IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1996 SESSION

FILED

November 7, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9506-CR-00183**
Appellee,	)	
	)	**KNOX COUNTY**
VS.	)	
	)	**HON. RICHARD R. BAUMGARTNER,**
GREGORY JAY HOXIE,	)	**JUDGE**
	)	
Appellant.	)	(Stalking - 2 counts; harassment)

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted on one count of felony stalking, one count of misdemeanor stalking, and two counts of harassment. A jury convicted the defendant of both stalking offenses and one harassment offense. After a sentencing hearing, the defendant was sentenced to two years on the felony conviction, and eleven months twenty-nine days each on the misdemeanor stalking and harassment convictions. The judge ordered these sentences to run consecutively. The jury also imposed a fine of two thousand five hundred dollars ($2,500). The defendant now appeals as of right, claiming that the trial court erred by not requiring the State to elect which offenses it was prosecuting; that the evidence was not sufficient to sustain the convictions for stalking; and that the dual stalking convictions, as well as the stalking and harassment convictions, subject him to double jeopardy. After our review of the record, we find no merit in the defendant's contentions and affirm the judgment below.

We will first address the defendant's claim concerning sufficiency of the evidence. When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of witnesses, the weight and value to

be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

The defendant was indicted for misdemeanor stalking for actions taken "[o]n or about the ___ day of January, 1994, and divers and diverse days between that day and the ___ day of June, 1994." In 1994, our code set forth the misdemeanor offense of stalking as follows:

> (a)(1) A person commits the offense of stalking: (A) Who repeatedly follows or harasses another person with the intent to place that person in reasonable fear of a sexual offense, bodily injury or death; (B) Whose actions would cause a reasonable person to suffer substantial emotional distress; and (C) Whose acts induce emotional distress to that person.

T.C.A. § 39-17-315 (1994 Supp.) The statute also includes the following definitions in subsection (2):

> (A) "Follows" means maintaining a visual or physical proximity over a period of time to a specific person in such a manner as would cause a reasonable person to have a fear of a sexual offense, bodily injury or death; (B) "Harasses" means a course of conduct directed at a specific person which would cause a reasonable person to fear a sexual offense, bodily injury, or death, including, but not limited to, verbal threats, written threats, vandalism, or unconsented-to physical contact; and (C) "Repeatedly" means on two (2) or more separate occasions.

Id. Although the statute is written in the disjunctive with respect to the offender either following or harassing, and with respect to the victim fearing either bodily injury or death, the indictments against the defendant on the stalking offenses state that he followed and

harassed the victim with the intent to cause her to fear bodily injury and death. Because the trial court instructed the jury that it must find the defendant guilty of both following and harassing the victim with the intent of causing her to fear both bodily injury and death, the erroneous indictment caused the defendant no prejudice.

The evidence was more than sufficient to sustain the defendant's conviction for this offense. According to the victim Suzette Hoxie, she and the defendant had been married approximately eight years when they separated in 1993. Ms. Hoxie filed for divorce, which was granted in May 1994. Prior to that time, in May 1993, she had obtained a protective order against the defendant which, according to her testimony, allowed "social contact." The couple had a daughter who was five years old when they separated. Ms. Hoxie also had a twelve-year-old daughter.

Ms. Hoxie testified that on March 16, 1994, the defendant had been at her garage and, during an argument, both strangled her and picked her up and threw her. On April 20, 1994, he returned to her garage and jumped on the hood of her car while she was in it and screamed that he was going to kill her. On May 21, 1994, again at Ms. Hoxie's garage, the defendant threw a large metal box at her windshield while she was in her car. On May 29, 1994, he accosted the victim in her yard, threw a wet towel in her face, cursed her in front of her children, and after she and her children went inside, beat on the door and yelled that he would kill them all. These incidents proved that the defendant had maintained a physical proximity to Ms. Hoxie over a period of time and in such a manner as would cause a reasonable person to fear bodily injury and death. They also involved a course of conduct directed at Ms. Hoxie which would cause a reasonable person to fear bodily injury and death, and included verbal threats and unconsented-to physical contact. There is no question that the defendant's actions were engaged in with

the intent to place Ms. Hoxie in reasonable fear of bodily injury and death. There is furthermore no question that these actions would cause a reasonable person to suffer substantial emotional distress. Ms. Hoxie testified that the defendant's actions in fact caused her to feel "afraid for her life." The defendant was properly convicted of this offense. This issue is without merit.

The felony stalking charge covered the period from "the ___ day of June, 1994" to "the ___ day of October, 1994." On June 2, 1994, Ms. Hoxie obtained a court order enjoining the defendant from "coming about [her] for any purpose and specifically from abusing, threatening to abuse [her], or committing any acts of violence upon [her] upon penalty of contempt." Following the entry of this order, the defendant's violation of the stalking statute became a Class E felony. T.C.A. § 39-17-315(b)(3) (1994 Supp). Thus, proof of incidents occurring after June 2, 1994, which would otherwise support a misdemeanor stalking conviction, supports the defendant's conviction for the felony stalking offense.

Ms. Sharron Fair, a friend of Ms. Hoxie's, testified that on June 4, 1994, the defendant drove beside the car that she, Ms. Hoxie and their daughters were in and began hollering at them. Ms. Fair testified about this incident that she "ha[d] never been so afraid for someone in my life" and that Ms. Hoxie had appeared fearful. On June 11, 1994, the defendant phoned Ms. Hoxie and told her he had been sitting in a room next to hers at school the day before and had watched her during a two-hour lecture. On June 12, 1994, the defendant appeared three times at Ms. Hoxie's community swimming pool while she and her daughters were there, and on one of these visits slammed his body against hers and threatened to have her killed if she had him thrown out of the pool. On June 13, he confronted her at a childrens' function, was made to leave by the

doorman, and told the victim that "he would see me later at the house." In October, he arrived at Ms. Hoxie's garage upon her request that he remove his truck from that location. They argued and she told him to leave. Rather than do so, he grabbed her by the throat and threw her against a wood pile.

For the same reasons as set forth above, this proof would have supported a conviction for misdemeanor stalking. Because these incidents occurred after the entry of the protective order, however, this evidence is sufficient to support the defendant's conviction for felony stalking. This issue is without merit.

We now address the defendant's initial issue, that the State should have been required to elect those particular incidents for which it was seeking convictions at the close of its proof-in-chief. As set forth above, the State introduced evidence of numerous incidents in support of its prosecution of one charge of misdemeanor stalking and one charge of felony stalking.[1] The defendant argues that his state constitutional right to jury unanimity required an election among these incidents, citing Burlison v. State, 501 S.W.2d 801 (Tenn. 1973), and its progeny. However, upon an analysis of the rationale underlying Burlison and due consideration of the evil at which the stalking statute is aimed, we conclude that the State need not make such an election in cases of this nature.

In Burlison, the defendant had been indicted for one count of carnal knowledge of a female child under the age of twelve years. 501 S.W.2d at 802. The State introduced proof of numerous incidents of sexual fondling and intercourse during the relevant time period. The trial court did not instruct the jury that they must all decide

[1]Indeed, the State presented proof of many more incidents between Ms. Hoxie and the defendant in support of its case than are recited herein.

upon the particular offense, if any, of which the defendant was guilty. Our Supreme Court held that "it [is] the duty of the trial judge to require the State, at the close of its proof-in-chief, to elect the particular offense of carnal knowledge upon which it would rely for conviction, and to properly instruct the jury so that the verdict of every juror would be united on the one offense." Burlison, 501 S.W.2d at 804.

The Court relied on three cases in making its ruling. The case of Jamison v. State, 117 Tenn. 58, 94 S.W. 675 (1906), had also involved a single charge of carnal knowledge, proved by several acts. Finding that each unlawful act was a separate substantive offense, the Court had held that the State could be required to elect among the proved offenses that upon which it sought conviction. The Court set forth three reasons for this requirement: first, to give the defendant adequate notice of the offenses he needed to defend against during his presentation of proof; second, to protect the defendant from double jeopardy; and third, to insure that the jury was unanimous in its conviction of the defendant on each charged offense, thereby avoiding the danger of some jurors convicting on one offense and other jurors convicting on a different offense.

The Burlison court also relied on Vinson v. State, 140 Tenn. 70, 203 S.W. 338 (1918), in which the defendant had been charged with violating the age of consent law during the month of September. Proof of multiple acts was elicited during the trial. The trial court had denied the defendant's motion to require the State to elect the act upon which it was relying for conviction. On appeal, our Supreme Court reversed, holding "[t]he defendant is entitled to require the election before he introduces any proof so that he can meet by his proof the evidence upon which the state relies." Vinson, 203 S.W. at 339. Finally, the Burlison court relied on Cox v. State, 270 S.W.2d 182 (Tenn. 1954), a case involving a charge of lewdness. Proof of multiple offenses was admitted

but the State was not required to make an election. As in the other two cases, our Supreme Court reversed and remanded, holding that the State should have been required at the close of its proof to select which proven acts it was relying upon for a single conviction.

Subsequent to Burlison, our Supreme Court decided the case of State v. Shelton, 851 S.W.2d 134 (Tenn. 1993). Shelton had been charged with the unlawful sexual penetration of one female and unlawful sexual contact with two other females. Prior to trial, the State narrowed the time frame to the period between April 7 and September 6, 1989. At trial, proof of numerous incidents of the prohibited conduct was admitted. The trial court did not require the State to elect the offenses for which it sought convictions, but did give the jury a general charge regarding unanimity. The Supreme Court concluded that "this instruction is an inadequate substitution for Burlison's explicit requirement that the prosecution identify the specific offenses for which it seeks convictions." Shelton, 851 S.W.2d at 136.

Explaining its holding, the Shelton Court returned to the Jamison decision and noted the statement therein that "'each unlawful act of carnal knowledge is a separate, substantive offense,' rather than a continuous offense." Shelton, 851 S.W.2d at 137, quoting Jamison v. State, 117 Tenn. at 62. "Thus," the Court continued in Shelton, "to avoid the prosecution of uncharged crimes in cases involving age of consent laws and other sexual crimes, the state is required to 'elect the specific offense upon which a verdict of guilty would be demanded.' " 851 S.W.2d at 137, quoting Burlison, 501 S.W.2d at 803.

In its most recent decision on this issue, our Supreme Court again dealt

with sexual offenses. In Tidwell v. State, 922 S.W.2d 497 (Tenn. 1996), the defendant had been charged with fifty-six counts of rape, statutory rape, incest and contributing to the delinquency of a minor arising out of monthly sexual encounters with the victim over a fourteen month period. The State introduced evidence of many more encounters than charged, and was not required to elect those offenses for which it was seeking convictions. In finding that the defendant's constitutional right to a unanimous jury verdict had been violated, the Supreme Court continued to "adhere to the Shelton rationale." Tidwell, 922 S.W.2d at 501.

Clearly, then, these cases require that the State make an election of offenses when it is pursuing convictions for discrete crimes and proves more discrete crimes than it has charged. That is not the case before us. Unlike the crime of rape, the crime of stalking is not committed upon a single, discrete act by the defendant. Rather, the stalking statute contemplates a series of discrete actions amounting to a continuing course of conduct. It is the continuing course of conduct which constitutes the offense, not the individual discrete actions making up the course of conduct. The jury is asked to find in a stalking case that the defendant engaged in the prohibited conduct "repeatedly." "Repeatedly" is defined by the statute as "two (2) or more separate occasions." T.C.A. § 39-17-315(a)(2)(C) (1994 Supp) (emphasis added). Thus, there is no danger that the jury may convict on the basis of different offenses: there is only one offense charged, and only one offense proved. That the offense involves numerous discrete parts does not put the defendant at risk of a non-unanimous jury verdict.

Analogously, a defendant may be charged with criminal conspiracy where "two (2) or more people, each having the culpable mental state required for the offense which is the object of the conspiracy and each acting for the purpose of promoting or

facilitating commission of an offense, agree that one (1) or more of them will engage in conduct which constitutes such offense." T.C.A. § 39-12-103(a). However, "[i]f a person conspires to commit a number of offenses, the person is guilty of only one (1) conspiracy so long as such multiple offenses are the object of the same agreement or continuous conspiratorial relationship." T.C.A. § 39-12-103(c). In order to prosecute a conspiracy case, the State must prove that at least one "overt act in pursuance of such conspiracy [was] . . . done by the person [charged with conspiracy] or by another with whom the person conspired." T.C.A. § 39-12-103(d). If it can, of course, the State will attempt to prove many more than one such overt act. However, no matter how many such acts it proves in furtherance of the single conspiracy charged, the State will not be forced to make an election of offenses. Only one offense has been charged -- the conspiracy -- and the overt acts proved to have occurred in furtherance of the conspiracy are simply discrete parts of the whole: not wholes in and of themselves.[2] We think the statute setting forth the crime of stalking is properly interpreted in the same manner.

Accordingly, we find that no error was committed when the trial court did not require the State to elect which incidents it was relying on in order to prove either the felony or misdemeanor stalking charge. In fact, it was relying on all of them, although it was certainly not necessary that the jury find that all of them had been proved beyond a reasonable doubt in order to properly convict the defendant. Rather, the jury simply had to find that the defendant had engaged in the prohibited conduct "on two (2) or more separate occasions" during each of the relevant time periods. This, the jury obviously did. This issue is therefore without merit.

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[2]We acknowledge, of course, that each of the discrete actions taken in furtherance of the conspiracy may constitute other crimes in and of themselves. For instance, a conspiracy to distribute cocaine may involve many individual sales of cocaine, each of which may constitute a separate criminal offense. Each such sale will not, however, constitute a separate conspiracy. Similarly, we find it conceivable that discrete actions engaged in during the course of stalking a victim may also be separate, distinct crimes -- assault, for instance. This does not alter our interpretation of the overarching crime of stalking as being not subject to the requirement of election of offenses.

The defendant also asserts the inverse of his Burlison argument: that he cannot be convicted of both felony and misdemeanor stalking because all of his conduct -- not just that occurring after June 2, 1994 -- was in violation of a protective order. Therefore, he argues, all of his behavior during the January through October period covered by the indictment was "the same" and, thus, two convictions for the same conduct violates his constitutional right against double jeopardy. We are not persuaded.

Ms. Hoxie testified that she had obtained an initial order of protection against the defendant on May 12, 1993, which, according to her, allowed "social contact." The defendant contends in his brief that this document ordered him "not to commit the type of behavior proscribed by the stalking statute." However, the text of this particular order is not in the record. Nor does the record contain adequate proof as to how long this order was in effect. It is the defendant's duty to have prepared an adequate record in order to allow a meaningful review on appeal. T.R.A.P. 24(b); State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983); State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988). When no evidence is preserved in the record for review, we are precluded from considering the issue. Roberts, 755 S.W.2d at 836. Therefore, we find this issue to have been waived.

Finally, the defendant also makes a double jeopardy argument with respect to his stalking and harassment convictions; that is, that he cannot be convicted of both stalking and harassment because both convictions are based on the same conduct.

The defendant was indicted on two charges of harassment: one count alleged that he threatened by telephone to take action known by him to be unlawful against Ms. Hoxie and that by so doing "did knowingly annoy and alarm" Ms. Hoxie. The

second count alleged that he placed telephone calls to Ms. Hoxie "in an offensively repetitious manner and without a legitimate purpose of communication" thereby annoying and alarming her.[3] However, both counts covered the period of January 1994 to June 1994. Thus, only the misdemeanor stalking charge is arguably a "double conviction" against the defendant.

In determining whether a defendant has been convicted more than once for the same offense in violation of the guarantee against double jeopardy, we must analyze

> (1) whether the event is a violation of two distinct statutory provisions, (2) whether either offense is necessarily included in the other, (3) whether the offenses require proof of different elements, (4) whether each offense requires proof of additional facts not required by the other, and (5) whether the legislative intent suggests that one or several offenses were intended.

State v. Pelayo, 881 S.W.2d 7, 10 (Tenn. Crim. App. 1994). Obviously, in the case before us, we have two distinct statutory provisions: T.C.A. § 39-17-308 defining and prohibiting harassment, and § 39-17-315 defining and prohibiting stalking. Neither offense is necessarily included in the other. For instance, stalking can occur without any verbal or written threats so long as the victim reasonably fears a sexual offense, bodily injury or death as a result of being "followed" as it is defined under the stalking statute. Such conduct would not be an offense under the harassment statute. Similarly, conduct which merely annoys or alarms the recipient may be harassment, but would not be stalking. Thus, neither offense is necessarily included in the other.

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[3]The crime of harassment is set forth in our code as follows: "(a) A person commits an offense who intentionally: (1) Threatens, by telephone or in writing, to take action known to be unlawful against any person, and by this action knowingly annoys or alarms the recipient; (2) Places one (1) or more telephone calls anonymously, or at an inconvenient hour, or in an offensively repetitious manner, or without a legitimate purpose of communication, and by this action knowingly annoys or alarms the recipient; or (3) Communicates by telephone to another that a relative or other person has been injured, killed or is ill when such communication is known to be false. (b) A violation of this section is a Class A misdemeanor." T.C.A. § 39-17-308 (1991).

The offenses require proof of different elements. Stalking must "cause a reasonable person to have a fear of a sexual offense, bodily injury or death." T.C.A. § 39-17-315(a)(2). Harassment has no such requirement. Harassment requires some form of oral or written communication. T.C.A. § 39-17-308(a). Stalking does not. The same analysis holds in determining that the offenses require proof of different facts. Finally, the legislature obviously intended these provisions to constitute different offenses. Thus, the defendant's convictions for both misdemeanor stalking and harassment do not violate his protection against double jeopardy. This issue is without merit.

The defendant's convictions are affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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DAVID G. HAYES, Judge

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WILLIAM M. BARKER, Judge