

Case Summary and Issues

Bryan Berryman appeals his convictions, following a jury trial, of insurance fraud, a Class D felony, false reporting or informing, a Class B misdemeanor, and failure to stop after an accident resulting in damage to property of another person other than a vehicle, a Class B misdemeanor. For our review, Berryman raises two issues: 1) whether the State proved venue was proper in Ohio County with respect to the insurance fraud count; and 2) whether sufficient evidence supports his convictions. Concluding Berryman waived his venue challenge by failing to raise the issue to the trial court, and the evidence is sufficient to support his convictions, we affirm.

Facts and Procedural History

In the early morning of December 13, 2007, Berryman's Dodge SUV was involved in a single-vehicle accident on the property of Grand Victoria Casino and Resort (the "Casino"). The Casino is located in Rising Sun, Ohio County, Indiana. As witnessed by a Casino employee on his way to work, the SUV ran off the road and struck a tree. At approximately 2:45 a.m., a Casino security officer arrived at the scene and saw a tree had been knocked over, grass was torn up, and vehicle parts were strewn about, but no vehicle was present. Officer Miller of the Rising Sun Police Department was dispatched to the scene and recovered a front bumper cover. The bumper cover had a sticker on the inside indicating it belonged to a Dodge vehicle of mineral gray color and showing the vehicle's partial vehicle identification number ("VIN"). At no time during Officer Miller's investigation did anyone return to the scene and identify himself as the person involved, and no contact information of the person was left at the scene.

Later that morning, Berryman went to the Rising Sun Police Department, also located in Ohio County. Berryman told Lieutenant Browning that his vehicle was missing and he wanted to report it stolen. Lieutenant Browning was aware of the presence near the police counter of the bumper cover recovered by Officer Miller. Berryman noticed the bumper cover and asked Lieutenant Browning if it was part of his vehicle. While Berryman and Lieutenant Browning were talking, Lieutenant Browning received a report of a suspicious gray SUV parked behind a liquor store. Lieutenant Browning left to investigate and found behind the liquor store a gray SUV that was “heavily damaged in the front end” and appeared to have hit a tree or pole. Transcript at 78. The driver’s airbag had deployed, but the steering column was undamaged and there was no evidence the SUV had been broken into.

Lieutenant Browning had the SUV towed back to the Rising Sun Police Department, where Berryman identified it as his vehicle. Berryman completed the stolen vehicle report by stating that after leaving an employee Christmas party at the Casino, he went to a bar on Main Street in Rising Sun and had drinks with friends until 2 a.m. Then, according to Berryman, he got a ride home with a friend and later returned to Main Street to look for his vehicle, where he believed he had parked it. Berryman claimed he could not then locate his vehicle, leading him to believe it was stolen, and stated he was not in his vehicle when it crashed. Lieutenant Browning continued the investigation of Berryman’s stolen vehicle report, comparing the SUV’s color and partial VIN with those recovered from the scene of the accident and finding that both matched.

Also on December 13, 2007, Berryman contacted Geico Insurance Company, his insurer for the SUV, and claimed the SUV had been stolen. On December 18, 2007, Berryman was interviewed by Geico claims investigator Steve Warren, and he told a story similar to what he told Lieutenant Browning. Geico eventually declared Berryman's vehicle a total loss and paid his claim, as well as an additional \$1,500 for a sixty-day car rental for Berryman. The Casino paid at its own expense the cost of repairing the damage to its property.

However, Lieutenant Browning continued to investigate the circumstances surrounding the crash of Berryman's SUV and his insurance claim, and spoke with Berryman's friends whom he had claimed to be with during the early morning of December 13. One of those people, Patrick Ferrari, reported – and testified at trial – that Berryman had admitted to him he did wreck his vehicle that night.

The State charged Berryman in Ohio County with insurance fraud, a Class D felony, false reporting or informing, a Class B misdemeanor, and failure to stop after an accident resulting in damage to property of another person other than a vehicle, a Class B misdemeanor. A jury trial was held on July 28 and 29, 2009. At the close of the State's evidence, Berryman moved for judgment on the evidence, arguing the State had failed to prove Berryman was involved in the accident or intended to defraud Geico, but did not specify a lack of evidence regarding venue as the basis for the motion. After the motion was denied, the jury found Berryman guilty as charged, and the trial court sentenced him to 1,095 days incarceration. He now appeals.

Discussion and Decision

I. Venue

Berryman argues the State failed to prove venue was proper in Ohio County with respect to the insurance fraud count, for which he claims the proper venue was Dearborn County. A defendant has the constitutional and statutory right to be tried in the county where the crime was committed. See Ind. Const. art. 1, § 13(a); Ind. Code § 35-32-2-1(a). Venue is not an element of the offense, and therefore, although the State is required to prove venue, it may be established by a preponderance of the evidence rather than beyond a reasonable doubt. Baugh v. State, 801 N.E.2d 629, 631 (Ind. 2004). Further, the right to be tried in the proper venue “is a right personal to the defendant which he waives by failing to object.” Critchlow v. State, 264 Ind. 458, 467, 346 N.E.2d 591, 597 (1976). Any error relating to venue is waived on appeal if the defendant fails to make an objection before or during trial. Smith v. State, 809 N.E.2d 938, 942 (Ind. Ct. App. 2004), trans. denied; see Floyd v. State, 503 N.E.2d 390, 393 (Ind. 1987) (“Many times this Court has held that a defendant waives error relating to venue when he fails to make an objection at the appropriate time in the trial court.”); Neff v. State, 915 N.E.2d 1026, 1032 n.3 (Ind. Ct. App. 2009) (noting that “venue may be challenged at any time before a verdict or guilty finding”), trans. denied.

At no time during the trial court proceedings did Berryman object to the insurance fraud count being filed or tried in Ohio County. Although Berryman moved for judgment on the evidence, in so doing he made no claim the State failed to prove proper venue, and neither did he raise the issue by tendering a jury instruction or arguing insufficiency

concerning venue during closing argument. Therefore, Berryman’s argument regarding venue, raised for the first time on appeal, is waived and cannot entitle him to a new trial.

Waiver notwithstanding, the jury was presented with sufficient evidence from which it could have inferred the proper venue for all counts was Ohio County. Berryman concedes that his two misdemeanor offenses – failure to stop at the accident and false informing to the Rising Sun Police Department – occurred in Ohio County and the counts were properly filed there. As to the insurance fraud count, claims investigator Warren testified that the initial report he received from the claims department “indicated that a theft claim was filed in Rising Sun, Indiana, by Mr. Berryman.” Tr. at 122. Thus, the jury could reasonably have inferred Berryman was in Ohio County when he made his initial stolen vehicle report to Geico.¹

II. Sufficiency of the Evidence

In separately challenging the sufficiency of the evidence,² Berryman argues only that there is insufficient evidence he was driving the SUV at the time of the single-vehicle accident.³ When reviewing the sufficiency of the evidence to support a

¹ Berryman argues that Warren’s investigative notes indicate his in-person interview with Berryman took place at Berryman’s residence in Aurora, Dearborn County. However, these notes were not introduced into evidence at trial and therefore cannot support Berryman’s claim of trial error.

² In discussing his sufficiency claim, Berryman renews his argument regarding venue as resolved in Part I, supra.

³ Berryman does not dispute that the State’s evidence is otherwise sufficient to convict him of each charged crime. See Ind. Code § 35-43-5-4.5(a) (providing a person commits insurance fraud as a Class D felony if, among other things, the person knowingly and with intent to defraud presents, causes to be presented, or prepares with knowledge or belief it will be presented to or by an insurer, a statement that the person knows to contain materially false information as part of, in support of, or concerning a fact material to a claim for payment or benefit under an insurance policy); Ind. Code § 35-44-2-2(d) (providing a person commits false informing as a Class B misdemeanor if, among other things, the person gives a false report of commission of a crime, knowing the report to be false); Ind. Code § 9-26-1-8(b) (providing a person commits a Class B misdemeanor by knowingly or intentionally failing “to stop or comply with section 3 or 4 of this chapter after causing damage to the property of another person”); Ind. Code § 9-26-1-4 (requiring the driver of a vehicle that causes damage to property of another person, other than damage to a vehicle, to, among other things, immediately stop, return to, and remain at the scene of the accident and

conviction, we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We neither reweigh the evidence nor assess the credibility of witnesses. Id. If there is probative evidence from which a reasonable trier of fact could find the elements of the crime proven beyond a reasonable doubt, we must affirm. Id.

Berryman concedes it was his SUV that was involved in the single-vehicle accident. Ferrari testified that Berryman told him he wrecked his SUV that early morning. From this testimony and the surrounding circumstances, the jury could reasonably infer Berryman was driving the SUV when he wrecked it. By merely alleging Ferrari's testimony "is questionable at best" and "was inconsistent and lacking of sufficient detail," Appellant's Brief at 8, Berryman invites us to revisit questions of weight and credibility that were determined by the jury in reaching its verdict. This we will not do, and as a result, the evidence is sufficient to support Berryman's convictions.

Conclusion

Berryman waived his venue challenge by failing to raise the issue to the trial court, and waiver notwithstanding, we find no error. Further, the evidence is sufficient to support Berryman's convictions.

Affirmed.

MAY, J., and VAIDIK, J., concur.

take reasonable steps to notify the property's owner or person in charge, and if after reasonable inquiry that is not possible, to notify the county sheriff or state police).