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

KEASLER, J., delivered the opinion of the Court, in which KELLER, P.J., and MEYERS, PRICE, and HERVEY, JJ., joined. KELLER, P.J., filed a concurring opinion in which JOHNSON, J., joined. COCHRAN, J., filed a concurring opinion in which JOHNSON, and ALCALA, JJ., joined. WOMACK, J., concurred.

O P I N I O N

Elisa Wilson appealed her telephone-harassment conviction claiming that the evidence was legally insufficient to establish that she made repeated telephone communications in a manner reasonably likely to annoy or alarm another. The court of appeals acquitted Wilson, finding that Wilson's calls were neither repeated nor reasonably likely to harass or annoy. We hold that (1) the phrase "repeated telephone communications" does not require the

communications to occur within a certain time frame in relation to one another, and (2) a facially legitimate reason for the communication does not negate *per se* an element of the statute. We reverse and remand.

BACKGROUND

Complainant Nicole Bailey moved into the Kelliwood Terrace subdivision in Fort Bend County in 2000. She became acquainted and frequently socialized with Wilson, her next-door neighbor. By 2009, however, their relationship had soured and eventually led to Bailey filing a criminal complaint alleging that she was the victim of Wilson's harassment.

The information charging Wilson with harassment under Texas Penal Code § 42.07(a)(4)[1] stated that "Elisa Merrill Wilson . . . on or about April 06, 2009 [through] March 03, 2010, did then and there . . . with intent to harass, annoy, alarm, abuse, torment or embarrass Nicole Bailey, make repeated telephone communications to Nicole Bailey in a manner reasonably likely to harass or annoy or alarm or abuse or torment or embarrass or offend the said Nicole Bailey." The evidence at trial focused on six voicemail messages that Wilson left on Bailey's phone over a period of ten months. The jury heard testimony from Bailey regarding various interactions between the two during that time period.

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[1] TEX. PENAL CODE § 42.07(a)(4) (West 2010) ("A person commits an offense, if with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:

. . .

(4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another[.]").

On April 6th, 2009, Wilson left a message saying that a neighbor's dog was in her yard and that Bailey should inform the dog's owner. On June 11th, Wilson left a message stating that debris from construction being done on Bailey's driveway was running into a storm drain. Around the same time as this message, Wilson confronted Bailey on Bailey's driveway, yelling at her and taking pictures of her. Additionally, police and environmental authorities visited Bailey regarding the drainage, but no fines or sanctions were imposed. Bailey stated that the message and the related events left her "[a]nnoyed, intimidated, frightened, frustrated, [and] tired."

On August 30th, Wilson again confronted Bailey and Bailey's boyfriend in a grocery store. Bailey testified that she and her boyfriend did not respond to Wilson's shouts and immediately went to the front of the store to check out. However, Wilson followed them and continued to yell, accusing Bailey of being a prostitute and Bailey's boyfriend of being a "pimp" and a "drug dealer." On August 31st, the following day, Wilson left a message apologizing, but also stating that she had felt like Bailey had been attacking her. Bailey testified that she and her boyfriend had done nothing to provoke Wilson's behavior, and that this incident and the subsequent message made her feel harassed, annoyed, and alarmed. Six days later, on September 5th, Wilson left another message, demanding that Bailey never talk to her or approach her in public again.

On December 23rd, Wilson left a message complaining that the work Bailey was doing on her driveway was in violation of deed restrictions. On February 5th, 2010, Wilson

left a message stating that her security cameras had observed Bailey leaving a newspaper on Wilson's lawn, and that Bailey should come retrieve it. Bailey testified that she had not left a newspaper on Wilson's lawn and that the message was an attempt to get her to come onto Wilson's property. She further testified that on the same day, Bailey and her boyfriend had encountered Wilson on the street in front of Bailey's house and that Wilson began screaming profanities and making accusations similar to those made in the grocery store in August. Bailey stated that these events made her feel alarmed and offended.

The jury found Wilson guilty of telephone harassment, and she was sentenced to twelve months' community supervision. Wilson appealed, arguing that the evidence did not support the jury's verdict because calls occurring over a period of ten months did not constitute "repeated" communications as required by statute, and because her messages were not objectively annoying, offensive, embarrassing, or abusive.[2] The court of appeals agreed.[3] The court first stated that those messages that were not within a thirty-day period of each other were not in close enough proximity to be considered a single episode, and thus did not constitute "repeated" communications.[4] The court did identify two messages, those from August 31st and September 5th, that were within a thirty-day period. However, the court stated that the fact that Wilson made the September 5th message for a facially legitimate

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[2] *Wilson v. State*, 431 S.W.3d 92, 94 (Tex. App.—Houston [1st Dist.] 2013).

[3] *Id.* at *3.

[4] *Id.* at *1–2 (citing *Scott v. State*, 322 S.W.3d 662, 669 n. 12 (Tex. Crim. App. 2010)).

reason "negat[ed] any reasonable inference that Wilson left the message with the intent to harass Bailey, or that it was made in a manner reasonably likely to harass or annoy her."[5] As a result, the court held that no rational fact finder could have found Wilson guilty, and rendered a judgment of acquittal.

"REPEATED" COMMUNICATIONS

A person commits the offense of telephone harassment if she, "with intent to harass, annoy, alarm, torment, or embarrass another . . . makes repeated telephone communications . . . in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another."[6] The main question we are presented with today is whether any or all of the six telephone messages left by Wilson over a period of ten months constitute "repeated" communications.

The court of appeals cited to this Court's decision in *Scott v. State*[7] in holding that the messages that were not within thirty days of one another were not repeated communications.[8] In *Scott*, we acknowledged that the offense of telephone harassment requires an actor to make "repeated telephone calls to the victim; one telephone call will not suffice."[9] The Court

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[5] *Id.* at *2.

[6] TEX. PENAL CODE § 42.07(a)(4) (West 2010).

[7] *Scott*, 322 S.W.3d at 662.

[8] *Wilson*, 2013 WL 1912451, at *2.

[9] *Scott*, 322 S.W.3d at 669.

affixed the following annotation to this statement:

> The term "repeated" is commonly understood to mean "reiterated," "recurring," or "frequent." 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.[10]

We find the *Scott* footnote neither controlling nor persuasive. First, *Scott* did not require this Court to determine whether "repeated" requires the actor's calls to exist in "close enough proximity to properly be termed a single episode." In that case, the issue before the Court concerned whether § 42.07(a)(4) unconstitutionally infringed upon First Amendment rights.[11] The Court concluded that it did not because "the statutory subsection does not implicate the free-speech guarantee of the First Amendment."[12] We agree with the parties that the footnote was dicta because it was unnecessary to *Scott*'s reasoning or conclusion.

Second, the footnote contains no persuasive value because it lacks relevant reasoning. We take no issue with the definitions it offered from common dictionaries. However, the pronouncement of what the Legislature intended in passing § 42.07(a)(4) without any statutory interpretation is unsupportable. The *Scott* Court relied on a 1989 law-review article

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[10] *Id.* at 669 n.12 (citations omitted).

[11] *Id.* at 669–70.

[12] *Id.* (holding that the statute's offenders "will have only the intent to inflict emotional distress for its own sake" and if conduct was communicative conduct, it "invades the substantial privacy interests of another (the victim) in an essentially intolerable manner.").

to support its definitive statement 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[.]'"[13] This definition does not come from the statutory text at issue or extratextual sources indicative of the Texas Legislature's intent. It was instead taken from a model statute proposed by the article's author in which the author defined "repeated telephone calls" as "mean[ing] more than one call in close enough proximity to rightly be termed a single episode."[14] Other than the similarly worded "repeated" phrase, there is no connection between the proposed statute and § 42.07(a)(4). Moreover, the article's proposed statute could not have influenced Texas's harassment statute because § 42.07(a)(4) was enacted approximately six years before the article was published.[15]

Third, the Court's definition of repeated itself causes confusion. Defining repeated to mean more than one call in close enough proximity to properly be termed a single episode merely begs the question and offers no definition at all. How are courts to define a single episode? The Court was unclear whether this was an inartful reference to "criminal episode"

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[13] *Id.* at 669, n.12 (citing M. Sean Royall, Comment, *Constitutionally Regulating Telephone Harassment: An Exercise in Statutory Precision*, 56 U. CHI. L. REV. 1403, 1430 (1989)).

[14] Royall, *supra* note 12, at 1425 ("(g) The term 'repeated telephone calls' means more than one call in close enough proximity to rightly be termed a single episode.").

[15] *See* Acts of 1983, 68th Leg., R.S., ch. 411, § 1, p. 2204, 2204–2206 (effective Sept. 1, 1983).

found in Chapter 3 of the Penal Code or something else entirely.[16] As Presiding Judge Keller's dissent in *Scott* pointed out, "Would once a day for a month constitute 'a single episode?'"[17] The *Scott* majority's reasoning provides no answer.

We accordingly disavow the troublesome footnote and turn to the rules of statutory construction to determine what the Legislature meant by "repeated telephone communications." In construing a statute, we limit our analysis to the plain meaning of the text, unless the language is ambiguous or the plain meaning leads to absurd results that the Legislature could not have possibly intended.[18] When we are called upon to go beyond the plain meaning of the text, we may consider various extratextual factors, including but not limited to the objective the statute seeks to attain, the circumstances under which the statute was enacted, legislative history, former statutory provisions, and the consequences of a particular construction.[19]

We must initially determine whether § 42.07(a)(4)'s undefined use of "repeated" is

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[16] *See* TEX. PENAL CODE § 3.01 (West 2012) ("In this chapter, 'criminal episode' means the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances: (1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or (2) the offenses are the repeated commission of the same or similar offenses.").

[17] *Scott*, 322 S.W.3d at 672 (Keller, P.J., dissenting).

[18] *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

[19] *Ex parte Rieck*, 144 S.W.3d 510, 512 (Tex. Crim. App. 2004); *see also* TEX. GOV'T CODE § 311.023 (West 2012).

ambiguous. Neither party contends that it is ambiguous *per se*, but each suggests the Court adopt different definitions. The State offers a number of definitions of the word "repeated," including "said, made, done, or happening again, or again and again"[20] and "renewed or recurring again and again."[21] The State argues that the recurrence of Wilson's telephone calls satisfies the dictionary definitions of "repeated" because it was behavior that recurred "again." Wilson too asserts that "repeated" is unambiguous, but urges this Court to adopt the definition of "repeated" used in our dicta in *Scott*: "'reiterated,' 'recurring,' or 'frequent.'"[22] Wilson states that this definition reflects the Legislature's unambiguous attempt to exclude actions not in close proximity.

Common to all issues of potential statutory ambiguity, whether a statutory term or phrase is ambiguous depends upon the guidance sought from the statute. The statute's use of "repeated" simply speaks in terms of the number of telephone communications, it does not attempt to define the required frequency of the communications or temporal proximity of one communication to another.[23] Finding § 42.07(a)(4)'s use of "repeated" ambiguous in

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[20] WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1533 (Unabridged 2nd ed. 1983).

[21] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1924 (Unabridged 2002).

[22] *Scott*, 322 S.W.3d at 669 n. 12 (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 998 (1988); 2 OXFORD ENGLISH DICTIONARY 2494 (1971)).

[23] *Cf.* TEX. PENAL CODE § 25.072 (West 2012) ("REPEATED VIOLATION OF CERTAIN COURT ORDERS OR CONDITIONS OF BOND IN FAMILY VIOLENCE CASE. (a) A person commits an offense if, during a period that is 12 months or less in duration, the

describing these specific characteristics of the communication asks too much of the term. It would require presuming that the Legislature intended to define and regulate this type of harassing conduct by a particular frequency or temporal standard—a notion unsupported by the statute's plain language. We find the court of appeals' treatment of telephone communications occurring outside a thirty-day period from each other is inconsistent with § 42.07(a)(4)'s plain language.

It is unquestioned that "repeated" means, at a minimum, "recurrent" action or action occurring "again." To resolve the question presented, we need not go any further than we did in *Scott*, that "one telephone call will not suffice" and a conviction secured by evidence of a single communication will not stand.[24] The communications' periodic frequency or the temporal relationship of each communication are characteristics that may further describe the communications' nature, but we do not find those characteristics necessary to the definition of repeated. This is not to say that such things will be irrelevant. Although 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, we think it exceedingly rare that the State will be able to sufficiently prove that the defendant made those communications with the intent to harass, annoy, alarm, abuse, torment, or embarrass

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person two or more times engages in conduct that constitutes an offense under Section 25.07.").

[24] *Scott*, 322 S.W.3d at 669.

another.[25] As with all prosecutions, the State may rely upon the circumstances surrounding a defendant's actions to prove his intent. The total number of communications (provided it is greater than one) and the frequency and the temporal relationship of the communications are more appropriately considered evidentiary matters that may be probative of both the defendant's intent and whether the communications are made in a manner prohibited by the statute.

In her concurrence, Judge Cochran alleges that our statutory interpretation of the term repeated invites a constitutional vagueness and overbreadth challenge to the statute.[26] Whatever the merits of Judge Cochran's concerns, they are not implicated in Wilson's legal-sufficiency challenge. Moreover, while we have a duty to interpret statutes in a way as to preserve their constitutionality, we can do so only to the extent that our interpretative authority permits.[27] The explanation of how § 42.07(a)(4)'s constitutionality allegedly hangs on *Scott* footnote's definition of repeated itself is forced to alter the footnote's substance by inserting the word "criminal" in the footnote's "criminal episode" phrase and then interpret that phrase, as amended, to mean "common scheme or plan."[28] Like the *Scott* footnote, Judge

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[25] *See* TEX. PENAL CODE § 42.07(a) (West 2012).

[26] *Post*, at 2 (Cochran, J., concurring).

[27] *Long v. State*, 931 S.W.2d 285, 295 (Tex. Crim. App. 1996) (holding that this Court may only narrowly construe a statute to preserve its constitutionality when it is "readily subject" to such a construction.)

[28] *Post*, at 4–5 (Cochran, J., concurring).

Cochran's approach does not provide any persuasive authority as to why "repeated" should be defined this way consistent with legislative intent nor any argument that this statute is "readily subject" to such an interpretation without exceeding our interpretative authority.

LEGAL SUFFICIENCY OF THE EVIDENCE

Evidentiary sufficiency challenges are reviewed under the standard set forth by the United States Supreme Court in *Jackson v. Virginia*: "Considering all of the evidence in the light most favorable to the verdict, was a jury rationally justified in finding guilt beyond a reasonable doubt."[29] This requires us to assess the evidence in the light most favorable to the prosecution.[30] We will uphold the verdict unless a rational factfinder must have had reasonable doubt with respect to any essential element of the offense.[31]

The court of appeals dismissed the probativeness of Wilson's voicemail concerning the runoff from Bailey's driveway construction project because the call's facially legitimate reason "negat[ed] any reasonable inference that Wilson left the message with the intent to harass Bailey, or that it was made in a manner reasonably likely to harass or annoy her."[32] We disagree with this conclusion for two main reasons and conclude, by way of an alternate

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[29] *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010).

[30] *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009) (quoting *Jackson*, 443 U.S. at 319).

[31] *Laster*, 275 S.W.3d at 518; *Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992).

[32] *Wilson*, 2013 WL 1912451, at *3.

holding, that the court's sufficiency analysis was flawed. First, a plain-language reading of § 42.07(a)(4) does not excuse from criminal culpability the act of making prohibited repeated telephone communications if the content of the communications is facially "legitimate," however that term may be defined. Second, the existence of evidence that may support the conclusion that the call had a facially legitimate purpose does not legally negate the prohibited intent or manner of the call. Benign content does not always prove benign intent, nor the objective harmlessness of its delivery. Determining the evidence's sufficiency with respect to Wilson's intent of the communication required the court of appeals to consider all the evidence presented at trial and the rational inferences drawn from it.[33] By analyzing only testimony suggesting the benign intent of the call, "the court failed to properly consider the combined and cumulative force of the evidence and to view the evidence in the light most favorable to the jury's guilty verdict."[34]

We find the evidence legally sufficient. From the content of the six calls over the ten-month period, combined with evidence of Wilson's combative conduct and verbal abuse toward Bailey, the jury could have rationally found that Wilson, with the intent to harass, annoy, alarm, abuse, torment, or embarrass Bailey, made repeated telephone communications to Bailey in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend her.

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[33] *See, e.g.*, *Merritt v. State*, 368 S.W.3d 516, 526 (Tex. Crim. App. 2012).

[34] *Merritt*, 368 S.W.3d at 526 (citing *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007)).

CONCLUSION

Because we find the evidence legally sufficient, we reverse the court of appeals' judgment acquitting the defendant. The case is remanded to the court of appeals to address Wilson's remaining issues.

DELIVERED: September 17, 2014

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