Affirmed and Opinion filed March 1, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00918-CR

HEATHER JOANN CURE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 12
Harris County, Texas
Trial Court Cause No. 99-11-400

O P I N I O N

Pursuant to a plea agreement, appellant, Heather Cure, entered a plea of guilty to violating a City of Houston ordinance that prohibits persons employed at sexually oriented businesses from engaging in entertainment without displaying a permit issued by the City. The trial court assessed punishment at two days incarceration in the Harris County Jail and a fine of one hundred dollars. In five points of error, appellant contends that the trial court erred in denying her motion to quash the information because the county court at law lacked original jurisdiction for the prosecution of a city ordinance because the information was

defective. We affirm.

I. Background and Procedural History

The State charged appellant with entertaining in a sexually oriented business without properly displaying her permit. She moved to quash the information on the grounds that it was fundamentally defective because it failed to: (1) allege a violation of any law which would vest the county criminal court at law with jurisdiction; (2) allege all material elements of the offense because it did not describe the manner or means by which she allegedly violated the ordinance; (3) provide her with notice in order to prepare a defense because it charged her with the violation of one section of the ordinance but described an offense found in a related provision; and (4) allege a culpable mental state as purportedly required under the Texas Penal Code. In response to appellant's motion, the State amended the information and added a culpable mental state, *i.e.,* she was charged with an intentional and knowing violation. The trial court denied the remainder of appellant's motion to quash, and appellant entered a plea of guilty.

II. Jurisdiction of the Trial Court

In her first two points of error, appellant contends that the county criminal court at law lacked original jurisdiction for the prosecution of a violation of the ordinance under which she was charged. Specifically, appellant contends that (1) the State's proof is insufficient to establish jurisdiction, (2) exclusive original jurisdiction over violations of municipal ordinances rests with the municipal courts, and (3) Chapter 243 of the Texas Local Government Code only regulates the licensing of owners or operators of sexually oriented businesses, not their entertainers.

Appellant first maintains that because the State was alleging a violation of a municipal ordinance, it was required to either offer a copy of the ordinance into evidence or to ask the trial court to take judicial notice of the ordinance. We disagree.

This Court recently decided an identical issue under a similar ordinance.[1] *Flores v. State*, 33 S.W.3d 907 (Tex. App.—Houston [14th Dist.] 2000, pet. filed). In *Flores*, we held that proof of the ordinance was unnecessary because the record reflected that the trial court had taken judicial notice of the ordinance, which it could do pursuant to Rule 204 of the Texas Rules of Evidence. *Id.* at 922. Here, there is nothing in the record to indicate whether the trial court took judicial notice of the ordinance. Rule 204, however, allows any court—including an appellate court—to take judicial notice of a city ordinance, even upon its own motion. TEX. R. EVID. 204; *Flores*, 33 S.W.3d at 914. Therefore, the trial court could have—and this Court may—take judicial notice of the ordinance at issue in this case.[2] Accordingly, there is no requirement that the State either offer a copy of the ordinance into evidence or ask the trial court to take judicial notice of the ordinance.

Appellant's remaining contentions under this point of error were also addressed in *Flores*. In *Flores*, we held that the county criminal court at law has jurisdiction in cases involving violations of ordinances that are passed pursuant to chapter 243 of the Local Government Code and directed towards sexually oriented businesses, including the regulation of entertainers' conduct. *Id.* at 914–16. Because the ordinance at issue in this case was passed pursuant to chapter 243 of the Local Government Code, the trial court had jurisdiction to hear the case. Finally, this Court explained in *Flores* why municipal courts do not have *exclusive* original jurisdiction over violations of municipal ordinances and why Chapter 243 of the Texas Local Government Code does not act as a limitation upon municipalities to regulate the entertainers at sexually oriented businesses. 33 S.W.3d at 915. Accordingly, we need not address these same arguments again.

Appellant's first two points of error are overruled.

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[1] In *Flores*, the defendant was charged with failing to obtain a permit to act as an entertainer, whereas here, appellant was charged with failing to conspicuously display her permit.

[2] The ordinance is available on the Internet at the City's website.

III. FUNDAMENTAL DEFECT

In points of error three and four, appellant contends that the information was fundamentally defective because it failed to allege all material elements of the offense. Accordingly, she argues that the trial court reversibly erred by denying her motion to quash. Appellant's argument is based upon the fact that the ordinance proscribes alternate means by which it may be violated, *i.e.*, by exposing specified anatomical areas or displaying specified sexual activities.

A charging instrument is fundamentally defective only if it fails to "charg[e] a person with the commission of a crime." *Ex Parte Patterson*, 969 S.W.2d 16, 19 (Tex. Crim. App. 1998) (alteration in original) (quoting TEX. CONST. Art. V, § 12(b)). Stated another way, an information is not fundamentally defective if it charges someone with "the commission of an offense," even though it fails to allege an element of that offense. *Duron v. State*, 956 S.W.2d 547, 551 (Tex. Crim. App. 1997). The failure of a charging instrument to allege an element of the offense is, however, a defect of substance. *Struder v. State*, 799 S.W.2d 263, 267–68 (Tex. Crim. App. 1990). A defect of substance can support a conviction, so long as the charging instrument purports to charge a person with an offense. *Ex Parte Patterson*, 969 S.W.2d at 19.

We find that the information adequately charged appellant with the commission of an offense. The ordinance at issue provides that an "entertainer shall conspicuously display his personal card upon his person at all times while acting as an entertainer . . . in an enterprise." HOUSTON, TEX., CODE § 28–256(a) (2000). Thus, an offense is committed if (1) a person (2) fails to conspicuously display (3) his personal card (4) upon his person (5) while acting as an entertainer.

Here, the amended information charged, in relevant part:

> [T]hat in Harris County, Texas, HEATHER JOANN CURE,

> hereafter styles [sic] the Defendant, heretofore on or about MARCH 16, 1999, did then and there unlawfully while AN ENTERTAINER IN a sexually oriented enterprise . . . within the incorporated limits of the City of Houston, . . . whole [sic] acting as AN ENTERTAINER on the premises of the aforesaid sexually oriented enterprise, to conspicuously display upon his person at all times his personal card issued by the Chief of Police of the City of Houston or his designee pursuant to Section 28-254 of the Code of the Ordinances of the City of Houston did intentionally and knowingly fail to conspicuously display on his person at all times his personal card while acting as an ENTERTAINER [on the premises of a sexually oriented business].

The trial court did not abuse its discretion by not quashing the information because, having charged appellant with an offense, the information was not fundamentally defective, even if it failed to include the manner or means by which she entertained, a point we now turn to. Appellant's third and fourth points are overruled.

IV. NOTICE

In her final point of error, appellant complains that the trial court reversibly erred in denying her motion to quash because the information failed to provide her sufficient notice in order to prepare for trial and because it failed to plead sufficient facts to bar a subsequent prosecution. Specifically, appellant complains that, because an offense can be committed either by displaying specified anatomical areas or by engaging in specified sexual activities, the State was required to plead which of the alternate means it intended to prove. While we agree that the trial court erred by not quashing the information, we also find that such error was harmless beyond a reasonable doubt

In *Flores*, we found the information was defective for lack of notice because "the type of sexual activity performed [or] the specific anatomical area exposed [are] facts essential to give notice." 33 S.W.3d at 919 & n.3 (distinguishing *Kaczmarek v. State*, 986

S.W.2d 287 (Tex. App.—Waco 1999, no pet.)). Accordingly, we now hold—consistent with our opinion in *Flores*—that the information at issue here failed to give appellant adequate notice to prepare a defense because it failed to indicate whether the State intended to prove appellant violated the ordinance by displaying a specified sexual activity or by exposing a specified anatomical area. *Id.* at 919.

Appellate courts are to apply a three-step test to determine whether a conviction should be reversed where the trial court erred in overruling a defendant's motion to quash based upon defective notice. First, the appellate court must inquire whether the charging instrument failed to supply some necessary part of notice. If so, we must decide whether this failure had an impact on the defendant's ability to prepare a defense. Lastly, we must determine how great an impact the lack of notice had. *Adams v. State*, 707 S.W.2d 900, 903 (Tex. Crim. App. 1986).

Having found that the information failed to supply appellant with proper notice, we turn to the second part of the *Adams* analysis. In determining whether the failure to provide proper notice impacted appellant's ability to prepare a defense, we note that a charging instrument that fails to give a defendant adequate notice is a defect of form. *Hillen v. State*, 808 S.W.2d 486, 488 (Tex. Crim. App. 1991). A judgment is not affected by a defect of form unless it "prejudice[s] the substantial rights of the defendant." TEX. CODE CRIM. PROC. ANN. art. 21.19 (Vernon 1989). In deciding whether appellant was harmed, we review the entire record. *Saathoff v. State*, 908 S.W.2d 523, 528 (Tex. App.—San Antonio 1995, no pet.) (op. on remand). In reviewing the record, we must be satisfied beyond a reasonable doubt that the error did not contribute to the conviction or punishment. TEX. R. APP. P. 44.2(a); *See Sullivan v. State*, 831 S.W.2d 533, 534 (Tex. App.—Houston [14th Dist.] pet. ref'd) (looking to whether lack of notice as to manner of intoxication was harmless beyond a reasonable doubt).

The record before this Court is sparse. It consists only of a brief hearing on the

motion to quash and the plea of guilty. There is nothing in the record that indicates appellant's ability to prepare a defense was adversely impacted by the lack of notice in the information. In fact, appellant directs us to nothing in the record to show how the defective notice harmed her, other than a conclusory statement in her *brief* that she was unable to learn what activity she engaged in that required a permit. As in *Flores*, nothing in the record indicates that appellant's defense strategy turned upon whether she engaged in a specified sexual act or displayed a specified anatomical area. *See, e.g., Hodge v. State*, 756 S.W.2d 353, 354 (Tex. App.—Dallas 1988, no pet.) (finding trial court error in overruling motion to quash harmless in light of plea of guilty, defendant's pretrial access to police reports, and the minimal sentence imposed).

We find that, due to a total lack of any evidence in the record showing how appellant was prevented from preparing a defense, the absence of notice of the manner and means of the commission of the offense in the information did not prejudice the substantial rights of appellant. Accordingly, appellant's fifth point of error is overruled and the judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed March 1, 2001.
Panel consists of Justices Yates, Wittig, and Frost.
Do Not Publish — TEX. R. APP. P. 47.3(b).