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

KEASLER, J., delivered the opinion of the Court as to Parts I, II, III-A, III-C, III-D, and IV, in which HERVEY, RICHARDSON, YEARY, and KEEL, JJ., joined, and filed an opinion as to Part III-B, in which HERVEY, RICHARDSON, and KEEL, JJ., joined. YEARY, J., filed a concurring opinion. NEWELL, J., filed a dissenting opinion. WALKER, J., filed a dissenting opinion, in which SLAUGHTER, J., joined. SLAUGHTER, J., filed a dissenting opinion. KELLER, P.J., dissented.

O P I N I O N

Dai'Vonte Ross is accused of committing disorderly conduct for "intentionally or knowingly . . . display[ing] a firearm . . . in a public place in a manner calculated to alarm."[1]

[1] TEX. PENAL CODE § 42.01(a)(8).

The information charging him with this offense largely tracks the relevant penal statute. Both the trial judge and the San Antonio Court of Appeals held that this information does not provide Ross with sufficient notice. Concluding that the information is completely descriptive of a criminal offense, we will reverse their decisions.

I. FACTS

This is a State's pre-trial appeal.[2] Ross presently stands charged by information with disorderly conduct under Texas Penal Code Section 42.01(a)(8), which says that a person commits an offense if he "intentionally or knowingly . . . displays a firearm or other deadly weapon in a public place in a manner calculated to alarm."[3] The information charging Ross similarly alleges 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."

Ross moved to quash the information, "asserting [that] his constitutional right to be fairly informed of the charge was denied 'by the failure of the Information to allege . . . the manner and means by which the offense was allegedly committed.'"[4] At the hearing on the motion, Ross argued that tracking the language of the statute provided insufficient notice with respect to this particular disorderly-conduct offense, specifically because Texas is an

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[2] *See* TEX. CODE CRIM. PROC. art. 44.01(a)(1).

[3] TEX. PENAL CODE § 42.01(a)(8).

[4] *See State v. Ross*, 531 S.W.3d 878, 880 (Tex. App.—San Antonio 2017).

open-carry state.[5] He asserted that, to give sufficient notice, the information needed to contain additional facts specifying how the manner of display was "calculated to alarm"—so as to distinguish the charged conduct from the otherwise-lawful open display of a firearm. The State responded that such additional facts would be evidentiary in nature and that the State was not required to plead evidentiary matters.[6] The trial judge granted the motion to quash, and the State appealed.

The court of appeals affirmed. Relying on our opinion in *May v. State* (addressing a vagueness challenge to the pre-1983 harassment statute),[7] the court of appeals concluded that the term "alarm," as it appears in Section 42.01(a)(8), is unconstitutionally vague—and is therefore necessarily "of indeterminate or variable meaning" when used without clarification in a charging instrument.[8] The court of appeals ultimately held that "when a defendant is charged with disorderly conduct under section 42.01(a)(8), he is entitled to notice of how the manner in which he displayed [the] firearm was calculated to 'alarm' because absent such notice the defendant would be unable to prepare a defense."[9]

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[5] *See* TEX. GOV'T CODE ch. 411, subch. H ("License to Carry a Handgun").

[6] *See, e.g.*, *Curry v. State*, 30 S.W.3d 394, 398 (Tex. Crim. App. 2000) ("On the other hand, the State need not plead evidentiary matters.") (footnote and citation omitted).

[7] 765 S.W.2d 438 (Tex. Crim. App. 1989).

[8] *See State v. Mays*, 967 S.W.2d 404, 407 (Tex. Crim. App. 1998) ("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.").

[9] *Ross*, 531 S.W.3d at 884.

II. LAW

"The sufficiency of a charging instrument presents a question of law. An appellate court therefore reviews a trial judge's ruling on a motion to quash . . . *de novo*."[10]

The Texas and United States Constitutions grant a criminal defendant the right to fair notice of the specific charged offense.[11] To provide this fair notice, the charging instrument must convey sufficient information to allow the accused to prepare a defense.[12] In most cases, a charging instrument that tracks the relevant statutory text will provide adequate notice to the accused.[13] But tracking the language of the statute may be insufficient if the statutory language is not "completely descriptive" of an offense.[14]

We have held, for example, that "if the prohibited conduct is statutorily defined to include more than one manner or means of commission," then "the State must, upon timely request, allege the particular manner or means it seeks to establish."[15] Because Section 42.01(a)(8) is not statutorily defined to include more than one manner or means of

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[10] *Smith v. State*, 309 S.W.3d 10, 13–14 (Tex. Crim. App. 2010) (footnotes and citations omitted).

[11] *State v. Barbernell*, 257 S.W.3d 248, 250 (Tex. Crim. App. 2008) (citations omitted); *see also* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10.

[12] *Barbernell*, 257 S.W.3d at 250 (quoting *Curry*, 30 S.W.3d at 398).

[13] *Id.* at 251 (citations omitted).

[14] *Curry*, 30 S.W.3d at 398 (citing *Olurebi v. State*, 870 S.W.2d 58, 62 (1994)).

[15] *E.g.*, *Saathoff v. State*, 891 S.W.2d 264, 266 (Tex. Crim. App. 1994).

commission, that requirement is not implicated in this case. We have also said that "[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."[16] That requirement is at least potentially implicated here.

The court of appeals apparently sought to determine whether the term "alarm" is indeterminate or variable by first considering whether the statute in which that word appears, Penal Code Section 42.01(a)(8), is unconstitutionally vague on its face. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[17]

The State makes a plausible argument that, in analyzing the statute's potential for vagueness, the court of appeals was attempting to resolve an issue not squarely before it. Whether a particular indictment or information satisfies the constitutional and statutory requisites of a charging instrument is a separate—and arguably much narrower—question compared to whether the statute underpinning the indictment is vague.

On the other hand, there is some sense to the court of appeals' approach. The court of appeals' reasoning seems to be that, because the term "alarm" as it appears in Penal Code Section 42.01(a)(8) is unconstitutionally vague, any indictment containing that term will,

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[16] *Mays*, 967 S.W.2d at 407.

[17] *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations omitted).

without further elaboration, necessarily provide inadequate notice to the defendant of the nature of the accusation against him. Although it may have implications for other disorderly-conduct prosecutions, there is nothing absurd about this way of thinking.

We will assume, without deciding, that the court of appeals properly reached the issue of whether Section 42.01(a)(8) is unconstitutionally vague in determining whether an information tracking that statute provided Ross with sufficient notice. Ultimately, however, we disagree with the court of appeals' resolution of that issue. We begin our analysis by examining the text of Section 42.01(a)(8), to determine the elements of this particular disorderly-conduct offense.[18]

III. ANALYSIS

A. What Section 42.01(a)(8) proscribes.

i. "Alarm."

Penal Code Section 42.01(a)(8) says that "[a] person commits an offense if he intentionally or knowingly . . . displays a firearm or other deadly weapon in a public place in a manner calculated to alarm."[19] Most of Ross's complaint, and most of the court of appeals' analysis, turns on what Ross perceives to be the vagueness and/or indeterminacy of

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[18] *E.g.*, *State v. Zuniga*, 512 S.W.3d 902, 907 (Tex. Crim. App. 2017) ("[O]ur notice jurisprudence requires appellate courts to engage in a two-step analysis when analyzing whether a charging instrument provides adequate notice. First, the reviewing court must identify the elements of the offense. Next, it must consider whether the statutory language is sufficiently descriptive of the charged offense.") (citations omitted).

[19] TEX. PENAL CODE § 42.01(a)(8).

the word "alarm." Because "alarm" is undefined, we look to its common usage.[20]

A common dictionary defines the verb "alarm" as either (1) "to give warning to," (2) "to strike with fear," or (3) to "disturb, excite."[21] We agree with the State that, in the context of Section 42.01(a)(8), the latter two definitions are the ones plainly embraced by the language of the statute.[22] We furthermore agree that construing "alarm" to mean "strik[ing] with fear," particularly in a sudden or exciting manner, makes that term both comprehensible to the ordinary person and evenhandedly enforceable.

But the court of appeals' concern over the meaning of "alarm" clearly did not arise from the lack of a suitable dictionary definition of that word. Instead, the court of appeals found the term "alarm" to be constitutionally fraught precisely because "conduct that alarms some people does not alarm others."[23] The court of appeals cited to a Fifth Circuit opinion, *Kramer v. Price*, which suggested that the bare term "alarm" is "inherent[ly] vague[]" for this very reason.[24] The court of appeals concluded that an ordinary person attempting to conform his conduct to the statute would have no idea how to do so, because he would have no way

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[20] *See, e.g.*, *Kirsch v. State*, 357 S.W.3d 645, 650 (Tex. Crim. App. 2012) (citing TEX. GOV'T CODE § 311.011).

[21] *Alarm*, WEBSTER'S NEW COLLEGIATE DICTIONARY (1980).

[22] *See, e.g.*, *Wagner v. State*, 539 S.W.3d 298, 306 (Tex. Crim. App. 2018).

[23] *Ross*, 531 S.W.3d at 883 (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)) (brackets omitted).

[24] *Kramer v. Price*, 712 F.2d 174, 177–78 (5th Cir. 1983); *see also May*, 765 S.W.2d at 440.

of knowing how, if at all, those who were present to witness his display would react to it.

But, as the State rightly points out, the literal language of the statute does not require the actor to avoid actually alarming another person. Instead, the statute proscribes displaying a firearm in a particular manner—one that is "calculated to alarm."

ii. "Calculated."

This raises yet another question: What does the word "calculated" mean? Our sister court, the Supreme Court of Texas, has held that the word "calculated" may, depending on the context, "mean either likely or intended."[25] And, again consulting with a common dictionary, we agree; in this context, "calculated" can be reasonably understood to mean either "planned or contrived to accomplish a purpose," or else simply "likely."[26]

Because the word "calculated" may be reasonably interpreted in either of two ways, our precedents indicate that it is ambiguous, permitting us to consult extra-textual interpretive sources to best discern its meaning.[27] And, for the following reasons, we conclude that, in Penal Code Section 42.01(a)(8), "calculated" is best understood to mean "likely," according to an objective standard of reasonableness and from the perspective of an ordinary,

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[25] *See Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 438 (Tex. 1998) (citing, *inter alia*, *Pouchan v. Godeau*, 167 Cal. 692, 140 P. 952, 953 (Cal. 1914)).

[26] *Calculated*, WEBSTER'S NEW COLLEGIATE DICTIONARY (1980) (some capitalization altered); *see also calculated*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "calculated" as, *inter alia*, "[p]lanned so as to achieve a specific purpose; deliberate" or "[l]ikely; apt").

[27] *See, e.g.*, *Arteaga v. State*, 521 S.W.3d 329, 334 (Tex. Crim. App. 2017).

reasonable observer.

We begin by noting that, in a more exhaustive dictionary, it says that when "calculated" is used as a synonym for "likely," it is typically "used with a complementary infinitive."[28] An infinitive verb usually takes the form, "to [verb]." Some examples of infinitive verbs are "to walk," "to run," "to jump," and so forth. And that is the precise verb form that follows the word "calculated" in Section 42.01(a)(8)—"to alarm."

We note also that this calculated-plus-infinitive-verb construction appears in several other Texas criminal statutes.[29] For example, Article 36.19 of the Code of Criminal Procedure states that jury-charge error is not reversible unless, among other things, the error appearing from the record was "calculated to injure" the rights of the defendant.[30] As the State concedes, "calculated" in this context is better understood to convey likelihood or probability rather than intent. We have never held that, to establish reversible jury-charge error under Article 36.19, the appellant must show that the trial court "purposely or intentionally injured his rights."[31] This tends to support the idea that, when the Legislature uses the word "calculated" with an infinitive verb, it generally, but perhaps not always,

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[28] *Calculated*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed. 2002).

[29] *See, e.g.*, TEX. CODE CRIM. PROC. arts. 36.14 ("calculated to arouse"), 36.19 ("calculated to injure"), 38.05 ("calculated to convey").

[30] *See id.* art. 36.19.

[31] State's Reply Brief at 8.

intends to convey likelihood rather than purposefulness.[32]

By comparison, there are several reasons why the intent-centric understanding of "calculated" is not as workable in the context of Section 42.01(a)(8). First of all, if "calculated" is understood to convey intent or purposefulness, it would essentially function as a kind of culpable mental state. We have often said that when the Legislature wishes to attach a particularized culpable mental state to an element of an offense, "it knows how to do so."[33] The disorderly conduct statute is no exception. For example, under Penal Code Section 42.01(a)(11), a person commits an offense if, "for a lewd or unlawful purpose," he enters on the property of another and looks into a dwelling.[34] Had the Legislature wished to convey some heightened sense of intent or purposefulness in Section 42.01(a)(8), we might have expected it to have used a similar construction as Subsection (a)(11). But it did not do so. This casts some doubt on the idea that the Legislature meant for the word "calculated" to serve as a culpable mental state in Section 42.01(a)(8).

Furthermore, construing "calculated" to refer to objective probability rather than

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[32] *Cf. also* TEX. CODE CRIM. PROC. art. 38.05 (a trial judge "shall [not], at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case"); *English v. State*, 85 Tex. Crim. 450, 457 (Tex. Crim. App. 1919) (op. on reh'g) ("[T]he question whether the judgment is to be reversed is determined, not upon the language used in making the comment, or the fact that the comment is made, but upon the consequences which probably result therefrom.") (discussing C.C.P. art. 787 (1911), precursor to current TEX. CODE CRIM. PROC. art. 38.05).

[33] *See Rodriguez v. State*, 538 S.W.3d 623, 629 (Tex. Crim. App. 2018) (citations omitted).

[34] *See* TEX. PENAL CODE § 42.01(a)(11).

subjective intent would put the statute on surer constitutional footing from a vagueness perspective. This is because, as the Supreme Court of Texas has noted, reading "calculated" to convey a sense of objective likelihood also tends to invoke the reasonable-person standard.[35] We agree with our sister court that the word "calculated," used in this manner, does convey some sense of the reasonable person's response, rather than the actor's subjective intent. And we note that linking this objective-likelihood understanding of "calculated" to the reasonable-person standard greatly reduces Section 42.01(a)(8)'s susceptibility to a vagueness challenge—because compliance with the statute would not turn upon the unknowable, idiosyncratic sensibilities of whoever may be present.[36]

Simply attaching a culpable mental state to an undefined term does not, to the same extent as the reasonable-person standard, alleviate that term's potential for vagueness. In *Kramer*, the Fifth Circuit struck down the former harassment statute as unconstitutionally vague because "the standard of conduct it specifies is dependent on each complainant's sensitivity."[37] The State argued that any vagueness in the statute was cured by the inclusion of a culpable mental state. But the Fifth Circuit disagreed: "Specifying an intent element does not save [the statute] from vagueness because the conduct which must be motivated by

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[35] *Benton*, 980 S.W.2d at 438–39.

[36] *See, e.g.*, *Munn v. City of Ocean Springs, Missouri*, 763 F.3d 437, 440–41 (5th Cir. 2014) (vagueness arising from an otherwise "unquantifiable standard" is "constitutionally remedied . . . by the inclusion of the reasonable person standard").

[37] *Kramer*, 712 F.2d at 178 (referencing *Coates*, 402 U.S. at 613–14).

intent, as well as the standard by which that conduct is to be assessed, remain vague."[38] The objective understanding of the word "calculated" avoids this concern by design.

Putting these ideas together, we conclude that the phrase "a manner calculated to alarm" means a manner that is objectively likely to frighten an ordinary, reasonable person.

iii. Culpable Mental State

Finally, there remains the question of "how far down the sentence" the culpable mental state of "intentionally or knowingly" travels.[39]

In *McQueen v. State*, we said that "where specific acts are criminalized because of their very nature, a culpable mental state must apply to committing the act itself."[40] Section 42.01(a)(8) quite plainly attaches a culpable mental state to "the act itself," which in this context is displaying a firearm. But, especially in an open-carry state like Texas, displaying a firearm in a public place is not criminalized because of its very nature. Under Section 42.01(a)(8), something beyond the bare act of displaying a firearm in public is required to make a complete criminal offense.

McQueen elaborated that "where otherwise innocent conduct becomes criminal because of the circumstances under which it is done, a culpable mental state is required as

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[38] *Id.*

[39] *See, e.g.*, *Liparota v. United States*, 471 U.S. 419, 424 n.7 (1985).

[40] *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989).

to those surrounding circumstances."[41] We believe that whether a particular manner of displaying a firearm is calculated to alarm is such a circumstance. A person might intentionally display a firearm in a public place and, without any guiltiness of mind, exhibit it in a manner that is objectively likely to frighten an ordinary person. If that display was truly unwitting with respect to its capacity to alarm, we believe this conduct could reasonably be described as "innocent." But if the display was made in a public place and with knowledge that it was objectively likely to frighten an ordinary person, it surely could not. That being the case, the culpable mental state of "intentionally or knowingly"[42] is best understood to embrace the element of "in a manner calculated to alarm."

We conclude that, to be guilty of disorderly conduct under Penal Code Section 42.01(a)(8), a person must intentionally and knowingly display a firearm in a public place in a manner that he knows is likely, under an objective standard of reasonableness, to frighten the average, ordinary person.

B. A conflict with open carry?

For the reasons that follow, we do not perceive any tension between our reading of Section 42.01(a)(8) and the right of law-abiding Texans to openly carry their firearms.

Penal Code Section 46.035 generally defines how a person may, if properly licensed,

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[41] *Id.*

[42] *But see Lugo-Lugo v. State*, 650 S.W.2d 72, 87 (Tex. Crim. App. 1983) (Clinton, J., concurring) (observing that a person cannot "intend 'circumstances surrounding his conduct;' at most he may be 'aware of' (know) the existence of such circumstances").

openly carry a handgun in a public place. Under Subsection (a), a person who is properly licensed under Subchapter H, Chapter 411 of the Government Code commits an offense if he carries a handgun on or about his person and "intentionally displays the handgun in plain view of another person in a public place."[43] It is an exception to the offense that the handgun was "carried in a shoulder or belt holster by the license holder."[44] The basic idea is that a civilian may openly carry a handgun in a public place only if (1) he is properly licensed to do so, and (2) the handgun is carried in a shoulder or belt holster.

Because keeping the handgun in a shoulder or belt holster is described as an exception to this offense, we can fairly deduce that all that is required for someone to "display" a handgun under Section 46.035 is for him to carry the handgun on or about his person in plain view of another. If a license holder carries a handgun in plain view of another by keeping it in a shoulder or belt holster, he is "display[ing]" the handgun, but his conduct does not violate Section 46.035 because it falls within the statutory exception. On the other hand, if a license holder openly carries a handgun in a public place in a leg or ankle holster, he is "display[ing]" the handgun, and he may not avail himself of the exception; barring some other defense or exception, this person's conduct violates Section 46.035. In any event, in both of these circumstances, the actor has "displayed" a handgun in contemplation of Penal Code Section 46.035.

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[43] TEX. PENAL CODE § 46.035(a).

[44] *Id.*

But that is all he has done—"display[ed] a firearm."[45] By comparison, Section 42.01(a)(8) does not say that a person commits an offense if he merely "displays a firearm in a public place." By its terms, Penal Code Section 42.01(a)(8) requires an additional something else—it requires displaying plus "a manner calculated to alarm."[46]

It is therefore apparent from the language of the statute that a person does not commit disorderly conduct if all he is doing is lawfully exercising his open-carry rights. That is because, if the person is merely carrying his firearm on his person and in plain view of the public, then all he is doing in contemplation of Section 42.01(a)(8) is "display[ing]" the weapon, and nothing more.[47] If he is displaying a handgun by carrying it in a holster that does not comply with Section 46.035, then he may still be guilty of an offense under that section, even though he has not violated Section 42.01(a)(8). But the fact that a person's conduct might violate one statute and not another does not necessarily mean that the two statutes conflict with one another.[48]

C. So understood, Section 42.01(a)(8) is not vague.

Construing the statute in this manner, we conclude that it is not unconstitutionally

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[45] *Compare* TEX. PENAL CODE § 42.01(a)(8) ("displays a firearm"), *with* TEX. PENAL CODE § 46.035(a) ("displays the handgun").

[46] *See* TEX. PENAL CODE § 42.01(a)(8).

[47] *See id.*

[48] *Cf. Lomax v. State*, 233 S.W.3d 302, 312 (Tex. Crim. App. 2007) ("That [two statutes] might, in some situations, apply to the same conduct does not mean that they irreconcilably conflict.").

vague. In the first place, this construction enables an ordinary person to know with reasonable certainty how to conform his conduct to the law. If a person simply carries a firearm on his person in plain view of another in a public place, then without any more information, the actor cannot be said to have displayed the firearm "in a manner calculated to alarm."[49] But if the actor knows that a particular manner of displaying his firearm, beyond merely carrying it on his person, is objectively likely to alarm an ordinary, reasonable person, he may not intentionally or knowingly display his weapon in that manner. This construction avoids the vagueness problem alluded to in *Kramer* because it does not require the actor to gauge the varying sensibilities of all possible complainants. Under our construction, the actor need only gauge the sensibility of the ordinary, reasonable person.

Furthermore, we do not think that this construction leaves the statute open to "arbitrary and discriminatory enforcement."[50] Far from being "standardless,"[51] the statute as we interpret it adopts a decidedly unitary standard—that of the ordinary, reasonable person. To be sure, there may be cases in which a person's display of a firearm comes close to the line of being objectively "calculated to alarm," such that reasonable law-enforcement officers and prosecutors could disagree about whether that display actually crossed the line. But under our construction, simply persuading a jury that the actor's display was objectively

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[49] TEX. PENAL CODE § 42.01(a)(8).

[50] *See Kolender*, 461 U.S. at 357 (citations omitted).

[51] *See id.* at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

alarming would not, by itself, be enough for a conviction. The State would also ultimately have to prove to the jury's satisfaction that the actor knew that his display was objectively likely to alarm. Necessarily, then, the jury will have an opportunity to impose its common sense on both of these elements—the objective impact of the actor's display and the actor's state of mind when he engaged in the display. This additional hurdle should help to prevent prosecutors and police from using the statute to "pursue their personal predilections."[52]

The court of appeals relied on *May v. State* to conclude that the word "alarm" is "inherently vague,"[53] but we think that its reliance on *May* was misplaced. In *May*, we analyzed whether the former Texas harassment statute was unconstitutionally vague.[54] Under that statute, a person committed an offense if, *inter alia*, he intentionally communicated with another person so as to "intentionally, knowingly, or recklessly annoy[] or alarm[] the recipient."[55] To assess the potential vagueness of that statute, we looked to the Fifth Circuit's decision in *Kramer v. Price*, which also involved a vagueness challenge to the former harassment statute.[56] *Kramer*, in turn, cited the Supreme Court's decision in *Coates v. City of Cincinnati* for the proposition that "[c]onduct that annoys some people does not annoy

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[52] *See id.* (quoting *Smith*, 415 U.S. at 575).

[53] *Ross*, 531 S.W.3d at 883 (citing *May v. State*, 765 S.W.2d 438, 440 (Tex. Crim. App. 1989)).

[54] *See May*, 765 S.W.2d at 438–40.

[55] *See id.* at 439 (quoting former TEX. PENAL CODE § 42.07(a)(1)).

[56] *See id.* at 440 (quoting *Kramer v. Price*, 712 F.2d 174, 178 (5th Cir. 1983)).

others."[57] Based on this quoted language, *Kramer* reasoned that the terms "annoy" and "alarm" are "inherent[ly]" vague.[58]

To the extent that *Kramer* and *May* suggest that the word "alarm" is vague in all possible settings, we disagree. In the first place, in both cases, that suggestion is *dictum*. *Kramer* and *May* only considered whether the word "alarm" was vague in the context of the former harassment statute. Those cases did not consider whether, or decide that, "alarm" is vague in every statute in which it appears. As a result, any language declaring the word "alarm" to be inherently vague was broader than necessary to decide the particular issues before the *Kramer* and *May* courts.[59] We are not bound by any such conclusion.

In the second place, *Coates* itself strongly suggests an that otherwise-vague law, even one containing a constitutionally perilous word like "annoy," might be saved if the reviewing court can determine "whose sensitivity" the actor must pay attention to in complying with the law.[60] And that is exactly the situation we are faced with here. Even if the word "alarm"

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[57] *See Kramer*, 712 F.2d at 177 (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)).

[58] *Id.* at 178 ("The Texas courts have made no attempt to construe the terms 'annoy' and 'alarm' in a manner which lessens their inherent vagueness.").

[59] *See Oliva v. State*, 548 S.W.3d 518, 524 (Tex. Crim. App. 2018) ("[L]anguage in an opinion can be *dictum* if it is broader than necessary to resolve the case.").

[60] *See Coates*, 402 U.S. at 613–14 (deciding that the statute under review was unconstitutionally vague because, *inter alia*, "the [state] court did not indicate upon whose sensitivity a violation does depend—the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of the hypothetical reasonable man.").

raises some *prima facie* vagueness concerns in the context of Section 42.01(a)(8), those concerns are greatly alleviated by the inclusion of an objective reasonable-person standard.[61] For these reasons, we conclude that the concerns expressed in *Kramer* and *May* about the vagueness of the former harassment statute do not apply to the disorderly conduct statute.

D. An indictment tracking Section 42.01(a)(8) provides sufficient notice.

Of course, the fact that an underlying statute is reasonably clear does not necessarily mean that a charging instrument tracking that statute will provide sufficient notice to the defense. However, having construed Section 42.01(a)(8) in the manner that we have, we believe that an information tracking that statute is also sufficiently clear.

This information essentially informs Ross that, on or about a specific date, he is accused of intentionally and knowingly displaying a firearm in a public place in a manner that he knew was objectively likely to frighten an ordinary, reasonable person. In this sense, the information may be said to be completely descriptive of an offense. It states everything "which is necessary to be proved,"[62] and it does so "in ordinary and concise language in such a manner as to . . . give the defendant notice of the particular offense with which he is charged[.]"[63] Relatedly, so understood, the information allows Ross to begin preparing a defense. Knowing the precise bad-act allegation he must contend with, and when and where

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[61] *See Munn*, 763 F.3d at 442 ("*Coates* was not so much about the word annoys but about the impermissibility of a subjective standard.").

[62] *See* TEX. CODE CRIM. PROC. art. 21.03.

[63] *See id.* art. 21.11.

the bad act is alleged to have occurred, Ross may begin to think productively about the kind of evidence he might want to marshal, as well as how he might best convince a jury that his display was done with an innocent mind, objectively non-frightening, or both.

Furthermore, under our construction of Section 42.01(a)(8), none of the terms appearing in the information is of indeterminate or variable meaning. First, the meaning of each term in the information may be determined according to how we have interpreted those words in the statute. Second, to the extent that the term "alarm" might be said to have a variable meaning depending on the sensitivities of each potential complainant,[64] that concern has been alleviated by measuring "alarm" against the ordinary-person standard. That standard does not vary according to who may have witnessed the display. So, in this setting, "alarm" is a fixed, not variable, term.

Each of the dissenting opinions today expresses some concern that we are unfairly reversing the trial judge on a legal basis that he could not reasonably have predicted.[65] We think that these concerns are overstated. At root, what we finally resolve today is the legal dispute between Ross and the State about the sufficiency of the State's information. Reversing the lower courts' judgments is a practical necessity in settling that dispute—nothing more and nothing less. Our reversal should not be seen as a mark of disapproval for failing to predict how we would ultimately resolve the statutory ambiguities

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[64] *Cf. Kramer*, 712 F.2d at 178.

[65] *See* Dissenting Opinion at 9–10 (Walker, J., dissenting); Dissenting Opinion at 3–5 (Slaughter, J., dissenting).

that we identify for the first time today.

In our capacity as a discretionary review court, our primary concern should be "shepherd[ing] the jurisprudence"[66]—so that if, in some future case, a similar issue should arise, the litigants and trial judge will be in a better position to decide the matter correctly. Were we to simply note the existence of a statutory ambiguity and on that basis affirm the trial judge's granting of the motion to quash, we would allow that ambiguity to persist, leaving future litigants and trial judges in doubt about its true meaning. While it has been argued that the statutory ambiguities at issue in this case are curable by a more specific charging instrument,[67] we think that that approach would effectively permit the State to decide the content of the statute on a case-by-case basis. That would only add to Ross's concern that the ordinary citizen would have no idea how to conform his conduct to the disorderly-conduct statute.

The dissenting opinions also suggest that resolving the statutory ambiguity subjects Ross to a kind of *ex post facto* unfairness, because he was initially charged with a facially ambiguous information and only now, several years later, do we decide its meaning.[68] But this is a pre-trial appeal. And in that unique posture, this opinion is better understood as

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[66] *See, e.g.*, *Morris v. State*, 361 S.W.3d 649, 676 (Tex. Crim. App. 2011) (Price, J., dissenting).

[67] *See* Dissenting Opinion at 2 (Slaughter, J., dissenting).

[68] *See, e.g.*, Dissenting Opinion at 2 (Walker, J., dissenting); Dissenting Opinion at 5 (Slaughter, J., dissenting).

forward-looking or prospective, not retrospective.[69] It provides Ross with a definitive interpretation of the statute that he may rely on going forward; it does not punish him, post-conviction, for failing to correctly guess what our interpretation of the statute might have been. We are confident that our decision to resolve these statutory ambiguities, rather than overlook them, will alleviate Ross's initial concerns and put him in a better position to prepare a defense in any future trial.

It is true that the information in this case does not contain a comprehensive and detailed description of Ross's display of the firearm. It does not, for example, describe the position, angle, and direction of the weapon, the placement of it in Ross's hands, the expression on Ross's face, the words he allegedly uttered, and so forth. But, with the wrongful act described with sufficient clarity to allow Ross to understand "what is meant,"[70] these particulars would ultimately serve as nothing more than an accounting of how the State intends to prove that Ross's display was "calculated to alarm." That is exactly what is meant by "evidentiary matters."[71] Ross will no doubt have other opportunities to preview the precise manner in which the State intends prove that his display was objectively alarming,[72] but he cannot expect to gather that kind of information from a charging instrument.

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[69] *Contra* Dissenting Opinion at 5 (Slaughter, J., dissenting).

[70] *See* TEX. CODE CRIM. PROC. art. 21.11.

[71] *See Curry*, 30 S.W.3d at 398.

[72] *See, e.g.*, TEX. CODE CRIM. PROC. art. 39.14.

IV. CONCLUSION

We reverse the court of appeals' judgment. The State's sole point of error on appeal having been sustained, we remand the case to the trial court for further proceedings.

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