COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00245-CR

NICHOLAS RODRIGUEZ — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 30TH DISTRICT COURT OF WICHITA COUNTY
TRIAL COURT NO. 54,703-A

MEMORANDUM OPINION[1]

A jury convicted Appellant Nicholas Rodriguez of the offense of failure to comply with registration requirements. The trial court sentenced Appellant to imprisonment for three years, suspended the sentence, and placed Appellant on community supervision for two years. The trial court also assessed a $1,000 fine. In his first point, Appellant contends that the evidence was insufficient to support his conviction. Specifically, Appellant argues that he was indicted for

[1]*See* Tex. R. App. P. 47.4.

failing to register his completed move to Vernon in Wilbarger County, but the evidence focused only on his failure to register his anticipated move out of Wichita Falls in Wichita County. In Appellant's second point, he argues that the jury charge contained egregious error. He asserts that he was indicted for failing to register his completed move to Vernon in Wilbarger County, but the trial court's jury charge focused exclusively on his failure to register his intended move out of Wichita Falls in Wichita County. We affirm.

BACKGROUND

The Statute

The registration statute provides,

> (a) [1] *If a person* required to register under this chapter *intends to change address*, regardless of whether the person intends to move to another state, the person shall, *not later than the seventh day before the intended change*, report in person to the local law enforcement authority designated as the person's primary registration authority by the department and to the juvenile probation officer, community supervision and corrections department officer, or parole officer supervising the person and provide the authority and the officer with the person's anticipated move date and new address. [2] *If a person* required to register *changes address*, the person shall, *not later than the later of the seventh day after changing the address* or the first date the applicable local law enforcement authority by policy allows the person to report, report in person to the local law enforcement authority in the municipality or county in which the person's new residence is located and provide the authority with proof of identity and proof of residence.

Tex. Crim. Proc. Code Ann. art. 62.055(a) (West Supp. 2016) (emphasis added). There are two manner and means by which to commit the offense. *Thomas v. State*, 444 S.W.3d 4, 9 (Tex. Crim. App. 2014). First, by failing to tell the county

of your current residence of your intent to move seven days or more before the move. *See id.* Second, by failing to tell the county into which you moved within seven days after the move. *See id.*

The Indictment

In the indictment, the State alleged,

> The Grand Jury of Wichita County, State of Texas, . . . does present that [Appellant], hereinafter called defendant, on or about the 10th day of March, A.D. 2014, in said county and state did then and there, while being a person required to register with the local law enforcement authority in the municipality or county where the defendant resided or intended to reside for more than seven days, to-wit: Wichita ~~and/or Vernon~~, because of a reportable conviction for sexual assault, intentionally or knowingly fail to notify law enforcement about a change of address within seven days.

Appellant had no pretrial objection to the indictment. Appellant filed no motion to quash the indictment. Near the close of voir dire, the State abandoned the three words "and/or Vernon" in the indictment, and Appellant voiced no objection.

The Evidence

Appellant was a registered sex offender in Wichita Falls, Wichita County. After a tip, a Wichita Falls detective determined Appellant had abandoned his residence in Wichita Falls. After another tip, an officer in Vernon, Wilbarger County, located Appellant there, living with his girlfriend.[2]

[2]To the extent Appellant argued at trial that he had not moved and, therefore, did not need to report a change of address, Appellant concedes in his first point that the State proved Appellant failed to notify law enforcement in Wichita Falls of his intended move to Vernon. Appellant's complaint on appeal is that he was never indicted for any failure to report an intended move.

The Jury Charge

The jury charge provided,

> Now bearing in mind the forgoing instructions, if you find from the evidence beyond a reasonable doubt, that [1] the defendant, [Appellant], on or about the 10th day of March, 2014, in the County of Wichita, and the State of Texas, as alleged in the indictment, did then and there, while being a person required to register with the local law enforcement authority in the municipality or county where the defendant resided or intended to reside for more than seven days, [2] to wit: Wichita Falls, Texas, because of a reportable conviction for Sexual Assault, intentionally or knowingly fail to notify the local law enforcement authority of his intent to change addresses not later than the seventh day before the intended change, then you will find the defendant "Guilty" of the offense of Failure to Comply with Registration Requirements as alleged in the indictment.

The first part of the charge more closely tracks the language of the indictment. The second part of the charge more closely tracks the language of the first manner and means under article 62.055(a). Appellant had no objection to the charge.

The Conviction and the Subsequent Plea to the Jurisdiction

The jury found Appellant guilty on March 11, 2015. The trial court did not sentence Appellant until June 19, 2015. In the interim, Appellant filed his first objection to the indictment on April 15, 2015, in his "Plea to the Jurisdiction of the Court." He argued that the indictment was invalid because the trial court in Wichita County did not have subject matter jurisdiction over an offense allegedly committed within the jurisdiction of Wilbarger County. He also argued that the trial court in Wichita County did not have personal jurisdiction over Appellant because the offense alleged in the indictment occurred in Wilbarger County.

ARGUMENTS

Sufficiency of the Evidence

In his first point, Appellant contends that the evidence was insufficient to support his conviction because there was a fatal variance between the amended indictment and the court's charge. Appellant contends that the State proved the first manner and means—the failure to report an anticipated move—under article 62.055(a) but indicted him for the second manner and means—the failure to report a completed move—and failed to prove the second manner and means. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Appellant focuses on the language in the indictment that provides that he did "intentionally or knowingly fail to notify law enforcement about a change of address within seven days." Appellant contends that the indictment does not mention any anticipated move. Appellant stresses that the application paragraph in the charge focuses on an intended move. We disagree.

The indictment does not track the language for either the first manner and means or the second manner and means under article 62.055(a) but appears, instead, to attempt to encompass both manner and means simultaneously. The indictment does not assert that Appellant failed to notify law enforcement of an intended change of address, and it does not assert that Appellant failed to notify law enforcement of an already completed change of address. The indictment is written in such a way as to encompass both failures. The language "intentionally or knowingly fail to notify law enforcement about a change of address within

seven days" applies equally to an anticipated change of address and a completed change of address. Identifying "Wichita," which appears to be a reference to Wichita Falls in Wichita County, and identifying "Vernon" in Wilbarger County reinforces the construction that the indictment was intended to cover both the failure to report the anticipated move and the failure to report the completed move. The deletion of "and/or Vernon" refutes Appellant's assertion that the State was proceeding on Appellant's failure to register his completed move to Vernon in Wilbarger County. The retention of "Wichita" refutes Appellant's assertion that the indictment did not encompass his failure to report his anticipated move.

Appellant had no pretrial objection to the indictment. Appellant filed no motion to quash the indictment. Appellant waived any complaint regarding any ambiguity in the indictment. *See* Tex. Crim. Proc. Code Ann. art. 1.14(b) (West 2005).[3]

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[3]Article 1.14(b) provides,

> (b) If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding. Nothing in this article prohibits a trial court from requiring that an objection to an indictment or information be made at an earlier time in compliance with Article 28.01 of this code.

Id.

Appellant concedes the State proved the first manner and means—his failure to report his anticipated move not later than the seventh day before the intended change. Because that offense was the only one left in the indictment, the only one the trial court charged him on, and the only one the jury convicted him of, we overrule Appellant's first point.

Charge Error

In Appellant's second point, he argues that the trial court erred by instructing the jurors that they could convict him upon a manner and means of committing the offense not alleged in the indictment. Appellant contends that the application paragraph in the charge tracked the first manner and means under article 62.055(a) but the indictment alleged the second manner and means; therefore, he concludes there is a fatal variance. Appellant acknowledges that because he did not object until after the verdict, he must rely on charge error and egregious harm. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g).

For the reasons set out in our analysis of Appellant's first point, we hold that Appellant was indicted for the first manner and means—the failure to report an anticipated move—and charged on the first manner and means. *See* Tex. Crim. Proc. Code Ann. art. 1.14(b). There was no error in the charge. We overrule Appellant's second point.

CONCLUSION

Having overruled Appellant's two points, we affirm the trial court's judgment.

/s/ Anne Gardner
ANNE GARDNER
JUSTICE

PANEL: LIVINGSTON, C.J.; DAUPHINOT and GARDNER, JJ.

DAUPHINOT, J., concurs without opinion.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: December 8, 2016