

NO. PD-0853-19

**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
8/16/2019
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ROBERT HERRON

APPELLANT

V.

THE STATE OF TEXAS

APPELLEE

THE STATE'S PETITION FOR DISCRETIONARY REVIEW

**FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-17-00239-CR**

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TRIAL COURT: 205th Judicial District Court of El Paso County, Texas, Honorable Francisco X. Dominguez, presiding

COURT OF APPEALS: Eighth Court of Appeals, Honorable Chief Justice Brian Quinn (sitting by assignment), Justice Yvonne T. Rodriguez, and Justice Gina M. Palafox

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STATEMENT REGARDING ORAL ARGUMENT

The State does not believe that oral argument is necessary in this case, as the issues presented herein are purely questions of law regarding well-settled legal-sufficiency standards, and the State's arguments are and will be set out fully in the State's petition and brief, should this Court grant review. However, should this Court determine that oral argument would be helpful in resolving the issues raised in this petition, the State would certainly welcome the opportunity to appear before the Court.

STATEMENT OF THE CASE

Robert Herron ("Herron") was indicted for failing to register as a sex offender. (CR:7).^{1,2} The parties having waived their right to a jury trial, the case proceed to trial on the merits before the bench; the trial court found Herron guilty as charged and, pursuant to the indictment's habitualization allegations, sentenced

¹ Throughout this petition, references to the record will be made as follows: references to the one-volume clerk's record will be made as "CR" and page number; references to the one-volume reporter's record will be made as "RR" and page number; references to the one-volume supplemental reporter's record will be made as "SRR" and page number; and references to exhibits will be made as either "SX" or "DX."

² As reflected in the filings and proceedings in the trial court, the correct spelling of the appellant's last name is "Herron." *See, e.g.*, (RR:5); (CR:7, 13-15). However, on appeal, the State referred to the appellant as "Harron," the spelling of his name as reflected in the appellate style of the case. The State notes that, thereafter, in its opinion, the 8th Court of Appeals utilized the correct spelling of the appellant's name, and thus, the State will hereafter do the same.

him to 25 years' confinement. (CR:7, 87); (RR:81-82). Herron timely filed notice of appeal. (CR:92-93).

STATEMENT OF PROCEDURAL HISTORY

On July 31, 2019, in an unpublished opinion, the Eighth Court of Appeals reversed Herron's conviction and rendered a judgment of acquittal. *See Herron v. State*, No. 08-17-00239-CR, 2019 WL 3451031, at *5 (Tex.App.–El Paso July 31, 2019, pet. filed)(not designated for publication). Specifically, the Eighth Court held that the State had failed to prove that, under Chapter 62 of the Code of Criminal Procedure, Herron had a duty to register with the El Paso County Sheriff's Office, as alleged in the indictment. *See id.* at *5. No motion for rehearing was filed by the State. The State now timely files this petition for discretionary review pursuant to rule 68.2(a) of the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 68.2(a).

SOLE GROUND FOR REVIEW

In holding the evidence legally insufficient to support the defendant’s conviction for failing to register, specifically, that the State failed to prove that the defendant had a duty to register with the El Paso County Sheriff’s Office, where there was at least “some evidence” (and specifically, direct evidence of the fact) that the Sheriff’s Office was the “local law-enforcement agency” with which Herron was required to register, rather than decide merely whether there was legally sufficient evidence that, when viewed in its proper context and in the light most favorable to the verdict, could support a rational inference that Herron was, indeed, required to register with the Sheriff’s Office, the Eighth Court improperly required the State to meet its evidentiary burden via the Court’s preferred manner of evidentiary proof, effectively increasing the State’s burden.

FACTUAL SUMMARY

The indictment

On August 2, 2016, Herron was indicted for failing to register as a sex offender. (CR:7). The indictment alleged, in pertinent part, the following:

[T]hat...[Herron]...,while being a person required to register with **the local law enforcement authority, to-wit: El Paso County Sheriff**, in the county where the defendant resided or intended to reside for more than seven days, to-wit: El Paso,..., intentionally or knowingly fail[ed] to register with the **local law enforcement authority in said El Paso County....**

(CR:7)(emphasis added).

The January 26, 2016, and February 4, 2016, pre-release and registration forms

At trial, sex-offender-unit parole supervisor Laura Spink (“Ms. Spink”) testified that earlier that year, on February 2, 2016, following his confinement for a felony drug offense, Herron was released on parole and required to report to a halfway house located at “1700 Horizon Boulevard North, El Paso, Texas 79928.” (RR:11-14, 25). On January 26, 2016, prior to his release, Herron signed a “CR-35 form” (*i.e.*, a registration form) as well as a “CR-32 form” (*i.e.*, a pre-release form), informing him of his sex-offender-registration duties, as Herron had been previously convicted of aggravated sexual assault of a child, subjecting him to lifetime sex-offender registration. (RR:21, 42, 44); (SX2–Texas Department of Public Safety (“DPS”) records, January 26, 2016, CR-35 and CR-32 forms).

Consistent with Ms. Spink's testimony regarding Herron's release to the halfway house, Herron's January 26, 2016, pre-release form described his "expected" physical address as "EPTTC 1700 Horizon Blvd. North, El Paso, TX 79928;" the words "El Paso Co S.O." were written under the section entitled "Local Law Enforcement Agency Name." (SX2-January 26, 2016, CR-32 form). The corresponding registration form for that date likewise described Herron's "physical address" as "EPTTC 1700 Horizon Blvd. North, El Paso TX 79928." (SX2-January 26, 2016, CR-35 form). The form reflected a checkmark designating this physical address as "urban." (SX2-January 26, 2016, CR-35 form).

Included within the January 26, 2016, pre-release form were several registration requirements, including that Herron: (1) pursuant to the section entitled "Registration," report to the "local law enforcement authority" (either the chief of police if residing within a municipality, or otherwise, the local sheriff) of the county where he resides or intends to reside for more than seven days; and (2) pursuant to the "change of address" section, no later than the seventh day before moving to a new residence, report in person both to his primary registration authority and his parole officer to inform them of his intended move. (SX2-January 26, 2016, CR-32 form).

Upon his arrival in El Paso on February 3, 2016, Herron was arrested on a parole-violation warrant when he went to a local motel instead of reporting directly to the halfway house. (RR:14-16). The next day, on February 4, 2016, Herron was transported to the El Paso County Sheriff's Office ("Sheriff's Office"), and after Detective Eduardo Gutierrez, Jr. ("Det. Gutierrez") reviewed his registration requirements with him, Herron completed his sex-offender registration and signed a new pre-release form, which contained the very-same registration requirements included in the one completed on January 26, 2016. (RR:16-17, 35-39); (SX3-February 4, 2016, CR-32 form). And just like the January 26, 2016, pre-release form previously signed by Herron, the February 4, 2016, pre-release form described Herron's expected physical address as "1700 Horizon, El Paso, TX 79928" and designated, a second time, "El Paso County Sheriff's Office" as the local law-enforcement agency with which Herron was to register. (SX3-February 4, 2016, CR-32 form). Under the category "Registering Agency ORI/Name," the corresponding February 4, 2016, registration form reflected the words "El Paso County Sheriff's Office." (SX3-February 4, 2016, CR-35 form).

Herron's parole violation and the subsequent June 24, 2016, pre-release and registration forms

As a result of his parole violation, Herron was transferred to the

Intermediate Sanctions Facility (“ISF”) in Brownfield, Texas. (RR:17-18). On June 24, 2016, prior to his June 27, 2016, release from ISF, Herron again signed and initialed a pre-release form, which designated his intended address as “1700 Horizon Blvd. North, El Paso County, Texas,” though, this time, the local law-enforcement agency name appearing on the form was “Horizon City Police Department” (“Horizon PD”). (RR:22-25); (SX2–June 24, 2016, CR-32 form). When he was released from ISF, Herron promptly fled from the authorities and removed his ankle monitor. (RR:19-20).

The “local law enforcement agency” with which Herron was required to register

Notwithstanding the June 24, 2016, pre-release form’s designation of Horizon PD as the “local law enforcement agency,” Ms. Spink, who had been employed by the Parole Division of the Texas Department of Criminal Justice (“TDCJ”) for fifteen years, eight-and-a-half of which were in a capacity as the parole-unit supervisor, testified that when Herron absconded, she immediately notified “the registering agency,” namely, Det. Gutierrez at the Sheriff’s Office (not Horizon PD). (RR:11-12, 19). Thereafter, during Herron’s cross-examination regarding the statutory requirements imposed on sex-offender registrants, Ms. Spink also explained that, pursuant to state law, “[e]very time [sex offenders] move to a new residence, return, they have to register.” (RR:30). And

shortly thereafter, when asked by Herron specifically, “who’s the **local law enforcement authority** [that he was] supposed to report to?”, Ms. Spink replied, “**Here in El Paso, it’s the El Paso County Sheriff’s Office.**” (RR:32)(emphasis added).³

Det. Gutierrez, a 20-year veteran Sheriff’s deputy then assigned to the Sheriff’s Office’s sex-offender-registration-and-tracking unit and whose job it was to “keep track and register all sex offenders that live in the jurisdiction of the El Paso County Sheriff’s Office and make sure that they are compliant with all stipulations [sic] under Chapter 62 [of the] Code of Criminal Procedure,” similarly identified the appropriate registration authority as the Sheriff’s Office, which had

³ In eliciting this testimony, defense counsel engaged in the following exchange:

[Defense Counsel]: Other than a prerelease form, is there a law, other than an agency rule, that might require him to re[-]register?

[Ms. Spink]: It’s not an agency rule; it’s state law.

* * *

[Defense Counsel]: Now, Ms. Spink, typically when somebody...that is required to register as a sex offender is about to be released, they go through a prerelease process, correct?

* * *

And they acknowledge where they’re supposed to go?

[Ms. Spink]: Right.

[Defense Counsel]: They acknowledge who they’re supposed to report to?

[Ms. Spink]: Right.

[Defense Counsel]: And that can often be a specific law enforcement agency, right?

* * *

[(referring to State’s Exhibit 3)] Who’s the **local law enforcement authority** he’s supposed to report to?

[Ms. Spink]: **Here in El Paso, it’s the El Paso County Sheriff’s [O]ffice.**
(RR:31-32)(emphasis added).

“jurisdiction at the halfway houses in Horizon.” (RR:36, 42).⁴

Det. Gutierrez also testified that, pursuant to Chapter 62 of the Texas Code of Criminal Procedure, Herron was required to report in person to the Sheriff’s Office even if, in violation of his pre-release instructions, Herron did not actually arrive in El Paso. (RR:39-40, 51); (SX2-3–January 26, 2016, February 4, 2016, and June 24, 2016 CR-32 forms).

In further explaining Herron’s registration requirements, Det. Gutierrez testified as follows:

[Prosecutor]: So what I’m specifically asking, if he does not move to an intended residence, who must he report to?^[5]

[Det. Gutierrez]: Okay. The **El Paso County Sheriff’s Office**.

[Prosecutor]: Why is that?

[Det. Gutierrez]: Because that’s what it says on the CR[-]32 form, that if he intends or does not intend to move to his address, he notifies us. He has to let us know. **“Us,” the sheriff’s office and/or parole[/] probation officer.”**

⁴ In this regard, Det. Gutierrez testified as follows:

[Prosecutor]: Why was he required to report to the El Paso County sheriff’s office as opposed to the El Paso Police Department?

[Det. Gutierrez]: Because we have jurisdiction at the—when I say “we”—the sheriff’s office has jurisdiction at the halfway houses in Horizon.

(RR:42).

⁵ Here, the prosecutor was specifically referring to the February 4, 2016, pre-release and registration forms contained in State’s Exhibit 3. (RR:51).

* * *

[Prosecutor]: Okay....the registration requirement, what does that tell the defendant he has to do?...

[Det. Gutierrez]: Okay...that if—a sex offender who resides in a municipality or county for more than seven days has to register either with the chief or the sheriff. **In this case, it would be the sheriff's office**, because he needs to stay—he needs to be living in our county for more than seven days.

(RR:51-52)(emphasis added).

After his release from ISF in June of 2016, Herron, yet again, failed to arrive in El Paso, failed to report to either his parole officer or the halfway house as instructed,⁶ failed to register his change of address with the Sheriff's Office as required, and was ultimately apprehended in a different county. (RR:19-20, 25-26, 40, 42, 49-50).

The trial court found Herron guilty as charged and sentenced him to the mandatory minimum sentence of 25 years' confinement. (RR:77, 79, 89).

⁶ As to Herron's failure to comply with his registration requirements after his June 2016 release from ISF, Det. Gutierrez testified as follows:

[Prosecutor]: And what day was he supposed to report to **you**?

[Det. Gutierrez]: No later than seven days after he was released from West Texas ISF.

[Prosecutor]: Which was when?

[Det. Gutierrez]: Which was 6/27 of 2016....[H]e needs to report to a **local law enforcement authority**.

(RR:44-45)(emphasis added).

ARGUMENT AND AUTHORITIES

SOLE GROUND FOR REVIEW: In holding the evidence legally insufficient to support the defendant’s conviction for failing to register, specifically, that the State failed to prove that the defendant had a duty to register with the El Paso County Sheriff’s Office, where there was at least “some evidence” (and specifically, direct evidence of the fact) that the Sheriff’s Office was the “local law-enforcement agency” with which Herron was required to register, rather than decide merely whether there was legally sufficient evidence that, when viewed in its proper context and in the light most favorable to the verdict, could support a rational inference that Herron was, indeed, required to register with the Sheriff’s Office, the Eighth Court improperly required the State to meet its evidentiary burden via the Court’s preferred manner of evidentiary proof, effectively increasing the State’s burden.

REASON FOR REVIEW: The Eighth Court has decided an important issue of state law in a way that conflicts with an applicable decision of this Court. TEX. R. APP. P. 66.3(c); *see Villa v. State*, 514 S.W.3d 227 (Tex.Crim.App. 2017); *Goodman v. State*, 66 S.W.3d 283, 286 (Tex.Crim.App. 2001).

- I. **The Eighth Court failed to conduct a proper legal-sufficiency analysis when it failed to afford the State the strongest legitimate view of *all* of the evidence presented to show that the Sheriff’s Office was the “local law-enforcement agency” with which Herron was required to register.**
 - A. **The Eighth Court erred when it omitted from its analysis the vast majority of the evidence identifying the Sheriff’s Office as the proper registration authority.**

In holding that the evidence was legally insufficient to sustain Herron’s failure-to-register conviction, the Eighth Court reasoned that, absent evidence speaking directly to the statutory criteria for determining which of “three possible entities at which a sex offender must register,” the State failed to prove that

Herron was required to register with the “El Paso County Sheriff,” as alleged in the indictment. *See Herron*, 2019 WL 3451031 at *3 (with respect to whether the Sheriff’s Office had been designated by DPS as the local registration authority, reasoning that “No one testified to that. Nor did the pre-release form or any other exhibit indicate as much.”).⁷

However, while the State takes no issue with the Eighth Court’s assertion that the identity of the law-enforcement entity with which a registrant is required to register is subject to several statutory delineations, a reading of the Eighth Court’s opinion reveals that not only did it take an impermissibly narrow view of the evidence that the State presented as to the identity of such entity (as will be discussed in more detail below), but it wholly failed to consider the vast majority of the evidence relevant thereto.

For instance, while the Eighth Court clearly considered in its analysis the

⁷ Article 62.051 provides that a person who has a reportable conviction is required to register with the local law-enforcement authority in any municipality or county in which the person resides, or intends to reside, for more than seven days. TEX. CODE CRIM. PROC. art. 62.051. And as the Eighth Court correctly noted, article 62.001(2) defines “local law enforcement authority” as “...the office of the chief of police of a municipality, the office of the sheriff of a county in this state, or a centralized registration authority.” *See* TEX. CODE CRIM. PROC. art. 62.001(2). Articles 62.004 and 62.0045, in turn, provide that a registrant’s “primary registration authority” shall be determined by DPS based on the municipality or county in which he resides, unless a specific entity (either the chief of police or the county sheriff) has been designated by the commissioner’s court as the mandatory countywide registration location (*i.e.*, “centralized registration authority”), in which case, the person must register with the centralized registration authority, regardless of whether the person resides within a municipality. *See* TEX. CODE CRIM. PROC. arts. 62.004 (a)-(a-1); 62.0045 (a).

February 2016 pre-release form directing Herron to register with the Sheriff's Office, as well as Det. Gutierrez' purportedly "conclusory" statement that Herron was required to register with the Sheriff's Office because it had "jurisdiction" over the halfway house in which Herron was to reside, *see Herron*, 2019 WL 3451031 at *4-5, wholly omitted from the Eighth Court's sufficiency analysis was the following additional evidence:

- that **twice**, prior to his June 2016 release from ISF, Herron signed a pre-release form describing his intended address as either "1700 Horizon Blvd. North, El Paso, Texas 79928" or "EPTTC 1700 Horizon Blvd. North, El Paso, TX 79928," and designating the Sheriff's Office as the corresponding "local law-enforcement agency" with whom he was required to register, (SX3– January 26, 2016, and February 4, 2016, CR-32 forms);
- that it was undisputed that the Horizon City halfway house at which Herron was required to reside upon his release in both February and June of 2016 was 1700 Horizon Blvd. North, (RR:25); (SX3– January 26, 2016, CR-32 form; February 4, 2016, CR-32 and CR-35 forms);
- that even though the January 2016 registration form had an annotation that the Horizon City address was "urban," it designated the Sheriff's Office as the applicable registration authority, (SX2–January 26, 2016, CR-35 form);
- that having previously been released to the very-same Horizon City halfway house in February of 2016, Herron, in fact, registered with the Sheriff's Office, (RR:12-13, 29, 32);
- that the February 2016 registration form named the Sheriff's Office as the "registering agency," (RR:16, 36-37); (SX3–February 4, 2016, CR-32 and CR-35 form);

- that prior to his June 2016 release from ISF, Herron’s new pre-release form included the same physical address (that of the Horizon City halfway house) that appeared in his two prior pre-release forms from January and February of 2016, (SX2–January 26, 2016, February 4, 2016, and June 24, 2016, CR-32 forms, all describing Herron’s assigned address as “1700 Horizon Blvd. North”);
- that Ms. Spink, a fifteen-year veteran TDCJ employee with an eight-and-a-half-year tenure as a parole-unit supervisor, testified that the Sheriff’s Office was the “registering agency” with whom Herron was required to register upon his release to the Horizon City halfway house, (RR: 19)(wherein Ms. Spink testified she notified Det. Gutierrez of the Sheriff’s Office when Herron absconded because it was “common practice for the parole division to notify the **registering agency**”)(emphasis added);
- that while being questioned regarding Herron’s registration requirements under state law, specifically, “who’s the **local law enforcement authority** [that he was] supposed to report to?”, and after agreeing that registrants are required to report to “a *specific* law enforcement agency,” Ms. Spink replied, “**Here in El Paso, it’s the El Paso County Sheriff’s Office.**” (RR:30, 32)(emphasis added);
- that Det. Gutierrez, a 20-year veteran Sheriff’s deputy then assigned to the Sheriff’s Office’s sex-offender-registration-and-tracking unit, who testified it was his job to “keep track [of] and register all sex offenders that live in the jurisdiction of the El Paso County Sheriff’s Office and make sure that they are compliant with all stipulations [sic] under Chapter 62 [of the] Code of Criminal Procedure,” also testified that, rather than registering with the El Paso Police Department, Herron had to register with the Sheriff’s Office because it had “jurisdiction at the halfway houses in Horizon[,]” (RR:36, 42);
- that in response to a question about the “registration requirement” that was explained to Herron during his February 2016 registration, Det. Gutierrez related that a sex offender has to register with either

the chief of police or the sheriff and that, “[i]n this case, it would be **the sheriff’s office**, because he needs to be living in our county for more than seven days[,]” (RR:52)(emphasis added); and

- that when asked “who must [Herron] report to?” if he did not move to the intended address as indicated, Det. Gutierrez replied, “Okay. The El Paso County Sheriff’s Office.”

(RR:51-52).⁸

As will be discussed below, because, viewed in its totality and in the proper context, this evidence was at least “some evidence” that Herron had a duty to register with the Sheriff’s Office, the Eighth Court erred in holding that there was legally insufficient evidence to prove as much.

B. The Eighth Court erred in failing to view the evidence in the light most favorable to the verdict and defer to the trial court’s resolution of any conflicts in the evidence in favor of its guilty verdict.

As is well settled, regardless of whether a reviewing court believes the defendant’s evidence outweighs or is more compelling than that of the State, so long as there is “some evidence” that, when viewed in the light most favorable to the verdict, along with all reasonable inferences therefrom, could allow any

⁸ The State notes that in his appellate brief, Herron did not challenge the legal-sufficiency of the *identity* of the Sheriff’s Office as the proper registration authority; rather, he challenged the sufficiency of the evidence only as to *notice* of his duty to register with the Sheriff’s Office. *See* (Appellant’s Br. at 6, 8-9, 13—wherein Appellant argued that because the June 24, 2016, pre-release form instructed him to report to Horizon PD, he “never received notice” that he needed to report to the Sheriff’s Office, such that the State failed to prove the *mens rea* element of the offense).

rational fact-finder to find all the elements of the charged offense beyond a reasonable doubt, an appellate court must reject an appellant's legal-sufficiency claim. *See, e.g., Matlock v. State*, 392 S.W.3d 662, 672 (Tex.Crim.App. 2013)(explaining that an appellate court is "required to first decide if there was 'some evidence' to support a reasonable jury's finding [of an elemental fact]" and that, "If there was some evidence, then the court must reject appellant's legal sufficiency claim."); *Matson v. State*, 819 S.W.2d 839, 846 (Tex.Crim.App. 1991); *Wicker v. State*, 667 S.W.2d 137, 143 (Tex.Crim.App. 1984).

And as this Court held in *Goodman v. State*, 66 S.W.3d 283, 286 (Tex.Crim.App. 2001), "[d]irect evidence of "X" fact is *always* legally sufficient to support a finding of "X" fact[,]" even if its source is particularly untrustworthy, and even if there is conflicting evidence from a more credible source. *See Goodman*, 66 S.W.3d at 285-86 (wherein this Court explained that direct testimony by "Cretan Liar" of fact "X" is always legally sufficient to prove that fact, even if contradicted by the testimony of "a dozen boy scouts")(emphasis added).

But here, despite repeated instances of direct testimony that Herron was required to register with the Sheriff's Office, the Eighth Court held that the evidence was legally insufficient to show that Herron, in fact, had such an

obligation. *See Herron*, 2019 WL 3451031 at *5. As noted above, Ms. Spink testified that when Herron absconded in February of 2016, she informed the Sheriff’s Office, which she described as the “registering agency,” and when questioned specifically, “who’s the local law enforcement authority that [Herron was] supposed to report to?”, she also testified that, “Here in El Paso, it’s the El Paso County Sheriff’s Office.” (RR:19, 30, 32). This was direct evidence that Herron was required to register with the Sheriff’s Office, and under *Goodman*, it was legally sufficient evidence in support of the State’s indictment allegation to that effect. *See Goodman*, 66 S.W.3d at 285-86.

Det. Gutierrez likewise testified—specifically, with regard to Herron’s “registration requirement”—that a sex offender has to register either with the chief of police or the local sheriff, but that, “In this case, it would be the sheriff’s office....” (RR:52). And when asked to what agency Herron was required to report if he did not complete an intended change of address, Det. Gutierrez, again, replied, “The El Paso County Sheriff’s Office.” (RR:51-52). This was yet additional direct evidence that Herron was required to register with the Sheriff’s Office, as alleged by the State in its indictment, and thus also legally sufficient to show that the Sheriff’s Office was the proper registration authority with which Herron was required to (but did not) register. *See Goodman*, 66 S.W.3d at 285-

86. Thus, insofar as the Eighth Court, having omitted this evidence from its analysis, held that the evidence presented was legally insufficient to show the Sheriff's Office's identity as the proper "local law-enforcement agency" with which Herron was required to register, such a holding amounted to an impermissibly narrow view of the evidence. *See Villa v. State*, 514 S.W.3d 227, 233 (Tex.Crim.App. 2017)(where this Court held the Eighth Court erred in failing to defer to an evidence-supported inference consistent with guilt simply because the witness did not expressly state the elemental fact).

And as to the Eighth Court's reasoning that Det. Gutierrez' statement that Herron was required to register with the Sheriff's Office because it had "jurisdiction at the halfway houses in Horizon" was merely "conclusory" and lacking in "context" that could lend any evidentiary support, *see Herron*, 2019 WL 3451031 at *5, the Court's assertion is refuted by the record, which shows that Det. Gutierrez made the statement in the course of explaining why it was the Sheriff's Office *specifically* that Herron was required to register, and not with another agency (such as, for instance, the El Paso Police Department). (RR:36, 42). Moreover, contrary to the Eighth Court's implication, this "jurisdiction" statement was not made in the ordinary, general law-enforcement sense. Rather, the statement was made in the course of describing Herron's sex-offender

registration requirements and by a seasoned law-enforcement officer whose specific occupation was to “keep track [of] and register all sex offenders that live in the jurisdiction of the El Paso County Sheriff’s Office and make sure that they are compliant with all stipulations [sic] under Chapter 62 [of the] Code of Criminal Procedure.” (RR:36, 40-42).

Certainly, when considered in this context, Det. Gutierrez’ statement regarding the Sheriff’s “jurisdiction” was sufficient to allow the fact-finder to conclude that the Sheriff’s Office was the proper registration authority with which Herron was required to register under Chapter 62, especially given that Det. Gutierrez described his occupation in terms of monitoring sex-offenders’ compliance with their registration requirements “under Chapter 62 [of the] Code of Criminal Procedure”. (RR:36). And to any extent Det. Gutierrez’ “jurisdiction” statement could be deemed ambiguous, the existence and/or weight of any such ambiguity was a question for the fact-finder, and the Eighth Court should have deferred to that determination by the trial court in favor of the State. *See Smith v. State*, 340 S.W.3d 41, 48-49 (Tex.App.-Houston [1st Dist.] 2011, no pet.)(holding that because it was unclear if the witness’ ambiguous reference to “this last summer” referred to the summer of 2007 or 2008, the jury could have reasonably reconciled this ambiguity in such a way as to support its guilty

verdict); *see also Queeman v. State*, 520 S.W.3d 616, 622 (Tex.Crim.App. 2017)(holding that the reviewing court must presume that the jury resolved any such conflicts in favor of the verdict).

Similarly, to any extent the June 24, 2016, pre-release form's designation of Horizon PD as the "local law enforcement agency" could show that Herron was not required to register with the Sheriff's Office, at best, such was a mere conflict in the evidence, which the trial court was free to resolve in favor of the multitudinous other evidence identifying the Sheriff's Office as the proper registration authority. *See Queeman*, 520 S.W.3d at 622; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex.Crim.App. 2010)(cases holding that the reviewing court should presume that the fact-finder resolved any conflicts in the evidence in favor of the prevailing party).

Moreover, the additional circumstantial evidence, which included the January 2016 and February 2016 pre-release forms (designating the Sheriff's Office as the corresponding registering agency for the very-same 1700 Horizon North Blvd. address to which Herron was finally released in June of 2016), the fact that Herron had previously registered with the Sheriff's Office on February 4, 2016, (when he was to reside at the very-same 1700 Horizon Blvd. North address), and the February 2016 registration form's designation of the Sheriff's Office as

the “registering agency,” all of which tended to show that the proper registration authority corresponding to the Horizon City halfway house was the Sheriff’s Office, further corroborated Ms. Spink’s and Det. Gutierrez’ identification of the Sheriff’s Office as the proper registration authority.

That the Eighth Court would have preferred that the State’s witnesses expressly describe the identity of the Sheriff’s Office as the proper registration authority in terms of the applicable statutory definition—that is, by explaining the underlying reasons as to why the Sheriff’s Office was the registration authority corresponding to Herron’s intended address at the Horizon City halfway house under Chapter 62 (for instance, either because DPS or the commissioner’s court had designated it as Herron’s primary registration authority or centralized registration authority, respectively)—in no way lessens the legitimacy of the evidence (direct or otherwise) actually presented, which, when considered in a proper legal-sufficiency analysis, was sufficient to allow, at the very least, a rational inference that the Sheriff’s Office was the agency with which Herron was required to register.

For all of these reasons, the Eighth Court erred in holding that the State failed to present legally sufficient evidence to show that Herron was required to register with the Sheriff’s Office, as alleged in the indictment. As such, the Eighth

Court's judgment of acquittal should be reversed, and Herron's conviction should be affirmed.

PRAYER

WHEREFORE, the State prays that this petition for discretionary review be granted and that, upon hearing, this Court hold the evidence legally sufficient to support Herron's failure-to-register conviction and affirm his conviction.

JAIME ESPARZA
DISTRICT ATTORNEY
34th JUDICIAL DISTRICT

/s/ Raquel López

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document, beginning with the factual summary on page 1 through and including the prayer for relief on page 19, contains 4,496 words, as indicated by the word-count function of the computer program used to prepare it.

/s/ Raquel López

RAQUEL LOPEZ

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on August 15, 2019, a copy of the foregoing petition for discretionary review was sent by email, through an electronic-filing-service provider, to appellant’s attorney: Kenneth Del Valle, kendelvalle@aol.com.

(2) The undersigned also does hereby certify that on August 15, 2019, a copy of the foregoing petition for discretionary review was sent by email, through an electronic-filing-service provider, to the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Raquel López

RAQUEL LOPEZ

APPENDIX

COURT OF APPEALS' OPINION

2019 WL 3451031

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

(Do Not Publish)

Court of Appeals of Texas, El Paso.

[Robert HERRON](#), Appellant,

v.

The STATE of Texas, Appellee.

No. 08-17-00239-CR

|
July 31, 2019

Appeal from the 205th District Court of El Paso County,
Texas (TC# 20160D03600)

Attorneys and Law Firms

Renan Kenneth Del Valle, Raquel Lopez, for Appellant.

[Jaime E. Esparza](#), for Appellee.

Before [Rodriguez, J.](#), [Palafox, J.](#) and [Quinn, C.J.](#)

OPINION

[BRIAN QUINN](#)

*1 Robert Herron (Appellant) appeals his conviction under [article 62.102\(a\) of the Texas Code of Criminal Procedure](#) for failing to register as a sex offender. His sole issue involves the sufficiency of the evidence underlying the conviction. Allegedly, the State failed to prove a particular element of the crime, that element being the requirement he register with the El Paso County Sheriff. We sustain the issue and reverse the judgment.

Background

It is undisputed that Appellant, having been convicted of sexually assaulting a child, was a person obligated to register as a sex offender. On June 24, 2016 and immediately prior to his release from an intermediate sanctions facility in Brownfield, Texas (ISF), he executed a “Pre-Release

Notification Form.” The intent was to release Appellant from ISF and return him to a halfway house. As testified to by the unit supervisor of the Texas Department of Criminal Justice Parole Division, Appellant “... was to report immediately to the residential reentry center, which was the halfway house in Horizon City.” Its address was 1700 Horizon Blvd North, El Paso, Texas and constituted “...one of our halfway houses in Horizon City [that] we call the north building.” Via his execution of the form, Appellant confirmed his obligation and agreement to “personally appear at the following local law enforcement authority to verify and complete my registration” The “Local Law Enforcement Agency Name” alluded to was “Horizon City Police Department” located at “14999 Darrington Rd Unit 7, Horizon City, TX 79928.”

Appellant did not show-up as promised, though. Personnel charged with his transportation to the halfway house took him to a local bus station. While they were acquiring a ticket for him, he “absconded.” Authorities eventually arrested him in South Texas. That resulted in Appellant being indicted under [article. 62.102\(a\)](#).

The State alleged, in its indictment, that Appellant “...[d]id then and there, while being a person required to register with the local law enforcement authority to-wit: El Paso County Sheriff, in the county where [Appellant] resided or intended to reside for more than seven days, to-wit: El Paso, ... intentionally or knowingly fail[ed] to register with the local law enforcement authority in said El Paso County” Trial was to the court, and during same, the State did present evidence illustrating that Appellant failed to report to or register with that sheriff. Yet, whether Appellant reported to or registered with the local law enforcement authority prescribed in the pre-release form, *i.e.* Horizon City Police Department, was a topic unaddressed by the State. Neither of the two witnesses presented at trial discussed that. Nor did the State call any representative from the Horizon Police Department to address whether he registered with it in any manner. Nonetheless, the trial court found Appellant guilty of the “offense of failure to register” with the El Paso County Sheriff.

Authority

As mentioned earlier, Appellant contends that insufficient evidence supports his conviction because the State proved merely that he failed to register with the El Paso County Sheriff. We sustain the issue.

*2 The standard of review is that recently described in *Ramjattansingh v. State*, 548 S.W.3d 540 (Tex. Crim. App. 2018) and *Morrow v. State*, No. 08-16-00040-CR, 2019 WL 1499484, at *6 (Tex. App.—El Paso Apr. 5, 2019, no pet.) (not designated for publication). The standard described in them implicates the elements of the crime as defined in a hypothetically correct jury charge. A hypothetically correct charge is one that accurately sets forth the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or restrict its theories of liability, and adequately describes the particular offense. *Ramjattansingh*, 548 S.W.3d at 546. The prong of being “authorized by the indictment” refers to the statutory elements of the crime as modified by the charging instrument. *Id.* And, in applying the prong, it must be remembered that where the statute describes several ways of committing the crime or has several definitions of an element of the crime and the indictment alleges less than all, then the State is limited to the methods or definitions alleged. *Id.* That is, the conviction may not be affirmed simply because evidence may also prove a violation based on the other unalleged ways or definitions. Finally, one violates [article 62.102\(a\) of the Code of Criminal Procedure](#) if he or she is a person required to register and fails to comply with any requirement imposed by chapter 62 of that Code. [TEX. CODE CRIM. PROC. ANN. art. 62.102\(a\)](#); *Robinson v. State*, 466 S.W.3d 166, 170 (Tex. Crim. App. 2015).

Analysis

Again, the State indicted Appellant for “... being a person required to register with the local law enforcement authority to-wit: El Paso County Sheriff, in the county where [he] resided or intended to reside for more than seven days, to-wit: El Paso,” and who “... intentionally or knowingly fail[ed] to register with the local law enforcement authority in said El Paso County” In play here is not whether Appellant was someone obligated to register. He does not question that. His complaint lies with the State's proof regarding his purported failure to register as mandated by chapter 62 of the Code of Criminal Procedure. Did the State prove he violated [article 62.102\(a\)](#) by failing to register with the entity alleged in the indictment (*i.e.* the El Paso County Sheriff) upon his release from ISF at the end of June 2016. Appellant argues that he did not since the State neglected to establish an obligation to register with that sheriff. We agree.

Chapter 62 of the Code prescribes various governmental agencies or authorities with whom individuals within its scope must register. Because of the number of those agencies or local law enforcement authorities, the State has the burden “to prove the elements which established the identity of the law enforcement entity with which [the accused] was required to register.” *Simpkins v. State*, 300 S.W.3d 860, 863 (Tex. App.—Texarkana 2009, no pet.); *see also Webster v. State*, No. 06-17-00093-CR, 2017 WL 4937994, at *2 (Tex. App.—Texarkana Nov. 1, 2017, no pet.) (mem. op., not designated for publication) (reaffirming *Simpkins*). In other words, the State must prove the identity of the particular agency with which the accused was obligated to register, and it does that by satisfying the test inherent in the definition of “local law enforcement authority.”

The definition of “local law enforcement authority” appears at [article 62.001\(2\) of the Code of Criminal Procedure](#). It means “...the office of the chief of police of a municipality, the office of the sheriff of a county in this state, or a centralized registration authority.” [TEX. CODE CRIM. PROC. ANN. art. 62.001\(2\)](#). From this definition, we see that there are three possible entities at which a sex offender must register. Which one is the applicable entity in any particular case depends upon either the edict of a county commissioners court or the residence or intended residence of the offender, as explained in articles 62.004, 62.051, and 62.0045 of chapter 62.

For instance, under [article 62.004\(a\)](#), the Texas Department of Public Safety selects the entity. Through it, the legislature said that: “[e]xcept as provided by Subsection (a-1), for each person subject to registration ... the department shall determine which local law enforcement authority serves as the person's primary registration authority” [TEX. CODE CRIM. PROC. ANN. art. 62.004\(a\)](#).¹ Furthermore, the determination is “based on the municipality or county in which the person resides or, as provided by [Article 62.152](#), the municipality or county in which the person works or attends school.” *Id.*

*3 Similarly, the geographic location of offender's residence or intended residence dictates a determination under [article 62.051](#) of the Code. [TEX. CODE CRIM. PROC. ANN. art. 62.051](#). Through the provision, the legislature declared that a person required “to register as a condition of parole, release to mandatory supervision, or community supervision shall register ... with the local law enforcement authority in any municipality where the person resides or intends to reside for more than seven days.” *Id.* at 62.051(a). If he or she

“does not reside or intend to reside in a municipality, [then] the person shall register ... in any county where the person resides or intends to reside for more than seven days.” *Id.* So, if the offender lives in an unincorporated area he registers with the county sheriff; if living within an incorporated areas or municipality, he registers with that municipality's police department. *Simpkins*, 300 S.W.3d at 864.

Or, the county's commissioners court wherein the offender lives or intends to live may designate a centralized registration authority per article 62.0045. [TEX. CODE CRIM. PROC. ANN. art. 62.0045\(a\)](#) (stating that the commissioners court may designate the office of the sheriff of the county or may, through interlocal agreement, designate “the office of a chief of police of a municipality in that county to serve as a mandatory countywide registration location for persons subject to this chapter”). Should a commissioners court make such a selection, the centralized registration authority chosen becomes the primary registration authority at which the registrant must register. *Id.* at [art. 62.004\(a-1\)](#) & [62.0045\(b\)](#).

Here, the June 2016 pre-release form executed by the Texas Department of Corrections and Appellant disclosed both the geographic place where Appellant was expected to reside and the authority with which he was to register. The former was “1700 Horizon BLVD North, El Paso, Texas 79928” and the latter the “Horizon City Police Department” at “14999 Darrington Rd. Unit 7, Horizon City, TX 79928.” Whether the Department of Public Service selected the Horizon City Police Department as the pertinent location is unknown. No one testified to that. Nor did the pre-release form or any other exhibit indicate as much. Yet, it is clear that Appellant was being sent to a “halfway house in *Horizon City*” according to the unit supervisor from the Texas Department of Criminal Justice Parole Division. (Emphasis added). The halfway house apparently being within the borders of the Horizon City or City of Horizon municipality, it would seem appropriate to designate that municipality's police department as the point of registration per [article 62.051\(a\)](#). [TEX. CODE CRIM. PROC. ANN. art. 62.051\(a\)](#); *Simpkins*, 300 S.W.3d at 863. This is especially so when nothing of record indicates that a commissioners court selected a different locale as the applicable registration authority under [article 62.0045](#).

Despite Appellant being sent to reside within Horizon City and told to register with that city's police department, the State accused him of neglecting to register with the sheriff. So too did its evidence prove what it alleged; Appellant did not register with the sheriff of El Paso County. But, as previously

mentioned, nothing was said or presented about whether Appellant registered elsewhere, such as with the Horizon City police. Indeed, the only witness discussing whether Appellant registered upon his June 2016 release from ISF conceded that he did not know if Appellant actually registered with any authority. That is, the sheriff's detective answered “correct” when asked: “[s]o you wouldn't know if he had reported anywhere or not, correct?”

Nor did either of the State's witnesses describe the halfway house to which Appellant was sent as located outside a municipality. Quite the contrary. One described the place as (1) “the halfway house *in Horizon City*” and (2) “...one of our halfway houses *in Horizon City* [that] we call the north building.” (Emphasis added). The other alluded to the houses as being “in Horizon.”

*4 In short, the evidence of record indicates that the place where Appellant was to reside lay within the municipality of Horizon City. No evidence illustrates that it lay outside an incorporated area and solely within El Paso County. So, the State failed to satisfy an element of its burden, just as it did in *Simpkins*. Without proving that the geographic location of the halfway house lay within an unincorporated area of El Paso County, it failed to prove that Appellant violated chapter 62 by neglecting to register with the El Paso County Sheriff. And its subsequent arguments urged in effort to fill the void are themselves insufficient.

For instance, the circumstances before us do not implicate a mere failure to issue a valid pre-release form, as suggested by the State. *See* [TEX. CODE CRIM. PROC. ANN. art. 62.053](#) (prescribing the issuance of the pre-release form and specifying its content). Irrespective of the form's content, establishing that Appellant resided or intended to reside within a locale outside a municipality and, consequently, had to register with the sheriff was a prerequisite to proving guilt. *Simpkins*, 300 S.W.3d at 864. The State did not do that.

Nor is Appellant having signed a pre-release form in February 2016 directing him to register with the sheriff of consequence for several reasons. First, the form simply told him where to register; it did not say anything suggesting that he had to register there because the halfway house lay in an unincorporated area. Second, a county sheriff's “jurisdiction” extends throughout the county. *See* [TEX. CODE CRIM. PROC. ANN. art. 2.17](#) (stating that each sheriff is a conservator of the peace “in his county”); *Dominguez v. State*, 924 S.W.2d 950, 954-55 (Tex. App.—El Paso 1996, no

pet.) (stating that a “county sheriff’s jurisdiction to conduct investigations and make arrests is county-wide.”) Because it does, it necessarily encompasses any geographic area of a municipality within that county. See *Weber v. City of Sachse*, 591 S.W.2d 563, 567-68 (Tex. App.—Dallas 1979, writ *dism’d*) (recognizing that a sheriff has the discretion to select the number of sheriff deputies assigned to patrol within a municipality). So, because a sheriff has “jurisdiction” inside and outside of municipalities located within a county, it does not reasonably follow that merely because an offender is told to register with the sheriff, he must reside outside all municipalities within the county.

Third, the February 2016 pre-release form was not the form generated immediately prior to Appellant’s departure from ISF in June of 2016. Another was executed telling him to register with the City of Horizon Police Department. We hesitate to hold that designations in earlier forms supersede like designations in the last form issued by the State, especially when the designations cover the exact same topic.

Fourth, if being told earlier to register with the El Paso County Sheriff is evidence that Appellant intended to reside outside a municipality in February of 2016, then being told to register with the Horizon City police is evidence that he was going to live within a municipality upon his release in June of 2016. Yet, as illustrated above, neither designation is evidence of whether the geographic location of where an offender intends to live falls inside or outside a municipality. And, to hold contrary would be to reject *Simpkins* and its holding that the aforementioned element must be established through evidence. There would be no need for evidence establishing the element if the designation itself proved it.

Of no moment as well is the State’s suggestion that the sheriff detective proved Appellant had to register with the sheriff. This proof allegedly came in the form of the detective telling the trial court that Appellant had to register there because the sheriff had “jurisdiction” over the halfway house. No one asked the detective to clarify what he meant when uttering the conclusory statement. Whether he was alluding to power versus geography is up for speculation. Nonetheless, we discussed above why the mere concept of “jurisdiction” over a geographic spot within a county fails to establish whether the spot lies outside a municipality. Again, it may lay in or out. To that, we note other reasons for deeming the argument deficient.

*5 First, and as observed, the detective’s statement about the sheriff having jurisdiction was conclusory. Neither context nor evidentiary support accompanied it. Without such evidentiary support, conclusions are no evidence of the fact at issue. See, e.g., *Herrington v. State*, 534 S.W.2d 331, 334-35 (Tex. Crim. App. 1976) (stating that “[t]he bare conclusory statement of the witness ‘He failed to report as directed by the probation officer at least once per month’ in the absence of further facts concerning such failure is too vague, indefinite and ambiguous to reflect that appellant failed to report as directed by the court”). Second, statute controls the determination of the pertinent agency at which registration must occur. Statute also prescribes the methods used to make the selection. None encompass selection by a local sheriff or member of the sheriff’s office. Rather, each requires proof of certain criteria distinct from what a sheriff or his employee may conclude the location to be. Third, and most importantly, the complete statement of the detective is quite telling. When asked why Appellant “was he required to report to the El Paso County sheriff’s office as opposed to the El Paso Police Department,” the detective said “[b]ecause we have jurisdiction at the -- when I say ‘we’ -- the sheriff’s office has jurisdiction at the halfway houses *in Horizon*.” (Emphasis added). That indicates the houses were in the city of “Horizon,” as opposed to the area lying outside its boundaries.

As for the final argument of the State, we assume *arguendo* that Appellant reported neither his change of address upon absconding nor his intent to change his address by absconding. So too do we assume *arguendo* that such neglect fell within the parameters of [article 62.102\(a\) of the Code of Criminal Procedure](#). Yet, the State opted to indict Appellant for the distinct offense of failing to register with the local law enforcement authority, not for neglecting to report an address change or intent to change an existing address. As we said above, “[w]hen a Texas statute lists more than one method of committing an offense or definition of an element of an offense, and the indictment alleges some, but not all, of the statutorily listed methods or definitions, the State is limited to the methods and definitions alleged” in the indictment. *Ramjattansingh*, 548 S.W.3d at 546-47; accord *Nikolaev v. State*, 474 S.W.3d 711, 714 (Tex. App.—Eastland 2014, *pet ref’d*) (applying the same rule in a case involving chapter 62 of the Code of Criminal Procedure). Having chosen to indict Appellant for failing to register, the State cannot now protect its conviction by arguing that Appellant committed infractions other than those mentioned in the indictment. See *Martin v. State*, No. 11-14-00060-CR, 2016 WL 1294252,

at *4 (Tex. App.—Eastland Mar. 31, 2016, no pet.) (mem. op., not designated for publication) (holding that the State was limited to the charge of failure to report a change in an online identifier because that was the charge alleged in the indictment); *Roberts v. State*, No. 05-11-00450-CR, 2012 WL 2362530, at *3 (Tex. App.—Dallas June 22, 2012, no pet.) (mem. op., not designated for publication) (rejecting the argument that the appellant could be prosecuted for the failure to change addresses in violation of the registration statute when that mode of violating the statute was omitted from the indictment); *Rios v. State*, 141 S.W.3d 750, 753 (Tex. App.—Corpus Christi 2004, pet. ref'd) (stating that “In proving Rios failed to comply with registration requirements, the State was ... limited to the allegation in the indictment: that he failed to report within seven days of his ‘arrival in’- or return to-Corpus Christi’ ”).

Here, the record lacks legally sufficient evidence to support Appellant's conviction for the offense charged in the indictment. And, under the facts at bar, we find no lesser included offense for which Appellant could be convicted per *Thornton v. State*, 425 S.W.3d 289, 299 (Tex. Crim. App. 2014). See *Martin*, 2016 WL 1294252, at *5 (finding *Thornton* inapplicable to a conviction under chapter 62 because the reviewing court could not “see how there could

be a lesser included offense that would apply to the facts of this case”). Consequently, we reverse the judgment of the trial court and render a judgment of acquittal.

The trial court certified Appellant's right to appeal in this case, but the certification does not bear Appellant's signature indicating that he was informed of his rights to appeal and to file a *pro se* petition for discretionary review with the Texas Court of Criminal Appeals. See [TEX.R.APP.P. 25.2\(d\)](#). The certification is defective, and has not been corrected by Appellant's attorney, or the trial court. To remedy this defect, this Court ORDERS Appellant's attorney, pursuant to [TEX.R.APP.P. 48.4](#), to send Appellant a copy of this opinion and this Court's judgment, to notify Appellant of his right to file a *pro se* petition for discretionary review, and to inform Appellant of the applicable deadlines. See [TEX.R.APP.P. 48.4](#), 68. Appellant's attorney is further ORDERED, to comply with all of the requirements of [TEX.R.APP.P. 48.4](#).

Quinn, C.J., sitting by assignment

All Citations

Not Reported in S.W. Rptr., 2019 WL 3451031

Footnotes

- 1 Statute specifies the Texas Department of Public Safety as the “department.” [TEX. CODE CRIM. PROC. ANN. art. 62.001\(1\)](#).