COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

SERGIO PEREZ,	§	No. 08-15-00253-CR
Appellant,	§	Appeal from
v.	§	County Court at Law No. 4
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC # 20130C07785)

O P I N I O N

Appellant was convicted of the Class A misdemeanor offense of violating a protective order. TEX.PENAL CODE ANN. § 25.07(a)(2)(A)(West Supp. 2016). The predominant theme of this appeal is that the protective order was void, and that a person cannot be criminally responsible for violating a void order. Additionally, Appellant claims that the statute under which he was convicted violates his First Amendment rights to free speech. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant is Laura Robles's ex-boyfriend. She filed an application for a protective order in the 65th District Court following an alleged altercation after their break-up. Appellant appeared at the hearing on the application without counsel. The hearing resulted in what is

denominated as an agreed protective order dated May 2, 2012. Relevant here, it prohibited Appellant from communicating directly with Ms. Robles in a threatening or harassing manner, or engaging in conduct directed at her that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass. The agreed order recites that the court had jurisdiction over the parties and subject matter jurisdiction over the proceeding. In issuing the order, the court found that it was in the best interest of the Applicant or a member of the family or household. The court did not make any findings of prior family violence, nor the likelihood of future family violence (and those findings were specifically struck through on the pre-printed form order). Appellant agreed to the order both as to form and substance. The order also contains an admonition in all capital letters that it is in full force and effect unless a court changes the order, and violation of the order may be punishable by fine or imprisonment.

In this criminal proceeding, the State's information alleges that on June 9, 2012, Appellant violated the protective order by intentionally and knowingly communicating directly with Ms. Robles in a threatening or harassing manner. Prior to trial, Appellant filed a pretrial application for habeas corpus asserting that the agreed protective order was void. As we explain in more detail below, the application asserted that the 65th District Court did not make a finding that there had been prior family violence, and Appellant contends that such was required for the protective order to be issued. The trial court denied the application, and Appellant filed a mandamus with this court challenging that ruling. In our opinion denying mandamus relief, we noted Appellant (there appearing as Relator) must show "that he has no adequate remedy at law and that what he seeks to compel is a ministerial act." *In re Perez*, 08-15-00188-CR, 2015 WL 4038711, at *1 (Tex.App.--El Paso July 1, 2015)(orig. proceeding) *citing In re State ex rel.*

Weeks, 391 S.W.3d 117, 122 (Tex.Crim.App. 2013)(orig.proceeding). We concluded that Appellant had failed to meet that burden.

The case proceeded to trial. The State presented its case through Ms. Robles, her aunt, and a police officer. The evidence supported the State's theory that on June 9, 2012, Appellant arrived at a birthday party for Ms. Robles's thirteen-year-old daughter at the pool area of the Chase Suites Hotel. Ms. Robles was standing near the pool with a man, both watching their children swim. Appellant approached her, exclaiming "Oh, so this is the one you're f--king now?" Appellant appeared intoxicated. He proceeded to shout at Ms. Robles, referring to her as a whore, a bitch, a slut, and a poor excuse of a woman. Ms. Robles testified that he tried to push and grab her, and at one point said "I'm going to kill you. You're not going to pass tonight without me killing you." The hotel manager and other guests eventually convinced Appellant to leave. Ms. Robles's daughter overheard the vulgarities and threats, and the party ended abruptly when hotel management asked everyone to leave.

Appellant testified at trial and presented a far different story. He claimed that Ms. Robles had come to his house that morning and told him about the party and that she had dropped the protective order. She had somehow taken his keys and he went to the party to retrieve them. He denied making any of the statements attributed to him, or threatening her. The jury apparently believed Ms. Robles's account and returned a guilty verdict. Based on the jury's recommendation of a fine only, the trial court assessed a $2,500 fine and no jail time.

ISSUES ON APPEAL

Appellant brings four issues for review. The common thread in the first three issues is that the underlying protective order is facially void. Issue One contends the evidence is legally insufficient to convict because the protective order was void. Issue Two likewise contends the

trial court lacked subject matter jurisdiction because the earlier protective order was void. Issue Three contends the trial court erred in overruling his motion for directed verdict for the same reason. We will address these issues together.

Issue Four contends that the criminal statute upon which the protective order is based violates the First Amendment to the United States Constitution, both on its face and as applied.

THE PROTECTIVE ORDER PROVIDED A SUFFICIENT BASIS TO SUSTAIN THE CONVICTION

Appellant was convicted of violating a protective order issued pursuant to Chapter 85 of the Texas Family Code. Under that chapter "[a] court shall render a protective order as provided by Section 85.001(b) if the court finds that family violence has occurred and is likely to occur in the future." TEX.FAM.CODE ANN. § 81.001 (West 2014). A protective order proceeding begins with the filing of an application. *Id.* at § 82.001. Thereafter, the court must set an expedited hearing. *Id.* at § 84.001. At the close of the hearing, the court "shall find" whether family violence has occurred and is likely to occur in the future. *Id.* at § 85.001(a)(1)(2). "If the court finds that family violence has occurred and that family violence is likely to occur in the future, the court . . . shall render a protective order as provided by Section 85.022" as against the person found to have committed family violence. *Id.* at § 85.001(b)(1). A protective order under Section 85.022 can among other things prohibit a "person found to have committed family violence" from communicating with the applicant "in a threatening or harassing manner" or engaging in conduct that is "reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass the person." *Id.* at § 85.022 (b)(2)(A) and (b)(5). "To facilitate settlement," parties may also agree in writing to the terms of a protective order as provided by Section 85.022, subject to the approval of the court. *Id.* at § 85.005(b). "The agreed order is enforceable civilly or criminally." *Id.* A person commits an offense by violating an order issued under Chapter 85

of the Family Code, by knowingly or intentionally communicating with a protected individual in a "threatening or harassing manner." TEX.PENAL CODE ANN. § 25.07(a)(2)(A).

Appellant argues that the protective order issued here was void because it was issued without any specific finding of past family violence or the likelihood of future family violence as contemplated by Section 81.001. We disagree, at least with respect to whether the order is void. The order here was agreed upon and is authorized under Section 85.001. *Id*. at § 85.005(b)("To facilitate settlement, a respondent may agree in writing to the terms of a protective order as provided by Section 85.022, subject to the approval of the court."). Respondent focuses on the clause "as provided by Section 85.022" and takes this to mean that all the requirements in Section 85.022 must apply, including the predicate that its remedies may be invoked against a "person found to have committed family violence." We note, however, that the phrase "as provided by Section 85.022" modifies the phrase "terms of a protective order" and the "terms" could be understood as nothing more than the specific prohibitions that are available under Section 85.022, such as not communicating with the applicant in a harassing or threatening manner. In other words, a person might agree to the remedies available under Section 85.022 without admitting to the predicates necessary for a judge to involuntarily impose those same remedies.

Ultimately, we need not resolve this question of statutory construction because Appellant's argument falters on a more fundamental ground. Appellant's first three issues turn on whether the earlier order is void, as distinct from being merely voidable. This constitutes a collateral attack on the prior protective order. *Kortebein v. American Mutual Life Ins. Co.*, 49 S.W.3d 79, 88 (Tex.App.--Austin 2001, pet. denied), *cert. denied*, 534 U.S. 1128, 122 S.Ct. 1065, 151 L.Ed.2d 968 (2002)("A collateral attack is an attempt to avoid the effect of a judgment

in a proceeding brought for some other purpose."). But only a void judgment may be collaterally attacked. *Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005). When the order is merely voidable, it must be attacked directly. *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 271 (Tex. 2012). A judgment is void only when it is apparent that the court rendering judgment had no jurisdiction over the parties or property, no jurisdiction over the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act. *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985).[1]

We conclude that *if* the agreed protective order was improperly approved by the trial court because it lacked family violence findings, the error would make the order voidable, and not void. We faced an analogous situation in *In re Ocegueda*, 304 S.W.3d 576 (Tex.App.--El Paso 2010)(orig. proceeding) where several non-parties sought to set aside an expunction order. They filed their motion to do so in the originating court, but well after the order had become final. As here, their ability to challenge the order turned on whether the order was void (and could be attacked at any time) or merely voidable (and thus must have been timely appealed). The essence of their attack was that the petition seeking the expunction order did not meet the requisite elements of the expunction statute. We concluded that the errors complained of would at best make the order voidable, and not void. *Id.* at 579. In so holding, we cited a number of cases similarly holding that alleged statutory or procedural errors render an order voidable, and not void. *Id*. at 579-80, *citing City of San Antonio v. Summerglen Property Owners Ass'n Inc.*, 185 S.W.3d 74, 84 (Tex.App.--San Antonio 2005, pet. denied)(statutory provisions that do not limit the area or type of land a city can annex, i.e., do not restrict the city's annexation authority,

[1] The underlying order arose as a civil matter and we look to civil case law precedents to determine if it is void or voidable. *Dillard v. State*, 05-00-01745-CR, 2002 WL 31845796, at *4 (Tex.App.--Dallas Dec. 20, 2002, no pet.)(not designated for publication). Even were we mistaken in that regard, courts reviewing collateral attacks on criminal judgments apply a parallel analysis. *Nix v. State*, 65 S.W.3d 664, 668 (Tex.Crim.App. 2001).

are procedural requirements that could make the annexation voidable, but not void); *Gaston v. State*, 63 S.W.3d 893, 898 (Tex.App.--Dallas 2001, no pet.)(failure by trial court to adhere to procedural requirements when entering judgment does not render a conviction void, but voidable).

The State similarly points us to several unpublished opinions where defendants were convicted of violating a protective order and sought to collateral attack the protective order upon which their criminal conviction was based. *Glandon v. State*, 14-10-00020-CR, 2011 WL 345634, at *5-6 (Tex.App.--Houston [14th Dist.] Feb. 1, 2011, no pet.)(mem. op.)(not designated for publication)(claim that protective order was based on default when the record did not affirmatively show proper service)*; Ramirez v. State*, No. 08-07-00207-CR, 2008 WL 3522369, at *4 (Tex.App.--El Paso Aug. 14, 2008, no pet.)(not designated for publication) (protective order was challenged based on respondent not being present at hearing); *Dillard v. State*, No. 05-00-01745-CR, 2002 WL 31845796, at *4 (Tex.App.--Dallas Dec.20, 2002, no pet.)(not designated for publication)(similar claim that application for protective order had never been served). These cases all arose out of claimed defects in service of the application for the protective order, or on the defendant's absence from the proceeding. Those claimed defects, however, did not render the protective orders void, and thus they were not subject to collateral attack.

We also agree with the reasoning of these cases that the recitals in the underlying judgment should be respected. We "must indulge every presumption in favor of the regularity of the proceedings and documents" in the trial court. *McCloud v. State*, 527 S.W.2d 885, 887 (Tex.Crim.App. 1975). This presumption of regularity means "recitations in the records of the trial court, such as a formal judgment, are binding in the absence of direct proof of their falsity."

Breazeale v. State, 683 S.W.2d 446, 450 (Tex.Crim.App. 1984)(op. on reh'g). The recitals here included that the court had jurisdiction over the parties, had subject matter jurisdiction over the case, and that the terms of the order were agreed by the parties. To allow Appellant to agree to the terms of an order, and then later avoid the order because of a perceived procedural failing would thwart the goals of Chapter 85 protective orders.

Appellant relies on *In the Interest of I.E.W.*, No. 13-09-00216-CV, 2010 WL 3418276 (Tex.App.--Corpus Christi 2010, no pet.)(mem.op.). There, a father had voluntarily agreed to a protective order which prohibited all contact with his daughter. *Id*. at *3. He apparently did so because at the time of the hearing, there were criminal charges pending against him for inappropriate contact with his daughter, and his criminal defense counsel advised him not to testify at the protective order hearing. *Id*. When those criminal charges were later disposed of in his favor, the father sought to vacate the protective order as allowed by Section 85.025. *See* TEX. FAM. CODE ANN. § 85.025(b)(West Supp. 2016)("A person who is the subject of a protective order may file a motion not earlier than the first anniversary of the date on which the order was rendered requesting that the court review the protective order and determine whether there is a continuing need for the order."). As one basis to vacate the order, the father asserted that the original agreed order did not contain specific findings of past violence or the likelihood for future violence.

The trial court denied the motion to vacate, concluding in part that the prior agreed order constituted a judicial admission that the order was necessary to prevent family violence, and by virtue of the agreed order, the father was estopped to deny otherwise. *Id*. at *4. The court of appeals disagreed, reasoning that the father had made no judicial admission, nor was he estopped to attempt to vacate the order. *Id*. at *6-7. But nothing in the opinion suggests the agreed order

was void on its face and subject to collateral attack. Rather, the father sought to vacate the order through a procedure specifically permitted by the Family Code. If anything, the teaching from *In the Interest of I.E.W.* is that a family violence order that is erroneously issued can be vacated by the issuing court. In other words, the errors of which Appellant here complains might make the order voidable by the issuing court, but that is a far cry from being void, and thus subject to collateral attack.

Appellant's first three issues are all dependent on the protective order being void, and thus subject to collateral attack. Because we disagree with that premise, whether Appellant frames his argument as one of insufficient evidence, lack of subject matter jurisdiction,[2] or failure to grant his motion for directed verdict, the argument fails. We overrule Issues One, Two and Three.

FIRST AMENDMENT CHALLENGE

Appellant's fourth issue contends that TEX.PENAL CODE ANN. § 25.07(a)(2)(A) violates the First Amendment to the United States Constitution both on its face, and as applied to the facts of his case. On appeal he complains that the statute permitted his conviction for merely harassing speech, when only obscene, defamatory, and fighting words escape First Amendment protection. We disagree.

Preservation of Error

A statute may be challenged as unconstitutional on its face, or as applied. *Scott v. State*, 322 S.W.3d 662, 665 n.1 (Tex.Crim.App. 2010). A statute is unconstitutional on its face when the statute, by its terms, always operates unconstitutionally. *Id.* A statute is unconstitutional as applied when the particular circumstances of the defendant's case result in the violation. *Id.* The

[2] In any event, the criminal trial court's subject matter jurisdiction to hear this case turns on the presentation of the information, and not the underlying veracity of the evidence to support the allegations made in that information. *See* TEX.CONST. art. V § 12(b); *Teal v. State*, 230 S.W.3d 172, 176 (Tex.Crim.App. 2007).

State urges that Appellant's facial challenge is forfeited because it was not raised below, a claim to which Appellant does not respond. Our review of the record reflects that Appellant objected below that the statute was unconstitutional as applied, but not that the statute is facially unconstitutional.

"[A] defendant may not raise for the first time on appeal a facial challenge to the constitutionality of a statute." *Karenev v. State*, 281 S.W.3d 428, 434 (Tex.Crim.App. 2009)(overruling line of prior cases which had permitted the same);[3] TEX.R.APP.P. 33.1(a)("As a prerequisite to presenting a complaint for appellate review, the record must show that . . . the complaint was made to the trial court . . . ."); *see also Curry v. State*, 910 S.W.2d 490, 496 (Tex.Crim.App. 1995)(resolving facial challenge to statute but rejecting as-applied challenge that was not preserved at the trial court). Accordingly, we consider the facial attack on the statute as forfeited.

Standard of Review

A litigant raising only an "as applied" challenge concedes the general constitutionality of the statute, but asserts that the statute is unconstitutional as applied to his particular facts and circumstances. *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex.Crim.App. 2011); *In re D.J.R.*, 319 S.W.3d 759, 764-65 (Tex.App.--El Paso 2010, pet. denied). We review the constitutionality of a statute *de novo*. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex.Crim.App. 2013). Ordinarily, we start with the presumption that the statute is valid and the Legislature did not act arbitrarily or unreasonably in enacting the statute. *See Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex.Crim.App. 2002). Given that presumption, the party challenging the statute carries the

[3] Once a court declares a statute unconstitutional, however, litigants in other cases might then raise the claim for the first time appeal because the statute under which they were convicted is a nullity. *Smith v. State*, 463 S.W.3d 890, 896 (Tex.Crim.App. 2015).

burden of establishing its unconstitutionality. *Id.* We must uphold the statute if we can determine a reasonable construction that renders it constitutional. *See Ex parte Granviel*, 561 S.W.2d 503, 511 (Tex.Crim.App. 1978).

Prior Case Law

Two cases have already addressed constitutional challenges to Section. 25.07(a)(2)(A): *Wagner v. State*, 05-13-01329-CR, 2015 WL 2148103 (Tex.App.--Dallas May 5, 2015, pet. granted) and *Garcia v. State*, 212 S.W.3d 877, 886 (Tex.App.--Austin 2006, no pet.). In *Wagner*, the defendant was convicted for communicating with his soon to be ex-spouse in a harassing manner as prohibited by a protective order. The communications consisted mainly of multiple text messages, emails, and a letter. The communications contained mostly either poetry, pleas for reconciliation, bible verses, or routine communications about bills or insurance. 2015 WL 2148103 at *1, 2. The defendant claimed that the statutory language "communicates ... in a . . . harassing manner" is unconstitutionally vague and overbroad, and violated his rights to free speech and freedom of religion under the United States and Texas constitutions. *Id*. at *3. The court of appeals rejected the overbreadth and vagueness challenges, concluding that the term harassment could be given an ordinary dictionary meaning. *Id*. ("A person harasses another when he persistently disturbs, bothers continually, or pesters that person," *quoting* Webster's Encyclopedic Unabridged Dictionary 645 (1989)). The *Wagner* court rejected an as-applied vagueness claim because the defendant would have appreciated the ordinary meaning of the term harassment and that his numerous communications were harassing. *Id*. at *4. The court also concluded that he had waived any claims that the statute penalized him for making communications protected by the First Amendment. *Id*.

The Austin Court of Appeals similarly rejected claims that Section 25.07 was facially overbroad and vague in violation of the First Amendment. *Garcia v. State*, 212 S.W.3d 877, 886 (Tex.App.--Austin 2006, no pet.). The defendant claimed that the statute was overbroad because it prohibits all direct communications with the protected individual. *Id*. at 887. The court rejected that claim because the statute was initially limited to a narrow class of persons subject to specific court orders. *Id.* at 888. The statute was further limited to prohibit only communications that were threatening or harassing. *Id*. Accordingly, the statute did not reach a "substantial amount of constitutionally protected conduct," which the core question in a overbreadth challenge. *Id.* at 889.

The court also rejected the defendant's contention that the statute was vague because it fails to define what kind of communications are considered "harassing." *Id*. The court construed the term harass to mean a course of conduct directed at a specific person causing or tending to cause substantial distress and having no legitimate purpose. *Id*., *citing Commission for Lawyer Discipline v. Benton*, 980 S.W.2w 425, 439 (Tex. 1998). Applying that definition, the vagueness challenge failed.

Against this backdrop, we narrow our focus to Appellant's singular argument. He has not raised a facial overbreadth or vagueness challenge, and we have already concluded any type of facial challenge was not preserved. His contention appears to be that in the factual context presented here, calling his ex-girlfriend a "slut," a "whore," a "poor excuse of a woman," and asking about who she is "f--king now" is all protected speech under the First Amendment.[4] In

[4] The Appellant's argument from his brief is as follows:

> [What Appellant is claimed to have said] would certainly fit the description of speech calculated to 'harass', but this speech would not fall within any of the categorical exceptions to the First Amendment which the United States Supreme Court has recognized. As such, Appellant has been convicted of a crime which violates the First Amendment, i.e. communicating directly with a protected individual or a member of the family or household in a harassing manner, as proscribed

this "as applied" challenge, the context is important. He made these statements in a public setting at a child's birthday party, and joined with the statements an explicit threat to kill his ex-girlfriend.

Appellant's Statements Are Only Entitled to Limited Protection

The First Amendment safeguards the "uninhibited marketplace of ideas" and communication of "social, political, esthetic, moral, and other ideas" important to a free society. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390, 89 S.Ct. 1794, 1807, 23 L.Ed.2d 371 (1969); *see also Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting)(hallmark of free speech is to allow "free trade in ideas"--even for ideas that the overwhelming majority of people might find distasteful or discomforting). But in a nation of ordered liberties, the guarantee of free speech cannot be absolute and the communication of certain matters are subject to content regulation. *See, e.g., Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957)(obscenity); *Beauharnais v. Illinois*, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952)(defamation). For instance, burning a cross communicates an idea, but the Government can, consistent with the First Amendment, ban cross burning done with the intent to intimidate. *Virginia v. Black*, 538 U.S. 343, 347, 123 S.Ct. 1536, 1541, 155 L.Ed.2d 535 (2003).

So called "fighting words" are another class of proscribable speech. These are words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). They include "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction" *Black*, 538 U.S. at 359, 123 S.Ct. at 1547. Nor does the free speech clause forbid the State from regulating

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by Texas Penal Code § 25.07(a)(2)(A).

content which advocates the "use of force" or "advocacy [that] is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

Closely aligned, the First Amendment also permits the State to regulate "true threats." *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 1401, 22 L.Ed.2d 664 (1969)(*per curiam*); *accord, R.A.V. v. City of St. Paul*, 505 U.S. 377, 388, 112 S.Ct. 2538, 2546, 120 L.Ed.2d 305 (1992)("threats of violence are outside the First Amendment"); *In re C.B.L.*, No. 08-00-00116-CV, 2001 WL 282761, at *3 (Tex.App.--El Paso, Mar. 22, 2001, no pet.)(not designated for publication). "True threats" are those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. *See Watts*, 394 U.S. at 708, 89 S.Ct. at 1401 ("political hyperbole" is not a true threat); *R.A.V.*, 505 U.S. at 388, 112 S.Ct. at 2546. The speaker need not actually intend to carry out the threat because the State's interest is to "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." *Black*, 538 U.S. at 360, 123 S.Ct. at 1548.

Simple profanity, however, while a close cousin to fighting words, enjoys some constitutional protection. *See Lewis v. City of New Orleans*, 415 U.S. 130, 134, 94 S.Ct. 970, 973, 39 L.Ed.2d 214 (1974)(statute which made it unlawful to wantonly curse, revile, or to use obscene or opprobrious language towards city police was facially unconstitutional as overbroad); *Gooding v. Wilson*, 405 U.S. 518, 528, 92 S.Ct. 1103, 1109, 31 L.Ed.2d 408 (1972)(statute criminalizing "opprobrious" and "abusive" language was overbroad); *Cohen v. California*, 403

U.S. 15, 20, 91 S.Ct. 1780, 1786, 29 L.Ed.2d 284 (1971)(wearing jacket with words "f--k the draft" was not a fighting word when not directed at any particular person)

While there might be instances where Appellant's words could be viewed as only profane, such is not the case here. In this context, we could easily see how calling a mother such invectives in front of other family members, and at a child's birthday party, could lead to physical violence. *Chaplinsky*, 315 U.S. at 569, 62 S.Ct. at 768 (calling person "damned Fascist" and similar words viewed as incitement to violence). Unlike *Cohn*, where the vulgar language was directed at no one in particular, Appellant's words were all directed at and spoken directly to their intended target. And even if viewed only as profanity, the State has greater latitude in regulating the time, manner, and place of communications, than in regulating content. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791-92, 796, 109 S.Ct. 2746, 2753-54, 2756, 105 L.Ed.2d 661 (1989)("reasonable" regulations on time, place, or manner requires only a "substantial" governmental interest and "narrow tailoring," so long as such regulations are content-neutral). Section 25.07(a)(2)(A) essentially prohibits Appellant from making these kind of invectives directly to Ms. Robles, such that they would harass or threaten her. He was free to say anything he wanted outside her presence.

In this sense, the regulation is similar to that upheld in *U.S. v. Hicks*, 980 F.2d 963, 971 (5th Cir. 1992) as a reasonable time, manner, and place restriction. *Hicks* upheld the constitutionality of a federal statute that criminalizes intimidation of airline flight attendants. The statute was applied to passengers who directed vulgarities at flight attendants during a flight. While the profane words may have been otherwise protected, the government had an interest in restricting such speech during the flight of an airplane if it interfered with flight crews' duties. Similarly, the State has a legitimate interest protecting family members from further

communications of a harassing or threatening nature when there have been past incidents severe enough to merit court intervention. The State has, within its police power, the right to protect the "well-being and tranquility of a community." *Kovacs v. Cooper*, 336 U.S. 77, 83, 69 S.Ct. 448, 451, 93 L.Ed. 513 (1949). The statute does not preclude Appellant from calling his ex-girlfriend anything he wants -- it just prevents him from saying such things in her presence. The time, manner, and place restriction is justified, as weighed against the minimal value of Appellant expressing his invectives directly to Ms. Robles. His in-person expressions are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Black*, 538 U.S. at 358-59.

Another problem with Appellant's as-applied challenge is that he ignores the threatening language component of the statute, and the jury charge upon which he was convicted. The evidence at trial supported a finding that he directly threatened Ms. Robles' life. The charge permitted the jury to find Appellant guilty if he intentionally or knowingly communicated with Ms. Robles in a threatening *or* harassing manner. We could view that unchallenged evidentiary basis as an independent ground upon which to uphold the conviction. *See Patton v. State*, 835 S.W.2d 684 (Tex.App.--Dallas 1992, no pet.)(upholding conviction when several means of violating protective order statute are presented and evidence supports at least one of those alternate means). But it is also important to the context of the other statements that Appellant claims are protected. Speech made as part of committing a crime is not protected. *United States v. Williams*, 553 U.S. 285, 297, 128 S.Ct. 1830, 1841, 170 L.Ed.2d 650 (2008). The epitaphs made to Ms. Robles were part and parcel of the threat. They all occurred in a relatively short time span, and all as part of the same occurrence. Threats do not enjoy First Amendment protection, nor does speech integral to criminal conduct. *See Watts*, 394 U.S. at 708, 89 S.Ct. at

1401; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, 69 S.Ct. 684, 93 L.Ed. 834 (1949).

The Austin Court of Appeals in *Garcia* concluded that "threats and harassment are not entitled to First Amendment protection." *Garcia*, 212 S.W.3d at 888-89, *citing Test Masters Educ. Servs. v. Singh*, 428 F.3d 559, 580 (5th Cir. 2005)(stating that there is a "distinction between communication and harassment" and that "courts have the power to enjoin harassing communication"); *Thorne v. Bailey*, 846 F.2d 241, 243 (4th Cir. 1988)("Prohibiting harassment is not prohibiting speech, because harassment is not protected speech."). At least in the context of this "as applied" challenge and under the facts presented here, we agree that the harassing statements made were proscribable speech and overrule Issue Four. We affirm the conviction.

May 11, 2017

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., not participating

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