# NO. 12-16-00322-CR

# IN THE COURT OF APPEALS

# TWELFTH COURT OF APPEALS DISTRICT

# TYLER, TEXAS

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| ***GEORGE HOLMES, APPELLANT*** | ***§*** | ***APPEAL FROM THE 159TH*** |
| ***V.*** | ***§*** | ***JUDICIAL DISTRICT COURT*** |
| ***THE STATE OF TEXAS, APPELLEE*** | ***§*** | ***ANGELINA COUNTY, TEXAS*** |

***MEMORANDUM OPINION***

George Holmes appeals one of his two convictions for evading arrest or detention. Appellant raises two issues challenging the sufficiency of the evidence and the trial court's ruling on his motion for directed verdict. We affirm.

## BACKGROUND

On October 29, 2015, a citizen contacted the Lufkin police department to report suspicious activity at a local car wash. Officer Caleb Forrest with the Lufkin Police Department responded to the call and contacted an individual at the car wash about five minutes later. Corporal Perez Sobolewski, also with the Lufkin Police Department, arrived to assist. The individual identified himself as Appellant and gave Forrest his work identification card. Forrest patted Appellant down and located what he believed to be a pill bottle in his jacket. Forrest asked to see the bottle. Appellant reached into his pocket, turned, and fled. The officers gave chase but soon lost him and ended their pursuit. A warrant was issued for Appellant's arrest.

On November 8, Lufkin Police Officer Quinton McClure stopped a bicyclist for going south in a northbound traffic lane without lights on his bicycle. The cyclist identified himself to McClure as "Calvin Jones." Officer Forrest arrived to assist. He immediately recognized Appellant's face and jacket from the previous incident in October. When Appellant saw Forrest,

he ran from the scene. The officers chased Appellant about five blocks before they lost sight of him after he jumped a fence. Meanwhile, other officers had begun looking for Appellant. Using an infrared device, Corporal Sobolewski located him hiding in a backyard under a tarp.

The State charged Appellant with two counts of evading arrest or detention, enhanced by two prior convictions. Appellant pleaded "not guilty" to the charged offenses and "not true" to the enhancements. The jury found appellant guilty of both counts of evading, found the enhancement paragraphs "true," and assessed Appellant's punishment at imprisonment for thirteen years in each count. This appeal followed.

## VENUE

In his first issue, Appellant argues that the trial court erred by denying his motion for directed verdict because the State failed to establish that the offense in Count II[1] occurred in Angelina County.

**Standard of Review and Applicable Law**

The state bears the burden of proving venue by a preponderance of the evidence. TEX. CODE CRIM. PROC. ANN. art. 13.17 (West 2015); ***Fulmer v. State***, 401 S.W.3d 305, 317 (Tex. App.—San Antonio 2013, pet. ref'd). Venue error is non-constitutional and is subject to a harm analysis under Texas Rule of Appellate Procedure 44.2(b). ***Schmutz v. State***, 440 S.W.3d 29, 39 (Tex. Crim. App. 2014). Under that rule, a non-constitutional error that does not affect substantial rights must be disregarded. ***Id.***; TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. ***Schmutz***, 440 S.W.3d at 39. We examine the record as a whole to assess whether an appellant was actually harmed by the error. ***Id.*** at 40.

**Analysis**

In this case, although no witness explicitly stated that Count II occurred in Angelina County, the preponderance of the evidence indicates that it did. The police officers who detained Appellant and assisted in his pursuit—Officer Forrest, Officer McClure, and Corporal Sobolewski—all testified that they were Lufkin police officers. Furthermore, Forrest testified that he was on duty in Angelina County when he detained Appellant at the car wash. We take judicial notice that Lufkin is in Angelina County, Texas. *See* ***Carpenter v. State***, 333 S.W.2d

[1] Count II is the second offense that occurred.

391, 394 (Tex. Crim. App. 1960); *see also* ***Edwards v. State***, 427 S.W.2d 629, 633-34 (Tex. Crim. App. 1968). Thus, while the officers did not specifically state the county in which Count II occurred, their testimony implies that both offenses occurred in Angelina County.

Moreover, even if the State did not show by a preponderance of the evidence that Count II occurred in Angelina County, the record indicates that the error is harmless because it did not affect Appellant's substantial rights. The indictment was handed down by an Angelina County grand jury and alleged that both offenses occurred in Angelina County. There is no indication that the State was forum shopping or attempting to taint the trial process. Appellant had notice that he would be tried in Angelina County. There is no indication in the record that Appellant was misled by the venue allegation, inconvenienced by the trial in Angelina County, or prevented from presenting a defense. Nor is there any suggestion that the Angelina County jury was not impartial. Furthermore, since venue is not an element of the offense, the error did not prejudice the jurors' decision making process. *See* ***Thompson v. State***, 244 S.W.3d 357, 366 (Tex. App.—Tyler 2006, pet. dism'd).

After considering the entire record, we conclude that the venue error, if any exists, did not have a substantial and injurious effect or influence in determining the jury's verdict. *See* ***Schmutz***, 440 S.W.3d at 39. Therefore, any error by the trial court in denying Appellant's motion for directed verdict is disregarded. *See* ***id.***; TEX. R. APP. P. 44.2(b). Accordingly, we overrule Appellant's first issue.

## SUFFICIENCY OF THE EVIDENCE

In his second issue, Appellant contends that the evidence of his identity as the offender in Count II is legally insufficient.

### Standard of Review and Applicable Law

When reviewing the legal sufficiency of the evidence, we consider the combined and cumulative force of all admitted evidence in the light most favorable to the conviction to determine whether, based on the evidence and reasonable inferences therefrom, a rational trier of fact could have found each element of the offense beyond a reasonable doubt. ***Ramsey v. State***, 473 S.W.3d 805, 808 (Tex. Crim. App. 2015) (citing ***Jackson v. Virginia***, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2788-89, 61 L. Ed. 2d 560 (1979)). The trier of fact is the exclusive judge of the credibility and weight of the evidence and is permitted to draw any reasonable inference from the

evidence so long as it is supported by the record. ***Id.*** at 809. The jury alone decides whether to believe eyewitness testimony and resolves any conflicts or inconsistencies in the evidence. ***Bradley v. State***, 359 S.W.3d 912, 917 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd). The jury alone weighs the evidence, and it may find guilt without physical evidence linking the accused to the crime. ***Id***. Eyewitness testimony can be enough to support a conviction. ***Price v. State***, 502 S.W.3d 278, 281 (Tex. App.—Houston [14th Dist.] 2016, no pet.). A person commits an offense if he intentionally flees from a person he knows is a peace officer attempting to lawfully arrest or detain him. *See* TEX. PENAL CODE ANN. § 38.04(a) (West 2016).

**Identity**

Appellant argues that the evidence is insufficient to prove his identity as the individual who evaded the police in Count II because the officers momentarily lost sight of the individual during the chase, the testimony describing the individual at the original detention and later when he was captured is inconsistent, and no physical evidence regarding identity was admitted. We disagree.

Appellant contends that the testimony regarding his appearance was inconsistent because the clothing that the cyclist was wearing when he was detained was different from the clothing Appellant was wearing when he was located under the tarp. Although his clothing varied, the testimony of the officers explains this discrepancy. Officer McClure testified that the cyclist was wearing a blue jacket, a cap, and gloves when he was detained, but that he removed the jacket and cap "right in front of [the officers]" during the pursuit. The jacket and cap were later recovered. Officer Forrest also testified that the cyclist was wearing a blue jacket and baseball cap, but that he saw Appellant "shedding items of clothing" during the pursuit. Based on this evidence, we conclude that the jury could reasonably find that Appellant's appearance differed from that of the cyclist not because he was a different person but because he removed clothing during the pursuit.

Nor does Appellant's argument regarding the lack of physical evidence avail him. Appellant specifically notes that a cell phone left behind by the cyclist was not investigated for fingerprints or ownership, and that no DNA analysis was conducted. However, the jury alone weighs the evidence, and it may find guilt without physical evidence linking the accused to the crime. ***Bradley,*** 359 S.W.3d at 917. Therefore, we conclude that the lack of physical evidence does not render the evidence of identity insufficient.

Despite the evidentiary weaknesses identified by Appellant, the record contains abundant eyewitness evidence of his identity, and eyewitness testimony alone is sufficient to sustain a conviction. *See* ***Price***, 502 S.W.3d at 281. Officer McClure identified Appellant in court as the cyclist who fled from him. Officer Forrest identified Appellant in court as the person he detained at the car wash and testified that he recognized him and his jacket when he was detained on the bicycle. Further, the jury was able to view the in-car video of the detention. Finally, Sobolewski's testimony that Appellant was winded and breathing heavily when he found him under the tarp tends to show that he had been running very recently. Viewing the evidence in the light most favorable to the verdict, we conclude that the jury was rationally justified in finding, beyond a reasonable doubt, that Appellant committed Count II of the indictment. *See* ***Ramsey***, 473 S.W.3d at 808; TEX. PENAL CODE ANN. § 38.04(a). Accordingly, we overrule Appellant's second issue.

## DISPOSITION

Having overruled Appellant's first and second issues, we ***affirm*** the trial court's judgment.

**JAMES T. WORTHEN**
Chief Justice

Opinion delivered February 6, 2018.
*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

**FEBRUARY 6, 2018**

**NO. 12-16-00322-CR**

**GEORGE HOLMES,**
Appellant
V.
**THE STATE OF TEXAS,**
Appellee

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Appeal from the 159th District Court
of Angelina County, Texas (Tr.Ct.No. 2016-0201)

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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.

James T. Worthen, Chief Justice.
*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*