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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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Kevin Ratliff
Appellant

v.

The State of Texas
Appellee

On Appeal In Case Number CR7557, from the 424th District Court of Llano County, the Hon. Evan C. Stubbs, Judge Presiding, and the Opinion of the Third Court of Appeals in Case No. 03-18-00569-CR; dated February 14, 2020.

Appellant's Brief on the Merits

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Identity of Parties and Counsel

Pursuant to Rule 38.1(a), Rules of Appellate Procedure ("Tex.R.App.Pro."), the following is a complete list of the names and addresses of all parties to the trial court's final judgment and their counsel in the trial court, as well as appellate counsel, so the members of the Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case and so the Clerk of the Court may properly notify the parties to the trial court's final judgment or their counsel, if any, of the judgment and all orders of the Court of Criminal Appeals.

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Note Regarding Abbreviations & Hyperlinks

In this brief, Appellant refers to the Clerk's Record as "CR" followed by the appropriate page: e.g., "(CR 123)." Appellant refers to the Reporter's Record as "RR" followed by the volume, page and line numbers: e.g., "(RR Vol. 3, P. 47, L. 12-15). Additionally, in this brief, Appellant utilizes hyperlinks to cited opinions. Where an opinion was not designated for publication or the published opinion and is not yet available on a free public service, and when possible, the hyperlink will be to the posted opinion on the particular court's website. All other hyperlinks are to a copy of the opinion on the Google Scholar site.

Statement Regarding Oral Argument

The Court has indicated that oral argument will be permitted. Appellant therefore respectfully requests the opportunity to present oral argument.

Statement of the Case

The following is a general statement of the nature of the case:

> Appellant was charged by indictment with the offenses of official oppression and tampering with a governmental record. He was convicted of both offenses and sentenced to confinement for six months probated for one year as to each count.

Statement of Procedural History

The following is a summary of the procedural history of the instant case:

> Appellant was convicted in July of 2018, and Notice of Appeal was timely given on August 30, 2018. The Court of Appeals opinion on which review was granted is ***Ratliff v. State***, 604 S.W.3d 65 (Tex.App. - Austin 2020). Appellant's petition for discretionary review was timely filed on August 28, 2020, and review was granted on January 27, 2021.

No. PD-0545-20

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

Kevin Ratliff, Appellant

v.

The State of Texas, Appellee

On Appeal In Case Number CR7557, from the 424th District Court of Llano County, the Hon. Evan C. Stubbs, Judge Presiding, and the Opinion of the Third Court of Appeals in Case No. 03-18-00569-CR; dated February 14, 2020

Appellant's Brief on the Merits

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, Kevin Ratliff, Appellant in the above styled and numbered cause, by and through Robert Daniel, John G. Jasuta, and David A. Schulman, his undersigned attorneys of record, and respectfully files his brief on the merits, and would show the Court as follows:

Ground on Which Review was Granted

The Court of Appeals Erred to Find that the Evidence Was Sufficient to Sustain the Convictions Entered in the Instant Case

Relevant Facts[1]

In Counts 1 and 2 of the indictment, the State alleged that Appellant committed four separate acts:

❶ Intentionally subjected Cory Nutt to an unlawful arrest;

❷ Unlawfully detained, arrested, or seized Cory Nutt;

❸ Unlawfully entered Cory Nutt's residence and seized him without a warrant, knowing such conduct was unlawful; and

❹ Subjected Cory Nutt to mistreatment by criminally trespassing upon Cory Nutt's residence.[2]

Each of the four particular claims alleged that Appellant knew that his conduct was unlawful, and sections 39.03 (a)(1) and (a)(2) of the Penal Code require that the actor knows his conduct is unlawful. Moreover, the trial court's charge on guilt/innocence required the jury to find that, as to Count 1 and Count 2, Appellant knew his conduct was unlawful.

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[1] The Court of Appeals recitation of the facts is generally adequate. See ***Ratliff***, 604 S.W.3d at 69. To the extent there is a disagreement about the facts set out in the Court of Appeals' opinion, Appellant will discuss those differences in this brief.

[2] All four allegations stemmed from a single act: Appellant's warrantless arrest of Nutt for public intoxication, which occurred inside Nutt's trailer.

The State called five witnesses. Jack Schumacher, the chief investigator for the district attorney's office for "about five years" (Vol. 4, PP. 32-33), discussed his investigation and detailed his qualifications as "Fourth Amendment" expert. Lisa Bujnoth, who described herself as being "recently retired from the Houston police department where I worked for 38 years" (Vol. 6, PP. 34), testified that she had "spent that last 29 years of my career working in patrol and investigations as a lieutenant," and had worked on an "acting" basis as both captain and commander (Vol. 6, P. 35).

In Count 3 of the indictment, the State charged Appellant with tampering with a governmental record. Specifically, the indictment alleged that Appellant:

> did then and there, with intent to defraud or harm another, namely, Cory Nutt, make or present or use a governmental record, namely, a Llano Police offense report, in case number L 17-130, by omitting or misrepresenting facts of the arrest of Cory Nutt, and the Defendant made or presented or used the governmental record with knowledge of its falsity.

The report in question was prepared by Grant Harden (RR Vol. 4, P. 16), and the State's theory of the case, as explained to

the jury, was that when Harden made the report he left out all of the information about Appellant going into Nutt's trailer (RR Vol 4, Pl. 16, L. 10-11). The tampering on Appellant's part, in the State's theory, occurred when the report was initialed by Appellant, indicating his approval. In fact, the indictment alleged that Appellant tampered with the report "by omitting or misrepresenting facts of the arrest of Cory Nutt" (CR 8).

Summary of the Argument

As to the conviction for Tampering with a Government Record, the evidence submitted to the jury during the trial of the case shows that ❶ including the "facts of the arrest" in an offense report is not required by any statute or rule; and ❷ any facts not stated in the offense report were provided via video evidence. As to the conviction for Official Oppression, the evidence submitted shows that ❸ Appellant reasonably believed he was authorized to arrest Nutt without a warrant; ❹ exigent circumstances authorized Appellant to enter Nutt's trailer to defuse the situation; and ❺

Appellant did not know that his conduct in entering Nutt's trailer to defuse the situation was unlawful, *arguendo* it was unlawful.

Argument & Authorities

I. The Law Relating to Sufficiency of the Evidence

In reviewing the sufficiency of the evidence necessary to support each element of a criminal offense the State is required to prove beyond a reasonable doubt, the standard is that established in ***Jackson v. Virginia***, 443 U.S. 307, 319 (1979). See ***Queeman v. State***, 520 S.W.3d 616, 623 (Tex.Cr.App. 2017); ***Adames v. State***, 353 S.W.3d 854, 859 (Tex.Cr.App. 2011); ***Brooks v. State***, 323 S.W.3d 893, 912 (Tex.Cr.App. 2010). The reviewing court considers all the evidence in the light most favorable to the verdict and determines whether, based on that evidence and reasonable inferences to be drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***Queeman***, 520 S.W.3d at 623.

In Texas, the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge, which

is "one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." ***Malik v. State***, 953 S.W.2d 234, 240 (Tex.Cr.App. 1997); see also ***Zuniga v. State***, 551 S.W.3d 729, 733 (Tex.Cr.App. 2018).

II. The State's Burden

As to Count 1 of the indictment (official oppression), the State was required to prove Appellant:

❶ was a public servant;

❷ was acting under color of his office or employment;

❸ intentionally arrested, detained, or seized Cory Nutt; and

❹ knew that his actions were unlawful.

As to Count 2 of the indictment (tampering with a governmental record), the State was required to prove Appellant:

❶ was a public servant

❷ was acting under color of his office or employment;

❸ intentionally criminally trespassed upon Cory Nutt's residence; and

❹ knew that his actions were unlawful.

III. Application of The Law to the Facts

A. Appellant's Knowledge

The prosecution in this case is based on approximately 30 seconds in Appellant's life. When viewed through the prism of the exigency of the circumstances and the eyes of an experienced police officer, a review of the video of those seconds, along with the interview evidence, demonstrates that Appellant committed no crime during his interaction with Nutt.

Appellant asserts initially that, assuming any of Appellant's actions were unlawful, the State failed to prove he knew such actions were unlawful. The content and tenor of Schumacher's testimony and Bujnoth's testimony was that, in their opinions, Appellant should have known the conduct he engaged in was unlawful. Thus, while the State may have proven that, in the opinions of Schumacher and Bujnoth, Appellant acted improperly, it wholly failed to prove that Appellant acted unlawfully, and, more

importantly, that Appellant knew his actions were unlawful. The cases of ***Ross v. State***, 543 SW 3d 227 (Tex.Cr.App. 2018)("***Ross* II**"); and ***Reynolds v. State***, 543 S.W.3d 235 (Tex.Cr.App. 2018)("***Reynolds* II**"), will be instructive, as will be ***Arrington v. State***, 589 S.W.3d 196, 203 (Tex.App. - Houston [14th] 2019).

Ross v. State

On December 12, 2011, the Texas Department of Family and Protective Services ("the Department") received a referral stating that a baby had just been born at a two bedroom, one bath, mobile home to a mother who was using drugs during her pregnancy. The report stated that the newborn had not received any medical attention, and the mother had a previous child who was removed due to the mother's drug use. The defendant, Ross, was assigned to the case on December 13, 2011. The district court issued an Order in Aid of Investigation on December 15, 2011. ***Ross* II**, 543 S.W.3d at 229-230.

The day after the order was issued, Ross, two deputies, and another Department investigator, Jessica Francis, went back to

the mobile home and broke down the door because no one was home. In searching the bedroom, Ross and a deputy flipped over a mattress and discovered a large stain of blood and bodily fluid on its underside and on the box springs. There was also blood and bodily fluid that had sprayed onto the walls. In the bedroom they found a journal and a calendar indicating that the baby had been born at the home. There was nothing else to indicate whether the child was still alive or whether the child had died. After the search, Francis reported to Ross's supervisor, Natalie Ausie Reynolds, and to her own supervisor, Rochell Bryant, that she did not believe Ross followed Department policies in conducting the search of the kitchen. ***Ross* II**, 543 S.W.3d at 231.

Ross was eventually charged with the criminal offense of official oppression. A one-day bench trial was conducted at which the State presented six witnesses, rested, and then the defense rested without presenting any witnesses. ***Ross* II**, 543 S.W.3d at 231. The State's second witness was Sandra Balderas, the Region 3 Training Academy Manager for the Department who testified

about Ross's training, including training on the Fourth Amendment. ***Ross* II**, 543 S.W.3d at 232.

The trial judge found Ross guilty and the Court of Appeals affirmed the conviction ***Ross v. State***, 507 S.W.3d 881, 894 (Tex.App. - Texarkana 2016)("***Ross* I**"). The Court of Criminal Appeals granted discretionary review to address whether the Court of Appeals erred by holding that the evidence was legally sufficient to prove that Ross knew her search was unlawful. ***Ross* II**, 543 S.W.3d at 234. Ultimately, the Court of Criminal Appeals found, despite the extensive discussion of Ross's training, the evidence was insufficient to prove that Ross knew her conduct was unlawful. ***Ross* II**, 543 S.W.3d at 235.

Reynolds v. State[3]

On June 13, 2012, the Department received a referral regarding a fifteen-year-old girl, A.K., who had run away from her guardian, Brenda Robertson. Robertson had called the Department seeking assistance. Robertson told them that A.K. had

[3] The defendant in ***Reynolds* II** was the supervisor of the defendant in ***Ross* II**.

run away from Robertson; that A.K. was using and dealing methamphetamine and marijuana (Robertson had found scales, baggies, and drug paraphernalia); that A.K. had lost a significant amount of weight; that A.K. had been gone for two weeks; and that Robertson did not know her whereabouts. Attempts to contact A.K.'s mother, Hollie King, were unsuccessful.

After she was located, A.K. was transported to the Hunt County Juvenile Detention Center, where her personal belongings, a ring, a bracelet, and her cell phone, were confiscated. The next day, June 14, 2012, A.K. was released into the custody of the Department because A.K. did not have an appropriate or willing caregiver, and because it was determined that if she were released from the Detention Center she would run away again. ***Reynolds* II**, 543 S.W.3d at 237.

The case was assigned to Rebekah Thonginh Ross, who was an investigator with the Department and supervised by Reynolds. When A.K. arrived at the Department with Ross and Reynolds, A.K. made it very clear that she refused to go to a placement home

in Dallas or any other "shelter." While in the Department's custody, A.K.'s ring and bracelet were returned to her, but she was not given her cell phone, as that facility did not allow the children to have cell phones. ***Reynolds* II**, 543 S.W.3d at 237.

More than a full year later, Reynolds was charged with the criminal offense of official oppression based on her allegedly seizing and searching A.K.'s cell phone. The indictment alleged that, on or about June 14, 2012, Reynolds, acting individually or as a party with Ross, intentionally subjected the complainant, A.K., to a search and/or a seizure that Reynolds knew was unlawful, and Reynolds was acting under color of her employment as a public servant, namely, a CPS investigator for the Texas Department of Family Protective Services, at the time of the offense. ***Reynolds* II**, 543 S.W.3d at 238.

On October 20, 2015, a one-day bench trial was conducted. The State presented four witnesses, then it rested, and then the defense rested without calling any witnesses. The State's first witness was Sandra Balderas, the Region 3 Training Academy

Manager for the Department. ***Reynolds* II**, 543 S.W.3d at 238. As she had done in the trial in ***Ross* II**, Balderas testified about Reynolds' training. ***Reynolds* II**, 543 S.W.3d at 238-239.

The trial judge found Reynolds guilty and the Court of Appeals affirmed the conviction. ***Reynolds v. State***, 507 S.W.3d 805, 808 (Tex. Appellant. - Texarkana 2016)("***Reynolds* I**"). As with ***Ross* II**, the Court of Criminal Appeals granted review to address whether the court of appeals erred by holding that the evidence was legally sufficient to support Reynolds's conviction for official oppression. Also as it had done in ***Ross* II**, the Court of Criminal Appeals found, despite the extensive discussion of Reynolds's training, the evidence was insufficient to prove that she knew her conduct was unlawful. ***Reynolds* II**, 543 S.W.3d at 243.

Arrington v. State

In ***Arrington***, private citizen Conley had contacted law enforcement about the defendant's driving, followed the defendant and stopped about two houses away from the residential driveway into which the defendant had driven. A deputy constable stopped

next to Conley and spoke with him from the car. While they were talking, a Harris County Deputy ("Latham") arrived and parked in front of the house with her spotlight on. She saw the deputy constable talking to Conley, who then told her that he had followed the defendant's vehicle, that it was in the driveway, and that he had seen the driver get out of the car and stumble. ***Arrington***, 589 S.W.3d at 200.

Deputy Latham saw the defendant standing behind an iron fence. She approached the defendant and asked him if the car in the driveway belonged to him and if he had been driving it. He responded that Deputy Latham did not see him driving, and he made it home. At that time, the gate was closed but unlocked. ***Arrington***, 589 S.W.3d at 200.

Deputy Latham asked the defendant to come out from behind the fence to talk to her. She saw several dogs behind the fence, and she did not want anything to happen to them. The defendant then fumbled with a keyed padlock on the outside of the fence and

locked it. Deputy Latham told Appellant several times to come outside of the fenced area. ***Arrington***, 589 S.W.3d at 203.

The defendant's balance was unsteady, and he was stumbling. Deputy Latham noticed his heavily slurred speech and the strong odor of alcohol as he stumbled past her. The defendant repeated that he lived in the home and that Deputy Latham did not see him driving. He then moved toward the back door of the main house and stumbled. ***Arrington***, 589 S.W.3d at 200.

Deputy Latham called for backup, believing that the defendant was trying to evade detention. She unholstered her taser and ordered him not to enter the house. The defendant fumbled with the doorknob to the house and opened it. When he opened the door, Deputy Latham tased him, jumped over the fence, and arrested him. ***Arrington***, 589 S.W.3d at 200.

The defendant filed a motion to suppress the evidence of his intoxication, arguing that it was obtained from an illegal seizure. The trial court made extensive findings of fact and conclusions of law. The court found that once the motorist and the deputy

constable saw Appellant stumble out of his car, both the motorist and the deputy constable had probable cause to arrest for DWI, and authorized entry into the cartilage of the home. The Court of Appeals held that the trial court did not err because both Conley and the deputy constable had probable cause to arrest Appellant for DWI and, upon arrival, Deputy Latham acquired probable cause due to the cumulative knowledge of the three. ***Arrington***, 589 S.W.3d at 202.

B. Comparing this Case with *Ross* II & *Reynolds* II

In both ***Ross* II** and ***Reynolds* II**, the State tried to satisfy its burden of proving that the defendants knew their conduct was unlawful by having the defendant's training supervisor discuss the defendants' training histories. The Court of Criminal Appeals rejected those attempts in both cases. See ***Ross* II**, 543 S.W.3d at 235; and ***Reynolds* II**, 543 S.W.3d at 243.

The similarity of the level of evidence submitted by the State in ***Ross* II** and ***Reynolds* II** and in the instant case is inescapable. In all three cases, the record of the defendant's training was the

lynchpin of the State's case. In all three cases, there was discussion about how training about the 4th Amendment was involved. In all three cases, however, what the State lacked was anyone who could say with personal knowledge that the training listed actually involved training on any circumstances similar to that in case at bar.

Moreover, the level of proof offered in ***Ross* II** and ***Reynolds* II** was significantly greater than in the instant case, as in those two cases, the State offered the person responsible for the defendants' training. Here, neither Schumacher nor Bujnoth in any way indicated they were familiar with the content of the training Appellant had actually received. Bujnoth even admitted that she did not know anything about "the training for chiefs of police" (RR Vol. 6, P. 50). Further, although the State introduced Appellant's "Personal Status Report" from the Texas Commission on Law Enforcement Education (State's Exhibit 19), which included a list of courses Appellant had taken, that's all it was, a list of courses taken. Nothing in State's Exhibit 19 gives any

indication of the content of the courses, or if those courses covered any circumstance similar to the circumstances in this case.

As in ***Ross* II** and ***Reynolds* II**, what the State did in this case was nothing more than demonstrate that Appellant might have known or may have known about the legality of his conduct.[4] The Court of Criminal Appeals' holdings in ***Ross* II** and ***Reynolds* II** reject any notion that such evidence would satisfy the State's burden of showing that Appellant knew his conduct was unlawful. Appellant asserts that ***Ross* II** and ***Reynolds* II** stand for the proposition that, when the State must prove a police officer or similar employee of a state agency or sub-division of the State, knew their conduct was unlawful, it is not sufficient to show that they might have known, may have known, or even should have known. ***Ross* II** and ***Reynolds* II** demonstrate that the State must show conclusively that the defendant actually knew the complained of conduct was unlawful. The evidence introduced in

[4] As to what Appellant "should have known" about the legality of his actions, neither witness was able to state that Appellant actually received any training which would alert him to the questionable legality of his actions and thus could not testify accurately as to what he, due to his training, " should have known."

this case simply does not support such a finding. Thus, under ***Jackson v. Virginia*** and ***Brooks v. State***, the evidence is insufficient, and Appellant is entitled to an acquittal.

C. Comparing this Case with *Arrington*

In ***Arrington***, the Court of Appeals wrote that Deputy Latham was in a public place and approached the defendant, "noting a strong odor of alcoholic beverage, slurred speech, staggering, and fumbling." ***Arrington***, slip op., at 8. The defendant admitted to Deputy Latham that he had been driving, and that, before Deputy Latham jumped over the fence, she had a reasonable suspicion to detain the defendant for DWI ("[s]he had developed the requisite facts while being in an area she was entitled to be in, and she ordered him to come out so she could perform a DWI investigation. Arrington refused and locked the gate"). ***Arrington***, 589 S.W.3d at 201.

> When he attempted to enter the house, Deputy Latham gave him a direct order not to do so. The trial court found that even though Arrington was standing in the curtilage of his home, the order was valid based on the reasonable suspicion of a DWI. Arrington violated the order, giving Deputy Latham probable cause to arrest him for

> evading detention. Under the circumstances, he could not avoid an arrest by fleeing into his house.

Arrington, 589 S.W.3d at 201. The same is true in the instant case. According to State's Exhibit 1, Officer Grant Harden wrote:

> 1. On 2 May 2017 at approximately 1 0:50 pm, Llano PO Officers Shannon and Idol were answering a call for service at 1100 W Haynie St, Apt. 311 in reference to a physical domestic disturbance. The subject(s) had barricaded themselves inside the residence. When this information went out over the radio, I responded. As I was leaving the Riverway RV Park, located at 1907 W Ranch Road 152, I could hear a male subject yelling. I stopped my vehicle and asked the man if he was alright. The subject yelled at me "slow the fuck down". I immediately noticed the Subject to be speaking with slurred speech.
>
> 2. I presented my officer's badge and asked the man his name, which he refused to give. He then asked for my name. I told him that my name was Grant Harden, that I was an officer with the Llano Police Department and that I was on my way to an officer's call for emergency assistance. The man said something that was unintelligible. I also noticed that the male was staggering heavily as he walked. The male was clearly intoxicated. I told the man to go inside his RV, due to my need to leave the area. I then left.
>
> 3. After providing assistance to Officers Shannon and Idol, I returned to the RV park. I stopped behind the intoxicated male's RV in order to get his license plate number, in an attempt to identify him. I did not see the male and thought that he had probably retreated into his RV for the night. The license plate on the RV and the pickup truck parked next to it were both registered to a CORY DON NUTT (DOB: 12/1/1978). As soon as I had received this information, Nutt stepped out of the shadows and began speaking to me. I asked him his name, but he refused again. He then said to me "get out of the truck bitch".

> 4. Given Nutt's slurred speech, inability to walk without staggering and the fact that he had chosen to begin using profane language in a public place, I made the decision that Nutt may be a danger to himself or others. I decided that Nutt was to be arrested for Public Intoxication. I exited my vehicle and requested a patrol unit for assistance.

RR Vol. 9, P. 6 (Exhibit Volume).

As in ***Arrington***, Officer Harden had probable cause to arrest Nutt at a point in time that he was outside and in public. Like the defendant in ***Arrington***, Nutt "could not avoid an arrest by fleeing into his house." ***Arrington***, 589 S.W.3d at 201. Consequently, Officer Harden would have been justified in entering Nutt's RV to effect an arrest for public intoxication.

If Officer Harden was authorized to arrest Nutt inside his RV, then Appellant was also authorized to arrest Nutt inside his RV. If Appellant was authorized to arrest Nutt inside his RV, the arrest was not unlawful and Appellant could not have known the arrest was unlawful. Even assuming the jury accepted Nutt's testimony that he was already back in his trailer when Harden returned to the RV park, Appellant was nevertheless authorized to enter the

trailer based on Harden's assertion that Nutt evaded arrest. As such, the evidence to sustain the instant conviction is insufficient.

D. Reviewing the Sufficiency of the Evidence

1. Conviction for Tampering with a Government Record

a. Appellant Did Not Conceal Facts

In holding that the evidence was sufficient to support both convictions, the court below relied heavily on the mistaken premise that Appellant concealed or suppressed evidence relating to Nutt's arrest. In the challenged opinion, the court below held that evidence showing Appellant approved an offense report that did not mention his role in arresting Nutt supported Appellant's tampering with a governmental record conviction. The court below also held that Appellant's approval of the offense report demonstrated he knew that he was acting unlawfully when he entered Nutt's trailer, a key element of the official oppression offense.[5]

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[5] In its discussion of this issue, the opinion quoted a Fourteenth Court of Appeals opinion which explained "consciousness of guilt is perhaps one of the strongest kinds of evidence of guilt" (***Ratliff***, 604 S.W.3d at 81, quoting ***Hedrick***

Appellant, however, did not conceal or suppress the facts relating to Nutt's arrest. Rather, Appellant prepared copies of the Llano Police Department's video footage of Nutt's arrest and provided the copies to the City prosecutor (RR Vol. 5, PP. 253-254), who in turn gave them to Nutt (RR Vol. 5, PP. 253-254). As explained below, the Court of Appeals' failure to recognize that Appellant provided prosecutors and Nutt with the information that was purportedly missing from Harden's offense report influenced its analysis of the issues raised and led to an incorrect holding.

b. The Purported Omissions in the Offense Report Cannot Constitute an Offense Under Penal Code Sec. 37.10 Because There was No Duty to Perform the Act.

The court below erred to hold omissions in a police offense report were sufficient for a rational jury to find Appellant guilty of tampering with a governmental record. ***Ratliff***, 604 S.W.3d at 74. Additionally, the court below failed to consider the State's burden

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v. State, 473 S.W.3d 824, 830-831 (Tex.App. - Houston [14th] 2015).

to prove Appellant had a duty to include certain types of information in the report.

Penal Code section 6.01(c) provides that, "a person who omits to perform an act does not commit an offense unless a law as defined by Penal Code section 1.071 provides that the omission is an offense or otherwise provides that he has a duty to perform the act." This Court has explained that, "for an omission to be an offense, there must be a corresponding duty to act." ***State v. Taylor***, 322 S.W.3d 702, 705 (Tex.Cr.App. 2010).

Because the jury convicted Appellant of tampering with a governmental record by omission, Section 6.01(c)'s "duty to act" requirement should have been a central component of the Court of Appeals' sufficiency-of-the-evidence analysis. The opinion below, however, does not mention section 6.01(c). Instead, the opinion mistakenly suggests the lack of a "statute specifically requiring the preparation of an offense report" is of no importance. ***Ratliff***, 604 S.W.3d at 73. Additionally, the opinion mistakenly indicates it is enough that Appellant's actions were inconsistent with the

opinions of the State's "experts" regarding best practices in writing offense reports. ***Ratliff***, 604 S.W.3d at 73-74. The opinions of witnesses do not create the "duty to act" required by section 6.03 of the Penal Code.

Because the court below did not consider section 6.01(c) in its analysis, it reached a decision that was incorrect. The evidence is insufficient to support the conviction because no law created a duty for Appellant to include certain information in a police offense report. The trial court's judgment of conviction should be reversed.

2. Conviction for Official Oppression

a. Appellant's Arrest of Nutt Was Not "Unlawful"

The State alleged Appellant committed the offense of official oppression by violating Article 14.05, C.Cr.P., which provides that "an officer making an arrest without a warrant may not enter a

residence to make the arrest" unless the resident consents or exigent circumstances exist.[6]

This Court, however, has held that an arrest which violates either a statute or the constitution is, nevertheless, a "lawful" arrest unless it involves criminal or tortious behavior. ***Hall v. State***, 158 S.W.3d 470, 474 (Tex.Cr.App. 2005). Similarly, an arrest made under a warrant improperly issued by a judge is, nevertheless, "lawful" if the judge's act was not criminal or tortious in nature. ***Palacios v. State***, 511 S.W.3d 549 (Tex.App. - Corpus Christi 2014). Accordingly, proof that Appellant's actions violated Article 14.05, C.Cr.P., without more, is insufficient to sustain a conviction for official oppression.[7]

Appellant's arrest of Nutt was not a tortious or criminal use of his authority as a public servant, and, thus, was not "unlawful."

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[6] In three paragraphs (CR 7-8), the indictment as to Count I alleged Appellant committed the offense by "intentionally subjecting [the complainant] to arrest [Appellant] knew was unlawful," "detaining, seizing, and arresting [the complainant]," or "entering [the complainant's] residence and seizing him without a warrant."

[7] As discussed in greater detail below, Appellant's actions did not violate Art. 14.05, C.Cr.P.

Hall, 158 S.W.3d at 474-475. The Court of Appeals' opinion supports this assertion, for the analysis relating to Count I never states that Appellant violated a criminal statute or committed a tortious act by arresting Nutt. ***Ratliff***, 604 S.W.3d at 75-77; 82-83; and 85. Instead, the analysis regarding Count I focuses on whether Appellant was aware of Art. 14.05's requirements and whether he knew Art. 14.05 applied to the situation at hand. ***Ratliff***, 604 S.W.3d at 75-77; 82-83; and 85. The opinion describes Appellant's "unlawful" action relating to Count I as "facilitating [the complainant's] arrest" (***Ratliff***, 604 S.W.3d at 80).

Because the court below did not consider whether Appellant's alleged violation of Art. 14.05 was criminal or tortious in nature, it reached a decision that was incorrect. Its analysis and its decision as to the sufficiency of the evidence is equally as faulty and is not supported by the record.

b. The Court Below Did Not Properly Address Exigent Circumstances.

The court below acknowledged that exigent circumstances exist when peace officers must act expeditiously to prevent the

destruction of evidence, but it did not consider whether Appellant acted to prevent the destruction of evidence, nor did it consider whether Appellant received information that caused him to believe Nutt had run into his trailer to evade arrest. Both of these exigencies were raised by the evidence, and authorized Appellant to enter Nutt's home.

First, the court below should have addressed the possibility Appellant may have acted to preserve evidence (***Ratliff*** at 14), quoting ***Cooksey v. State***, 350 S.W.3d 177, 185 (Tex.App. - San Antonio 2011), because Nutt was observed committing the offense of public intoxication. It is well-established that evidence of intoxication is fleeting, and must be collected promptly if justice is to be served. ***Mitchell v. Wisconsin***, 588 U.S. _____ (No. 18-6210; June 27, 2019)(slip op., at 9).

Appellate courts, including this Court, have held the human body's natural elimination of alcohol is one of the factors utilized in determining whether it is proper for peace officers to circumvent the warrant requirement, although that factor is not in and of

itself dispositive. See ***State v. Robinson***, No. 03-15-00153-CR (Tex.App. - Austin; October 12, 2016)(not designated for publication)(slip op., at 11); ***Cole v. State***, 490 S.W.3d 918, 927 (Tex.Cr.App. 2016). Additionally, at least one Texas Court of Appeals has justified warrantless entry into a residence based on the need to collect rapidly-diminishing evidence of intoxication. ***Giles v. State***, No. 13-06-00570-CR (Tex.App. - Corpus Christi August 23, 2007)(not designated for publication)(slip op., at 4, 8, and 11).

Second, Appellant asserts that, because he received information that Nutt had tried to get away from a known officer of the law by retreating into his trailer, Appellant had authority to enter Nutt's trailer to arrest him. See ***Arrington***, 589 S.W.3d at 203. Harden communicated information to Appellant which established probable cause for Appellant to arrest Nutt under Penal Code section 38.04 (Evading Arrest or Detention), a Class "A" misdemeanor.

The challenged opinion fails to recognize the importance of Harden's communications with his fellow officers, and, in the passages reproduced below, also gives the mistaken impression that evading arrest or detention is not a separate, jailable offense. More importantly, the Court of Appeals failed to understand the significance of ***Arrington***.

> We find that *Arrington* is distinguishable. The appeal in *Arrington* involved the review of a ruling on a motion to suppress and not the review of the sufficiency of the evidence. Additionally, the offense at issue in *Arrington* was driving while intoxicated, *id*. at 198, 202 03, which unlike public intoxication, carries the possibility of confinement as a potential punishment, see Tex. Penal Code §§ 12.22, 49.04. Moreover, even if exigent circumstances could authorize the warrantless arrest of a defendant engaging in behavior similar to that of *Arrington* to evade arrest for the offense of public intoxication, the jury could have reasonably inferred from the evidence that Nutt was in his trailer when Officer Harden returned to the property."

Ratliff, 604 S.W.3d at 78 (FN 2).

Additionally, the Court of Appeals wrote:

> Accordingly, assuming that the continuous-pursuit exception could have applied in these circumstances, see Tex. Penal Code §§ 12.23, 49.02(c) (explaining that public intoxication "is a Class C misdemeanor" and that "Class C misdemeanor" is punishable by fine but not by jail time); *Waugh v. State*, 51 S.W.3d 714, 718 n.3 (Tex.App.—Eastland 2001, *no pet.*) (noting that officers may make warrantless entry into home if in hot pursuit of suspect who

> committed misdemeanor offense punishable by confinement in jail), the evidence presented at trial is legally sufficient to support the jury's determination that the exception did not apply in this case."

Ratliff, 604 S.W.3d at 72.

Under section 38.04 of the Penal Code, a person commits the offense of evading arrest if he "intentionally flees from a person he knows is a peace officer . . . attempting lawfully to arrest or detain him." As the Court below has indicated, the offense of evading arrest or detention "does not require high-speed fleeing, or even effectual fleeing. It requires only an attempt to get away from a known officer of the law." ***Sartain v. State***, No. 03-09-00066-CR (Tex.App. - Austin; May 19, 2010)(not designated for publication)(slip op., at 5), quoting ***Mayfield v. State***, 219 S.W.3d 538, 541 (Tex.App. - Texarkana 2007); see also ***Griego v. State***, 345 S.W.3d 742, 755 (Tex.App. - Amarillo 2011); ***Rush v. State***, 549 S.W.3d 755, 759 (Tex.App. - Waco 2017).

Here, there is no dispute about the fact that Officer Harden communicated facts to his fellow officers which established probable cause to arrest Nutt for violating section 38.04. Harden

stated, in Shannon's presence, that he had shown Nutt his police badge during their initial encounter.[8] Nutt also admitted, at trial, that he knew Harden was a peace officer (RR Vol. 5, P. 239, L. 14-19). Harden stated to his fellow officers, via the police dispatcher, that Nutt "went back in his RV"[9] (RR Vol. 9, State's Exhibit 5). Harden also told Shannon that he had attempted to detain Nutt, but "couldn't" because Nutt "ran inside and slammed the door" (RR Vol. 9, State's Exhibit 2T). Clearly, Harden was describing facts that, if true, would support a conviction for evading arrest or detention. ***Rush***, 549 S.W.3d at 759. Additionally, a person may not avoid a peace officer's attempt to arrest or detain him by retreating to his home, and doing so gives rise to an exigent circumstance. ***Arrington***, 589 S.W.3d at 203.

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[8] A non-uniformed officer's display of his badge can be a show of authority which results in a detention. ***Diltz v. State***, 172 S.W.3d 681 (Tex.App. - Eastland 2005).

[9] It should be noted that the opinion quoted Schumacher's testimony paraphrasing what Harden said ("the individual was 'back in his trailer'"), rather than what Harden actually said ***Ratliff***, 604 S.W.3d at 78; RR Vol. 9, State's Exhibit 5).

It is also well-established that peace officers may rely on the collective knowledge of their colleagues in establishing probable cause to make an arrest. ***State v. Martinez***, 569 S.W.3d 621, 626 (Tex.Cr.App. 2019). Appellant's authority to arrest Nutt for evading arrest could, therefore, have been based on the facts known by or communicated by Officers Harden, Shannon or Latta. ***Martinez***, 569 S.W.3d at 626. The analysis of whether Appellant knew his actions were unlawful therefore should have focused on the information Appellant's fellow officers knew and/or communicated to him, but instead it focused on what the jury may have believed "really happened" between Nutt and Harden, i.e. whether Appellant actually ran inside his trailer and slammed the door.

Additionally, it does not matter whatsoever that "the jury could have reasonably inferred from the evidence that [the complainant] was in his trailer when Harden returned to the property." The relevant question is whether Appellant reasonably believed, based on officer communications at the time he arrested

Nutt, that Nutt fled from Harden during an attempt at detention. Additionally, Appellant's description of the "situation" he encountered that night demonstrates he believed Nutt fled from Harden. Appellant told an investigator that "it was a - obviously a drunk guy that was refusing to come out after he went back in the trailer, uh, that's the way I looked at it" (RR Vol. 9, State's Exhibit 10T).[10]

The bottom line is that Appellant entered Nutt's trailer based on information, received from Harden, that authorized the entry. Appellant could not have known his actions were illegal unless Harden's statements were incorrect and Appellant knew they were incorrect. There is no evidence in the record that would indicate Appellant believed Harden was lying when he told his fellow officers Nutt had evaded arrest or detention.

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[10] The Court of Appeals' opinion focuses on Appellant's answer to a hypothetical question about what Harden and Shannon might have done if Nutt had stepped outside his trailer ("I'm sure they were gonna place him under arrest for PI") to determine "the jury could have reasonably inferred . . . [Appellant] understood the nature of the alleged offense for which Harden was wanting to arrest Nutt" (***Ratliff***, 604 S.W.3d at 84). This statement, however, has nothing to do with the question of whether probable cause existed to arrest Nutt for evading arrest. The statement is merely Appellant's speculative opinion about what other officers might have done if Nutt's arrest had played out differently.

By focusing on whether the jury could have inferred Nutt did not run inside his trailer, instead of whether Appellant believed, based on Harden's communications, that Nutt did run inside his trailer, the court below reached a decision that was incorrect. Its analysis and its decision as to the sufficiency of the evidence is equally as faulty and is not supported by the record. Thus, the evidence is insufficient to support Count I of the indictment, and the Court should reverse the judgment of the court below.

Appellant further asserts that the time between the two incidents supports a "continuous pursuit" exigency. The Court held Harden's second encounter with Nutt was not part of a continuous criminal episode, but the Court relied on a timeline that is not supported by the record to reach its holding (***Ratliff***, 604 S.W.3d at 69, 77-78). The opinion states Harden's contacts with Nutt were "more than half an hour" apart, but the record reflects they could not have been more than twenty-three (23) minutes apart (***Ratliff***, 604 S.W.3d at 69). The use of a timeline by the court below that is not supported by the record calls into

question its holding that Appellant was not responding to an ongoing criminal episode when he arrested Nutt (***Ratliff***, 604 S.W.3d at 77-78).

The opinion also states that, "After responding to the emergency call, Harden drove back to Nutt's trailer home more than half an hour later" (***Ratliff***, 604 S.W.3d at 69). The following facts in the record demonstrate a much shorter period of time between the two encounters:

❶ Harden's offense report (State's Exhibit 1) recites on page 3 that he heard the radio call related to a domestic disturbance "at approximately 10:50 p.m." The report also reflects that Harden's first encounter with Nutt occurred after he received this radio transmission, but before he responded to the domestic disturbance call.

❷ State's Exhibit 4 reflects that Harden responded to the domestic disturbance call at 22:53:36 hours.

❸ State's Exhibit 3 reflects that Harden's second encounter with Nutt began at 23:10 hours.

❹ State's Exhibit 3 reflects Shannon (Unit 705) arrived at the trailer park at 23:12:45 hours.

❺ The "Llano County Jail Arrest and Booking Sheet" (State's Exhibit 1, p. 4), reflects LPD arrested Nutt at 11:25:59 hours.

❻ Shannon's "body cam" video of the incident (State's Exhibit 2) reflects that Nutt was out of his trailer and being placed in handcuffs approximately eleven (11) minutes after the video began.

Considering this evidence, it is clear the first encounter between Harden and Nutt began not earlier than 10:50 p.m., and the second encounter began not later than 11:14 p.m. Thus, the State's evidence demonstrates Harden returned to the trailer park slightly less than twenty-three (23) minutes after the first encounter began, and not "more than half an hour later" (***Ratliff***, 604 S.W.3d at 69). This discrepancy is relevant to the ultimate holding that "exigent circumstances did not justify the warrantless entry into Nutt's trailer" (***Ratliff***, 604 S.W.3d at 80).

Because the court below relied on a timeline which is not supported by the record, the Court reached a decision that was incorrect. Its analysis and its decision as to the sufficiency of the evidence is equally as faulty and is not supported by the record.

Conclusion

The evidence is insufficient to sustain either conviction. The judgment of the Court of Appeals should be vacated/reversed, and the case remanded for entry of judgments of acquittal as to both convictions.

Prayer

WHEREFORE, PREMISES CONSIDERED, Kevin Ratliff, Appellant in the above styled and numbered cause respectfully prays that the Court will review his brief on the merits, and upon submission of the case to the Court will vacate the decision of the Court of Appeals and cause the case to be returned to the trial court for entry of a judgment of acquittal.

Certificate of Compliance and Service

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foregoing brief on the merits was transmitted via the eService function on the State's eFiling portal, to R. Blake Ewing (asstda3@burnetcounty.org), counsel of record for the State of Texas, and Stacey M. Soule (stacey.soule@spa.texas.gov), the State's Prosecuting Attorney.

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