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

WALKER, J., filed a dissenting opinion, in which SLAUGHTER, J., joined.

DISSENTING OPINION

Appellee, Dai'Vonte E'Shaun Titus Ross, was charged with violating the disorderly conduct statute. The information alleged that he "did intentionally and knowingly in a manner calculated to alarm, display a firearm in a public place." Appellee moved to quash the information, the trial court granted the motion, and the court of appeals affirmed the trial court's ruling. The allegation that Appellee's display was "calculated to alarm" is subject to at least two reasonable interpretations.

Today, the majority of the Court chooses one interpretation. Judge Slaughter's dissenting opinion argues that another interpretation is correct. Whichever interpretation is correct is an issue of first impression at this Court. Appellee could not have had adequate notice of what an allegation that he displayed a firearm in a manner "calculated to alarm" charges him with doing, when the Court's decision about what that language means comes years after Appellee was charged. I respectfully dissent.

I — Adequate Notice

Under the Texas and United States Constitutions, a criminal defendant has the right to fair notice of the specific charged offense. *State v. Zuniga*, 512 S.W.3d 902, 906 (Tex. Crim. App. 2017); *State v. Barbernell*, 257 S.W.3d 248, 250 (Tex. Crim. App. 2008). "The charging instrument must convey sufficient notice to allow the [accused] to prepare a defense." *Zuniga*, 512 S.W.3d at 906 (quoting *Curry v. State*, 30 S.W.3d 394, 398 (Tex. Crim. App. 2000)). Toward that end, Chapter 21 of the Texas Code of Criminal Procedure governs charging instruments and provides legislative guidance concerning the requirements and adequacy of notice. *Id.*

With respect to informations, article 21.21 sets out what facts must be included in an information and states that an information is sufficient if the offense is set forth in plain and intelligible words. TEX. CODE CRIM. PROC. Ann. art. 21.21(7); *Barbernell*, 257 S.W.3d at 251. Additionally, an information must include everything that is necessary to be proved. *Barbernell*, 257 S.W.3d at 251; TEX. CODE CRIM. PROC. Ann. arts. 21.03, 21.23. An information is sufficient if it:

> charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged, and enable the court, on conviction, to pronounce the proper judgment . . . .

Barbernell, 257 S.W.3d at 251; TEX. CODE CRIM. PROC. Ann. arts. 21.11, 21.23.

In most cases, a charging instrument that tracks the statutory language for an offense is sufficient to provide a defendant with adequate notice. *Zuniga*, 512 S.W.3d at 907. When a statutory term or element is defined by statute, the charging instrument does not need to allege the definition of the term or element. *Id.* Typically the definitions of terms and elements are regarded as evidentiary matters. *Id.*

In some cases, a charging instrument that tracks the statutory language may be insufficient to provide a defendant with adequate notice. *Id.* This is so when the statutory language fails to be completely descriptive. *Id.* Statutory language is not completely descriptive when the statute defines a term in such a way as to create several means of committing an offense, and the definition specifically concerns an act or omission on the part of the defendant. *Barbernell*, 257 S.W.3d at 251 (quoting *Solis v. State*, 787 S.W.2d 388, 390 (Tex. Crim. App. 1990)).

Thus, when a statute defines the manner or means of commission in several alternative ways, a charging instrument will fail for lack of specificity if it neglects to identify which of the statutory means it addresses. *Zuniga*, 512 S.W.3d at 907. In such cases, more particularity is required to provide adequate notice. *Id.* Similarly, where a statute uses an undefined term of indeterminate or variable meaning, a charging instrument tracking such statutory language will require more specific pleading in order to notify the defendant of the nature of the charges against him. *Id.*

For example, in *Olurebi v. State*, the defendant was charged with credit card abuse, and the indictment tracked the language of the statute and alleged use of a fictitious credit card. *Olurebi v. State*, 870 S.W.2d 58, 59 (Tex. Crim. App. 1994). Although "credit card" was defined by statute, "fictitious" was not. *Id.* at 60–61. We determined that "fictitious credit card" was subject to two

different meanings: either a credit card not issued by the purported owner or a credit card with an actual owner but issued to a nonexistent cardholder. *Id.* at 61. Because "fictitious credit card" was not defined by the legislature, and because there were two ways for a credit card to be "fictitious" under the statute, we held that "a trial court should grant a motion to quash an indictment that fails to adequately notify the defendant of the manner in which the credit card is fictitious." *Id.* at 62.

II — "Calculated" Provides Inadequate Notice

In this case, Appellee was charged by information of violating subsection (a)(8) of the disorderly conduct statute, which provides:

> (a) A person commits an offense if he intentionally or knowingly:
>
> > (8) displays a firearm or other deadly weapon in a public place in a manner calculated to alarm;

TEX. PENAL CODE Ann. § 42.01(a)(8). The information tracked the language of the statute, alleging that:

> on or about the 8th Day of June, 2016, DAI'VONTE E'SHAUN TITUS ROSS did intentionally and knowingly IN A MANNER CALCULATED TO ALARM, DISPLAY A FIREARM IN A PUBLIC PLACE, to wit: the 300 block of Ferris Avenue

Information — Clerk's Original, Clerk's R. 7. The issue is whether this language tracking the statute provided Appellee with adequate notice of what he is alleged to have done.

The majority, in considering the meaning of "calculated," identifies two possible interpretations. "Calculated" could mean that a defendant would be guilty of an offense if he displays a firearm in a public place in a manner that he knows is likely to cause alarm, or it could mean that a defendant would be guilty of an offense if he displays a firearm in a public place in a manner that is planned or contrived to accomplish the purpose of causing alarm.

Because it could be interpreted in two different ways, the majority of the Court decides that "calculated" does not have a plain meaning and is ambiguous, and the majority proceeds to consult extra-textual interpretive sources to discern its meaning. *See Arteaga v. State*, 521 S.W.3d 329, 334 (Tex. Crim. App. 2017) ("A statute is ambiguous when it is reasonably susceptible to more than one interpretation."). After consulting dictionaries, other statutes, and a decision from our sister court, the majority ultimately chooses the "likelihood" interpretation of "calculated." Judge Slaughter's dissent also consults extra-textual sources, including the recently enacted "open-carry law," articles, and dictionaries to support a forceful and convincing argument that "calculated" should be interpreted under the "deliberately planned or contrived" meaning. I agree with Judge Slaughter's interpretation, but this is beside the point. The issue is whether Appellee had adequate notice of the offense charged based on a charging instrument that tracked this statutory language, which is subject to multiple, reasonable interpretations, as proved by the very disagreement between the majority and Judge Slaughter as to what it means.

Yet, despite the determination that "calculated" is subject to multiple interpretations, does not have a plain meaning, is ambiguous, and requires resort to extra-textual sources, the Court concludes Appellee had adequate notice of what he was accused of doing when he allegedly displayed a firearm in a manner "calculated" to alarm. Given the multiple interpretations of what "calculated" means and thus the language's ambiguity, Appellee could not have had adequate notice of the offense charged when it is alleged using those very same ambiguous words.

How could Appellee know, from a charging instrument alleging he displayed a firearm in a manner "calculated" to alarm, that he needed to tailor his defense against a prosecution that the manner of display was likely to cause alarm? The Court's construction of the language in this

particular way is a new decision. Until today, an allegation that he displayed a firearm in a manner "calculated" to alarm could describe an offense where he displayed the firearm in a manner likely to cause alarm or an offense where he displayed the firearm in a manner deliberately planned or contrived to cause alarm. Appellee did not have the benefit of the Court's decision, handed down today, when the information charging him with the offense was filed two-and-a-half years ago. At that time, Appellee could have reasonably understood the charge to allege conduct under the second interpretation, that he displayed a firearm in a manner that was deliberately planned or contrived to cause alarm. Appellee would have been reasonable in believing that, to defend against such a charge, he would have to craft a defensive strategy of showing that his display was neither deliberately planned nor contrived to cause alarm, even though the evidence may show that he knew that the manner of display was likely to cause alarm.

III — "Alarm" Provides Inadequate Notice

Furthermore, not only is "calculated" subject to multiple, reasonable interpretations, "alarm" is as well. The court of appeals appropriately determined that "alarm" was vague, because "conduct that alarms some people does not alarm others." *State v. Ross*, 531 S.W.3d 878, 883 (Tex. App.—San Antonio 2017, pet. granted). The court of appeals reached this decision by consulting our decision in *May*, in which we held that "alarm" in the pre-1983 version of the harassment statute was vague. *May v. State*, 765 S.W.2d 438, 440 (Tex. Crim. App. 1989).

Although the holding in *May* was superseded by statute and the infirmity of "alarm," as used in the harassment statute, was corrected,[1] the reasoning of *May* is still instructive, and the court of

[1] After we decided *May*, the Legislature amended the statute to spell out what "alarm" means. Act of May 26, 1983, 68th Leg., R.S., ch. 411, § 1, 1983 Tex. Gen. Laws 2204, 2204 (amending TEX. PENAL CODE § 42.07(a)); *Bader v. State*, 773 S.W.2d 769, 770 (Tex. App.—Corpus

appeals correctly followed our lead. In *May* we relied upon the Fifth Circuit's decision in *Kramer v. Price*, in which that court earlier held that "alarm" in the pre-1983 version of the harassment statute was inherently vague. *Id.*; *Kramer v. Price*, 712 F.2d 174, 178 (5th Cir. 1983). *Kramer* relied upon a United States Supreme Court decision which found that "annoy" was vague because "[c]onduct that annoys some people does not annoy others." *Kramer*, 712 F.2d at 177–78; *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). I agree with the court of appeals and Appellee that "alarm" is vague because it is undefined and conduct that alarms some people may not alarm others.

The Court's majority today acknowledges that "alarm" is undefined, and it identifies three possible meanings for "alarm" from the 1980 edition of Webster's New Collegiate Dictionary: "(1) 'to give warning to,' (2) 'to strike with fear,' or (3) to 'disturb, excite.'" Majority Opinion at 7 (quoting *Alarm*, WEBSTER'S NEW COLLEGIATE DICTIONARY (1980)). Just as "calculated" is an undefined term of variable meaning, so is "alarm," and more specific pleading was required to give Appellee adequate notice of how his displaying a firearm was supposed to have been calculated to "alarm." *Zuniga*, 512 S.W.3d at 907.

Ultimately, the Court decides that "alarm" means to "strike with fear," particularly in a sudden or exciting manner. This construction is preferable, says the majority, because it makes "alarm" "both comprehensible to the ordinary person and evenhandedly enforceable." Whether or not that interpretation is correct, and whether or not the consequences of the majority's interpretation

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Christi 1989, pet. ref'd) ("It is apparent that the legislature, in amending section 42.07, corrected the defects of the former statute. The new law clearly delineates 'what alarms people.'").

This was the appropriate result instead of the Court defining "alarm." *See Long v. State*, 931 S.W.2d 285, 297 (Tex. Crim. App. 1996) ("Any such changes [to clarify unconstitutionally vague statutory language] are the province of the legislature.").

bears the fruit the majority claims it will,[2] the Court's reasoning highlights the problem we are actually faced with today. According to the majority, without the Court's "preferable" construction under the "strike with fear" meaning, a charge that a defendant displayed a firearm in a manner calculated to "alarm" would be incomprehensible to the ordinary person and would not be evenhandedly enforceable.

This was the exact position Appellee was in when he was supposed to have adequate notice of the charges against him. While the majority's determination of what "alarm" means out of multiple definitions may provide adequate notice to defendants going forward, Appellee was charged two-and-a-half years before the majority's decision of which definition of "alarm" was the intended definition. Up until today, "alarm" in the disorderly conduct statute was not defined. At the time Appellee was charged, the information's allegation that his display of a firearm was calculated to "alarm" did not give him notice that he had to defend against a charge that his display was calculated to "strike fear" into others. The language may have instead put him on notice that he was being charged with displaying a firearm in a manner calculated to give warning to others of approaching danger, and, construing the charge against him in this way, Appellee could have believed his defense against the charge should be to argue that the statute was overbroad and criminalized good behavior,

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[2] I doubt that the "strike with fear" meaning of "alarm" is any more comprehensible or capable of evenhanded enforcement than any other meaning of "alarm," because it still suffers from the same defect that afflicted "alarm" in the pre-1983 harassment statute or "annoy" in *Coates*: even if it means "strike with fear," what strikes fear into some people does not strike fear into others. Judge Slaughter's dissenting opinion recognizes the reality that, even in Texas, "many ordinary people . . . may become alarmed at the sight of a gun in public." Dissenting Opinion at 6–7 (Slaughter, J., dissenting). Without reasonably clear guidelines as to whose sensibilities must be offended, officials will be given unbounded discretion to apply the law selectively. *Kramer*, 712 F.2d at 178. Exactly who must be struck with fear: the judge or jury, the arresting officer, or a hypothetical reasonable man? *Coates*, 402 U.S. at 613.

because such charged behavior was actually salutary, beneficial to society, and should not be criminal altogether.

IV — Conclusion

From the Court's determination of what "calculated to alarm" means and that Appellee had adequate notice of what "calculated to alarm" means, the Court apparently deems that Appellee must have had the foresight, two-and-a-half years ago, to reach the same interpretation of both "calculated" and "alarm" that the majority reaches today. Should every defendant be deemed to have the clairvoyance to see what our future decisions will say about charging instruments that track statutory language that we acknowledge is subject to different interpretations and is ambiguous?

At the time Appellee was charged, "calculated to alarm" was an undefined term of variable meaning, and it required more specific pleading. *Zuniga*, 512 S.W.3d at 907. As Judge Slaughter's dissenting opinion states, the "Court's opinion . . . acknowledges that the terms 'calculated' and 'alarm' in the disorderly-conduct statute are ambiguous in that they have more than one possible meaning. Finding that there are ambiguous statutory terms that heretofore this Court has not clarified, this should have ended the Court's inquiry and should have resulted in affirming the court of appeals." Dissenting Opinion at 3 (Slaughter, J., dissenting). I agree, and we should resolve this case in the same manner that we resolved numerous analogous cases dating back to 1942 and earlier,[3] and as recently as 1994. In *Olurebi*, after we determined that the language of the indictment

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[3] *See, e.g.*, *Conklin v. State*, 162 S.W.2d 973 (Tex. Crim. App. 1942) ("device"); *Monroe v. State*, 157 S.W.2d 648 (Tex. Crim. App. 1942) ("by means of threats, force, and fraud"); *Parker v. State*, 114 S.W.2d 906 (Tex. Crim. App. 1938) ("tapping"); *Beles v. State*, 299 S.W. 899 (Tex. Crim. App. 1927) ("becomes agent to obtain a poll tax"); *Stanford v. State*, 268 S.W. 161 (Tex. Crim. App. 1925) ("post"); *Kennedy v. State*, 216 S.W. 1086 (Tex. Crim. App. 1919) ("procure"); *Thompson v. State*, 16 Tex. Ct. App. 159 (1884) ("disturbing" a congregation); *Langrone v. State*, 12 Tex. Ct. App. 426 (1882) ("impute a want of chastity"); *Gray v. State*, 7 Tex. Ct. App. 10 (1879)

was ambiguous, we held that the trial court should have granted the motion to quash, and, because Olurebi's motion to quash was erroneously denied, we remanded to the court of appeals to determine whether the error impacted Olurebi's ability to prepare a defense. *Olurebi*, 870 S.W.2d at 62. Notably, we did not proceed to construe the meaning of the ambiguous terms. Unlike *State v. Jarreau*, in which we found *Olurebi* inapplicable because *Jarreau* "[did] not involve a statutorily-undefined term or a statute that is not completely descriptive of the offense," the case before us does involve a statutorily-undefined term. *State v. Jarreau*, 512 S.W.3d 352, 355 (Tex. Crim. App. 2017); *see also State v. Mays*, 967 S.W.2d 404, 407 (Tex. Crim. App. 1998) (concluding that we were not faced with the *Olurebi* problem because the portion of the statute in question contained only one manner or means of commission, and the statute defined that manner or means). *Olurebi* is applicable. The language of the indictment, as acknowledged by the Court, is ambiguous, and we should hold that trial court did what it should have when it granted the motion to quash. We should not proceed to construe the meaning of the ambiguous terms.[4]

Instead, the Court's inquiry does precisely that. "This . . . misses the mark, as we are not concerned with the definition" of calculated and alarm "but rather, with the sufficiency of an information using the general term[s]" calculated and alarm. *Haecker v. State*, 571 S.W.2d 920, 921 (Tex. Crim. App. [Panel Op.] 1978). The issue before us asks: "Does such an information adequately

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("concerned in the purchase and sale of an interest in the public lands of the state of Texas"). In these cases, other than *Conklin*, in which we declined to even consider what the term meant, although we noted several meanings that could apply to the challenged statutory terms, we did not proceed to decide, definitively, which particular meaning would apply to those terms.

[4] *See Castillo v. State*, 689 S.W.2d 443, 448–49 (Tex. Crim. App. 1984) (after determining that indictment for arson using statutory term "start a fire" was insufficient because "start a fire" was undefined, we did not proceed to define "start a fire").

notify the accused of the crime charged?" *Id.* As we said in *Conklin v. State*:

> It would serve no useful purpose to here attempt to set forth the various definitions or meanings that could or might be given to the word . . . It is sufficient to say that it has no fixed, definite, or certain meaning or application . . . Such being true, the conclusion is reached that the indictment was subject to the criticism leveled, and that the motion to quash should have been sustained.

Conklin v. State, 162 S.W.2d 973, 975 (Tex. Crim. App. 1942) (holding that indictment for keeping and exhibiting a "device" for the purpose of gaming, using statutory term of "device," was insufficient where "device" was undefined).

Even if the Court's decision today establishes "calculated to alarm" as a judicially defined term and it chooses one meaning from a number of variable meanings, that was not the case at the time the trial court decided Appellee's motion to quash. When the Legislature does not define a term, like the term in this case, and we recognize that there are multiple ways to interpret the term, the "trial court should grant a motion to quash an [information] that fails to adequately notify the defendant of the manner in which the" display of a firearm was calculated to alarm. *Olurebi*, 870 S.W.2d at 62. Under the circumstances, the trial court did what it was required to do.

Appellee did not have adequate notice of what "calculated to alarm" was supposed to mean when the Court's decision today comes two-and-a-half years after he was charged. How was he to have notice that he was being charged with allegedly displaying a firearm in a manner likely to strike fear, when yesterday one could read the information as alleging he displayed a firearm in a number of different ways? The manner could have been, but was not necessarily limited to being: (1) deliberately planned or contrived to strike fear, (2) likely to disturb or excite, (3) deliberately planned or contrived to disturb or excite, (4) likely to give warning to others of approaching danger, or (5) deliberately planned or contrived to give warning to others of approaching danger. The trial court

was not wrong in granting Appellee's motion to quash. I respectfully dissent.

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