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MCDONALD, J., concurring in part and dissenting in part.

I agree with the majority opinion as to the breach of the peace count. I dissent from the majority's conclusion that there was insufficient evidence to support the conviction of the defendant, Diana L. Moulton, as to the harassment count.

The state concedes that the defendant was punished on the basis of the verbal content of her telephone call and not for the conduct involved in the making of the call, which ordinarily serves as a basis for prosecution under the harassment statute, General Statutes § 53a-183 (a) (3). Historically, the use of the telephone to make repeated, unwelcome, speechless calls during the early morning hours has ordinarily been a basis for prosecution under § 53a- 183 (a) (3).

The majority holds that a spoken threatening call is not to be the subject of the harassment statute because the harassment statute is violated when the telephone rings and the ringing itself is likely to cause alarm. This is one type of call where the statute may be violated. By its terms, the statute can also be violated when a conversation or speech ensues and that call is made in a manner likely to cause alarm. Section 53a-183 (a) (3) provides that one violates the statute when one with "intent to harass, annoy or alarm another person . . . makes a telephone call, *whether or not a conversation ensues*, in a manner likely to cause annoyance or alarm." (Emphasis added.) In his concurrence in *Gormley v. Director*, *Connecticut State Dept. of Probation*, 632 F.2d 938 (2d Cir.), cert. denied, 449 U.S. 1023, 101 S. Ct. 591, 66 L. Ed. 2d 485 (1980), Judge Mansfield stated that he would uphold the application of the Connecticut harassment statute to speechless calls or to obscene or threatening calls, so that it will not penalize the exercise of first amendment free speech rights. Id., 943–45 (Mansfield, J., concurring).

In *Commonwealth* v. *Welch*, 444 Mass. 80, 101, 825 N.E.2d 1005 (2005), the Massachusetts Supreme Judicial Court stated that the court effectuated the intent of the legislature to apply the Massachusetts harassment statute solely to constitutionally unprotected speech "by protecting victims from harassment that may begin with words, but tragically end with violence," thereby establishing a continuum, along which law enforcement may confront behavior that potentially can escalate from threats to violence.

The majority opinion states that the defendant's speech may be considered only as circumstantial evidence of the caller's intent to alarm another person by making her telephone call. Our Supreme Court has held,

however, that speech may be considered as to the alarming manner in which the call was made. *State* v. *Murphy*, 254 Conn. 561, 570, 757 A.2d 1125 (2000). As our Supreme Court stated, "in a prosecution seeking a conviction under § 53a-183, the fact finder may consider the language used in the communication in determining whether the state has proven the elements of the offense, namely, that the defendant intended to harass, annoy, or alarm and that he did so in a manner likely to cause annoyance or alarm." Id., 569.

While I agree that without the threatening speech there could be no rational basis to consider this single telephone call to the postal office during business hours as harassment causing alarm, our law provides that threatening speech can be considered as to the alarming manner in which the call was made. Despite the threatening speech, the majority opinion concludes that the defendant's conviction for harassment cannot stand. I disagree.

The majority opinion also concludes that there was insufficient evidence to find that the defendant intended to harass or to annoy the recipient of her telephone call. The record indicates, however, that the information charged the defendant with intending "to harass, annoy, or *alarm* another person" by making "a telephone call . . . in a manner likely to cause annoyance or alarm . . . ." (Emphasis added.)

As the majority recognizes, with respect to the breach of the peace count, the defendant's intent may be inferred from her conduct. There was evidence that the call was answered by a co-worker of the defendant at the Norwich post office. There also was evidence that five days before, a disgruntled postal worker entered her California post office and shot and killed a number of co-workers. I would conclude that a jury could reasonably find that the defendant did intend to alarm her listener when she stated, in an angry and agitated tone during the telephone call, that the defendant could "do that, too," because of her similar mistreatment by postal supervisors.

The majority opinion also states that no judicial gloss defining the defendant's speech as a true threat is required because the harassment statute does not punish one for the contents of a telephone call but only for making a telephone call. In this case, the contents of the defendant's call could be viewed as a threat of violent and lethal harm to postal office co-workers. As such, if it is a true threat, the speech is not protected by the first amendment, and it could be punished. *State* v. *Murphy*, supra, 254 Conn. 568 n.13, citing *Mozzochi* v. *Borden*, 959 F.2d 1174, 1178 (2d Cir. 1992). I would hold that the defendant's statement must be a true threat or it could not constitutionally be punished without violating the first amendment of the United States constitution. As the majority implicitly recognizes as to

the breach of the peace count, citing *State* v. *DeLoreto*, 265 Conn. 145, 827 A.2d 671 (2003), and *State* v. *Cook*, 287 Conn. 237, 249, 947 A.2d 307, cert. denied, U.S. , 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008), the right to complain about harassment and bullying by postal supervisors is protected by the first amendment. Also, as the majority points out, with respect to the breach of the peace count, the defendant's statement in this case could be construed as not being a true threat.

Judge Mansfield, in his concurring opinion in *Gormley v. Director*, *Connecticut State Dept. of Probation*, supra, 632 F.2d 943, found that the Connecticut harassment statute was not facially overbroad, if the Connecticut Supreme Court were to apply the statute only to speechless calls or to obscene or threatening calls to avoid penalizing anyone exercising first amendment free speech rights. His concurrence observed that if it were not so construed, the statute would clearly be void for overbreadth. Id., 943–44. I conclude that the conviction based on the jury's verdict, after the charge to the jury that did not require the defendant's statement to be a true threat, would be an overbroad application of the harassment statute. I would, therefore, conclude that the court's failure to instruct the jury that the defendant's statement must be a true threat would require a new trial as to the harassment count.

Because I do not agree with the majority that the evidence would not support a conviction for harassment in the second degree, I would order a new trial on that count.

For the reasons given, I respectfully dissent from the order to enter a judgment of not guilty as to the harassment count.