

**NO. 12-16-00093-CR**

**IN THE COURT OF APPEALS**

**TWELFTH COURT OF APPEALS DISTRICT**

**TYLER, TEXAS**

***SALVADOR BECERRA,  
APPELLANT***

§ ***APPEAL FROM THE 244TH***

***V.***

§ ***JUDICIAL DISTRICT COURT***

***THE STATE OF TEXAS,  
APPELLEE***

§ ***ECTOR COUNTY, TEXAS***

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***MEMORANDUM OPINION***

Salvador Becerra appeals his convictions for improper sexual activity with a person in custody. In his sole issue, Appellant contends that the trial court erred by denying Appellant's motion for change of venue. We affirm.

**BACKGROUND**

Appellant was a police officer in Odessa, Texas. As part of his official duties, Appellant patrolled Odessa and investigated potential violations of the law. On many occasions, Appellant deemed it necessary to question women. And on a few of those occasions, Appellant inappropriately touched women he was investigating.<sup>1</sup>

Eventually, one woman complained to the Odessa Police Department, and the department investigated Appellant. After the investigation, Appellant was charged with six counts of improper sexual activity with a person in custody and one count of sexual assault. Local news sources in Odessa deemed the allegations against Appellant newsworthy. Appellant was the subject of several newspaper articles, and television and radio reports. The allegations against Appellant were also discussed on social media.

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<sup>1</sup> Appellant does not challenge the legal sufficiency of the evidence against him.

Claiming that he could not receive a fair trial in Ector County,<sup>2</sup> Appellant filed a motion for change of venue. Appellant argued that he could not receive a fair trial because of the pretrial publicity and his status as a former police officer. After an evidentiary hearing on the motion, the trial court denied Appellant's motion for change of venue. However, the trial court also ordered that Appellant's motion would be reconsidered after voir dire of the jury panel.

At voir dire, the trial court, the State, and Appellant questioned the panel regarding their familiarity with the case. All further questioned the potential jurors on any preconceived notions that they may have had of Appellant's guilt, and whether any aspect of the case that they learned from media reports may have made them an unfit juror for the case. While several panel members were deemed unfit to serve on the case, more than enough of the jury panel remained for each side to exercise their peremptory strikes and for a jury to be seated. Moreover, the trial court again denied Appellant's motion for change of venue. Thereafter, a jury was empaneled.

At the conclusion of a trial on the merits, the jury found Appellant "guilty" of five counts of improper sexual activity with a person in custody.<sup>3</sup> The jury then returned a verdict on punishment,<sup>4</sup> and the trial court sentenced Appellant in accordance with the jury's verdict. This appeal followed.

### **MOTION TO CHANGE VENUE**

In his sole issue on appeal, Appellant contends that the trial erred by denying his motion for change of venue. He also appears to argue that the trial court did not make a further order denying his motion for change of venue after voir dire of the panel members.

#### **Standard of Review**

We review a trial court's denial of a motion for change of venue for an abuse of discretion. *DeBlanc v. State*, 799 S.W.2d 701, 705 (Tex. Crim. App. 1990). A trial court does not abuse its discretion so long as the trial court's ruling is within the zone of reasonable

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<sup>2</sup> Odessa is the county seat of Ector County.

<sup>3</sup> Appellant was found "guilty" of counts one, two, three, six, and seven. Appellant was found "not guilty" of counts four and five.

<sup>4</sup> On count one, the jury assessed Appellant's punishment at confinement for one year and a fine of \$10,000. On counts two, three, six, and seven, the jury assessed Appellant's punishment at confinement for two years for each count. In accordance with the jury's recommendation, the trial court suspended Appellant's sentences in counts two, three, six and seven, and placed Appellant on community supervision for five years for each count to be run concurrently.

disagreement. See *Gonzalez v. State*, 222 S.W.3d 446, 449 (Tex. Crim. App. 2007). Under an abuse of discretion standard, we give deference to the trial court's ruling which is in the best position to make credibility determinations and resolve conflicts in testimony. *Ryser v. State*, 453 S.W.3d 17, 34 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd).

### **Applicable Law**

Under Article 31.03, a change of venue may be granted on the written motion of a criminal defendant supported by his own affidavit, and the affidavits of at least two credible residents of the county, when the trial court determines either (1) there exists in the county so great a prejudice against him such that he cannot obtain a fair and impartial trial; or (2) there is a dangerous combination against him instigated by influential persons such that he cannot expect a fair trial. See TEX. CODE CRIM. PROC. ANN. Art. 31.03 (West 2006).

The defendant seeking a change of venue bears a heavy burden. *DeBlanc*, 799 S.W.2d at 704. When the motion is based on media publicity, mere publicity is not enough as jurors need not be totally ignorant of the facts of a particular case. *Id.* Instead, the defendant must demonstrate that publicity about the case is pervasive, prejudicial, and inflammatory such that potential jurors have an actual, identifiable prejudice against the defendant. *Id.* “Even extensive knowledge of the case in the community is not sufficient if there is not a showing of prejudicial or inflammatory coverage.” *Ryser*, 453 S.W.3d at 33 (citing *Gonzalez*, 222 S.W.3d at 449).

If the trial court rules after the voir dire examination, the trial court can consider both the evidence presented at the change of venue hearing and statements made by panel members during voir dire. *Id.* In examining whether the pretrial publicity is prejudicial and inflammatory, a trial court may take three matters into consideration: (1) the nature of the publicity, (2) any evidence presented at a change of venue hearing, and (3) testimony received from panel members at voir dire. See *Gonzalez*, 222 S.W.3d at 451.

### **Analysis**

In this case, Appellant listed two reasons that a change of venue was necessary because “there [was] so great a prejudice against [Appellant] in [Ector County] that a fair and impartial trial [could not] be obtained.” See TEX. CODE CRIM. PROC. ANN. Art. 31.03. He first argued that the allegations against him had received overwhelming pretrial publicity in which Appellant was made to appear guilty. Second, Appellant contended that his status as a former police officer combined with the pretrial publicity, made people presume that he was guilty. In determining

whether the pretrial publicity was prejudicial and inflammatory, the trial court considered the evidence presented at a hearing on Appellant's motion for change of venue.

Stephanie Gordon, Ruben Becerra, and Billy Valles, all residents of Ector County, testified in support of Appellant's motion. Gordon testified that she had heard people discuss Appellant's case. On one occasion, she heard an individual state that Appellant was a police officer so he must be guilty. Becerra, Appellant's brother, had heard many people discuss the charges against Appellant. He believed that many people who discussed the case had decided that Appellant was guilty. According to Becerra, he heard people state that the police officer, his brother, was probably guilty. Becerra also saw media coverage of the case. He testified that media reports included the allegations that had been made against Appellant. Becerra felt as though the media coverage painted Appellant as guilty of the allegations made against him. Becerra further testified that the ODESSA AMERICAN newspaper presented both sides of the story. He thanked the ODESSA AMERICAN for their coverage of the charges against Appellant.

Valles claimed that the charges against Appellant had generated substantial media coverage. According to Valles, one television station had eighty-eight reports on various aspects of the charges against Appellant, and the ODESSA AMERICAN had fifty news articles on the subject. He stated that other media outlets also ran multiple stories on the charges. Valles contended that the stories alleged facts beyond those contained in the indictment against Appellant. He stated that many of the newspaper reports also showed Appellant in handcuffs and jail clothes. Valles did not remember any of the media reports containing a disclaimer that Appellant was presumed "not guilty" of the charges. He also talked to other residents in Odessa who were familiar with the allegations against Appellant. According to Valles, many of those residents had concluded that Appellant was guilty. He later qualified his statement that residents had not actually formed a conclusion but were curious as to Appellant's guilt.

Appellant also offered one newspaper article into evidence at the hearing. The ODESSA AMERICAN article dated March 14, 2014, contained the headline, "*UPDATE Affidavit: OPD officer groped third detained woman.*" The article indicated that Appellant was in jail and contained two quotes that could be read as implying Appellant's guilt. Captain Mike Gerke, head of the Odessa Police Department's Professional Standards Unit, was quoting as saying, "Anytime something like this happens[,] it is a black eye, obviously, and it doesn't help our situation at all." Corporal Steve LeSueur, spokesperson for the Odessa Police Department, was

also quoted as saying, “The thing we want the public to remember is this: This is not a true reflection of the entire department. Not only was it inappropriate, it was illegal.” The article did not specifically refer to Appellant’s presumption of innocence, but, when discussing the allegations against Appellant, indicated that the information was obtained from court documents, more particularly, a probable cause affidavit.

Jimmy Gayler, Tom Sorrells, Douglas Mackey, and Roy Bobbitt testified on behalf of the State at the hearing. They had not heard much about the case, and they believed that Appellant could receive a fair trial in Ector County. The State conceded that the allegations against Appellant generated substantial media coverage, but the State contended that the media coverage was neither prejudicial nor inflammatory.

Further, the trial court considered the statements made by panel members during the voir dire examination. The jury panel consisted of seventy-two members. The trial court instructed the panel on the importance of an impartial jury who would make their decision solely based upon the evidence presented at trial. It then asked the panel members if they had heard any reports regarding the allegations against Appellant, and approximately forty-five panel members answered affirmatively.<sup>5</sup> The trial court continued by asking the panel if any of them could not limit their decision to the evidence presented at trial but instead would base their decision in part on information heard or read outside the courtroom. Three panel members indicated that they could not limit their decision to the evidence presented at trial.

The State then conducted its voir dire examination of the panel and again stressed the importance of a fair and impartial jury. The State also asked the panel members if they could decide the case based on the evidence presented at trial, and the panel members indicated that they could. Next, Appellant conducted his voir dire examination of the panel members. He individually questioned each panel member who had indicated hearing a report of the allegations prior to arriving for jury duty. Appellant asked each individual panel member if anything they had heard outside of court had caused them to form an opinion regarding the case. If so, he asked the panel member if their deliberations would be affected from the additional information

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<sup>5</sup> The trial court counted forty-four members answering affirmatively, but the State called out forty-five members of the panel as answering affirmatively. On appeal, Appellant contends that forty-six members of the panel had heard about the allegations prior to trial. From our review of the record, it appears as though Appellant is including the forty-five listed by the State and one additional panel member who remembered a report of the allegations later during the voir dire.

received outside of court. Many of the panel members, upon reflection after Appellant's additional questioning, indicated that their deliberations would be affected from the additional information received outside of court.

The trial court granted seventeen challenges for cause based upon individual panel members having formed an opinion based on information heard outside of court. Outside the presence of the jury, the trial court stated that "after having considered all of the evidence presented in the motions and evidence presented [at the hearing] and from my view of the panel, the motion to transfer venue is denied." The State and Appellant then made their peremptory challenges, and the trial court seated a twelve-person jury and one alternate. The trial court asked if either side had any objection to the jury that had been seated, and both the State and Appellant indicated that they had no objection.

### **Conclusion**

From our review of the record, the trial court heard the evidence and observed the jury panel during voir dire. Some of the witnesses believed that Appellant could not receive a fair trial in Ector County, but they offered sparse bases for their opinions. When pressed for the specific reasons for their opinions, the witnesses noted that Appellant was shown in handcuffs and jail clothes, that many people had decided that Appellant was guilty, and that media reports did not include sufficient disclaimers that the charges were only allegations against Appellant. The trial court heard conflicting evidence as well. The State presented testimony from four witnesses who testified that the pretrial publicity had not been so prejudicial and inflammatory that Appellant could not receive a fair trial in Ector County. The trial court also saw the reaction of the jury panel during an extensive voir dire examination. Clearly, the allegations against Appellant received substantial pretrial publicity. However, Appellant failed to demonstrate that the publicity was prejudicial and inflammatory to his ability to receive a fair trial. *See DeBlanc*, 799 S.W.2d at 704. Giving due deference to the trial court's ruling, we find that Appellant failed to carry his heavy burden that transfer to another county was necessary. *See id.* Therefore, the trial court did not abuse its discretion when it denied Appellant's motion for change of venue. *See Gonzalez*, 222 S.W.3d at 449.

Finally, Appellant also appears to argue in his brief that the trial court failed to make a further order denying his motion after examining statements made by panel members during voir dire. As noted above, the trial court orally denied the motion for change of venue after

considering all of the evidence presented in the motions, the evidence presented at the hearing, and “from [its] view of the panel.” Thus, we overrule that portion of Appellant’s issue regarding the trial court’s failure to make a further order denying his motion.

Accordingly, we overrule Appellant’s sole issue.

**DISPOSITION**

Having overruled Appellant’s sole issue, we *affirm* the trial court’s judgment.

**BRIAN HOYLE**  
Justice

Opinion delivered April 28, 2017.

*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*

(DO NOT PUBLISH)



## COURT OF APPEALS

### TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

#### JUDGMENT

APRIL 28, 2017

NO. 12-16-00093-CR

**SALVADOR BECERRA,**  
Appellant  
V.  
**THE STATE OF TEXAS,**  
Appellee

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Appeal from the 244th District Court  
of Ector County, Texas (Tr.Ct.No. C-43,743)

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THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.  
*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*