MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Vernon J. Collins,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

April 6, 2023

Court of Appeals Case No. 22A-CR-2427

Appeal from the Boone Circuit Court

The Honorable Lori N. Schein, Judge

Trial Court Cause No. 06C01-2011-CM-1883

Memorandum Decision by Judge Crone
Judges Robb and Kenworthy concur.

Crone, Judge.

Case Summary

[1] Vernon J. Collins appeals his conviction, following a bench trial, for class B misdemeanor harassment. We affirm.

Facts and Procedural History

[2] In the summer of 2019, Collins was at work when he met P.N. Collins was an employee at Prime Car Wash in Hamilton County, and P.N., a resident of Boone County, was a daily customer of the car wash. Collins would spray off cars before they were washed, and he would often speak to customers, like P.N., as they waited for their cars to be washed.

[3] On one occasion, P.N. was waiting for her son's Jeep to be washed when Collins gave her his phone number and told her about a business he had that removed and reattached Jeep tops. Collins and P.N. began text messaging each other, and they texted throughout the summer. Collins primarily texted P.N. asking for advice on how to market his business. However, the text conversations eventually turned more personal, and, at some point, Collins asked P.N. to go on a date with him. P.N. declined. Collins again asked P.N. to go on a date, and P.N. again declined. Thereafter, Collins's text messages to P.N. became "pretty derogatory." Tr. Vol. 2 at 14. Between September and October 2020, P.N. received multiple harassing text messages from Collins.[1]

[1] Because Collins does not challenge the sufficiency of the evidence to support his conviction, we need not recite the substance of the text messages here.

P.N. became concerned and reported Collins's behavior to the Zionsville Police Department.

[4] The State filed charges in Boone County against Collins for class B misdemeanor harassment. A bench trial was held on August 18, 2022. After the State rested its case-in-chief, Collins moved for judgment on the evidence, arguing that the State had failed to prove venue. The State asserted that it had already proved venue by establishing that P.N. was a Boone County resident who testified that Collins texted her every single day for a period of time over the summer. The State argued that it was reasonable to infer that some of those text messages were received while P.N. was in Boone County. Alternatively, the State argued,

> And for purposes of venue, case law is pretty clear that if that is an issue, State could always reopen for that limited purpose and limited scope of venue to specifically get a direct question from that witness as to that singular issue, if the Court does have an issue with that State is permitted by case law to do that.

Id. at 32-33. The trial court replied that it did "have an issue with that" and asked if the State was making a motion to reopen its case-in-chief. *Id*. at 33. The State responded that it was, and the trial court granted the motion over Collins's objection. The State then called P.N., who testified that she received at least some of the harassing text messages from Collins while she was at her home in Boone County. *Id.* at 34-35. On cross-examination, when asked how she could be so sure of her whereabouts after two years, P.N. stated that "some

of [the messages from Collins] were so alarming that I can tell you exactly where I was at and who I was with." *Id*. at 35.

[5] At the conclusion of the bench trial, the court found Collins guilty as charged. The court sentenced Collins to 180 days, with 172 days suspended to probation. This appeal ensued.

Discussion and Decision

[6] Collins's entire argument on appeal focuses on the trial court's decision to allow the State to reopen its case-in-chief to present additional evidence that Boone County was a proper venue. He contends that the court's decision constituted an abuse of discretion and that his subsequent conviction was barred by double jeopardy. We disagree.

[7] The decision to allow the State to reopen its case after the State has rested is within the trial court's discretion. *Gilman v. State*, 65 N.E.3d 638, 641 (Ind. Ct. App. 2016). To establish that the trial court committed reversible error, the defendant must establish that the trial court clearly abused that discretion. *Id*. In determining whether the trial court abused its discretion, we consider the following: (1) whether the defendant was prejudiced by the reopening of the case; (2) whether the party seeking to reopen the case rested inadvertently or purposefully; (3) the stage of the proceedings at which the request is made; and (4) whether any real confusion or inconvenience would result from granting the request. *Id*.

[8] Although venue is not an element of a criminal offense, the State must nonetheless prove by a preponderance of the evidence that all or part of the crime occurred in the county where charges were brought. *Baugh v. State*, 801 N.E.2d 629, 631 (Ind. 2004). Electronic communication, however, such as via cell phone and internet sites, is an area that does not fall readily into traditional venue analysis. *Jones v. State*, 967 N.E.2d 549, 551 (Ind. Ct. App. 2012). Indeed, when a crime is committed electronically, the victim and perpetrator may be in different counties, states, or countries. *Id*. Thus, "[c]onsidering the nature of mobile phone technology, an offense committed over the telephone may reasonably be deemed to have been committed at either the geographic location from which the calls were made or at which the calls were received." *Eberle v. State*, 942 N.E.2d 848, 856 (Ind. Ct. App. 2011), *trans. denied*; *see* Ind. Code § 35-32-2-1(b) (providing that "if a person committing an offense upon the person of another is located in one (1) county and the person's victim is located in another county at the time of the commission of the offense, the trial may be in either of the counties.").

[9] Circumstantial evidence may be sufficient to establish proper venue. *Peacock v. State*, 126 N.E.3d 892, 897 (Ind. Ct. App. 2019). We neither weigh the evidence nor resolve questions of credibility, but look to the evidence and reasonable inferences drawn therefrom that support the conclusion of requisite venue. *Id*.

[10] Here, in its case-in-chief, the State presented evidence that P.N. was a resident of Boone County at the time Collins was sending her daily text messages. Although P.N. testified that she left Boone County and drove into Hamilton

County to get her car washed daily, her testimony clearly implied that she received text messages from Collins after leaving the car wash and returning to her residence. We conclude that this testimony was sufficient to establish by a preponderance of the evidence that Boone County was a proper venue. In other words, a reasonable inference could be drawn from the evidence that P.N. received at least some messages from Collins while in Boone County. Under the circumstances, Collins cannot show that the trial court's decision to allow the State to briefly recall P.N. to the stand to directly state that she received harassing text messages while she was at her home in Boone County prejudiced him. Indeed, the case was reopened moments after the State had rested, and Collins concedes that no real confusion or inconvenience resulted from the trial court's grant of the State's request. More significantly, Indiana law is clear that a trial court does not abuse its discretion when the reopening of the case-in-chief merely grants the State an opportunity to properly present evidence of venue. *Dixon v. State*, 621 N.E.2d 1152, 1154 (Ind. Ct. App. 1993) (citing *Warrenburg v. State*, 260 Ind. 572, 576, 298 N.E.2d 434, 436 (1973)).[2] Collins has failed to establish that the trial court abused its discretion when it allowed the State to reopen its case to present additional evidence of venue.

[2] Collins acknowledges "that Indiana precedent permits the State to reopen its case-in-chief to provide additional evidence of venue[,]" Appellant's Br. at 15, but he invites us to "urge" our supreme court to reconsider such precedent because "it is fundamentally unfair to permit the State to reopen its case after the defendant has identified a shortcoming in its evidence[.]" *Id*. at 17. We decline the invitation.

[11] We further reject Collins's claim that his conviction after the trial court reopened the case was barred by double jeopardy. He suggests that the trial court entered judgment on the evidence (or judgment of acquittal) in his favor when it acknowledged that it had "an issue" with the State's proof of venue in its case-in-chief just before it granted the State's motion to reopen. Tr. Vol. 2 at 33. Collins directs us to *Elkins v. State*, 754 N.E.2d 643, 644 (Ind. Ct. App. 2001), *trans. denied* (2002), in which another panel of this Court held that a judgment on the evidence entered pursuant to a defendant's motion on grounds that the State had failed to prove venue is a judgment of acquittal to which jeopardy attaches.[3] However, the trial court here in no way, shape, or form entered judgment on the evidence or judgment of acquittal prior to allowing the State to reopen its case. To be clear,

> [w]hether the trial court's action constitutes acquittal for purposes of double jeopardy is not to be ascertained from the form of the judge's action, although the form of the order entered by the trial court should not be ignored, but rather by determining whether the substance of the ruling, whatever its label, actually represents resolution, correct or not, of some or all of the factual elements of the offense charged.

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[3] In *Neff v. State*, 915 N.E.2d 1026, 1036 (Ind. Ct. App. 2009), *trans. denied* (2010), another panel of this Court disagreed with *Elkins* and *Williams v. State*, 634 N.E.2d 849 (Ind. Ct. App.1994) and the determination that a ruling, such as judgment on the evidence, on improper venue grounds represents an acquittal to which jeopardy attaches. Specifically, the panel noted that an acquittal is a ruling that "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id*. (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)). Venue, however, is not an element of a crime, and therefore the State's failure to prove proper venue "implies nothing" with respect to a defendant's guilt or innocence. *Id*. As such, double jeopardy would not prevent retrial. *Id*.

Id.

[12] The trial court's mere statement that it had "an issue" with the State's proof of venue did not represent a ruling of any kind, much less a resolution of some or all of the factual elements of the charged crime of harassment. Indeed, trial courts should grant a motion for judgment on the evidence only "where there is a total absence of evidence upon some essential issue, or where there is no conflict in the evidence and it is susceptible of but one inference, and that inference is in favor of the accused." *State v. Taylor*, 863 N.E.2d 917, 919 (Ind. Ct. App. 2007). There is no indication that the trial court here came to any such conclusion. In sum, because the trial court made no substantive ruling on Collins's motion for judgment on the evidence prior to allowing the State to reopen its case, his subsequent conviction was not barred by double jeopardy. His conviction is affirmed.

[13] Affirmed.

Robb, J., and Kenworthy, J., concur.