Affirmed and Opinion filed February 14, 2002.

In The

Fourteenth Court of Appeals

NO. 14-01-00140-CR

SHARON JEAN RUSSELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court At Law No. 2
Brazos County, Texas
Trial Court Cause No. 2878-99

O P I N I O N

Appellant, Sharon Jean Russell, was convicted by a jury of the offense of stalking and sentenced to 365 days' imprisonment and a fine of $1,500. In five issues, appellant contends: (1) the cause should be dismissed for prosecutorial vindictiveness; (2) she was denied Due Process of Law and fundamental fairness at trial; (3) the trial court erred in denying her motion to dismiss based upon the unconstitutionality of the statute under which she was charged; (4) the trial court erred in denying her motion to quash the third paragraph of the information because it failed to state acts sufficient to constitute a criminal offense;

and (5) the trial court erred in denying her motion to dismiss upon double jeopardy grounds. We affirm.

Appellant contends she was arrested for public intoxication on December 4, 1998, and was subsequently charged with telephone harassment and stalking. Appellant was convicted in separate trials of both charges. This appeal arises solely from the stalking conviction.

In her first point of error, appellant complains the cause should be dismissed because of prosecutorial vindictiveness. Although appellant fails to cite to the record, she apparently contends the stalking charge was brought only because she refused to accept the State's plea bargain offer in the telephone harassment case.

On July 9, 1999, two warrants were served on appellant, and she was given Magistrate's Warnings for charges of telephone harassment and stalking. These charges were filed on the same day, July 20, 1999, and thus it appears chronologically unlikely that the stalking charge was the product of her refusal to plead guilty to the telephone harassment charge. Moreover, there is no presumption of prosecutorial vindictiveness in cases when a defendant opts to reject an offer to plead guilty and the prosecution later brings additional charges. *United States v. Goodwin*, 457 U.S. 368, 382–84 (1982); *Ex parte Bates*, 640 S.W.2d 894, 898 (Tex. Crim. App. 1982). Appellant had the burden, therefore, of proving prosecutorial vindictiveness by a preponderance of the evidence. *Id.* As aforementioned, appellant provides no record references to support her claim, and thus wholly fails to satisfy this burden. Accordingly, appellant's first point of error is overruled.

In her second point of error, appellant contends she was denied "Due Process of Law and fundamental fairness at trial." Specifically, appellant complains (1) the trial court erred in permitting an undisclosed State's witness to testify over objection, and (2) the State failed to give adequate notice of the prohibited conduct in the charging instrument.

Appellant filed a pretrial motion requesting the names of all witnesses whom the State expected to call at trial. The trial court granted appellant's motion, but thereafter allowed an undisclosed witness, Dr. Walter F. Stenning, to testify over appellant's objection. Appellant now alleges the State acted in bad faith in failing to include Dr. Stenning on its list of witnesses, and that this neglect deprived her of due process of law by preventing her from adequately preparing her defense.

We need not address the merits of this complaint because appellant failed to request a continuance on grounds of surprise. Failure to seek a continuance or postponement of the trial when the State allegedly fails to fully effectuate discovery causing surprise waives any error. *Lindley v. State*, 635 S.W.2d 541, 544 (Tex. Crim. App. [Panel Op.] 1982); *McQueen v. State*, 984 S.W.2d 712, 718 (Tex. App.—Texarkana 1998, no pet.); *Garner v. State*, 939 S.W.2d 802, 804 (Tex. App.—Fort Worth 1997, pet. denied); *Mock v. State*, 848 S.W.2d 215, 222 (Tex. App.—El Paso 1992, pet. ref'd).

Under the same point of error, appellant rather incongruously asserts that the charging instrument provided insufficient notice of the conduct that allegedly placed the victim in fear of injury or death. Appellant, however, has waived appellate consideration of her contention for two reasons. First, appellant has failed to adequately brief the point of error. *See* TEX. R. APP. P. 38.1(h); *see also Lawton v. State*, 913 S.W.2d 542, 558 (Tex. Crim. App. 1995) (overruling the defendant's argument for failure to brief adequately). In her brief, appellant notes that she was "entitled to allegation [*sic*] of fact sufficient to give her notice of conduct that she engaged in that would cause another to believe [appellant] would cause injury or death." Without further ado, appellant concludes "that the charging instrument failed to convey adequate notice sufficient to prepare her defense and was deficient in apprising [appellant] of the conduct prescribed, and thereby denied [her] due process of law and fundamental fairness." Appellant thus recites elements of the stalking offense itself (albeit absent citation), but fails to specifically identify any alleged deficiencies in the nineteen paragraphs of the information.

Under Texas Rule of Appellate Procedure 38.1(h), appellant must, through her brief, provide "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(h). In the instant case, however, appellant provided only bare factual assertions couched in the language of the statute under which she was charged; she neither provided arguments in their support nor cited to the record. We do not have, nor would we employ, the judicial resources needed to manufacture arguments for appellant and scour the record in their support. *See Garcia v. State*, 887 S.W.2d 862, 871 (Tex. Crim. App. 1994).

The second reason appellant has waived the issue for review is that she did not object to the alleged defect prior to trial. TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 2002). Although appellant filed a written motion to quash the information, she did not do so on any grounds now alleged on appeal. A defect of form or substance in an information is waived if no objection is made before the date trial commences. *State v. Murk*, 815 S.W.2d 556, 558 (Tex. Crim. App. 1991). Accordingly, appellant's second point of error is overruled.

In her third point of error, appellant complains the trial court erred in denying her motion to dismiss based upon the unconstitutionality of the statute under which she was charged. Specifically, appellant argues the statute is unconstitutionally vague and overbroad, and thus violates the First Amendment to the United States Constitution.

In pertinent part, the stalking statute under which appellant was prosecuted and which she now challenges provides:

> (a) A person commits an offense if the person, on more than one occasion and pursuant to the same scheme or course of conduct that is directed specifically at another person, knowingly engages in conduct, including following the other person, that:
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> (1) the actor knows or reasonably believes the other person will regard as threatening:
>
> (A) bodily injury or death for the other person;

> (B) bodily injury or death for a member of the other person's family or household; or
>
> (C) that an offense will be committed against the other person's property;
>
> (2) causes the other person or a member of the other person's family or household to be placed in fear of bodily injury or death or fear that an offense will be committed against the other person's property; and
>
> (3) would cause a reasonable person to fear:
>
> (A) bodily injury or death for herself;
>
> (B) bodily injury or death for a member of the person's family or household; or
>
> (C) that an offense will be committed against the person's property.

TEX. PEN. CODE ANN. § 42.072 (Vernon Supp. 1999).

Whenever an attack upon the constitutionality of a statute is presented for determination, we commence with the presumption that such statute is valid and that the legislature has not acted unreasonably or arbitrarily in its enactment. *Cotton v. State*, 686 S.W.2d 140, 144 (Tex. Crim. App. 1985); *Clements v. State*, 19 S.W.3d 442, 450 (Tex. App.—Houston [1st Dist.] 2000, no pet.); *DeWillis v. State*, 951 S.W.2d 212, 214 (Tex. App.—Houston [14th Dist.] no pet.). The burden rests upon the individual who challenges the statute to establish its unconstitutionality. *Cotton*, 686 S.W.2d at 145; *Ex parte Granviel*, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978). It is the duty of this court to uphold the statute if it can be reasonably construed in a manner that is consistent with the legislative intent and not repugnant to the constitution. *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App. 1979); *DeWillis*, 951 S.W.2d at 214.

Criminal laws must be sufficiently clear in at least three respects: (1) a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited; (2) the law must establish determinate guidelines for law enforcement; and (3) where First Amendment freedoms are implicated, the law must be sufficiently definite to prevent

chilling of protected speech. *Long v. State,* 931 S.W.2d 285, 287 (Tex. Crim. App. 1995). If a statute concerns First Amendment rights, there must be an even greater degree of specificity than in other contexts. *Id.* at 287–88 (citing *Kramer v. Price,* 712 F.2d 174 (5th Cir.1983, *rehearing en banc granted,* 716 F.2d 284 (5th Cir. 1983), *grant of relief aff'd,* 723 F.2d 1164 (5th Cir.1984). If a vagueness challenge involves First Amendment concerns, the statute may be found facially invalid even though it may not be invalid as applied to appellant's conduct. *Long,* 931 S.W.2d at 288. Where no First Amendment rights are involved, the court need only examine the statute to determine whether the statute is impermissibly vague as applied to appellant's specific conduct. *Bynum v. State,* 767 S.W.2d 769, 774 (Tex. Crim. App. 1989) .

The language of the statute thoroughly specifies what conduct is prohibited and subject to prosecution. *Clements,* 19 S.W.3d at 450. "For example, one way in which a person can be convicted of stalking is by engaging in conduct [s]he knows or reasonably believes will be regarded by the other person as threatening bodily injury or death." *Id.* (citing TEX. PEN. CODE ANN. § 42.072(a)(1)(A) (Vernon Supp. 1999)). A person may also be convicted under the statute where he or she knowingly engages in conduct that would cause a reasonable person to fear bodily injury or death. TEX. PEN. CODE ANN. § 42.072(a)(3)(A) (Vernon Supp. 1999); *Clements,* 19 S.W.3d at 450. The stalker is on notice, therefore, of the prohibited conduct if she knows or believes the other person will regard that conduct as threatening bodily injury or death. *Id.* Section 42.072 is thus not unconstitutionally vague. *Id.* at 450–51.

A statute is impermissibly overbroad if, in addition to proscribing activity that may be forbidden constitutionally, it sweeps within its ambit a substantial amount of expressive activity protected by the free speech guarantee of the First Amendment. *State v. Markovich,* 34 S.W.3d 21, (Tex. App.—Austin 2000, no pet.) (citing *Morehead v. State,* 807 S.W.2d 577, 580 (Tex. Crim. App. 1991)); *see also Clements,* 19 S.W.3d at 451.

The stalking statute at issue specifically prohibits conduct that causes another person to be placed in fear of bodily injury or death. *Id.* "While conduct does not lose First Amendment protection merely because the actor intends to annoy the recipient, such conduct is much less likely to enjoy protection where the actor intends to place the recipient in fear of death or bodily injury. If the First Amendment can be removed from the arena, a stalking statute can be evaluated under more deferential due process standards, and thus is more likely to survive scrutiny." *Long v. State,* 931 S.W.2d 285, 293 (Tex. Crim. App. 1996) (en banc) (finding a previous enactment of the stalking statute to be unconstitutional). Here, appellant was not engaged in constitutionally protected conduct because her conduct placed her victim in fear of bodily injury or death on more than one occasion. *See Clements*, 19 S.W.3d at 451. We therefore hold the stalking statute at issue to be constitutional and, accordingly, overrule appellant's third point of error.

In her fourth point of error, appellant contends the trial court erred in denying her motion to quash the third paragraph of the information because it failed to state acts sufficient to constitute a criminal offense. Appellant filed a written motion prior to trial to set aside and quash the information on two grounds that are not here presented: (1) that it was defective for alleging a specific location but failing to give the address and city thereof; and (2) that it was defective for failing to allege the time at which an electronic mail message was sent, or the location from which it was transmitted.[1] During pre-trial motions, however,

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[1] In full, appellant's grounds for quashing the information were as follows:

> 1. There is an allegation that defendant drove "in her car all the way to Virginia Wentrcek's house, turning on her blinker at Virginia Wentrcek's house so as to indicate to Virginia Wentrcek . . ." Since the information alleges a specific location the information should give the address and city where this allegedly occurred. Failure to do so does not give adequate notice and therefore the information should be set aside and quashed.
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> 2. There is no allegation as to when the e-mail may have been sent nor whether this occurred in Brazos County, Texas. Therefore, sufficient notice is not given and the information should be set aside and quashed.

appellant orally asserted the ground that she now brings on appeal: the information should be quashed because its third paragraph failed to state a cause of action.[2]

All motions to set aside an information must be in writing. TEX. CODE CRIM. PROC. ANN. art. 27.10 (Vernon Supp. 2001). The Code of Criminal Procedure also provides:

> If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding.

TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 2001). Appellant's oral motion to quash, made on the first day of trial, thus preserved nothing for review. *See Faulks v. State*, 528 S.W.2d 607, 609 (Tex. Crim. App. 1975); *Smith v. State*, 902 S.W.2d 755, 755 (Tex. App.—Fort Worth 1995, no pet.); *DePaul v. State*, 624 S.W.2d 709 (Tex. App.—Houston [14th Dist.] 1981, no pet.). Because there is no proper motion to quash before us, we do not reach the question of whether the third paragraph of the information stated a cause of action. Accordingly, appellant's fourth point of error is overruled.

In her fifth and final point of error, appellant complains the trial court erred in denying her motion to dismiss on double jeopardy grounds. The burden was on appellant to bring forth a record before the trial court and this court to establish her defense of double jeopardy. *See Zimmerman v. State*, 750 S.W.2d 194, 209 (Tex. Crim. App. 1988); *Anderson v. State*, 725 S.W.2d 722, 725 (Tex. Crim. App. 1982) (en banc); *Pompa v. State*, 787

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[2] The third paragraph of the information alleged that appellant:

> knowingly engage[d] in conduct directed specifically toward Virginia Wentrcek that the defendant knew or reasonably believed the said Virginia Wentrcek would regard as threatening bodily injury or death to the said Virginia Wentrcek [,] to wit: the defendant followed Virginia Wentrcek in her car all the way to Virginia Wentrcek's house, turning on her blinker at Virginia Wentrcek's house so as to indicate to Virginia Wentrcek that she knew where Virginia Wentrcek lived, and the defendant's said conduct would cause a reasonable person to fear[] bodily injury or death for the said Virginia Wentrcek.

S.W.2d 585, 587 (Tex. App.—San Antonio 1990, no pet.). Because we have neither an information, statement of facts, nor a record of any other evidence, we are in no position to review appellant's contention that the trial court erred in denying her claim of double jeopardy. *See Anderson*, 725 S.W.2d at 726; *Young v. State*, 650 S.W.2d 457, 459 (Tex. App.—Houston [14th Dist.] 1982, no pet.) (citing *Evans v. State*, 622 S.W.2d 866 (Tex. Crim. App. 1981), for the proposition that "this court cannot go to the record of another case for the purpose of considering matters not shown in the record of the case before it"). We overrule appellant's fifth point of error.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed February 14, 2002.

Panel consists of Justices Anderson, Hudson, and Frost. (Anderson, J., concurs in the result only.)

Do Not Publish — TEX. R. APP. P. 47.3(b).