IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0755-13

ELISA MERRILL WILSON, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FIRST COURT OF APPEALS FORT BEND COUNTY

COCHRAN, J., filed a concurring opinion in which JOHNSON and ALCALA, JJ., joined.

I agree with the majority that the evidence is sufficient to support appellant's conviction for telephone harassment. I respectfully disagree that the term "repeated" in the telephone-harassment statute means just "more than one telephone call."[1] We ought not jettison the discussion of the term "repeated" from our prior telephone-harassment decision,

[1] *See* Majority Op., at 10 (stating that "the State may legally obtain a harassment conviction under § 42.07(a)(4)'s prohibited repeated-telephone-communications theory on the bare minimum of two telephone communications").

Scott v. State,[2] particularly since the majority's new definition clearly invites a vagueness and overbreadth challenge to the statute.[3] The federal courts declared our previous telephone-harassment statute unconstitutionally vague,[4] and, under the majority's interpretation, they will surely be asked to do so again.[5] As Presiding Judge Keller notes, under the majority's interpretation, any two annoying calls made by a single person to another person over any

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[2] 322 S.W.3d 662, 669 n.12 (Tex. Crim. App. 2010). In *Scott*, we noted:

> The term "repeated" is commonly understood to mean "reiterated," "recurring," or "frequent." *Webster's Ninth New Collegiate Dictionary* 998 (1988); 2 *Oxford English Dictionary* 2494 (1971). Here, we believe that the Legislature intended the phrase "repeated telephone communications" to mean "more than one telephone call in close enough proximity to properly be termed a single episode," because it is the frequent repetition of harassing telephone calls that makes them intolerable and justifies their criminal prohibition. *See* M. Royall, *Constitutionally Regulating Telephone Harassment: An Exercise in Statutory Precision,* 56 U. CHI. L. REV. 1403, 1430 (1989) ("Prudence may justify a hands-off policy for single calls made with the intent to harass, but as harassing calls are repeated the state interest in intervening to protect the recipient becomes more compelling.").

Id. I think that our discussion in *Scott*, albeit *dicta*, was important to preserve the constitutionality of the harassment statute against a vagueness or overbreadth challenge.

[3] Indeed, one of the issues presented in *Scott* was whether the term "repeated" in the telephone harassment statute was unconstitutionally vague. *See id.* at 667.

[4] *See Kramer v. Price,* 712 F.2d 174, 178 (5th Cir. 1983) (holding Texas telephone-harassment statute unconstitutionally vague for failing to (1) construe the terms "annoy" and "alarm" in a manner that would lessen their inherent vagueness, and (2) specify whose sensibilities must be offended).

[5] *See Alexander v. Johnson*, 217 F. Supp. 2d 780, 800 (S.D. Tex. 2001) (discussing, in *dicta*, possible constitutional deficiencies of the Texas telephone-harassment statute and the vagueness of its terms).

undefined period of time suffices to create criminal liability.[6] I do not think that this is what the Legislature intended, and I do not think that such a position can withstand constitutional scrutiny.

I believe that the Legislature intended the term "repeated" to mean, just as we said in *Scott*, sufficiently "recurring" or "frequent" to constitute a single episode, *i.e.*, a single criminal episode "committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan."[7] In *Scott*, we provided this narrowing interpretation of the telephone-harassment statute to preserve its constitutionality against a "vagueness" challenge and to satisfy First Amendment guarantees.[8]

The purpose of the telephone-harassment statute is to protect an individual's privacy rights from another person's unwanted or offensive speech. "There is simply no right to

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[6] *See* Concurring Op. at 2 (Keller, P.J., concurring) (noting that the majority's message to the public concerning the telephone-harassment statute is, "'If you have any disagreements with your neighbor, and you have called her on the telephone once, do not ever call her on the telephone again, or you will be exposed to criminal liability.'").

[7] TEX. PENAL CODE § 3.01(1).

[8] *Scott*, 322 S.W.3d at 669; *see also People v. Astalis*, 172 Cal. Rptr. 3d 568, 575 (Cal. App. Dep't Super. Ct. 2014) ("Narrowly interpreted to preserve its constitutionality under the First Amendment, a person violates the [telephone harassment] statute only when he or she (1) makes 'repeated' contacts, meaning 'recurring' or 'frequent' contacts; (2) with the specific intent to 'annoy,' meaning intentionally engaging in 'conduct designed to disturb, irritate, offend, injure, or at least tend to injure, another person,' or with the specific intent to 'harass,' meaning engaging in 'a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.'"); *State v. Alexander*, 888 P.2d 175, 182 (Wash. Ct. App. 1995) (rejecting vagueness challenge to use of the word "repeatedly" in telephone-harassment statute as its definition was clear to "persons of common intelligence" and noting that "Webster's defines 'repeated' as 'said, made, or done again, or again and again.'").

force speech into the home of an unwilling listener."[9] On the other hand, criminal statutes that restrict First Amendment liberties must be narrowly tailored and specific to avoid the potential for chilling protected speech.[10] A law could be void for vagueness for either one of two independent reasons: "First, [the statute] may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement."[11]

To avoid invalidating legislative enactments, courts may construe statutes that raise First Amendment concerns narrowly to clarify potentially vague statutory terms. That is precisely what we did in *Scott* in explaining that the purportedly vague term of "repeated" meant that criminal liability may be imposed only when the defendant makes multiple harassing telephone communications frequently or as part of a "single [criminal] episode,"[12]

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[9] *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988) (explaining that "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.").

[10] Under the vagueness doctrine, judicial scrutiny is most rigorous when the law in question impinges on First Amendment freedoms. *See Smith v. Goguen*, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts."). Courts impose heightened scrutiny on statutes affecting the First Amendment because prohibitions of uncertain scope may have a "chilling effect" on the exercise of protected rights. As the Supreme Court stated in *Baggett v. Bullitt,* 377 U.S. 360 (1964), vague statutes cause citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked," restricting their conduct "to that which is unquestionably safe. Free speech may not be so inhibited." *Id.* at 372. Thus, the requirement of specificity is enforced with special rigor when it serves to avoid the incidental impairment of First Amendment freedoms.

[11] *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

[12] *Scott*, 322 S.W.3d at 669 & n.12.

i.e., pursuant to "a common scheme or plan." A telephone harassment common plan or scheme might take the form of numerous telephone calls within a short period of time, all relating to a single objective, or they might be calls that are repeated over a long period of time, but still relating to a single objective or goal.

For example, a person might make various unwanted telephone calls, in-person harassing statements, derogatory social-media posts, false reports to the police, animal control, or CPS, and perhaps play practical jokes on the victim–all interspersed over a year or more–with the ultimate goal of publicly humiliating the victim, making that person lose her job, making her move, or literally driving her crazy. The telephone calls might be repeated only three or four times, but, coupled with the evidence of other types of harassment, they are sufficient to prove the person's scheme or plan and his intent to harass the victim.

I agree with the majority that, in this case, the full history of the rocky relationship between appellant and Nicole Bailey proves that appellant made "repeated" harassing telephone calls to Ms. Bailey over the space of a year, and those six telephone calls were made pursuant to a common scheme or plan to "harass, annoy, alarm, abuse, torment, or embarrass" her neighbor.[13] Like the jury, I have listened to those telephone calls, and, like

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[13] As the State Prosecuting Attorney (SPA) notes,

> Appellant's activities extended beyond the phone messages. Appellant told several neighbors that Bailey was a prostitute, a "porn queen," running an internet pornography ring, "Mafia-related," and dealing drugs, "you name it." Appellant would walk around in front of and behind Bailey's house blowing a whistle that could be heard inside, yelling at her and calling her names. Appellant threw

the jury, I conclude that appellant intended to harass and embarrass her neighbor with her repeated telephone calls and her other aberrant behavior.

The law does not require that the repeated calls be made within a certain time frame, as long as they are all part of the same episode, scheme, or plan. Here, the evidence clearly supports the jury's verdict that appellant purposely set out to intimidate, harass, and alarm several of her neighbors. One of them she literally drove out of the neighborhood.[14] She went after Ms. Bailey in the neighborhood, in stores, and by invading her privacy through repeated harassing telephone calls. The evidence supporting appellant's criminal conviction is not just sufficient, it is overwhelming.

I therefore concur in the majority's judgment, although I cannot join its opinion.

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> firecrackers in Bailey's pool and on her car, leaving burn marks on it. Appellant called the police and said Bailey had killed herself; the officers were irritated but not surprised that the call was unfounded and, at Bailey's request, told appellant not to contact Bailey again.

SPA's Brief at 6.

[14] The evidence showed that appellant harassed another neighbor, Stephanie Ballard, so much that, after a peace bond was denied and a civil suit deemed insufficient, she moved and tried to keep her new address secret. But appellant tracked her down at her church and then called her on her new unlisted telephone number. The harassment began after appellant's lawyer sent Mrs. Ballard a letter seeking damages for an "assault" that occurred when Mr. Ballard did not hug appellant at the Baileys' Christmas party. Thereafter, someone made three false allegations against Mrs. Ballard to CPS, including one complaint that alleged Ms. Bailey ran a pornography site using Mrs. Ballard's children. One day after Mrs. Ballard called the police because appellant was taking pictures of her children playing outside, a false report was made to Animal Control that Mrs. Ballard was letting her chihuahua/dachshund "run rabid" around the neighborhood. Both Mr. and Mrs. Ballard had their car tires punctured.