Reversed and Acquitted; Majority and Dissenting Opinions filed May 25, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00270-CR

IGDALIA MELANY FLORES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court of Law # 2
Harris County, Texas
Trial Court Cause No. 9835777

M A J O R I T Y O P I N I O N

Appellant, Igdalia Flores (Flores), was charged with and convicted of violating a City of Houston ordinance requiring "entertainers" to have a permit. After a jury convicted her, Flores was fined three hundred dollars and sentenced to two days incarceration in Harris County jail. In numerous points of error, she challenges her conviction. In several of these points, Flores challenges the lack of specificity of the information which charged her with an offense. We reverse the judgment and order the information dismissed.

I.

Factual Background

According to the record, Officer Tim Cox (Cox) of the Houston Police Department visited Michael's International, an adult cabaret, to conduct an unrelated investigation. Upon entering the cabaret, Cox observed Flores dancing for a customer. She was topless and dancing suggestively between the legs of the seated customer. After her dance, Cox approached Flores and asked her to come with him to another room. Flores complied, following Cox to another room, whereupon Cox asked her for her permit required by the City of Houston under its ordinances regulating this activity. When Flores replied she did not have one, Cox arrested her for violating the ordinance.

The day before trial, Flores submitted a motion to quash the information on the grounds that the trial court lacked jurisdiction to hear the case, and that the information failed to allege the particular manner in which she violated the ordinance. The trial court denied the motion. Although the trial court correctly asserted jurisdiction over this matter, the motion should have been granted because the information was defective.[1]

II.

The Ordinance

The City of Houston ordinance at issue states, "[i]t shall be unlawful for any person who does not hold a permit to act as an *entertainer* or manager of or in an enterprise." Code of Ordinances, City of Houston, Texas ch.28, art. VIII, section 28-253(a) (1997) (emphasis added) (hereinafter referred to as Ordinance). An entertainer is defined by the Ordinance as, "[a]ny employee of an enterprise who performs or engages in entertainment." *Id*., section 28-251. "Entertainment" is defined by the Ordinance as, "*[a]ny act or performance*, such as a play, skit, reading, revue, fashion show, modeling performance,

[1] In her first two points of error, Flores argues the trial court lacked jurisdiction over the case. We disagree. "The presentment of an indictment or an information to a court invests the court with jurisdiction of the cause." TEX. CONST. Art. 5, § 12(b). This is true even if the information is substantially defective. *See Cook v. State*, 902 S.W.2d 471, 477 (Tex. Crim. App. 1995). Because the State presented the trial court with an information, the court below had jurisdiction over this case. Points of error one and two are, therefore, overruled.

pantomime, role playing, encounter session, scene, song, dance, musical rendition or striptease *that involves the display or exposure of specified sexual activities or specified anatomical areas or engaging in any specified sexual activities whatever in the presence of customers*." *Id*. (emphasis added). "Specified anatomical areas" are defined as, "less than completely and opaquely covered: (a) human genitals, pubic region or pubic hair; (b) buttock; (c) female breast or breasts or any portion thereof that is situated below a point immediately above the top of the areola; or (d) any combination of the foregoing." *Id*., section 28-121. "Specified sexual activities" are defined as: (1) human genitals in a discernable state of sexual stimulation or arousal; (2) acts of human masturbation, sexual intercourse or sodomy; (3) fondling or other erotic touching of human genitals, pubic region or pubic hair, buttock or female breast or breasts; or (4) any combination of the foregoing. *See id*.

III.
The Information

The State's information charges the appellant with "unlawfully intentionally and knowingly act[ing] as an entertainer at Michael's International . . . without holding a valid permit issued by the Chief of Police of the City of Houston." Flores' motion to quash asserted that the information was defective in that it failed to allege all of the material elements of the offense. Specifically, the motion averred that the information failed to allege how Flores engaged in entertainment within the meaning of the Ordinance.

A. Notice

Article I, section 10 of the Texas Constitution "guarantees an accused the right to be informed of the nature and cause of the accusation against him in a criminal prosecution." *See Ward v. State*, 829 S.W.2d 787, 794 (Tex. Crim. App.1992); *see also* TEX. CODE CRIM. PROC. ANN. Arts. 21.02(7), 21.11 (Vernon 1989). This information must come from the face of the indictment. *See Ward*, 829 S.W.2d at 794. The accused is not required to look elsewhere. *See State v. Draper*, 940 S.W.2d 824, 826 (Tex. App. —Austin 1997, no pet.). It is not sufficient to say that the accused knew with what offense he was charged, but the inquiry must be whether the charge in writing furnished that information in plain and intelligible language. *See id*. citing *Benoit v. State*, 561 S.W.2d 810, 813 (Tex. Crim. App. 1977).

This fundamental guarantee enables the accused to learn the charge in advance of trial, with such certainty that a presumptively innocent person will know what she will be called upon to defend against. *See Wilson v. State*, 520 S.W.2d 377, 379 (Tex. Crim. App.1975); *see also Moss v. State*, 850 S.W.2d 788, 793 (Tex. App. —Houston [14th Dist.] 1993, pet. ref'd) (holding appellant is entitled to allegations of facts sufficient to give him precise notice of the offense with which he is charged). "[T]he accused is not required to anticipate any and all variant facts the State might hypothetically seek to establish." *See Brasfield v. State*, 600 S.W.2d 288, 295 (Tex.Crim.App.1980), overruled on other grounds by *Janecka v. State*, 739 S.W.2d 813, 819 (Tex.Crim.App.1987); *see also Drumm v. State*, 560 S.W.2d 944, 947 (Tex.Crim.App.1977).

B. Manner and Means of the Offense

As a general rule, any element that must be proven shall be stated in an indictment. *See* TEX. CODE CRIM. PROC. ANN. art. 21.03 (Vernon 1989); *see also Dinkins v. State*, 894 S.W.2d 300, 388 (Tex. Crim. App. 1995). This rule also applies to any information. *See* TEX. CODE CRIM. PROC. ANN. art. 21.23 (Vernon 1989). An information must allege on its face the facts necessary to (1) show that the offense was committed, (2) bar a subsequent prosecution for the same offense, and (3) give adequate notice to the defendant of the offense with which they are charged. *See American Plant Food Corp. v. State*, 508 S.W.2d 598, 603 (Tex. Crim. App. 1974). If a statute provides more than one way for the defendant to commit the act or omission, on timely request the State must allege the manner and means it seeks to establish, either separately or in some form of disjunctive combination. *See State v. Winskey*, 790 S.W.2d 641, 642 (Tex. Crim. App. 1990); *see also State v. Torres*, 865 S.W.2d 142, 144 (Tex. App. —Corpus Christi 1994, pet. ref'd).

In the face of a proper motion to quash, the information must state the elements of the offense, leaving nothing to inference or intendment. *See Green v. State*, 951 S.W.2d 3, 4 (Tex. Crim. App. 1997). The motion to quash should be granted where the language in the charging instrument concerning the defendant's conduct is too vague or indefinite as to not provide notice of the acts allegedly committed. *See Drumm v. State*, 560 S.W.2d 944, 946-947 (Tex. Crim. App. 1977); *see also Kaczmarek v. State*, 986 S.W.2d 287, 294 (Tex. App. — Waco 1999, no pet. h.).

The information in this case was insufficient because it failed to specify the manner or the means by which Flores acted as an entertainer which triggered the requirement of a permit.[2] The Houston City Council promulgated a plethora of ways in which Flores could have violated the Ordinance. A proper information would have charged her with at least one of the particular manner and means by which she acted as an entertainer. Where an information fails to specify the manner and means by which an appellant committed the offense – here, the offense of being an entertainer without a permit – it fails to provide facts sufficient to bar a subsequent prosecution for the same offense and sufficient to give her precise notice of the offense with which she was charged. *See Miller v. State*, 647 S.W.2d 266, 267 (Tex. Crim. App. 1983).

The information in this case simply charged Flores with being an entertainer. It failed to specify any of the acts that involved the display or exposure of the Ordinance's (a) six specified anatomical areas, or (b) nine specified sexual activities.[3] The Ordinance defines entertainment as "any act or performance" such as a dance that involves the display or exposure of specified sexual activities or specified anatomical areas. Thus, it is the act or performance, without a permit, that triggers the offense under the Ordinance. By charging Flores that she "intentionally acted as an entertainer," when the Ordinance defines entertainer as "a person who performs entertainment," which is defined as "an act or performance,"without defining the specific act, the information was deficient. It failed to specify the manner and means by which she provided "entertainment."

IV.
Motion To Quash

Flores' motion to quash asserts "[t]he information is defective in that it fails to allege all of the material elements of the offense. Specifically, it fails to allege what activities the Defendant engaged in

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[2] As noted above, the Ordinance provides that it shall be unlawful for any person who does not hold a permit to act as an entertainer.

[3] By way of example, if we focused only on Flores' entertainment function of "dancing," she could violate the ordinance by dancing: with her breasts uncovered; with her buttocks exposed; with her pubic region exposed; while masturbating; while engaging in sexual intercourse or sodomy; while fondling or erotically touching her genitals, pubic region, buttocks, or breasts; or while engaging in any combination of the above acts. *See* Code of Ordinances, City of Houston, Texas ch. 28, art. VIII, section 28-253(a) (1997).

which would classify her as an entertainer thus requiring the applicable permit. . . . The information fails to allege how the Defendant engaged in entertainment and thus is deficient."

Because the information was insufficient, the motion to quash the information should have been granted. *See Green*, 951 S.W.2d at 4 (Tex. Crim. App. 1997) (holding information charging defendant with failure to identify insufficient because it failed to allege the defendant's state of mind). Thus, the trial court erred by refusing to grant the motion to quash. Although in *Green* the Court of Criminal Appeals did not reach the issue of whether the error in the information was harmful, we do. *See Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997) (holding that no error is categorically immune to harmless error analysis).

V.

The Error

Basing a conviction on a defective information is a constitutional error. *See* TEX. CONST. Art. I, § 10. Texas Appellate Procedure Rule 44.2 governs how harm is assessed after error is found in criminal cases. Subsection (a) governs constitutional error where "the court of appeals must reverse unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." *See* TEX. R. APP. P. 44.2(a). Harm is assessed as set forth in *Harris v. State*, 790 S.W.2d 568, 583-88 (Tex. Crim. App. 1989). *See Fowler v. State*, 958 S.W.2d 853, 864 (Tex. App. —Waco 1997, *affirmed* 991 S.W.2d 258). A finding of constitutional error mandates reversal unless the appellate court determines beyond a reasonable doubt that the error was harmless. *See Marcias v. State*, 959 S.W.2d 332 (Tex. App.—Houston[14th Dist.] 1997, pet. ref'd). Under *Harris*, determining whether error is harmless, we are not to focus on the propriety of the outcome of the case, but instead are concerned with the integrity of the process leading to the conviction. *See Harris*, 790 S.W.2d at 587. Applying this standard of review, we focus on the error and its possible impact. *See Wilson v. State*, 938 S.W.2d 47, 61 (Tex. Crim. App. 1996).

First, the court must isolate the error and all of its effects. *See Harris*, 790 S.W.2d at 587. Second, the court must ask whether a rational trier of fact may have reached a different result if the error and its effects had not resulted. *See Harris* at 588. In the second prong analysis, the factors the court

may consider include (1) the source of the error; (2) the nature of the error, and (3) whether declaring the error harmless would encourage the State to repeat it with impunity. *See Harris* at 587.

Under the first prong, we have already determined error was present in the trial court's denial of the motion to quash the information. *See Green*, 951 S.W.2d at 4. Next we turn to the factors used in determining whether a rational trier of fact could have reached a different result. *See Harris*, 790 S.W.2d at 587. The source of the error in the information was the State's failure to articulate the manner and means of the offense with which the appellant was charged. The nature of the error was procedural. This procedural error has two detrimental results: first, the information failed to provide Flores with adequate notice allowing her to prepare a defense, and second, this information does not act as a bar to a subsequent prosecution based on the same offense.[4] Because the error impacted the notice afforded Flores, her ability to prepare a defense, and her ability to protect herself against subsequent prosecutions, it has constitutional significance. *See Ward*, 829 S.W.2d at 794.

According to the record, the prosecutor was prompted regarding the lack of specificity of the charge against Flores the day before trial at the hearing on the motion to quash the information. At this point, and for the first time, the State articulated an intention to prove Flores was an entertainer by performing certain sexual acts. Further prompting by the trial court as well as Flores elicited the information that the State was prosecuting Flores because she engaged in "fondling or other erotic touching of human genitals, pubic region or pubic hair, buttocks or female breast." Flores responded, "which one?" The trial court asked, "her left breast or right breast?" Only when the State's witness, Officer Cox, took the stand

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[4] The various acts by which one can violate the Ordinance has substantial potential consequences. Charging the accused with the offense of being an "entertainer without a permit" allows the State to bring multiple prosecutions under the same offense. Where, as here, the State charges an individual with being an "entertainer without a permit," a jury can convict or acquit the accused of erotically touching her buttocks. In a second, subsequent prosecution against the same defendant, the State can charge the same offense, being an "entertainer without a permit," and seek a conviction for erotically touching her breast, or any act or combination of acts listed in the Ordinance, even though they all occurred during the performance of a single act - a dance. In other words, the same offense, "entertaining without a permit," subjects an accused to as many prosecutions as the State can extract from the definitions contained in the Ordinance. Thus, because it violates the general rule that prosecutors are entitled to one, and only one, opportunity to require an accused to stand trial, this failure to amend the information to allege sufficient facts to bar a subsequent prosecution is harmful. *See Arizona v. Washington*, 434 U.S. 497, 505, 98 S.Ct 824, 830, 54 L.Ed.2d 717 (1978).

during trial and testified, did Flores have actual notice that the offense for which she was being prosecuted involved her "erotic touching" of her buttocks while she danced for a customer.

It is axiomatic that criminal defendants must be given adequate notice to prepare a defense. *See LaBelle v. State*, 720 S.W.2d 101, 107 (Tex. Crim. App. 1986). An accused's right to notice of the accusation against him is premised upon both federal and state constitutional principles. *See Daniels v. State*, 754 S.W.2d 214, 217 (Tex. Crim. App. 1988); *see also Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L. Ed.2d 799 (1963) (stating that notice is a quintessential aspect of federal and state due process protection). Furthermore, a defendant's right to protection from subsequent prosecutions based on the same offense is similarly fundamental. *See Ex parte Rhodes*, 974 S.W.2d 735, 742 (Tex. Crim. App. 1998).

Declaring this error harmless could encourage the state to continue with the practice of violating a criminal defendant's constitutional rights by drafting charging instruments without specifying the necessary elements of the offense. Therefore, we hold the trial court erred by denying Flores' motion to quash the information, and that error was harmful. For these reasons, Flores' points of error three, four, five, and six are sustained. The information will be dismissed. *See Miller*, 647 S.W.2d at 267.

VI.
Conclusion

Flores brought fourteen points of error on appeal. We have overruled the first two points and sustained points three through six, triggering dismissal of the information and concomitant loss of jurisdiction in the trial court. Thus, we do not reach Flores' points seven through fourteen because they relate to trial error and are not necessary to the final disposition of this appeal. *See* TEX. R. APP. P. 47.1. Accordingly, we reverse the judgment of the trial court and order the information dismissed.

/s/ John S. Anderson
Justice

Judgment rendered and Majority and Dissenting Opinions filed May 25, 2000.

Panel consists of Justices Anderson, Frost, and Lee[5]

Publish — TEX. R. APP. P. 47.3(b).

[5] Senior Justice Lee sitting by assignment.

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V.

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Trial Court Cause No. 98-35777

D I S S E N T I N G O P I N I O N

I agree with the majority's finding that the trial court correctly asserted jurisdiction over this matter and with its conclusion that the trial court erred in failing to grant appellant's motion to quash the indictment. However, we part ways on the harm analysis. I find this record supports a conclusion beyond a reasonable doubt that the trial court's error in failing to quash the indictment did not contribute to appellant's conviction or punishment because the error did not affect her ability to prepare her defense. *See Adams v. State*, 707 S.W.2d 900, 903-04 (Tex. Crim. App. 1986).

The failure to provide proper notice in a charging instrument is not reversible error unless the error affects the defendant's ability to prepare a defense. *See Chambers v. State*, 866 S.W.2d 9, 17 (Tex.

Crim. App. 1993); *Peck v. State*, 923 S.W.2d 839, 841 (Tex. App.—Tyler 1996, no pet.). In making this determination, we consider the complete record. *See Saathoff v. State*, 908 S.W.2d 523, 528 (Tex. App.—San Antonio 1995, no pet.)(opinion on remand); *Saathoff v. State*, 891 S.W.2d 264, 267 (Tex. Crim. App. 1994).

In this case, neither the majority opinion nor appellant mentions how appellant's lack of adequate notice adversely impacted her ability to prepare a defense. A review of the record fails to support that notion. The record shows that appellant had notice of the offense report in this case. That report states that appellant, wearing nothing but a bikini bottom, was performing a table dance between the legs of a seated male patron. The report contains a graphic and detailed description of appellant's performance (*e.g.*, "shaking her breasts near his face . . . placing her buttocks near his face"). Furthermore, the record shows that the day before trial, the State informed the trial court as well as appellant's counsel of the State's intention to prove that appellant acted as an "entertainer" by engaging in "specified sexual activities," namely "fondling or other erotic touching of human genitals, pubic region or pubic hair, buttocks or female breast." At trial, the arresting officer testified that while dancing between the legs of a seated male customer, appellant was caressing her buttocks and placing her buttocks near the customer's face.

There is nothing in the record or in appellant's arguments to suggest that defense strategy turned on the particular anatomical area (genitals, breast, buttocks, or pubic area) or sexual act (fondling or erotic touching) involved or that appellant was in any way impaired in her ability to present a defense. There is nothing in the record to suggest that appellant was prejudiced as a result of any surprise because she had anticipated that the State would target her touching of a different body part or engaging in a different sexual act, nor is there any reasonable basis to conclude that appellant was unable to defend against the charge of entertaining without a permit because she was not aware of the specific type of "entertainment" at issue. It is not reasonable to find from this record that the omission of the manner and means from the indictment had a deleterious impact on appellant's defense.

In the final analysis, this record supports a conclusion beyond a reasonable doubt that the trial court's error in failing to quash the indictment did not contribute to appellant's conviction or punishment. Accordingly, I would affirm the judgment of the trial court.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed May 25, 2000.

Panel consists of Justices Anderson, Frost, and Lee.[1]

Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justice Norman R. Lee sitting by assignment.