IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-1066-17

THE STATE OF TEXAS

v.

DAI-VONTE E'SHAUN TITUS ROSS, Appellee

ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH COURT OF APPEALS
BEXAR COUNTY

NEWELL, J., filed a dissenting opinion.

I agree with the Court's statutory analysis. The Court is right that there is a lack of clarity in the statute. The Court is right that the way our Legislature used the phrase "calculated to alarm" in the statute suggests a definition of "likely" rather than a second culpable mental state of intentional. And the Court is right that the need for clarity in the statute doesn't necessarily translate into a reason to quash the

indictment. Finally, the Court is right that we should ascribe an objective test to determine whether a particular manner of display was likely to cause "alarm." I simply part ways with the Court's determination that tracking the statutory language in this case is sufficiently descriptive of the offense.[1] If our Legislature insists that the State draw a molecular-level distinction between "displaying" and "carrying," then the State must provide some clarity when it charges someone with displaying a firearm in public in a manner calculated to alarm. The statute requires a particular type of display; but in this case, the charging instrument does not provide any indication as to the "manner" in which the firearm was displayed except that it occurred in a public place and it was likely to alarm.[2]

In that sense, I agree with Judge Walker that we are losing sight of what the case is about. Focusing on how an exception to a completely different offense might affect this offense carries a great temptation to substitute our individual policy preferences for the Legislature's in the

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[1] *See State v. Mays*, 967 S.W.2d 404, 406 (Tex. Crim. App. 1998) (noting that a charging instrument provides sufficient notice if it tracks the statutory language and the statute itself is completely descriptive of the offense).

[2] TEX. PENAL CODE § 42.01(a)(8); *see also Mays*, 967 S.W.2d at 407 ("A statute which uses an undefined term of indeterminate or variable meaning requires more specific pleading in order to notify the defendant of the nature of the charges against him.").

name of statutory interpretation. The focus should be on whether an ordinary defendant could look at this information and prepare his defense.[3]

Again, I agree with the Court's thorough statutory analysis. But given the broader definitions of "calculate" and "alarm" at play in the statute, I believe it points to the opposite conclusion than the one drawn by the Court. I'd require the State to allege some facts in the charging instrument about the manner in which the firearm was displayed. I'd leave the question of how this statute is supposed to exist alongside a different statutory offense for when that question is more properly before us.

With these thoughts, I respectfully dissent.

Filed: May 15, 2019

Publish

[3] *State v. Barbernell*, 257 S.W.3d 248, 251 (Tex. Crim. App. 2008).