NO. 14-24-00067-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH JUDICIAL DISTRICT
OF TEXAS AT HOUSTON

JOSE EDUARDO ACOSTA SANCHEZ
APPELLANT

VS.

THE STATE OF TEXAS
APPELLEE

APPELLANT'S BRIEF

Robert David Miller
2006 Broadway, Ste 105a
Pearland, TX 77581
Texas Bar No. 24049278
(281) 620-3921 Office
(832) 413-5789 (Fax)
attorneyrobertmiller@gmail.com

LIST OF PARTIES

The Appellant is Jose Eduardo Acosta Sanchez.

The Appellant's trial counsel is Luis Ledesma.

The Appellant's appellate counsel is Robert David Miller.

The Trial Judge is The Honorable Jessica Pulcher.

The appellate attorney representing the State is Trey Picard, Assistant District Attorney, Brazoria County, Texas.

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PRELIMINARY STATEMENT

On May 17, 2023, a jury found Jose Eduardo Acosta Sanchez guilty of Count 1: Harassment of a Public Servant and Count 2: Assault Peace Officer. (C.R. at 68 and 70) Punishment was then presented to the Court, who found Appellant to be enhanced to a second-degree felony, and sentenced him to 20 years in the Texas Department of Criminal Justice Institutional Division, concurrent on each count, on January 19, 2024. (R.R. Vol 5 at 13) Appellant perfected his appeal on January 26, 2024. (C.R. at 100)

STATEMENT OF FACTS

TRIAL PHASE

A. State's Witnesses

1. Sergio Mata

Sergio Mata testified that he was a jailer at Brazoria County Sheriff's Office. (R.R. Vol 3 at 115) Through this witness a booking video of the incident giving rise to Count 1 – Harassment was introduced. (R.R. Vol 3 at 117-118)

2. Kenneth Jasper

Kenneth Jasper testified that he was a jailer at Brazoria County Sheriff's Office and on November 22, 2022 was spit upon by Appellant. (R.R. Vol 3 at 121) He stated that he was working in the sally port of the jail when Appellant arrived and after being removed from the patrol vehicle he refused to walk. (R.R. Vol 3 at 126) Appellant was then placed in a wheelchair and was being taken to the EMT to be medically evaluated at which point Appellant spit on him. (R.R. Vol 3 at 126) Deputy Jasper was hit on the left side of his face on his glasses,

both lenses, as well as his face. (R.R. Vol 3 at 128) Appellant did not say anything to him. (R.R. Vol 3 at 136)

3. Kadyn Truitt

Kadyn Truitt testified that they were on patrol duty on November 22, 2022 and responded to a Shell Gas station in Manvel in regards to a suspicious person. (R.R. Vol 3 at 141) The witness testified Appellant was arrested and they went to the jail with another officer to assist because he was being aggressive. (R.R. Vol 3 at 145) Initially Appellant was taken to Manvel Police Department. (R.R. Vol 3 at 161) Appellant was subsequently taken to UTMB to be medically cleared for incarceration. (R.R. Vol 3 at 147) Upon arrival, Appellant spit on the floor of the medical facility and attempted to remove a blood pressure cuff. (R.R. Vol 3 at 148) A spit mask was placed on Appellant because he was spitting all over the medical facility. (R.R. Vol 3 at 149) While this witness was standing next to Appellant's bed holding him down he rolled onto this side and struck them with his knee, causing "discomfort" and/or "impairment of physical condition." (R.R. Vol 3 at 149-150) While they had their body camera operating at that time, the video did not show any physical contact. (R.R. Vol 3 at 162) There was a rail between Appellant on his hospital bed and the officer. (R.R. Vol 3 at 162)

After Appellant had been medically cleared at UTMB, he calmed down and became more docile prior to being transported back to the jail. (R.R. Vol 3 at 154) The second officer on scene, Officer Kulhanek removed his spit mask while placing him into his patrol vehicle for transport, and at that point Appellant "spit towards Officer Kulhanek." (R.R. Vol 3 at 154-155)

4. Matheau Kulhanek

He testified he was on day shift working for Manvel Police on November 22, 2022. (R.R. Vol 3 at 165) He stated a call for service was received due to a man walking around a gas station in Manvel approaching people and pulling on car handles. (R.R. Vol 3 at 167) As he arrived he received a second call about Appellant being inside of a Jack in the Box with a knife. (R.R. Vol 3 at 167) Appellant was found to be in possession of a pill bottle containing Alprazolam. (R.R. Vol 3 at 169) Appellant was arrested and transported to Manvel Police Department by Sergeant Peters, and then Officer Kulhanek transported him to Brazoria County jail. (R.R. Vol 3 at 175) Later at the hospital, the witness observed Appellant spitting a lot on the ground and on hospital equipment, and saw him "attempt to strike Officer Truitt with either his foot or his knee." (R.R. Vol 3 at 176) When they later exited the hospital Appellant attempted to spit on this witness. (R.R. Vol 3 at 176)

5. Nathan Peters

Nathan Peters was working as a Sergeant for Manvel Police on November 22, 2022 and responded to the scene in question. (R.R. Vol 3 at 179) The Shell Gas station from the original call for service was immediately adjacent to the Jack in the Box. (R.R. Vol 3 at 179) He testified that the Appellant was initially placed in handcuffs with his hands behind him and attempted to get the cuffs in front of him while being transported. (R.R. Vol 3 at 182) He testified Appellant kicked the rear window of the patrol vehicle. (R.R. Vol 3 at 185)

B. Defense Motion for Directed Verdict

After Sergeant Peters, the State rested, at which point the Defense moved for a directed verdict because "there was no evidence that this happened in Brazoria County, Texas, or in Count 2 that any bodily injury happened." (R.R. Vol 3 at 187) The Court overruled both issues, and then permitted the State to reopen. (R.R. Vol 3 at 188)

C. State's Witness on Reopen

1. Kadyn Truitt

The witness stated that Appellant was taken to UTMB from Manvel Police Department, which as located in Angleton, Brazoria County, Texas. (R.R. Vol 3 at 189) They then stated that when struck by Appellant's knee they felt physical pain. (R.R. Vol 3 at 189)

D. Defense Witnesses

The Defense rested immediately after the State reopened and rested for the second time, and the Court recessed for the day. (R.R. Vol 3 at 190)

E. Charging Conference

The next morning, the parties were to appear at 9:00 a.m. Defendant was not present, and at 10:10 a.m. the Court went on the record to memorialize the same and continued in his absence. (R.R. Vol 4 at 5)

F. Jury's Verdict

The jury found Appellant guilty of Count One: Harassment of a Public Servant, and guilty of Count Two: Assault Peace Officer. (R.R. Vol 4 at 35)

PUNISHMENT PHASE

A. State's Witnesses

1. Brandon Jones

The State called Brandon Jones as an expert on fingerprint evidence to prove up Appellant's prior criminal judgment. (R.R. Vol 5 at 7) He compared the Appellant's prints and a prior conviction and 2 year TDC sentence for Burglary of a Habitation was admitted into evidence for enhancement purposes. (R.R. Vol 6 at 12)

B. Defense Witnesses

The Defense rested after the State. (R.R. Vol 5 at 10)

C. Court's Sentence

The court assessed a sentence of 20 years in the Texas Department of Criminal Justice. (R.R. Vol 5 at 13)

POINTS OF ERROR

APPELLANT'S FIRST POINT OF ERROR:

The trial court abused its discretion when it concluded that Appellant voluntarily absented himself from trial, and Appellant preserved this issue for review.

APPELLANT'S SECOND POINT OF ERROR:

The evidence was legally insufficient to support a finding that Appellant caused Bodily Injury.

POINT OF ERROR NO. 1

The trial court abused its discretion when it concluded that Appellant voluntarily absented himself from trial, and Appellant preserved this issue for review.

A criminal defendant has a right under both the Texas and United States constitutions to be present during all phases of trial. *Miller v. State*, 692 S.W.2d 88 (Tex. Crim. App. 1985). A defendant can forfeit his right to be present by voluntarily absenting himself after the jury is sworn. *Ashley v. State*, 404 S.W.3d 672 (Tex. App.—El Paso 2013, no pet.). This constitutional guarantee is codified in Texas Code of Criminal Procedure which provides the following:

> In all prosecutions for felonies, the defendant must be personally present at the trial, and he must likewise be present in all cases of misdemeanor when the punishment or any part thereof is imprisonment in jail; provided, however, that in all cases, *when the defendant voluntarily absents himself* after pleading to the indictment or information, or after the jury has been selected when trial is before a jury, the trial may proceed to its conclusion. When the record in the appellate court shows that the defendant was present at the commencement, or any portion of the trial, is shall be presumed in the absence of all evidence in the record to the contrary that he was present during the whole trial. Provided, however, that the presence of the defendant shall not be required at the hearing on the motion for new trial in any misdemeanor case.

Tex. Code Crim. Proc. Art. 33.03 (West 2023) (emphasis added).

This Court reviews a trial court's determination that a defendant is voluntarily absent from trial for an abuse of discretion. *Moore v. State*, 670 S.W.2d 259 (Tex. Crim. App. 1984). If there is "some evidence" to support the trial court's determination that a defendant is voluntarily absent from trial, then that determination will be affirmed. *Moore*, 670 S.W.2d at 261. Additionally, in

order to preserve this issue for appeal, the defense must timely complain to the trial court about proceeding in their absence. *Aguirre v. State*, 695 S.W.2d 793 (Tex. App. 1985).

On the third day of trial, the parties appeared at 9:00 a.m. in the morning for the charging conference on the guilt – innocence phase of trial. (R.R. Vol. 4 at 5) The Court went on the record and stated as follows:

> State's present. Defense is present. The defendant is not present. He was told to be here at 9:00 o'clock this morning before we ended last night. It is now 10:10 in the morning, and the defendant has failed to appear. The jury is not present. The Court is going forward on the formal jury charge without the defendant's presence.

(R.R. Vol. 4 at 5) The Court then went immediately into the charge conference. The record was silent as to the situation. No findings were made at that time, nor was there any discussion on the record as to the circumstances of his absence or whether Counsel for Appellant had any contact with him. The following exchange then occurred:

> THE COURT: Okay. Does the State have a copy of the jury charge in front of it?
>
> MR. GOLDEN: Yes, ma'am.
>
> THE COURT: Have you had sufficient time to review the jury charge?
>
> MR. GOLDEN: Yes, ma'am.

THE COURT: Are there any additions, deletions, or changes to the jury charge?

MR. GOLDEN: No, ma'am.

THE COURT: Mr. Ledesma, have you had sufficient chance to review the jury charge?

MR. LEDESMA: Yes, Your Honor.

THE COURT: Do you have any changes, additions, deletions to the jury charge?

MR. LEDESMA: The one would be – I mean, it's already been decided against me in the case law; but the striking with the knee should be there.

THE COURT: So on the record, the indictment alleges in Count 2 that the manner and means is by striking the said K. Truitt with the defendant's knee. State has provided case law to the Court in which the language of the defendant's knee is not necessary language and increases its burden. So the jury charge has that language struck. It will leave in "recklessly cause bodily injury to K. Truitt by striking the said K. Truitt"; but "with the defendant's knee" has now been stricken from the jury charge so as not to increase the State's burden. And Mr. Ledesma has – is asking for that language to be placed back into the charge.

MR. LEDESMA: Right. And, also, because there's no bearings between the testimony and the indictment and that language. I understand the case law. I just haven't had sufficient time to review or see if there is other case law.

THE COURT: Is that something that you would like to do?

MR. LEDESMA: Well, I mean, at this time I just move for a mistrial just to preserve whether – if there is error.

(R.R. Vol 4 at 5-6)

Taken in the context of this exchange, Appellant argues that moving for a mistrial at this point was an objection towards continuing in Appellant's absence to preserve it for appellate review. The fact that trial counsel moved specifically for a mistrial is important, because had counsel been objecting specifically towards language in the charge, the proper objection and/or remedy would not have been a mistrial, but would rather be for him to have submitted his requested language for the charge in writing.

As mentioned above, prior to engaging in the charge conference Defendant was not present, and the record was completely silent as to the circumstances thereof. Therefore, at the time of going into the charging conference in his absence, there was less than "some evidence to support the trial court's determination that a defendant is voluntarily absent from trial." *Moore*, 670 S.W.2d at 261. In fact, there was none.

Later that morning, after conducting the charging conference in Appellant's absence and prior to closing arguments, the following exchange occurred:

> THE COURT: It is now 10:30. All jurors are present in the hallway. They are not here in the courtroom. The State's present. The Defense is present. The defendant has failed to appear. State had a motion to revoke bond. That motion was granted. Mr. Ledesma, do you anticipate your client showing if we continue to delay this trial?

> MR. LEDESMA: At this point, no, Your Honor. I mean, I told him to be here at 9:00, no later than 9:00 yesterday before leaving the courtroom. I've called twice. I'm not sure if he actually picked up the first time; but if he did, it was a quick hang up. And then there was no answer on the second phone call.
>
> THE COURT: Okay. Because the defendant was told to be here at 9:00 for the jury charge conference and now we're here an hour and a half later and the jury is present, we will be going forward without the defendant's presence. (R.R. Vol. 4 at 7-8)

No fact based findings other than conclusions were made on the record. No questions were asked of trial counsel as to what number was called in an attempt to contact Appellant, nor whether trial counsel had ever previously spoken with Appellant on whatever number was called. The record is silent as to whether a bailiff or court staff took any efforts to search for Appellant at the courthouse. The record is silent as to whether Appellant's bondsman was contacted. The only entry on the record other than the above exchange was a docket entry made on 5/17/23 which simply stated, "D failed to appear. State moved for revocation of bond. Bond is revoked – No bond. D voluntarily absenced himself. Jury charge outside presence of jury w/o D." (C.R. at 115)

While the trial court was not necessarily required to conduct a full evidentiary hearing, it was still required to make appropriate inquiries to support

its conclusion that Appellant was voluntarily absent. *Aguirre*, 695 S.W. 3d at 795. The record showed that Appellant was merely absent, and there was nothing in the record as to the voluntariness of the same. In *Bottom v. State*, 860 S.W.2d 266 (Tex. App.—Fort Worth 1993, no pet.), the defendant's action indirectly caused him to be absent from trial: "The competent evidence shows Bottom was not absent because of some sudden unexpected medical emergency, but because he chose to ingest large quantities of aspirin and arthritis medication. Because Bottom chose to act in this way, his absence was voluntary." *Id.* at 267. Similary in *Ashley v. State*, 404 S.W.3d 672 (Tex. App.—El Paso 2013, no pet.) the defendant voluntarily absented himself from his trial by his own misbehavior: "In the instant case, Ashley fought with deputies on the morning of jury selection; refused to communicate with his trial attorney; had taken off his clothes and refused to leave his cell; and refused to talk to anybody." *Id.* at 680. In *Gittens v. State*, 560 S.W.3d 725, 731, 738 (Tex. App.—San Antonio 2018, pet. ref'd), the defendant's cutting off his ankle monitor was some evidence that he had voluntarily absented himself from trial.

In the present case, the record only supports the conclusion that Appellant was not present, initially at the charging conference prior to *any* discussion taking place as to his whereabouts, and then during closing statements after trial counsel informed the Court that he had called an unknown phone number twice. This is

much different than instances where the circumstances lead directly to the conclusion of voluntary absence as per the cases above.

Continuing in Appellant's absence was clearly harmful as well. The State made numerous references to his absence during their closing argument. In fact, the overwhelming majority of their closing statement was centered around his absence, as per the following:

> Today is a little bit different. As you may have noticed when you walked in, the defendant decided not to join us today. You didn't see him out in the hallway. I know you've seen the door open several times while the Judge is talking. You didn't see the defendant come through it once. He's not here. He made that decision. There's something under the law called "consciousness of guilt"; and that's something that y'all can think about is, why isn't he here. And I would propose to you the reason that he's not here and he's absenced himself from this proceeding and specifically absenced himself from your decision is because he knows he's guilty. And he got to see all the evidence again yesterday that y'all saw, and he knows he's guilty. And he knows that 12 members of the community were going to come today, get this jury charge, get the verdict forms and find him guilty. And so he's decided that he won't be here so he won't have to take responsibility for that. The 12 of you have taken time out of your lives to show up and do your civic duty. You came on Monday to jury duty. You came back to be selected on the jury yesterday, and then you've come again today. So you've taken three days out of your life to perform your civic duty and to sit through a trial and to make a decision. And the defendant has decided that he doesn't need to be here, that he committed a crime on the 22nd of November of last year and he shouldn't have to pay the price for it. He doesn't want to take responsibility for it, and he certainly doesn't want to be here when you deliver a verdict of guilty on both counts to him and you would make him take responsibility for it. So think about that.

(R.R. Vol 4 at 21-22)

The state later continued, “I think one of the most important things in a charge is, it says you can use your common sense and make reasonable deductions. So one of those reasonable deductions you can make is why isn't he here? And that's, of course, because he's guilty. He doesn't want to pay the price. He doesn't want to be found guilty, to sit here and have 12 people say that he's guilty.” (R.R. Vol 4 at 23) And then a third time during their brief closing argument, the State commented, “And finally, today, we know that he doesn't seem to think he needs to show up to court, that he doesn't need to show up for the moment where 12 people from a community say we're done with this, we've had enough, and we're going to find you guilty. He couldn't even show up for that. Once again, he defied the rules because they don't apply to him.” (R.R. Vol 4 at 26) And then a fourth time, “Think about, again, why he's not here today. The 12 of you all showed up. Everyone else showed up, but he decided not to. And I will tell you, it's because today was the day, finally, that he was held accountable for what he did. And he knew it was coming. And so he took the easy way out of not showing up.” (R.R. Vol. 4 at 28) And then a fifth and final time, the State physically exited and re-entered the courtroom, stating, “This may come as a shock, but he’s still not out there.” (R.R. Vol. 4 at 30)

Based on the jury's verdict and the fact that almost all of the State's closing argument was centered around Appellant's absence, he was clearly harmed by continuing forward without there being a sufficient record to establish that such absence was voluntary.

POINT OF ERROR NO. 2

The evidence was legally insufficient to support a finding that Appellant caused Bodily Injury.

The legal sufficiency standard of review is the standard applied in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010) When reviewing for legal sufficiency the Court considers the evidence in the light most favorable to the verdict, considering all the evidence in the record, whether admissible or not. *Winfrey v. State*, 393 S.W.3d 763 (Tex. Crim. App. 2013) Circumstantial evidence may be sufficient to uphold a conviction as long as the cumulative force of *all the incriminating circumstances is sufficient* to support the conviction. *Ramsey v. State*, 473 S.W.3d 805 (Tex. Crim. App. 2015) (emphasis added) The jury is the sole judge of the credibility and weight to be attached to the testimony,

and the Court draws all reasonable inferences from the evidence in favor of the verdict. *Temple v. State*, 390 S.W.3d 341 (Tex. Crim. App. 2013) Reconciliation of conflicts in the evidence is thus determined by the finder of fact, and an appellate court faced with a record of facts that supports conflicting inferences must presume that the finder of fact resolved the same in favor of the State. *Crow v. State*, 500 S.W.3d 122 (Tex. App. 2016)(citing *Jackson v. Virginia*, 443 U.S. 30 (1979))

Appellant was convicted of Assault on a Peace Officer, which requires proof of bodily injury. Tex. Penal Code §22.01(b)(1) (West 2023). "Bodily Injury" means physical pain, illness, or any impairment of physical condition. Tex. Penal Code §1.07(a)(8) (West 2023). Appellant was convicted of Assault on a Peace Officer by "then and there intentionally, knowingly or recklessly causing bodily injury to K. Truitt by striking the said K. Truitt with the defendant's knee, and the defendant did then and there know that the said K. Truitt was a peace officer, and that the said peace officer was then and there lawfully discharging an official duty." (C.R. at 6) The jury was instructed properly as to the definition of what constitutes bodily injury.

Appellant argues that the evidence at trial was insufficient to show that he caused bodily injury to Officer Truitt, and that such contact, if any, did in fact

occur, constituted little more than offensive touching. The Court of Criminal Appeals has broadly interpreted this definition to include "even relatively minor physical contacts so long as they constitute more than mere offensive touching." *Lane v. State*, 763 S.W.2d 785 (Tex. Crim. App. 1989) Additionally, a jury can infer that a victim actually felt or suffered physical pain because people of common intelligence understand pain and some of its natural causes. *Goodin v. State*, 750 S.W.2d 857 (Tex. App. – Corpus Christi 1988, pet. ref'd)

In the instant case, the State failed to prove that bodily injury occurred. Brief discomfort amounts to nothing more than an offensive touching. During the relevant portion of K. Truitt's testimony, the following exchange occurred:

Q: And how were you struck exactly?

A: I was standing next to the bed that he was lying on; and the gentleman rolled onto his side and with his knee, aggressively struck me right underneath where my vest stops.

Q: So in your lower, what, torso?

A: Yes, sir.

Q: Did you feel it?

A: Yes, I did.

Q: Did it cause you any discomfort or impairment of physical condition?

A: Yes, it did.

(R.R. Vol 3 at 149-150)

There was a body cam video admitted into evidence from this officer which did not show there being any contact. (R.R. Vol 3 at 162) There also was a rail next to Appellant on his gurney between the parties that was an obstruction between them. (R.R. Vol 3 at 162) The officer was not sure if the Appellant struck him with one or with both knees. (R.R. Vol 3 at 162) There was a second officer present, Officer Matheau Kulhanek, who then testified on direct examination as follows:

Q: Did the defendant do anything or attempt to do anything of note to you while ya'll were at the hospital?

A: I mean, at the hospital he was spitting a lot on the ground and on hospital equipment and other things around; and then whenever Officer Truitt attempted to put a spit mask on him, he *attempted* to strike Officer Truitt with either his foot or his knee.

(R.R. Vol 3 at 176, emphasis added)

The evidence of "bodily injury" was so slight that after the close of the State's case in chief and the defense moving for a directed verdict, that they asked to reopen evidence, which was granted, at which point they recalled Officer Truitt simply to ask if there was "physical pain" in order to have a second chance to prove their elements from the Indictment (R.R. Vol 3 at 189) No jury could believe that a defendant, while held down on a hospital gurney, could cause bodily injury to an officer wearing a bullet proof vest by "attempting" to strike at the officer with either a foot, or one knee, or both, during which time there was a metal bar between them and he was being physically restrained. The officer never actually stated that they felt pain. Their only responses came in the form of answering a leading question by stating "Yes, sir." (R.R. Vol 3 at 150 and 189) They did not require any medical treatment, nor needed any time for recovery. (R.R. Vol 3 at 150) There was no testimony regarding any physical bruising, blood loss, or any other type of injury that could be documentable. Their direct testimony was contracted by a fellow officer as to whether any such contact even actually occurred in the first place.

Assault is a result-oriented offense. *Brooks v. State*, 967 S.W.2d 946 (Tex. App. – Austin 1998, no pet.) There is no injury here to observe. To hold otherwise would be to establish that brief discomfort or an offensive touch constitutes criminal bodily injury, thereby eliminating the distinction between

assault by causing bodily injury versus assault by contact. As such, the record does not support proof beyond a reasonable doubt as to the element of bodily injury.

CONCLUSION

Therefore, the record is insufficient to make a finding of voluntary absence, and the evidence is legally insufficient to find Appellant guilty of Count 2 - Assault on a Peace Officer. The conviction and sentence should be reversed and remanded for a new trial as to Count 1 only, and the conviction should be reversed and rendered as to Count 2.

Respectfully submitted,

Robert David Miller
2006 Broadway St., Ste. 105a
Pearland, TX 77581
TBN 24049278
(281) 620-3921 Office
(832) 413-5789 Fax
attorneyrobertmiller@gmail.com

CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Brief, as calculated under Texas Appellate Rule of Appellate Procedure 9.4, contains 5124 words as determined by the Word program used to prepare this document.

Attorney for Appellant

CERTIFICATE OF SERVICE

I do hereby certify that on this the 2nd day of July 2024, a true and correct copy of the foregoing Appellant's Brief was served by E-service in compliance with Local Rule 4 of the Court of Appeals or was served in compliance with Article 9.5 of the Rules of Appellate Procedure delivered to the Assistant District Attorney of Brazoria County, Texas, 111 E. Locust Street, 4th Floor Angleton, Texas 77515 at bcdaeservice@brazoriacountytx.gov.

Attorney for Appellant

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Associated Case Party: Tom Selleck

Name	BarNumber	Email	TimestampSubmitted	Status
Tom Selleck		bcdaeservice@brazoriacountytx.gov	7/2/2024 11:36:49 AM	SENT