PD-0075-24
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 3/6/2024 11:56 PM
Accepted 3/7/2024 8:39 AM
DEANA WILLIAMSON
CLERK

FILED
COURT OF CRIMINAL APPEALS
3/7/2024
DEANA WILLIAMSON, CLERK

To the Court of Criminal Appeals of Texas

No. PD-0075-24

Kevin Owens v. State of Texas

Appellant Kevin Owens's Petition for Discretionary Review

On Petition for Discretionary Review from
the Amarillo Court of Appeals
Cause No. 07-23-00115-CR

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March 6, 2024

Mr. Owens requests oral argument.

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Statement Regarding Oral Argument

This petition brings together several fascinating issues—issues that:

- This Court has recently declined to consider, over Judge Yeary's dissent (First Issue, whether alternate ways of committing a crime are manners, or separate offenses);
- This Court has alluded to, but no Texas court had yet addressed (Second Issue, how as-applied challenges are to be handled); or
- This Court has divided on, and on which the Supreme Court has since provided additional support to the dissent's position (Third Issue, the unconstitutionality of section 42.07(a)(7)).

Mr. Owens asks for oral argument so that this Court can test his attorneys' written arguments against the State's in the merciless crucible of this Court's well.

Identities of Parties and Counsel

The trial judge was Hon. J.D. Angelini, sitting pursuant to recusal of Hon. Tommy Stolhandske, Presiding Judge of County Court at Law Number 11 of Bexar County.

The parties are Kevin Owens, and the State of Texas.

In the trial court Mr. Owens was represented by Alex Scharff of San Antonio and Bianca Nicole "Nikki" Schmerber of Hondo, and the State was represented by Joe Gonzales, Megan Ledesma, and Steven Sanchez, all of the Bexar County Criminal District Attorney's Office.

On appeal Mr. Owens is represented by Mark W. Bennett of Houston and Lane Haygood of Odessa; the State, by Mr. Gonzales, Eric R. Rodriguez, and Clay Nelson, all of the Bexar County Criminal District Attorney's Office.

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CASES

STATUTES

In the Court of Criminal Appeals of Texas
No. PD-0520-22

State of Texas v. Kevin Owens	From the Amarillo Court of Appeals

Appellant's Petition for Discretionary Review

To the Honorable Court of Criminal Appeals:

Petitioner Kevin Owens, by and through his counsel of record, Mark William Bennett and Lane Haygood, petitions for discretionary review.

Statement of the Case

Mr. Owens was convicted of Harassment under section 42.07(a)(7) of the Texas Penal Code by a jury in Bexar County. He appealed, the appeal was transferred to the Amarillo Court of Appeals, and that court affirmed his judgment. *Owens v. State*, No. 07-23-00115-CR, 2024 WL 81583 (Tex. App.—Amarillo Jan. 5, 2024) (Opinion Below).

Reasons for Review

Regarding Mr. Owens's first and second issues, the Amarillo Court of Appeals has decided questions of state or federal law that have not been, but should be, settled by this Court.

Regarding his third issue, the Court of Appeals—and, indeed, this Court—have decided an important question of constitutional law in a

way that conflicts with the applicable decisions of the Supreme Court of the United States.

Grounds for Review

Petitioner offers the court a three-course menu of fascinating issues for review:

First, where a statute contains separate and distinct specific intents—here, the intent to *harass*, to *annoy*, to *alarm*, to *abuse*, to *torment*, and to *embarrass*—does each specific intent form an element of a separate and distinct offense, such that jury unanimity is required on which specific intent the actor had?

Second, how should courts handle as-applied First Amendment challenges to statutes? This issue has subsidiary issues:

- Was section 42.07(a)(7) used to punish Mr. Owens's speech based on its content?
- Was Mr. Owens's speech integral to criminal conduct?
- When a notionally valid statute is used to punish speech based on its content, is a defensive instruction on protected speech required?

Third, in light of the United Supreme Court's *Counterman v. Colorado*, is the Court's *Barton* and *Sanders* holding that section

42.07(a)(7) is not facially overbroad because it "does not implicate" the First Amendment no longer tenable?

Argument and Authorities

First issue: Does section 42.07(a)(7) create at least six separate and distinct offenses?

Where a statute contains separate and distinct specific intents—here, the intents to *harass*, to *annoy*, to *alarm*, to *abuse*, to *torment*, and to *embarrass*—does each specific intent form an element of a separate and distinct offense, such that jury unanimity is required on which specific intent the actor had?

The analysis performed by the court below shines a light on the unansweredness of the question, "what are elements, and what are manners?":

> The requirement of jury unanimity is not violated by a charge which presents the jury with the option of choosing among various methods of committing the statutorily[ ]defined offense. *Jourdan v. State*, 428 S.W.3d 86, 94 (Tex. Crim. App. 2014); *Francis v. State*, 36 S.W.3d 121, 124 (Tex. Crim. App. 2000). When the jury is presented alternate means of committing an offense in the disjunctive, it is appropriate for the jury to return a general verdict for that offense if the evidence supports a conviction under any one of them. *Kitchens v. State*, 823 S.W.3d [sic] 256, 258 (Tex. Crim. App. 1991).

Opinion Below at 14.

Jourdan is genuinely a *means* case—the statute forbade penetration by any "means"; the indictment alleged two different nonstatutory means,[1] "with his finger" and "with his penis," which were not in the statute, and therefore were not even arguably elements. *Jourdan v. State*, 428 S.W.3d 86, **94** (Tex. Crim. App. 2014).

In *Francis*, the two alleged acts—touching the victim's breast, and touching the victim's genitals—occurred on separate dates. Unanimity was required not because either manner was an element, but because each was a separate event. *Francis v. State*, 36 S.W.3d 121, **124** (Tex. Crim. App. 2000).

Kitchens involved allegations of separate capital-murder aggravating circumstances. *See Kitchens v. State*, 823 S.W.2d 256, **257** fn.1 (Tex. Crim. App. 1991) (describing allegations).

> A person commits an offense if he commits murder as defined under Section 19.02(b)(1) and:
>
> …
>
> (2) the person intentionally commits the murder in the course of committing or attempting to commit … robbery [or] aggravated sexual assault….

---

[1] *Manner* is how the thing was done, *means* the thing used.

Tex. Penal Code § 19.03(a) (Vernon's 1991). "In the course of" introduces a "circumstances surrounding the conduct" element of an offense. *See, e.g., Ash v. State*, 930 S.W.2d 192, 195 (Tex. App.—Dallas 1996, no pet.) ("in the course of committing theft").

While there is a plausible theory for why the specific felony that underlies a capital murder is not an element on which the jury must be unanimous,[2] *Kitchens* did not analyze this issue. Instead it discussed a) pleading of alternate methods of committing an offense in one indictment; b) conjunctive pleading and disjunctive proof; c) a general verdict; and d) *Schad v. Arizona*, 501 U.S. 624 (1991).

Pleading is not the problem in the present case: A single information may, in separate counts, plead separate offenses. If a single information pleads separate offenses in a single count, the problem may be cured with a jury charge that requires unanimity on one offense or another.

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[2] "In the course of x, y, and z" is an *adverbial phrase*. Under the Eighth Grade Grammar test, x, y, and z are means of committing the offense. Under Penal Code section 1.07(a)(22)'s test, a circumstance surrounding the conduct is not an element. On the other hand, if the Supreme Court's *Alleyne* test truly extends to facts that impose criminal liability, "in the course of committing robbery," and "in the course of committing aggravated sexual assault" are probably elements of distinct offenses.

Mr. Owens's complaint here is not over the pleading, but the jury charge.

Nor is *disjunctive proof* the problem here: If the State pleads that the accused committed crimes X, Y, and Z, but only proves crime Z, the proof is sufficient. Mr. Owens's complaint is not that the jury was permitted to find him guilty on only one of the six[3] different harassment offenses.

A *general verdict* is not the problem here, either: A jury charge may require unanimity on which of several crimes was committed without requiring that the jury specify which it was finding.

And *Schad* does not answer the question here: *Schad* did not address the question, "what are elements?", instead leaving it to the states; that leave-it-to-the-states approach may no longer be viable post *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020)—if unanimity on all elements is required by the Sixth Amendment, then the question, "what are elements" becomes a Sixth Amendment question. *See Edwards v. Vannoy*, 593 U.S. 255, 266 fn.4 (2021) (recognizing *Ramos*'s abrogation of *Schad*).

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[3] Or possibly 42—for each intended effect, there are seven distinct likely effects that might make the conduct criminal.

None of the cases cited by the court below to resolve the elements-or-manners question are anywhere close to the point.

Several statutory methods of committing a named offense may be manners (not requiring unanimity), but they may instead, this Court has recognized, be elements of separate and distinct offenses. *See, e.g., Ngo v. State*, 175 S.W.3d 738 (Tex. Crim. App. 2005) (alternate methods of committing Credit Card Abuse, even in the same subsection, are separate offenses); and *Nawaz v. State*, 663 S.W.3d 739 (Tex. Crim. App. 2022) (each subsection of section 22.04(a) created a distinct offense). Although Mr. Owens briefed it below, the court below did not consider that separate specific intents might be elements of separate and distinct offenses.

The court below did not address this Court's Eighth-Grade Grammar Test for elements, nor the Texas Penal Code's definition of "elements of an offense," which includes both "conduct"—"an act or omission and its accompanying mental state"—and "the required culpability."[4] Tex. Penal Code § 1.07(a)(22), (10). The court below also rejected Mr. Owens's argument that the U.S. Constitution defines

[4] A specific intent is either an accompanying mental state, or the required culpability.

"elements," because that's not *exactly* what *Alleyne v. United States* says. Opinion Below at *6. *Alleyne* dealt specifically with facts that increase punishment. But consider *Apprendi v. New Jersey*, 530 U.S. 466, 502, 506, 512, 518, 521 (2000) (Thomas, J., concurring) (arguing repeatedly that every fact that is a basis for "imposing or increasing" punishment is an "element").

This issue—whether words in a statute are manners of committing one offense, or elements of distinct offenses—is related to one offered to this Court in *Williams v. State*, ___ S.W.3d ___, No. PD-0099-23, 2024 WL 104220, at *3 fn.16 (Tex. Crim. App. Jan. 10, 2024) (motion for rehearing filed). There, the words at issue were acts; here, they are "accompanying mental states" or "required culpabilities."[5] Are they "elements," as the Texas Legislature and this Court and the United States Supreme Court have—all consistent with each other—defined those?

[5] This is unlike statutes in which an offense may be committed with various levels of culpability—intentionally, recklessly, etc.—because while proof of a higher degree of culpability constitutes proof of the lower, Tex. Penal Code § 6.02(e), proof of intent to—for example—*abuse* does not constitute proof of intent to *embarrass*.

Mr. Owens has an opinion, but in seeking discretionary review, Mr. Owens makes no claim beyond "It's a really interesting and important question, and this Court should settle it!"

SECOND ISSUE: HOW ARE AS-APPLIED CHALLENGES TO STATUTES THAT RESTRICT SPEECH TO BE HANDLED?

An "as applied" challenge to the constitutionality of a statute asserts that a statute, even if generally constitutional, operates unconstitutionally as to the claimant because of his particular circumstances. *Faust v. State*, 491 S.W.3d 733, 743 (Tex. Crim. App. 2015). As-applied challenges generally require a fully developed record from a trial. *London v. State*, 490 S.W.3d 503, 507–08 (Tex. Crim. App. 2016).

As the Supreme Court has said, even though a regulation is not specifically addressed to speech or to conduct necessarily associated with speech, applications of that policy "that violate the First Amendment can still be remedied through as-applied litigation." *Virginia v. Hicks*, 539 U.S. 113, 124 (2003); *see also United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012) (rare application of Federal anti-stalking statute that offends the First Amendment "can still be remedied through as-applied litigation").

This Court too has recognized that a statute that is not facially overbroad may, in its application, be void.

> When a statute … proscribes mostly speech that is not protected by the First Amendment but incidentally encompasses unusual situations that are protected by the First Amendment, the correct approach is to uphold the statute against an overbreadth challenge and deal with the unusual situations on an "as applied" basis when they arise.

Ex parte Ingram, 533 S.W.3d 887, 900 (Tex. Crim. App. 2017); *see also Ex parte Jones*, No. PD-0552-18, 2021 WL 2126172, at *17 (Tex. Crim. App. May 26, 2021).

More specifically to the case at bar, "Whether [section 42.07](a)(7) could implicate the First Amendment on an as-applied basis, and, if so, whether such application is permissible under the appropriate standard of scrutiny are questions for another day." *Ex parte Sanders*, 663 S.W.3d 197, 216 (Tex. Crim. App. 2022).

Make this that day.

First subissue: Was section 42.07(a)(7) used to punish the content of Mr. Owens's speech?

"From 1791 to the present … the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has

never included a freedom to disregard these traditional limitations." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (cleaned up)

Just as the first question in a facial-overbreadth challenge is, "does the statute restrict speech based on its content," the first question in an as-applied First Amendment challenge is, "was the statute used to punish speech based on its content?"

In *Sanders* this Court described non-communicative conduct that would violate section 42.07(a)(7):

> And there is no requirement that the data be actually usable. Entirely meaningless data understandable by neither man nor machine could just as well be sent, repeatedly, in a manner reasonably likely to harass, etc., with the specific intent to harass, etc.
>
> * * *
>
> But has anything been inherently expressed by such an act? We think not. There is no likelihood that an observer who views the bare conduct of sending repeated electronic communication would understand any expressive message from this conduct.

Sanders, 663 S.W.3d at 216 (cleaned up). Here, by contrast with that imagined conduct, Mr. Owens's communications were not "meaningless data." Observers—such as the jury—viewing his conduct (as it was presented to the jury) would understand the

expressive messages. *Please see* State's Exhibits 1–16. An as-applied claim is appropriate here. As applied, the statute implicates the First Amendment, because Mr. Owens was punished for his speech.

This Court has not, however, discussed how a trial court should deal with such claims.

Second subissue: Was Mr. Owens's speech integral to criminal conduct?

The court below disposed of Mr. Owens's as-applied unconstitutionality claim briefly: Mr. Owens's speech, it said, was "integral to criminal conduct," so it was "outside the protections of the First Amendment." Opinion Below at *3. That betrayed a misunderstanding of the *speech-integral to criminal conduct* exception to the First Amendment's general protection against content-based restrictions. To be unprotected *speech integral to criminal conduct*, the speech must "further[] some other activity that is a crime." *State v. Doyal*, 589 S.W.3d 136, 143 (Tex. Crim. App. 2019). The argument of the court below that pure speech, not connected to any non-communicative conduct, is *speech integral to criminal conduct* because it is the commission of a notionally valid statute, would eliminate all as-applied First Amendment challenges. But the State is not permitted to

assert that certain words are criminal, and then justify the restriction as constitutional because the words are part of criminal conduct.

Mr. Owens engaged in no activity other than speech that is a crime. His speech could not be "integral to criminal conduct," because aside from his communicative conduct—his speech—Mr. Owens did nothing.

There has been no suggestion that Mr. Owens's speech fell into any other category of unprotected speech. If it was not speech integral to criminal conduct, it was protected speech, and the statute was applied impermissibly to it.

Third subissue: When a notionally valid statute is used to punish speech based on its content, is a defensive instruction on protected speech required?

Most lawyers think that the holding in *Miller v. California* is that the test for unprotected obscenity is

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973) (cleaned up).

Not so. The holding in *Miller* is that these three factors must be basic guidelines for the trier of fact in an obscenity statute. *Id.* That is, the *Miller* test is not a test for *obscenity*, but a test for the validity of *restrictions* on obscenity. The importance of this distinction, for the present case, is that the unprotected nature of speech is a matter for the trier of fact—in a jury trial, for the jury.

Similarly, in true threats cases, "whether a defendant's statement is a true threat or mere political speech is a question for the jury." *United States v. Viefhaus*, 168 F.3d 392, 397 (10th Cir. 1999).[6]

Obscenity and true threats are specific examples of a general principle that logically extends to all categories of unprotected speech: When speech is punishable because of its content, the fact finder must determine whether it falls into an unprotected category.

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[6] This is not a disputed position. *See Garcia v. State*, 583 S.W.3d 170, 177 (Tex. App—Dallas 2018, pet. ref'd) ("Generally, whether appellant's statements were or were not "true threats" is a fact question for the trier of fact"); *United States v. Voneida*, 337 Fed. Appx. 246, 249 (3d Cir. 2009) (the existence of a true threat is a question best left to a jury); *Planned Parenthood of Columbia/Willamette v. American Coalition of Life Activists*, 290 F.3d 1058, 1069 (9th Cir. 2002) ("it is a jury question whether actions and communications are clearly outside the ambit of first amendment protection"); *United States v. Roberts*, 915 F.2d 889, 891 (4th Cir. 1990) (whether or not a threat is true is a jury question).

Appellate courts independently review jury determinations that speech is unprotected by the First Amendment "both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits," *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 505 (1984), but the determination is *initially* for the trier of fact. For a conviction for speech to stand, the jury and the appellate courts must agree that the speech is unprotected—that it falls within one of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Stevens*, 559 U.S. at 468–69.

Four state high courts agree that whether speech is unprotected is a jury issue—that the trial court was required to instruct the jury on the difference between protected and unprotected speech:

- Massachusetts (criminal harassment), *Com. v. Bigelow*, 59 N.E.3d 1105, 1119 (Mass. 2016). There, failure to instruct the jury was harmful error even though (unlike here) not objected to.
- Connecticut (harassment), *State v. Moulton*, 78 A.3d 55, 71-72 (Conn. 2013).
- Washington (harassment), *State v. Schaler*, 236 P.3d 858, 865 (Wash. 2010) ("manifest error," properly addressed for the first time on appeal).

- Wisconsin (threatening a judge), *State v. Perkins*, 626 N.W.2d 762, 772–73 (Wis. 2001) (postconviction relief based on unobjected-to-at-tria jury charge that did not limit the defendant's liability to true threats).

While this is a novel issue in Texas, all other authorities point to a rule that, even where a harassment statute forbids nonspeech conduct as well as speech, if the State relies on the content of a communication as evidence of a violation of the statute, the jury must be instructed on the category of unprotected speech into which the State contends the speech falls, and must be told to find the defendant not guilty unless it concludes beyond a reasonable doubt that the speech falls into that category.

THIRD ISSUE: IS SECTION 42.07(A)(7) FACIALLY OVERBROAD?

Finally, in light of the Supreme Court's opinion in *Counterman v. Colorado*, this Court may want to reconsider its opinions in *Barton* and *Sanders*.

Post *Sanders* the Supreme Court, in *Counterman v. Colorado*, 143 S.Ct. 2106 (2023), considered a statute very like section 42.07(a)(7), and applied First Amendment analysis. The fact that the Court applied First Amendment analysis demonstrates that in the Court's view the

statute implicated the First Amendment. If the Colorado statute implicates the First Amendment, then so does section 42.07(a)(7).

In response to the certiorari petition in *Barton* and *Sanders*, the State argued to the Court that the opinions in those cases, while final and not interlocutory for Texas purposes, were not Supreme Court-final. *Brief in Opposition* of State of Texas in No. 22-430 at 8–15. The State concluded its argument:

> Petitioners will have the opportunity to explain why they are either factually or legally innocent. If they fail to do so, and if the Texas courts interpret the statute in a way that undermines the First Amendment, they can seek relief then. Those contingencies have not materialized, and there is no need for the Court to step in now.

Id. at 32.

The rest of the State's cert-stage argument was a merits argument, *id.* at 15–24, which is not a certworthiness argument. *See* Sup. Ct. R. 10. Nobody but the court can say why a court of discretionary review decides not to exercise its discretion, but the Court's denial of certiorari in *Barton* and *Sanders* is not an indication that it will not grant certiorari in a case in which, like this one, "those contingencies have materialized."

In anticipation of another run at the Supreme Court, Mr. Owens offers this Court another opportunity to write on the facial-overbreadth topic.

Conclusion

Delectable legal issues. How can you resist?

Prayer

For these reasons, Mr. Owens prays that this Court grant discretionary review, order briefing and oral argument, and reverse the decision of the Amarillo Court of Appeals, remanding the case to that court or, because the statute is void as applied, rendering a judgment of acquittal.

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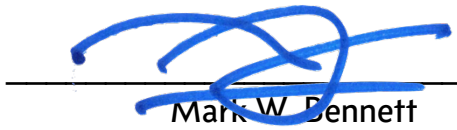
Certificate of Service

A true and correct copy of this Petition for Discretionary Review was served on counsel for the State via electronic service through the Texas

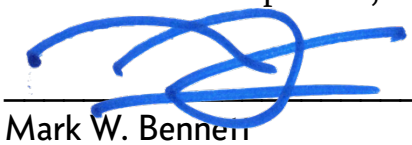
e-filing manager on the same date as the original was electronically filed with the Clerk of this Court.



Mark W. Bennett
Attorney for Petitioner

Certificate of Compliance

According to Microsoft Word's word count, this petition contains 3,113 words, not including the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.



Mark W. Bennett
Attorney for Petitioner

Appendix

Tab A — Opinion of the Seventh Court of Appeals in Cause No. 07-23-00115-CR

2024 WL 81583
Only the Westlaw citation is currently available.
SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.
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Court of Appeals of Texas, Amarillo.

Kevin J. OWENS, Appellant
v.
The STATE of Texas, Appellee

No. 07-23-00115-CR
|
January 5, 2024

On Appeal from County Court at Law Number 11, Bexar County, Texas, Trial Court No. 603172, Honorable Erica Pena, Presiding

Attorneys and Law Firms

Clay Nelson, Eric R. Rodriguez, Stephanie Paulissen, for Appellee.

Mark W. Bennett, Alex Joseph Scharff, for Appellant.

Before QUINN, C.J., and DOSS and YARBROUGH, JJ.

MEMORANDUM OPINION

Alex Yarbrough, Justice

***1** Following a plea of not guilty, Appellant, Kevin J. Owens, was convicted by a jury of harassment, sentenced to six months in jail, and assessed a $500 fine.[1] He challenges his conviction by seven issues as follows:[2]

1. The trial court erred in holding section 42.07(a)(7) of the Penal Code is constitutional on its face.

2. The evidence is insufficient to show a harassing manner of communication.

3. The trial court erred in holding section 42.07(a)(7) was constitutionally applied to him.

4. The trial court erred by admitting evidence of the content of his communications.

5. The trial court erred in failing to instruct the jury that it is a defense to harassment if the person's speech is constitutionally protected.

6. The evidence was insufficient to show that his communications were unprotected speech.

7. The jury charge, which allowed a non-unanimous verdict on two

elements of the offense, constituted structural error.

We affirm.

1 Tex. Penal Code Ann. § 42.07(a)(7).

2 Originally appealed to the Fourth Court of Appeals, this appeal was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. Tex. Gov't Code Ann. § 73.001. Should a conflict exist between precedent of the Fourth Court of Appeals and this Court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. Tex. R. App. P. 41.3.

Background

In 2016, Dr. Lindsay Bira began her private practice as a psychologist. Appellant reached out to her by email seeking therapy following a divorce. After eleven weekly in-person sessions, Appellant terminated the professional relationship. A year and a half later, in May 2018, Appellant began expressing his dissatisfaction with Dr. Bira's treatment of him by sending her emails, text messages, and a Facebook message demanding a refund of $1,785.[3]

3 He accused Dr. Bira of exploiting him, abusing him, abandoning him, raping him, tricking him, and cheating him. He referred to her as a "shitty therapist." He also referred to her as "eye candy" and insinuated she was a prostitute.

Dr. Bira was the sole witness at trial. She testified that during Appellant's third session, he indicated he was not benefitting from therapy but continued with more sessions. Dr. Bira testified she became uncomfortable in future sessions by things revealed by Appellant. She described his behavior as hostile, and she consulted colleagues on how to best terminate the relationship and refer him to another psychologist. Appellant refused a referral. He subsequently canceled all future sessions and emailed her to never contact him again.

The trial court admitted, over various objections by the defense, sixteen exhibits offered by the State. Those exhibits consisted of twenty-five emails,

three text messages, and one Facebook message spanning from May 13, 2018, through July 16, 2018. Although Appellant sought a refund of fees for his treatment, the messages contained hostile accusations and profane language. Dr. Bira reported the messages to the San Antonio Police Department and Appellant was eventually charged by information with two counts of harassment for sending repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend Dr. Bira. Following his conviction on both counts, he pursued this appeal.

Issues One and Three—Constitutionality of Section 42.07(a)(7)

***2** Appellant contends section 42.07(a)(7) is facially unconstitutional (issue one) and also unconstitutional as applied to him (issue three). We disagree.

The constitutionality of a criminal statute is a question of law we review de novo. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). Our review of a statute's constitutionality presumes the statute is valid and that the Legislature was neither unreasonable nor arbitrary in enacting it. Tex. Gov't Code Ann. § 311.021; *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 701 (Tex. 2014).

Facial Challenge

Section 42.07(a)(7) criminalizes the sending of repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another. Tex. Penal Code Ann. § 42.07(a)(7). The Court of Criminal appeals reaffirmed that a prior version of the electronic harassment statute was not facially unconstitutional and did not violate First Amendment protections because it prohibits non-speech conduct. *See Ex parte Sanders*, 663 S.W.3d 197, 215–16 (Tex. Crim. App. 2022). *See also Ex parte Barton*, 662 S.W.3d 876, 884–85 (Tex. Crim. App. 2022). The Court, however, deferred a decision on an "as applied" challenge until a proper case presented itself. *Ex parte Barton*, 662 S.W.3d at 885.

While Appellant acknowledges those decisions, he advances his arguments based on the United States Supreme Court's decision in *Counterman v. Colorado*, 600 U.S. ——, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023). He contends *Counterman* casts doubt on *Ex parte Sanders.* He also claims appeals are pending in the Court of Criminal Appeals which may involve revisiting the decision in *Ex parte Sanders.* Finally, he posits the reasoning in *Ex parte Sanders* is incorrect.

In *Counterman*, which involved thousands of Facebook posts, the United States Supreme Court vacated a stalking conviction and held that in "true threat" cases which are outside the bounds of First Amendment protection, the State must prove the defendant had some subjective understanding of the threatening nature of his statements, but the First Amendment requires no more demanding a showing than recklessness. 143 S. Ct. at 2112. The Colorado statute at issue criminalized "any form of communication" whereas section 42.07(a)(7) of the Penal Code does not. The United States Supreme Court did not address whether the proscribed conduct was "speech" for purposes of the First Amendment.

The Fourteenth Court of Appeals recently addressed *Counterman* in an electronic harassment case and found the United States Supreme Court did not specifically examine whether the elements of the harassment statute were noncommunicative as the Court of Criminal Appeals has held in both *Ex parte Sanders* and *Ex parte Barton. See Ex parte Ordonez*, No. 14-19-01005-CR, 2023 Tex. App. LEXIS 5389, at *10–11 (Tex. App.—Houston [14th Dist.] July 25, 2023, no pet. h.) (mem. op., not designated for publication). The Fourteenth Court of Appeals found *Counterman* did not alter its analysis of the Texas harassment statute. *Id.*

While *Ex parte Sanders* is still good law, this Court is bound to follow it. *See Gardner v. State*, 478 S.W.3d 142, 147 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). *See also Mitschke v. Borromeo*, 645 S.W.3d 251, 256 (Tex. 2022) (recognizing the principles of *stare decisis*). The transferor court has also held that section 42.07(a)(7) is constitutional. *See Lebo v. State*, 474 S.W.3d 402, 408 (Tex. App.—San Antonio 2015, pet. ref'd).[4] Lebo was charged with harassment through repeated electronic communications, specifically sending repetitive "threatening and combative" emails to a police detective. *Id.* at 404. The Fourth Court of Appeals relied on *Scott v. State*,

322 S.W.3d 662 (Tex. Crim. App. 2010), *disavowed on other grounds, Wilson v. State*, 448 S.W.3d 418, 423 (Tex. Crim. App. 2014). *Scott* held the telephone harassment portion of section 42.07 did not implicate the First Amendment's guarantee of free speech. *Lebo*, 474 S.W.3d at 407. *Lebo* applied the analysis in *Scott* to section 42.07(a)(7) and noted that any difference in text is "inconsequential to the First Amendment analysis." *Id.* at 407. *Scott* acknowledged the First Amendment's free speech protections but concluded the State "may lawfully proscribe communicative conduct ... that invades the substantial privacy interests of another in an essentially intolerable manner." *Scott*, 322 S.W.3d at 668–69. The *Lebo* Court noted that as with *Scott* and the telephone harassment statute, repeated emails made with the specific intent to inflict one of the designated types of emotional distress listed in the statute "for its own sake" invade the substantial privacy interests of the victim in "an essentially intolerable manner." 474 S.W.3d at 408 (quoting *Scott*, 322 S.W.3d at 670). The *Lebo* Court held section 42.07(a)(7) does not implicate protected speech under the First Amendment. 474 S.W.3d at 408.

4 Other courts of appeal have affirmed the constitutionality of section 42.07(a)(7). *State v. Grohn*, 612 S.W.3d 78, 81–82 (Tex. App.—Beaumont 2020, pet. ref'd); *Ex parte McDonald*, 606 S.W.3d 856, 859–62 (Tex. App.—Austin 2020, no pet.); *Tarkington v. State*, No. 12-19-00078-CR, 2020 Tex. App. LEXIS 2254, at *8–9 (Tex. App.—Tyler Mar. 18, 2020, no pet.) (mem. op., not designated for publication); *Ex parte Hinojos*, No. 08-17-00077-CR, 2018 Tex. App. LEXIS 10530, at *14 (Tex. App.—El Paso Dec. 19, 2018, pet. ref'd) (mem. op., not designated for publication); *Ex parte Reece*, No. 11-16-00196-CR, 2016 Tex. App. LEXIS 12649, at *7 (Tex. App.—Eastland Nov. 30, 2016, pet. ref'd) (mem. op., not designated for publication); *Blanchard v. State*, No. 03-16-00014-CR, 2016 Tex. App. LEXIS 5793, at *7–8 (Tex. App.—Austin June 2, 2016, pet. ref'd) (mem. op., not designated for publication); *Duran v. State*, Nos. 13-11-00205-CR, 13-11-00218-CR, 2012 Tex. App. LEXIS 7110, at *7–8 (Tex. App.—Corpus Christi Aug. 23, 2012, pet. ref'd) (mem. op., not designated for publication).

***3** Additionally, the gravamen of section 42.07(a)(7) is the sending of repeated electronic communications intended to elicit the sentiments described in the statute. *Ex parte Sanders*, 663 S.W.3d at 215. The prohibited conduct is noncommunicative and such non-speech conduct does not suddenly implicate First Amendment scrutiny. *Id. See Ex parte Ordonez*, 2023 Tex. App. LEXIS 5389, at *7–8 (concluding the 2017 version of the electronic harassment statute did not alter the gravamen of the offense and as with earlier versions of the statute analyzed in *Ex parte Sanders* and *Ex parte Barton*, the First Amendment is not implicated). Thus, section 42.07(a)(7)

passes muster when faced with a challenge that the statute is unconstitutional on its face. *See generally* Ex parte Moy, 523 S.W.3d 830, 836 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (holding statute criminalizing online solicitation of a minor regulates conduct and unprotected speech and is therefore constitutional).

In the underlying case, Appellant's conduct of sending repeated emails and texts invaded Dr. Bira's privacy interests. Dr. Bira testified some of the emails were lengthy and included details of her personal life. He made accusations in some of the emails which are intolerable in any situation including a health provider/patient relationship. In seeking a refund of the fees he paid, he accused Dr. Bira of being a prostitute and alleged she exploited, abused, and raped him. Appellant's communications were intended to inflict the types of emotional distress addressed in the statute. Appellant's facial constitutional challenge fails. Issue one is overruled.

"As Applied" Challenge

An "as applied" challenge asserts a statute, while generally constitutional, operates unconstitutionally as to the claimant who raises the issue because of his particular circumstances. *Rivera*, 445 S.W.3d at 702. A litigant who raises an "as applied" challenge concedes a statute's general constitutionality. *City of Corpus Christi v. PUC of Tex.*, 51 S.W.3d 231, 241 (Tex. 2001).

Here, Appellant does not concede section 42.07(a)(7) is constitutional as demonstrated by his first issue. Nevertheless, he complains he is being punished by the content of his messages because they caused Dr. Bira to feel harassed. We disagree. As noted by *Ex parte Sanders*, words can be used to commit the offense, but the conduct prohibited by the statute is distinct from recognized categories of expressive conduct. *Ex parte Sanders*, 663 S.W.3d at 213. This Court has acknowledged that any speech affected by a statute that is integral to criminal conduct is not protected by the First Amendment. *Ex parte Claycomb*, 657 S.W.3d 850, 855 (Tex. App.—Amarillo 2022, pet. ref'd) (applying *Ex parte Sanders* and *Ex parte Barton* to analyze statute criminalizing online impersonation). Because the words used to harass Dr. Bira are outside the protections of the First Amendment, Appellant has not shown that section 42.07(a)(7) operates unconstitutionally as applied to his

circumstances. Nor has he overcome the presumption of the statute's constitutionality. *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002). Thus his "as applied" challenge also fails. Issue three is overruled.

Issue Two—Sufficiency of the Evidence

Appellant contends the evidence is insufficient to show he sent the messages in a harassing, annoying, alarming, abusive, tormenting, embarrassing, or offensive manner. We disagree.

The only standard a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt is the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *See Adames v. State*, 353 S.W.3d 854, 859 (Tex. Crim. App. 2011); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). We consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, any rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017).

***4** The State was required to show Appellant sent repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend Dr. Bira. Tex. Penal Code Ann. § 42.07(a)(7). "Electronic communication" includes emails, cellular phone calls, and text messages. § 42.07(b)(1). "Repeated" has been interpreted as "at a minimum, 'recurrent' action or action occurring 'again.' " *Ex parte Barton*, 662 S.W.3d at 882 (citing *Wilson*, 448 S.W.3d at 423).

Appellant does not dispute he repeatedly sent messages, which is the gravamen of the statute. *Ex parte Sanders*, 663 S.W.3d at 215. Rather, he argues the evidence does not show he did so in any of the *manners* described by section 42.07(a)(7). Within a short time period between May 13, 2018, and July 16, 2018, he sent more than two dozen communications to Dr. Bira. On some days, he would send multiple communications. His communications also included texts and he created a fake Facebook account

to message her. She blocked all "Kevin Owens" on social media.

Dr. Bira testified Appellant's communications sickened her, scared her, and terrified her. As the communications escalated, she felt harassed, tortured, threatened, and also worried about her safety. She also described being embarrassed by the communications. During cross-examination, when asked if anyone can file a complaint against a psychologist, she answered without objection "I had enough evidence that he was harassing me." Dr. Bira's testimony provided sufficient evidence of Appellant's intent to inflict several types of emotional distress listed in the statute by his repeated communications. Issue two is overruled.

Issue Four—Error in Admission of Content of Messages

Appellant maintains the trial court erred in admitting the content of his messages because the harassment statute does not depend on what the communications are and doing so allowed the jury to improperly convict him based on that content. Relying on Rule 401 of the Texas Rules of Appellate Procedure, here, he maintains the content was not relevant. The State asserts his relevance argument was not preserved for appellate review. We agree with the State.

Appellant made numerous objections at trial and was granted a running objection to admission of the content of his messages as protected speech under the First Amendment.[5] However, Appellant made no relevant objections regarding the content of the messages. Thus, Appellant's argument on appeal raising relevance does not comport with the objections raised during trial. *See* *Hallmark v. State*, 541 S.W.3d 167, 171 (Tex. Crim. App. 2017); *Moreno v. State*, No. 04-19-00280-CR, 2020 Tex. App. LEXIS 4645, at *16 (Tex. App.—San Antonio June 24, 2020, pet. ref'd). As such, his complaint of error by the trial court in admitting the content of his messages was not preserved for review. Issue four is overruled.

5 The only relevance objections raised during trial were in response to the complainant's testimony on the meaning of the term "incel" and how one of Appellant's messages made her feel, to which she answered, "it's irrelevant."

Issue Five—Failing to Instruct the Jury on Requested Defensive Issue

Appellant contends the trial court should have instructed the jury that it is a defense to harassment if the actor's speech is constitutionally protected. We disagree.

During the charge conference, defense counsel requested the following defensive instruction:

> ***5** It is a defense to the crime of harassment if a person's speech falls into one of the recognized categories of historically protected speech. As a general matter, the First Amendment means the government has no power to restrict expression, because of the message, its ideas, the subject matter, or its content and as a result, the United States Constitution demands that content-based restrictions on speech be presumed invalid and that the government bear the burden of showing their constitutionality. Therefore, if you find that the speech of [Appellant] falls into a recognized category of historically protected speech, you must find [Appellant] not guilty.

The trial court denied the requested instruction.

On appeal, Appellant concedes the requested instruction was not "perfect" and also concedes it is not a defense to harassment that speech is *protected.* Here, he attempts to rewrite the requested instruction to recite that it should have been "unless you find that the speech of [Appellant] falls into a recognized category of historically *unprotected* speech, you must find [Appellant] not guilty." He contends the instruction requested during the charge conference "was close enough to notify the trial court of the problem" and the denial of the instruction caused him egregious harm.

To avoid procedural default, all a party is required to do is "let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." *Resendez v. State*, 306 S.W.3d 308, 312–13 (Tex. Crim. App. 2009). Assuming for the sake of argument that Appellant did preserve his complaint, we nevertheless find the trial court's denial of the requested instruction was not erroneous.

Relying on four cases from other jurisdictions outside Texas, Appellant contends he was egregiously harmed because the trial court's failure to instruct the jury as he requested allowed him to be punished for the content of his communications rather than for his conduct. As succinctly pointed out by the State, Appellant's argument fails because the Texas Court of Criminal Appeals has held in *Ex parte Sanders* and *Ex parte Barton* that section 42.07(a)(7) does not implicate the First Amendment. Those cases are the precedent this Court must follow. Also, Appellant was not entitled to the requested instruction because the Texas Penal Code does not provide a statutory First Amendment defense to harassment. *See Walters v. State*, 247 S.W.3d 204, 211 (Tex. Crim. App. 2007) (holding there is no right to a defendant's requested jury instruction not found in the Penal Code).[6] Issue five is overruled.

6 Appellant's argument would have increased the State's burden of proof by adding the additional element of requiring a jury to find Appellant's speech fell into a historically recognized category of unprotected speech. The harassment statute does not require such proof.

Issue Six—Insufficiency of the Evidence to Show Communications Were Unprotected Speech

Appellant contends the State did not present any evidence of the categories of unprotected speech i.e., obscenity, child pornography, fraud, defamation, etc., and thus, the State failed "to prove the 'unprotected speech' element of a hypothetically correct jury charge." We disagree.

As clarified in our analysis of issue five, the State was not required to prove Appellant's speech fell into a historically recognized category of unprotected speech. Thus, a hypothetically correct jury charge would not have included such an instruction. We need not address the sufficiency of the evidence of an element that is not required by the harassment statute. Issue six is overruled.

Issue Seven—Jury Charge Error Allowed a Non-Unanimous Verdict

***6** Appellant contends the charge did not require the jury to agree on the specific intents listed in section 42.07(a)(7). He contends the erroneous charge constitutes structural error which defies a harm analysis. We disagree.

Appellate review of claimed jury-charge error involves a two-step process. *See* Cortez v. State, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015). *See also* Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). A reviewing court must initially determine whether charge error occurred. Price v. State, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015). If an appellate court finds charge error, the next step requires the reviewing court to analyze that error for harm. Kirsch v. State, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). If no error is found, a reviewing court need not engage in the second step. *Allen v. State*, No. 07-22-00146-CR, 2023 Tex. App. LEXIS 5190, at *8 (Tex. App.—Amarillo June 30, 2023, pet. ref'd) (mem. op., not designated for publication).

The gravamen of section 42.07(a)(7) is the sending of repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend. *Ex parte Sanders*, 663 S.W.3d at 215. As such, the statute describes a nature-of-conduct offense. Price v. State, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015). *Ex parte Sanders* held the conduct of sending repeated electronic communications proscribes non-speech conduct and does not implicate the protections of the First Amendment.[7] 663 S.W.3d at 216.

7 Appellant asserts *Ex parte Sanders* was wrongly decided. For purposes of this opinion, *Ex parte Sanders* is precedent from a higher court we are obligated to follow under the doctrine of *stare decisis. See* Gutierrez v. State, 663 S.W.3d 128, 132 (Tex. Crim. App. 2022).

Texas requires that a jury reach a unanimous verdict about the specific crime the defendant committed. O'Brien v. State, 544 S.W.3d 376, 382 (Tex. Crim. App. 2018). But the jury does not have to find the defendant committed that crime in one specific way. *Id.* The requirement of jury unanimity is not violated by a charge which presents the jury with the option of choosing among various methods of committing the statutorily-defined offense. Jourdan v. State, 428 S.W.3d 86, 94 (Tex. Crim. App. 2014); Francis v. State, 36 S.W.3d 121, 124 (Tex. Crim. App. 2000). When the jury is presented alternate means of committing an offense in the disjunctive, it is appropriate for the jury to return a general verdict for that offense if the evidence supports a conviction under any one of them. *Kitchens v. State*, 823 S.W.3d 256, 258 (Tex. Crim. App. 1991).

In support of his argument of structural jury charge error, Appellant relies on *Alleyne v. United States*, 570 U.S. 99, 102–18, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). *Alleyne* held that facts which increase a federal mandatory minimum sentence are elements which must be submitted to a jury. 570 U.S. at 103–04. The State asserts Appellant's reliance on *Alleyne* is misplaced and we agree. The Texas harassment statute provides for proof of intent by different methods which do not constitute elements of the offense because they do not increase a mandatory minimum sentence or decrease a mandatory maximum sentence. They are merely alternate means of committing harassment for which jury unanimity is not required. *Francis*, 36 S.W.3d at 124.

***7** Here, the charge submitted to the jury did not violate the requirement of jury unanimity because there was no risk Appellant was convicted of different offenses. Thus, the charge submitted to the jury was not erroneous. Having found no error, we need not address the second step of the *Almanza* analysis. Issue seven is overruled.

Conclusion

The trial court's judgment is affirmed.

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