properly served with citation after the State instituted forfeiture proceedings against him. *Id.* at 871. The State argued that Arredondo "could have proven a lack of citation at the hearing for a motion on a new trial," but the Texarkana Court of Appeals, citing civil case law, held that "[i]t is well settled, however, that a failure of service can be raised for the first time on appeal." *Id.* Proper service of citation implicates a trial court's personal jurisdiction over the defendant. *See, e.g.*, *Goss v. Sillmon*, 570 S.W.3d 319, 322 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (stating that purpose of citation "is to give the court proper jurisdiction over the parties, satisfy due process, and notify the defendant she has been sued so that she may appear and defend herself"); *see also Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990) ("Actual notice to a defendant, without proper service, is not sufficient to convey upon the court jurisdiction to render default judgment against him."); *Lee Hoffpauir, Inc. v. Kretz*, 431 S.W.3d

776, 780 (Tex. App.—Austin 2014, no pet.) (concluding that defendant may raise complaint of defective service of citation for first time on appeal).

This case, however, does not concern service of citation or any matter that implicates the trial court's jurisdiction over appellant or over the case itself. Instead, appellant complains on appeal that, during the pendency of the case, the State failed to serve him with business records and accompanying affidavit at least fourteen days before trial, as required by Rule 902(10)(A). Failure to comply with this rule renders the exhibit not self-authenticating, meaning that the State, if it did not comply with the rule, would need extrinsic evidence, such as the live testimony of the custodian of records, to authenticate the exhibit. *See* TEX. R. EVID. 902 (providing that items of evidence listed in rule are "self-authenticating" and "require no extrinsic evidence of authenticity in order to be admitted"). This is the type of complaint that should be raised in the trial court and not for the first time on appeal. We conclude that appellant was required to object in the trial court on the basis that the State did not properly serve the records under Rule 902(10)(A) as a prerequisite to raising the issue on appeal. Because appellant did not, he has failed to preserve the complaint for appellate review. *See* TEX. R. APP. P. 33.1(a).

We overrule appellant's first issue.[7]

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[7] Furthermore, even if appellant had preserved his complaint for appellate review and the State failed to establish that it served defense counsel with the records contained in Exhibit 8 at least fourteen days before trial, we agree with the State that any error

Venue

In his second issue, appellant contends that the State failed to establish, by a preponderance of the evidence, that venue was proper in Fort Bend County. He argues that the evidence establishes, instead, that venue was proper in Harris County, but after the Harris County District Attorney's Office declined to charge him, law enforcement improperly engaged in forum shopping and pursued charges in Fort Bend County, despite "weak" evidence that venue was proper in that county.

Generally, venue is proper in the county in which the defendant committed the offense. TEX. CODE CRIM. PROC. ANN. art. 13.18. Venue, however, is not an element of a criminal offense under Texas law. *Schmutz v. State*, 440 S.W.3d 29, 34 (Tex. Crim. App. 2014). "Although venue must be proven 'at trial to establish a

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in admitting the records would be harmless. The trial court admitted, without objection, Exhibit 10, which was the order from the 372nd District Court of Tarrant County placing appellant on community supervision for ten years for the offense of injury to a child and requiring appellant to register as a sex offender. Exhibit 10 also included appellant's terms and conditions of community supervision. Even if, as appellant argues on appeal, Exhibit 10 was "irrelevant and inadmissible" without the fingerprints and mugshots contained in Exhibit 8, Exhibit 10 was admitted without objection and became part of the evidence in the case. Exhibit 8 was, therefore, not the only evidence of appellant's criminal history admitted during the punishment stage; the trial court also admitted Exhibit 10. We conclude that any error in admitting Exhibit 8 did not have a substantial and injurious effect or influence in determining appellant's punishment and, therefore, was harmless. *See* TEX. R. APP. P. 44.2(b); *Hernandez v. State*, 939 S.W.2d 665, 670–71 (Tex. App.—El Paso 1996, pet. ref'd) (holding that error in admitting medical records when State did not comply with previous version of Rule 902(10) was harmless, in part because testimony properly admitted from witnesses covered same information as evidence contained in medical records).

defendant's [legal] status,' that 'does not convert' venue into an 'element[] of the proscribed offense.'" *Id.* at 35 (quoting *State v. Mason*, 980 S.W.2d 635, 641 (Tex. Crim. App. 1998)). In a criminal case, the State must prove venue by a preponderance of the evidence. TEX. CODE CRIM. PROC. ANN. art. 13.17; *Murphy v. State*, 112 S.W.3d 592, 604 (Tex. Crim. App. 2003); *Cox v. State*, 497 S.W.3d 42, 56 (Tex. App.—Fort Worth 2016, pet. ref'd). Venue may be established by direct or circumstantial evidence, and the jury may draw reasonable inferences from the evidence to decide the issue of venue. *Thompson v. State*, 244 S.W.3d 357, 362 (Tex. App.—Tyler 2006, pet. dism'd). When determining whether the State presented sufficient evidence of venue, we view all of the evidence in the light most favorable to the verdict and then determine whether a rational factfinder could have found that venue was proper by a preponderance of the evidence. *Dewalt v. State*, 307 S.W.3d 437, 457 (Tex. App.—Austin 2010, pet. ref'd) (quoting *Gabriel v. State*, 290 S.W.3d 426, 435 (Tex. App.—Houston [14th Dist.] 2009, no pet.)). Failure to prove venue does not implicate the sufficiency of the evidence supporting conviction, and it does not require an acquittal. *Schmutz*, 440 S.W.3d at 35.

Appellant was charged with the offense of false identification as a peace officer. Penal Code section 37.12(a) provides:

> A person commits an offense if:
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> (1) the person makes, provides to another person, or possesses a card, document, badge, insignia, shoulder emblem, or other item,

including a vehicle, bearing an insignia of a law enforcement agency that identifies a person as a peace officer or a reserve law enforcement officer; and

(2) the person who makes, provides, or possesses the item bearing the insignia knows that the person so identified by the item is not commissioned as a peace officer or reserve law enforcement officer as indicated on the item.

TEX. PENAL CODE ANN. § 37.12(a). The statute provides that it does not apply if "the item was used or intended for use exclusively for decorative purposes or in an artistic or dramatic presentation." *Id.* § 37.12(b-1). There is no special venue provision applicable to this offense; therefore, the general venue rule, that venue is proper in the county in which the defendant committed the offense, applies. *See* TEX. CODE CRIM. PROC. ANN. art. 13.18; *Meraz v. State*, 415 S.W.3d 502, 506 (Tex. App.—San Antonio 2013, pet. ref'd).

The jury charge, which tracked the language of section 37.12(a) and the information, instructed the jury to find appellant guilty if it found beyond a reasonable doubt that, in Fort Bend County, appellant "did then and there intentionally or knowingly possess a badge bearing an insignia of Fort Bend County Sheriff's Office that identified a person as a peace officer, and [appellant] knew that he was not commissioned as a peace officer as indicated on the badge."

The evidence at trial indicated that when appellant met up with his police officer friends—and when they would see the Fort Bend County Sheriff's Office badge clipped to his belt—they would be at bars and restaurants located in Harris

County. Officer Edgar testified that he visited appellant's house in Missouri City, in Fort Bend County, on September 6, 2014, and that he saw the badge sitting on appellant's kitchen counter, next to a radio and a firearm. This evidence, however, was contradicted by Lieutenant Grimmer's testimony that appellant did not order the badge until September 30, 2014, and that he had it shipped to an address in Houston, and not to his house in Fort Bend County. Deputy Kitchens testified that he and others met up with appellant at a bar every Thursday night and that appellant, who had the badge clipped to his belt, typically arrived at the bar directly from his house. Kitchens testified that appellant would text him prior to going to the bar and say that "he was home getting ready, showering, getting dressed."

Section 37.12(a) criminalizes, among other things, the *possession* of a badge bearing the insignia of a law enforcement agency that identifies a person as a peace officer or reserve officer when the person who possesses the badge knows that they are not commissioned as a peace officer or reserve officer. This statute does not require that the badge be *displayed*. There is ample evidence in the record that appellant possessed and displayed the badge in Harris County. However, venue may be established by direct or circumstantial evidence, and the jury may draw reasonable inferences from the evidence to determine the issue of venue. *See Thompson*, 244 S.W.3d at 362. The evidence presented was disputed, but the jury could have concluded, based on the testimony that appellant lived in Fort Bend

County and that he would sometimes arrive at the bar in Harris County, carrying the badge with him, from his house, that appellant possessed the badge in Fort Bend County as well. Considering the evidence in the light most favorable to the verdict, a rational factfinder could have found, by a preponderance of the evidence, that venue was proper in Fort Bend County. *See Dewalt*, 307 S.W.3d at 457.

Even if, however, the State failed to present sufficient evidence showing that venue was proper in Fort Bend County, we conclude that this error was harmless. Failure to prove venue is non-constitutional error, and it is subject to a harm analysis under Texas Rule of Appellate Procedure 44.2(b). *Schmutz*, 440 S.W.3d at 39. Under Rule 44.2(b), a non-constitutional error that "does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b). A defendant's substantial rights are affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *Schmutz*, 440 S.W.3d 39. When determining the likelihood of whether the jury's decision was adversely affected by the error, we consider the entire record, including testimony, physical evidence, jury instructions, the parties' theories of the case, closing arguments, and voir dire, if applicable. *Id.*

Venue controls "only the geographic location where the case was to be tried"; it does not "impact the district court's jurisdiction," nor is it "an element of any charge or potential defense in this case." *Dewalt*, 307 S.W.3d at 460; *Thompson*, 244 S.W.3d at 365. When considering whether a venue error caused harm to the

defendant, we consider whether the venue error inconvenienced the defendant, whether the defendant had notice that he would be prosecuted in the improper county, whether the venue allegation misled the defendant or prevented him from presenting a defense, and whether there was a showing that the jury in the improper county was impartial. *Thompson*, 244 S.W.3d at 365–66. Because venue is not an element of a criminal offense, venue errors typically do not prejudice the jurors' decision making process; even though venue might be improper, the jurors are "still able to properly apply the law to the facts finding proof of all elements" of the offense. *Id.* at 366.

Here, the information alleged that the criminal offense occurred in Fort Bend County. Appellant had notice that the trial would occur in Fort Bend County. There is no indication that he was misled by the venue allegations or that, due to the venue allegations, he was somehow prevented from presenting a defense. There is also no indication in the record that the Fort Bend County jury was not impartial. *See Thompson*, 244 S.W.3d at 365–66.

Appellant argues, however, that the State, in initiating a criminal proceeding against him in Fort Bend County, clearly engaged in forum shopping, rendering the venue error harmful. In making this argument, appellant points out that the State first sought charges in Harris County, but the Harris County District Attorney's Office did not accept the charges and declined to prosecute. The State then sought charges

in Fort Bend County, and the Fort Bend County District Attorney's Office agreed to prosecute appellant. Appellant argues that this is "unambiguous" proof of harm because the record shows that "on crossing into Fort Bend County, Texas, this case went from the rejection of charges, to the maximum possible punishment."

We disagree that the record demonstrates that the State engaged in impermissible forum shopping. "Venue statutes function to ensure that jurors have a natural interest in the case because it touched their community; to ensure that prosecutions are initiated in counties that have some factual connection to the case, thus minimizing inconvenience to parties and witnesses; to aid predictability in judicial caseloads[;] and to prevent forum-shopping by the State." *Dewalt*, 307 S.W.3d at 460; *Thompson*, 244 S.W.3d at 366 ("The reasonableness of the choice of venue is in part determined by whether the criminal acts in question bear 'substantial contacts' with that venue."); *see also Soliz v. State*, 97 S.W.3d 137, 141 (Tex. Crim. App. 2003) ("Texas venue statutes are a species of codified 'substantial contacts' jurisdiction; thus, for venue to lie, the defendant, his conduct, his victim, or the fruits of his crime must have some relationship to the prosecuting county.").

Here, both Harris and Fort Bend Counties have a "factual connection" to the case. Appellant wore the badge while socializing with police officers in Harris County, but he lived in neighboring Fort Bend County, and the badge itself purported to be the badge of a Fort Bend County Sheriff's Deputy. There is no indication in

the record of why the Harris County District Attorney's Office declined to accept charges against appellant. Although appellant's conduct has a greater connection with Harris County, we cannot conclude that the connection with Fort Bend County is so tenuous that, in bringing charges against appellant in Fort Bend County, the State engaged in impermissible forum shopping. We therefore conclude that, even if the State failed to prove by a preponderance of the evidence that venue was proper in Fort Bend County, this error did not prejudice appellant's substantial rights and was therefore harmless.

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Kelly, and Landau.

Do not publish. TEX. R. APP. P. 47.2(b).