No. _____

In The

Supreme Court of the United States

ELISA MERRILL WILSON,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The First District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Wilson was convicted under the Texas harassment statute while it was governed by an opinion from the Court of Criminal Appeals that narrowly defined a key phrase. After Wilson pursued her appeal to acquittal in the Court of Appeals based on the narrow definition, the Court of Criminal Appeals abrogated its prior decision and broadened the definition such that the evidence was legally sufficient. At that point Wilson raised vagueness and overbreadth challenges to the statute, but the Court of Appeals and the Court of Criminal Appeals refused to address the challenges as untimely.

Does it violate due process for a state appellate court to prevent an appellant from raising a First Amendment challenge late in an appeal, but when the opportunity first arises?

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The opinion of acquittal from the Court of Appeals for the First District of Texas is reported at *Wilson v. State*, 431 S.W.3d 92 (Tex. App. – Houston [1st Dist.] 2013). This opinion is reproduced at Appendix 51-58.

The Texas Court of Criminal Appeals reversed and rendered the acquittal and remanded as to the remaining issues not reached by the Court of Appeals. The majority and concurring opinions, and the opinion dissenting to the denial of the motion for rehearing, are reported at *State v. Wilson*, 448 S.W.3d 418 (Tex. Crim. App. 2014). Those opinions are reproduced at Appendix 26-41 (majority opinion), 41-50 (concurring opinions), and 59-62 (dissenting opinion).

The opinion on remand from the Court of Appeals affirming Wilson's conviction is reported at *Wilson v. State*, No. 01-11-01125-CR, 2015WL1501812 (Tex. App. – Houston [1st Dist.], March 31, 2015). Wilson filed a petition for discretionary review in the Court of Criminal Appeals. The refusal of the petition by eight justices and the notation by one justice to grant Wilson's petition for discretionary review are not reported; they are reprinted in the Appendix at 65.

JURISDICTION

The judgment of the Court of Appeals for the First District of Texas sought to be reviewed was

entered on March 31, 2015. A motion for rehearing was filed on April 14, 2015, and was denied on April 30, 2015 (App. 63). A petition for discretionary review was refused by the Texas Court of Criminal Appeals on September 16, 2015 (App. 65).

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment

Congress shall make no law . . . abridging the freedom of speech, or of the press; of the right of the people to peaceably assemble. . . . U.S. CONST., amend. I.

Fifth Amendment

No person shall be . . . deprived of life, liberty, or property, without due process of law. . . . U.S. CONST., amend. V.

Fourteenth Amendment

No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . U.S. CONST., amend. XIV.

Tex. Penal Code § 42.07(a)(4)

A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass

another, he . . . makes repeated telephone communications . . . in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another. TEX. PENAL CODE § 42.07(a)(4).

STATEMENT OF THE CASE

Wilson was charged by information under section 42.07(a)(4) of the Texas Penal Code with the offense of telephone harassment; the information alleges that,

> on or about April 6, 2009, thr[ough] March 3, 2010, [Wilson] did then and there, with intent to harass, annoy, alarm, abuse, torment or embarrass Nicole Bailey, make repeated telephone communications to Nicole Bailey in a manner reasonably likely to harass or annoy or alarm or abuse or torment or embarrass or offend the said Nicole Bailey.

Memo. Op., App. 2; *see* TEX. PENAL CODE § 42.07(a)(4).

After the State presented its evidence to the jury, Wilson moved to dismiss the charge against her, arguing that section 42.07(a)(4) *as applied* to her violated her First Amendment rights. Memo. Op., App. 24-25; 2 RR 62-63; 5 RR 14, 18. (She did not argue in the trial court that the statute was vague or overbroad *on its face*.) The trial court denied the motion and the jury returned a guilty verdict. In the Court of Appeals for the First District of Texas, Wilson argued that she should be acquitted because the

evidence was legally insufficient to support the conviction; alternatively, she argued that she should be granted a new trial because of errors regarding the jury charge and evidence rulings. Memo. Op., App. 1-2. (She did not raise the as-applied or on-its-face challenges in her initial briefs filed in the Court of Appeals.) *Id.* App. 21-22.

All of Wilson's arguments were based on *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010), which, at the time of her conviction, was the relevant authority interpreting section 42.07(a)(4). *Scott* held that "repeated telephone communications" meant "more than one telephone call in close enough proximity to properly be termed a single episode." *Id*. at 669 n.12. Based on this holding, Wilson argued that the evidence was legally insufficient to support her conviction because her telephone calls, being more than thirty days apart, were not in close enough proximity to properly be termed a single episode. *Wilson v. State*, 431 S.W.3d 92, 94 (Tex. App. – Houston [1st Dist.] 2013). App. 51-52, 56-57. The Court of Appeals, also relying on the *Scott* interpretation of section 42.07(a)(4), agreed with Wilson and held that, because the calls were not made within a thirty-day period of each other, there was legally insufficient evidence to sustain the conviction. *Id*. at 96 (*citing Scott*). App. 55. The Court of Appeals therefore acquitted Wilson without reaching her jury charge and evidence complaints. *Id*. App. 57-58.

On the State's petition for discretionary review, the Texas Court of Criminal Appeals reversed the

Court of Appeals' judgment of acquittal by abrogating *Scott* and re-interpreting the meaning of the phrase "repeated telephone communications" contained in section 42.07(a)(4) such that it no longer requires the communications to occur within a certain time frame in relation to one another, and concluding that a facially legitimate reason for the communication does not negate per se an element of the statute. *State v. Wilson*, 448 S.W.3d 418, 422-425 (Tex. Crim. App. 2014). App. 32-40. On rehearing in the Court of Criminal Appeals, Wilson raised for the first time on appeal the vagueness and overbreadth of section 42.07(a)(4) by arguing:

> Under this Court's prior interpretation of the telephonic harassment statute there was no need for Wilson to challenge the vagueness or overbreadth of the statute because, under *Scott*, there was legally insufficient evidence to sustain Wilson's conviction based on the evidence presented at trial. Because of this, Wilson pursued her defense in the trial court and on appeal on the basis of insufficiency, without making the unnecessary and, under *Scott*, unviable argument that the statute was vague or subject to an overbreadth challenge. The court of appeals agreed with Wilson that the evidence was insufficient under *Scott* and acquitted. This Court, by reinterpreting the language used in the statute, has created a vagueness and overbreadth problem with the statute, which must now be raised by appellant – under the *Scott* interpretation of the statute there was no clear

> vagueness or overbreadth problem, but under the *Wilson* interpretation there is. Namely, that the statute as interpreted by this Court in its opinion reversing the court of appeals' decision to acquit Wilson does not require the telephonic communications to occur within a certain time frame in relation to one another and that a facially legitimate reason for the communications do not negate an element of the statute. This interpretation causes the statute to be vague and overbroad, according to Supreme Court jurisprudence.

See Aplt. M. Reh'g at 4-5 in the Court of Criminal Appeals. App. 61. A majority of justices denied the motion for rehearing without opinion, but Justice Elsa Alcala wrote an opinion in dissent (joined by Justices Cheryl Johnson and Cathy Cochran) noting that, "Because there had been no reason to challenge the vagueness or overbreadth of the telephone harassment statute as this Court had interpreted its requirements in *Scott*, appellant had no reason to assert that challenge until this Court's reformulation of the law in this case." *Wilson*, 448 S.W.3d at 431; App. 60-63. Thus, the Court of Criminal Appeals never reached the merits of Wilson's vagueness and overbreadth arguments.

On remand in the Court of Appeals, Wilson filed a motion for leave to file a supplemental brief, which was granted. App. 64. In the supplemental brief Wilson argued that Texas law does not bar her from raising, for the first time after the *Wilson* opinion, the complaint that section 42.07(a)(4) as re-interpreted

by *Wilson* is vague and overbroad on its face and as applied to the facts of her case. The Court of Appeals disagreed, writing that "well-established error preservation rules requiring that such complaints [*e.g.*, the facial challenge] be made both in the trial court and in the initial briefing on appeal preclude our consideration of these arguments on remand" and therefore "we hold that Wilson waived her facial challenge and thus decline to consider it, because it was first raised in supplemental briefing on remand." Memo. Op., App. 22, 24. In response, Wilson filed a motion for rehearing in the Court of Appeals arguing:

> If it is true that Texas law results in a waiver of the facial challenge complaint in this case by not having raised it before *Scott* was abrogated by *Wilson*, then those Texas waiver rules violate appellant's right to due process under the fifth and fourteenth amendments of the federal constitution. That is, state preservation rules that are so harsh as to violate federal due process are void under the supremacy clause.

The motion for rehearing was denied without opinion App. 63.

Wilson then filed a petition for discretionary review in the Court of Criminal Appeals arguing that if Texas preservation-of-error rules bar her from raising the vagueness and overbreadth challenges to the *Wilson* re-interpretation of section 42.07(a)(4), those rules violate her right to federal due process. Wilson also argued that the *Wilson* re-interpretation

renders section 42.07(a)(4) vague and overbroad on its face and as applied to the facts in her case. The petition was refused without opinion; Justice Alcala would have granted. App. 63.

REASONS FOR GRANTING THE PETITION

Texas applies the universally recognized rule that generally a prerequisite to presenting a complaint on appeal is that it must first be presented to the trial court. *See* TEX. R. APP. P. 33.1(a); TEX. R. EVID. 103(a). A corollary to this rule applied in Texas is that a complaint raised on appeal must be raised in the initial briefs, and not on rehearing. TEX. R. APP. P. 38.3; Memo. Op., App. 22; *Price v. State*, 93 S.W.3d 358, 364-65 (Tex. App. – Houston [14th Dist.] 2002, pet. denied). In this regard, Rule 38.7 of the Texas Rules of Appellate Procedure states that a "brief may be amended or supplemented whenever justice requires, on whatever reasonable terms the court may prescribe." TEX. R. APP. P. 38.7; Memo. Op., App. 22.

Wilson raised in the trial court the as-applied, but not the on-its-face challenge to section 42.07(a)(4). Wilson first raised the as-applied and on-its-face challenges on appeal in a motion for rehearing in the Court of Criminal Appeals after the *Wilson* re-interpretation. Three justices would have allowed her to raise these complaints on rehearing in the Court of Criminal Appeals given that the complaints could not have been made under *Scott*. *Wilson*, 448 S.W.3d at 431. App. 61-62. Wilson again raised the as-applied

and on-its-face complaints on remand to the Court of Appeals. The Court of Appeals refused to address the on-its-face challenge because "it was first raised in supplemental briefing on remand" and refused to address the as-applied challenge because, although first presented in the trial court, "Wilson did not address this preserved challenge in her principal brief" in the Court of Appeals and "[a]s a result, we have no basis for finding that justice requires consideration of this argument now and decline to consider it." App. 24-25. Thus Wilson was procedurally barred by the Texas preservation of error rules from having the merits of her as-applied and on-its-face challenges addressed, even though she raised those complaints when the first opportunity arose; namely, upon issuance of the *Wilson* opinion which gave rise to the vagueness and overbreadth problem with section 42.07(a)(4).

Most jurisdictions employ some mechanism to ameliorate, in appropriate circumstances, the harshness of the preservation rules.[1] Texas law has been eroding away the traditional rules applicable to criminal appeals that could be used in narrow circumstances

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[1] *See, e.g.*, *Brown v. Boren*, 74 Cal. App. 4th 1303, 1316 (1999) ("[W]e have discretion to consider a new theory on appeal when it is purely a matter of applying the law to undisputed facts."); *Greger v. Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006) ("We will exercise our discretion [to consider an issue raised for the first time on appeal] 'when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed.' ") (quoting *Bolker v. C.I.R.*, 760 F.2d 1039, 1042 (9th Cir. 1985)).

to allow for the raising of arguments on appeal that had not been raised in the trial court[2] or that had been raised for the first time in a motion for rehearing.[3] The ruling in this case is the culmination of that erosion. Under the circumstances of Wilson's case, refusal to address her vagueness and overbreadth challenges to section 42.07(a)(4), which first became viable upon issuance of the *Wilson* reinterpretation, violates her right to due process of law because it is so blatantly unreasonable to require her

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[2] *Compare Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009) ("We conclude that a defendant may not raise for the first time on appeal a facial challenge to the constitutionality of a statute.") and at 435 ("I respectfully disagree with the absolutist conclusion 'that a defendant may not raise for the first time on appeal a facial challenge to the constitutionality of a statute.' ") (Cochran, J., concurring, joined by Price, Womack and Johnson, JJ.), *with Rabb v. State*, 730 S.W.2d 751, 752 (Tex. Crim. App. 1987) ("Questions involving the constitutionality of a statute upon which a defendant's conviction is based should be addressed by appellate courts, even when such issues are raised for the first time on appeal.").

[3] *Compare Rochelle v. State*, 791 S.W.2d 121, 124 (Tex. Crim. App. 1990) ("If a party raises a new ground for the first time on motion for rehearing, we believe the clear import of the rules is that the decision of whether to consider that new matter is left to the sound discretion of the appellate court."), *with Wilson*, 448 S.W.3d at 431 (Alcala, J., opinion dissenting to the denial of motion for hearing, joined by Johnson and Cochran, JJ.) (stating the court should allow Wilson to raise vagueness and overbreadth complaints on rehearing because she "did not have a crystal ball to look into the future and see that this Court would reinterpret the telephone harassment statute in her case."). *See also Hughes v. State*, 878 S.W.2d 142, 151 (Tex. App. 1992); *Boyle v. State*, 820 S.W.2d 122, 141 (Tex. Crim. App. 1989).

to have made those arguments earlier. It also is in direct contravention of the opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 144-45 (1967). These circumstances make for compelling reasons to grant this petition.

Wilson relied on the holding in *Scott* that section 42.07(a)(4) requires "repeated telephone communications" to be in close enough proximity to properly be termed a single episode when she formulated her original arguments on appeal. *Scott*, 322 S.W.3d at 669. All of her initial arguments – *e.g.*, sufficiency of the evidence, jury charge and evidence errors – relied exclusively on the *Scott* holding. The Court of Appeals properly founded its first opinion of acquittal on the *Scott* holding, and then did the obvious on remand regarding the jury charge and evidence complaints, which was to overrule the remaining issues because they were also based on *Scott*. *Scott* was of course abrogated by the *Wilson* holding regarding the meaning of the words "repeated telephone communications" contained in section 42.07(a)(4). *Wilson*, 448 S.W.3d at 420 and 424. App. 422-425. The alteration of the law made all of Wilson's arguments on appeal up to that point clear losers because under the *Wilson* reinterpretation the time-frame within which the communications were made and their neutral content become relevant. Thus, there was sufficient evidence, the jury charge was correct, and the evidence surrounding Wilson's conduct and bad relations with the neighbors was relevant. The alteration of the law by the *Wilson* opinion however also opened section

42.07(a)(4) to the challenge that it is vague and overbroad on its face and as applied to the facts of this case because "repeated telephone communications" has, under *Wilson* but not *Scott*, such an open-ended meaning. Under *Scott* the vagueness and overbreadth problems were not present.

With this new legal landscape, Wilson raised the vagueness and overbreadth complaints in her motion for rehearing in the Court of Criminal Appeals because that was the first opportunity that she had to do so. Because the case was remanded to the Court of Appeals, it was plausible that the eight justices that denied the motion for rehearing did so to allow the vagueness and overbreadth issues to be first vetted by the Court of Appeals on remand. Wilson therefore raised those issues in a supplemental brief on remand, which the Court of Appeals allowed to be filed. App. 64. However, the Court of Appeals avoided reaching the merits of those arguments by stating that under Texas preservation of error rules they could not be reached because they had not been raised when the case was first briefed on appeal. In her motion for rehearing in the Court of Appeals and in her petition for discretionary review in the Court of Criminal Appeals, Wilson also argued that avoiding the merits because she did not raise the vagueness and overbreadth complaints before the *Wilson* abrogation of *Scott* violates her right to due process of law. Both courts refused to address the merits of the vagueness and overbreadth complaints because they had not been raised before *Scott* was abrogated.

The Texas courts' avoidance of Wilson's important First Amendment vagueness and overbreadth complaints on state preservation of error grounds directly conflicts with this Court's decisions in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 142-45 (1967) and *Lawrence v. State Commissioner*, 286 U.S. 276, 282 (1932). In *Lawrence*, this Court stated, "Even though the claimed constitutional protection be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided." *Lawrence*, 286 U.S. at 282. In *Curtis Publishing*, the lower courts concluded that one of the defendants had waived his First Amendment complaints by not raising them before trial even though the right upon which those complaints were based were articulated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), an opinion which issued *after the trial* in *Curtis Publishing*, which is the same situation in Wilson's case. 388 U.S. at 142-45. In that regard, this Court said that "the mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground," *id*. at 143, and "[w]e would not hold that Curtis waived a 'known right' before it was aware of the *New York Times* decision" because "Curtis' presentation of the constitutional issue after our decision in *New York Times* was prompt." *Id*. at 145. It was also significant to this Court that the right subjected to waiver was a First Amendment right:

> Finally the constitutional protection which Butts contends that Curtis has waived safeguards a freedom which is the "matrix, the indispensable condition, of nearly every other form of freedom." Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling.

Id. (citations omitted).

Wilson should not be required to have anticipated that section 42.07(a)(4) would be re-interpreted by the Court of Criminal Appeals as a prerequisite to challenging the yet-to-exist re-interpretation later on. *See id*. at 142-45. It would make no sense for Wilson to have argued in her first brief on appeal that under *Scott* there is insufficient evidence, jury charge and evidence errors, but just in case *Scott* is overruled by way of a possible future re-interpretation of section 42.07(a)(2) thus allowing for the record in this case to contain sufficient evidence, and eliminating the jury charge and evidence error, that re-interpretation gives rise to a vagueness and overbreadth challenge which is being raised in advance. *Id*. This speculative argument is what Wilson would have had to lodge under the failure-to-preserve holding if she wanted to have the merits addressed after *Scott* was abrogated by *Wilson* – of course such an argument could not have been addressed before *Scott* was abrogated because the vagueness and overbreadth challenges only alone arose after *Scott* was abrogated. Imposing

this onerous burden on Wilson is contrary to this Court's holding in *Curtis Publishing*.

The rule in Texas as exhibited in this case is that a party must object to an adverse law that does not even exist as a prerequisite to challenging the yet-to-exist law later on. Application of that rule to this case violates federal due process because it is unfair to impose such an impossible burden. *Curtis Publishing*, 388 U.S. at 142-45. When there is a rule, a party is entitled to rely on it without being required to make futuristic ascertainments about the rule's being abrogated. Here, the rule was stated in *Scott*, which Wilson relied on in not pursuing a vagueness and overbreadth argument in the initial appellate briefs. That reliance was well placed because the Court of Appeals also relied on *Scott* by acquitting Wilson. A basic element underlying the criteria of the rule of law is that human actors can fairly comply with the law. If human actors cannot fairly comply with the law, not only does that particular law fail to obey the rule of law, it also calls into question the entire enterprise of law as a set of rules that can and should govern human conduct. For Texas preservation-of-error rules to require inclusion of predictions of how a statute will be re-interpreted violates fundamental notions of rule of law, due process, and the waiver holding in *Curtis Publishing*. 388 U.S. at 142-45.

In short, this Court should grant this petition because application of waiver to Wilson, where she raised the vagueness and overbreadth challenges to section 42.07(a)(4) when the opportunity first arose,

violates her right to due process of law as protected by the Fifth and Fourteenth Amendments.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Court of Appeals for the First District of Texas.

Respectfully submitted,

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Opinion issued March 31, 2015

[SEAL]

In The

Court of Appeals

For The

First District of Texas

NO. 01-11-01125-CR

ELISA MERRILL WILSON, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 2
Fort Bend County, Texas
Trial Court Case No. 10CCR149142

MEMORANDUM OPINION

In 2011, a Fort Bend County jury found Elisa Wilson guilty of telephone harassment, and the trial court assessed punishment of 180 days in jail, probated for 12 months. *See* TEX. PENAL CODE ANN. § 42.07(a)(4) (West Supp. 2014). Wilson appealed her conviction, raising four issues: (1) that the evidence was insufficient to support the conviction; (2) that the trial court erred in rejecting Wilson's proffered jury instruction; (3) that the trial court abused its

discretion in overruling Wilson's objection to the State's extraneous-offense evidence; and (4) that the trial court abused its discretion in excluding proffered defense evidence. On original submission to this court, we found the evidence insufficient and, as a result, reversed. The Court of Criminal Appeals reversed, holding that evidence that Wilson left six telephone messages for Nicole Bailey over a 10-month period supported the statutory requirement of "repeated telephone calls" and that the benign content, or the facially legitimate purpose, of a telephone call does not legally negate the prohibited intent of the call. The Court of Criminal Appeals remanded the case to this Court for consideration of Wilson's jury-charge and evidentiary complaints. Also, Wilson seeks to raise both facial and as-applied First Amendment challenges to the telephone harassment statute in a supplemental brief filed after remand. We affirm.

Background

The information against Wilson charged that, "on or about April 6, 2009 thr[ough] March 3, 2010, [Wilson] did then and there, with intent to harass, annoy, alarm, abuse, torment or embarrass Nicole Bailey, make repeated telephone communications to Nicole Bailey in a manner reasonably likely to harass or annoy or alarm or abuse or torment or embarrass or offend the said Nicole Bailey." The jury heard evidence that Wilson left six telephone messages for Bailey, on April 6, 2009, June 11, 2009, August 31,

2009, September 5, 2009, December 23, 2009, and February 5, 2010. In these messages, Wilson:

- said that she saw a dog in her yard that looked like another neighbor's dog and asked Bailey to let them know that the neighbor could come pick it up if they were missing their dog;
- told Bailey that she did not want Bailey to talk to her or approach her in public ever again;
- referred to an incident that occurred on August 30, 2009, in which Wilson followed Bailey through a grocery store screaming at her; Wilson said that she was caught off guard and thought "it was an attack," and stated that she was calling to say she was sorry;
- complained that the work Bailey was having done on her driveway was against the deed restrictions;
- told Bailey that she saw what looked like cement debris from the driveway job that needed to be cleaned up, and that she was asking her "nicely this time"; and
- reminded Bailey that Wilson had surveillance cameras, told Bailey that she could "come pick up her newspaper," and warned Bailey to leave her alone and not "accost" or "harass" her any more.

The content of Wilson's calls was not overtly harassing. For this reason, the State sought to admit evidence of Wilson's various interactions with Bailey and other neighbors over the course of several years.

Bailey moved into a Fort Bend County subdivision in 2000. She became acquainted with her neighbors, the Wilsons. After Stephanie Ballard and her husband moved into the neighborhood, they all became friends and socialized frequently. Bailey and Wilson developed a close friendship, which they likened to a "mother-daughter" relationship. Ballard and Bailey, who were nearer each other in age, also became close friends.

The first witness to testify at trial was Stephanie Ballard. In December 2004, the Ballards held a Christmas party, which Bailey and the Wilsons attended. The party took on a celebratory tone until the conversation turned to politics. Ballard's husband said something that upset Wilson. She raised her voice, and, using profanity, left abruptly.

The Ballards' relationship with Wilson became strained. When Wilson set off fireworks in early 2005, Ballard, upset that the noise had awakened her toddler, went outside and confronted Wilson. The next day, she went to Wilson's home to discuss the situation, Wilson invited her into her dining room, went into the kitchen, and returned holding a revolver, which she placed on the table pointing toward Ballard. Then, Wilson told Ballard, "If you would like to talk, let's go ahead and talk." Wilson explained to

Ballard her understanding of her legal right to set off fireworks.

After that incident, Wilson set off fireworks with greater frequency, beginning early in the morning and sometimes hourly. Ballard filed a lawsuit in the justice court seeking a "peace bond" to prevent Wilson from setting off fireworks. Bailey agreed to appear at the hearing on Ballard's behalf. The proceeding was unsuccessful; the justice court decided that Wilson was acting within her rights to set off the fireworks.

After the hearing, Wilson became even more hostile to Ballard and turned against Bailey for siding with Ballard. She continued discharging fireworks and made other loud noises with an air horn and her car horn. According to Ballard, Wilson reported child abuse to Children's Protective Services, alleging that Ballard was mentally unstable and that she "was involved in a pornographic pedophile website, that [her] children were being used for a pornographic website of some sort."

In December 2005, the Ballards went to Bailey's home to greet her during the holidays and encountered Wilson, who had also been invited. Wilson leaned toward Ballard's husband to greet him, and he backed away from her. Shortly thereafter, the Ballards received a letter from Wilson's lawyer alleging that Ballard had assaulted Wilson during the incident. Around the same time, the Ballards found nails in their car tires, which they attributed to

Wilson. Ballard testified to various other incidents involving Wilson, including the following:

- When Ballard returned home from the hospital with her second child, she noticed a sign in Wilson's window stating: "Never mind the gun. Beware of the neighbor";
- Wilson took pictures of her and her children when they were out in the front yard;
- Wilson filed a false report with Animal Control that the Ballards allowed their dog to run loose in a rabid state.

Ballard explained that she and her family moved from the neighborhood specifically because of Wilson's behavior toward them. After they moved, Ballard testified, Wilson

- came to Ballard's workplace and told Ballard to stop sending her letters, which Ballard had not sent in the first place;
- told Ballard's boss, "Do you know . . . what kind of person you have working for you?," after which she was dismissed from the premises;
- called Ballard twice on her cell phone in January 2010 and talked about incidents with her (and Ballard's former) neighbors, which Ballard found harassing; and

- came up to the Ballards in a restaurant and told them how much she liked their new house, which unnerved Ballard because she had taken lengths to keep Wilson from knowing her new home's location and Wilson's description indicated that she knew where they lived.

The second witness to testify at trial was Tim Simmons, the neighborhood's representative to the homeowner's association. Simmons related his experience in dealing with Wilson in 2001, when the HOA sought easements from residents to build a community fence around the perimeter. Simmons testified that Wilson agreed to allow the fence to be on her property, but that she resisted signing an easement to the HOA. Simmons also testified to many neighborhood complaints he received about Wilson, including a 2006 complaint from Ballard about Wilson's use of firecrackers, and that the association had received fewer complaints about Ballard and none about Bailey. Simmons recalled that Wilson began screaming at him and his wife at an HOA meeting. In a 2007 election, Wilson's husband ran against Simmons for the neighborhood representative position and lost. The following Halloween, Wilson decorated her fence with a ghoulish figure and put a sign on it with the name "Sam" referring to Simmons's wife.

The third witness was Lisa Decoster, another of Wilson's neighbors. Decoster testified that in 2005 and 2006, she took care of the Wilsons' dog when they were away. She described the Wilson's home as

"unusual," because it had pet feces on the floor and multiple law books on the dining room table. Decoster corroborated Simmons's testimony that Wilson was argumentative at HOA meetings. Decoster also testified Wilson taped a letter on neighborhood doors in November 2007 that talked about Stephanie Ballard in a "negative" and "derogatory" way and had nothing to do with the ongoing HOA election. According to Decoster, Wilson pointed out Bailey's home to her and told her that that Bailey made pornography videos and was a drug dealer.

The first day of trial closed with testimony from Joan Hendricks, another neighbor. Like Ballard and Bailey, Hendricks had been friends with Wilson but was no longer. Hendricks buttressed previous testimony concerning Wilson's behavior, including her propensity to set off fireworks and make other loud noises, her animosity toward Simmons's wife, problems with Wilson's behavior raised at HOA meetings, and Wilson's false assault allegations against Ballard's husband. Hendricks recounted that her friendship with Wilson ended in late 2008. Hendricks had watched the Wilsons' home when they were out of town, and, when the Wilsons returned, Wilson made a police report falsely alleging that Hendricks's daughter had taken Wilson's car for a joyride. Hendricks told the jury that Wilson would throw firecrackers at her husband when he was out or at their cars in the driveway. She also described an incident where she saw Wilson walking in the street with a large kitchen

knife, which, Wilson told her, was to protect herself against loose dogs.

Enrique Ozuna, who married Nicole Bailey in 2011, testified the following morning. He explained that he first encountered Wilson while at the grocery store with Bailey and that Wilson had screamed at them and accused them of being involved in prostitution.

Bailey testified next. She described her circumstances when she moved into the neighborhood and how she became friends with Wilson. She recounted a trip that she took with Wilson to California following the death of Wilson's father, and that Bailey was taken aback at Wilson's confrontations with her former stepmother, whom Wilson accused of having murdered him, and area law enforcement.

Bailey explained that her friendship with Wilson ended when she testified on behalf of the Ballards at the peace bond proceeding. Wilson sued Bailey for negligence under her homeowner's insurance policy based on the December 2005 incident involving Ballard's husband.

Bailey testified that she sent letters to Wilson and her lawyer in April 2006 asking Wilson to stop calling her. According to Bailey, three CPS complaints were made concerning Ballard's children and included allegations that Bailey was using the children for internet pornography. Bailey also described Wilson's 2008 Halloween decorations and the reference to Simmons's wife. According to Bailey, Wilson also

harassed her by calling the police and feigning concern that Bailey was suicidal, which caused the police to visit Bailey's home. Bailey explained the situation to the police, and the police instructed Wilson to stop communicating with Bailey. Wilson retaliated by throwing dog feces into Bailey's yard and throwing fireworks at her car.

Bailey testified to the details of the messages that Bailey left on her telephone answering machine on six occasions – April 6, 2009; June 11, 2009; August 31, 2009; September 5, 2009; December 23, 2009; and February 5, 2010.

Officer Stevenson with the Fort Bend County Sheriff's Department testified about his investigation of the harassment complaint made by Ballard. He learned of Wilson's treatment of Bailey in the course of that investigation, and he recorded Bailey's statement to serve as the basis for her harassment complaint.

Discussion

I. Charge Error

During the charge conference, Wilson asked the trial court to include her proposed definition for "repeated telephone communications" to mean "more than one telephone call in close enough proximity to properly be termed a single episode." The trial court refused the instruction which, Wilson claims, was error.

The trial court must give the jury a written charge that sets forth the law applicable to the case. TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007). We review a claim of jury-charge error using the procedure set out in *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985), which first requires us to determine whether there is error in the charge. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005) (citing *Middleton v. State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003)). Where, as here, the appellant has properly preserved a claim of charge error by an objection or request for instruction, we must reverse if the error is calculated to injure the defendant's rights, that is, if there was "some harm." *Treviño v. State*, 100 S.W.3d 232, 242 (Tex. Crim. App. 2003).

The Court of Criminal Appeals disavowed our reliance on the proffered instruction in overruling Wilson's legal sufficiency challenge. *See State v. Wilson*, 448 S.W.3d 418, 422-23 (Tex. Crim. App. 2014). In the context of Wilson's charge complaint, we look to whether the instruction properly set forth the law applicable to the case.

The Court of Criminal Appeals held that the trial court erred in submitting an instruction purporting to define a statutorily undefined term in *Kirsch v. State*, 357 S.W.3d 645 (Tex. Crim. App. 2012). The defendant was charged with DWI under section 49.04 of the Texas Penal Code, which provides that "[a] person commits an offense if the person is intoxicated while operating a motor vehicle in a public place." TEX. PENAL CODE ANN. § 49.04(a), *quoted in Kirsch*, 357

S.W.3d at 649-50. In that case, the defendant objected to the inclusion in the charge of the definition of "operate" as "to exert personal effort to cause the vehicle to function." The Court looked to the Code Construction Act for guidance, which provides that statutorily undefined words and phrases shall be "construed according to the rules of grammar and common usage." *Kirsch*, 357 S.W.3d at 650 (quoting TEX. GOV'T CODE ANN. § 311.011). Words that have a technical or particular legal meaning may require definition in the charge, but common terms that have not acquired a technical meaning and may be interpreted according to their common usage need not be defined. *Id.*; *see Medford v. State*, 13 S.W.3d 769, 772 (Tex. Crim. App. 2000) (explaining that jurors should be provided uniform definition of statutorily undefined terms like "arrest," which have acquired precise legal meaning).

The Court classified "operate" as a common term subject to interpretation according to its common usage, observing that "nothing in our case law suggests that a risk exists that jurors may arbitrarily apply an inaccurate definition to the term 'operate' or that an express definition is required to assure a fair understanding of the evidence." *Kirsch*, 357 S.W.3d at 650. It concluded that, "[a]lthough the definition set forth in the charge is an appropriate definition for an appellate court to apply in assessing the sufficiency of the evidence to support the 'operate' element, instructing the jurors as to that definition in this case impermissibly guided their understanding of the

term" and improperly focused the jury on certain evidence, making it an improper comment on its weight. *See id.* at 652.

In this case, the Court of Criminal Appeals abrogated earlier caselaw and held that the term "repeated" in the telephone harassment statute "simply speaks in terms of the number of telephone communications, it does not attempt to define the required frequency of the communications or temporal proximity of one communication to another." *Wilson*, 448 S.W.3d at 424. As a common term, the jury was entitled to rely on its understanding of "repeated." *See id.* Thus, similar to the challenged definition in *Kirsch*, the proffered definition would have impermissibly confined the jury's understanding of the term and improperly focused them on the frequency of the calls and the length of time between them, constituting an improper comment on the weight of the evidence. Accordingly, we hold that the trial court correctly rejected the proffered definition. *See Kirsch*, 357 S.W.3d at 652.

II. Evidentiary Complaints

A. Standard of review

We review the trial court's evidentiary rulings for abuse of discretion. *See Layton v. State*, 280 S.W.3d 235, 240 (Tex. Crim. App. 2009); *Montgomery v. State*, 810 S.W.2d 372, 380, 391 (Tex. Crim. App. 1990). A trial court abuses its discretion if its decision is outside the zone of reasonable disagreement or if it

acts without reference to guiding rules or principles. *Burden v. State*, 55 S.W.3d 608, 615 (Tex. Crim. App. 2001); *Montgomery*, 810 S.W.2d at 391. If the ruling was correct under any theory of law applicable to the case, we must uphold the judgment. *Martin v. State*, 173 S.W.3d 463, 467 (Tex. Crim. App. 2005).

B. Admission of extraneous-act evidence

Wilson challenges the trial court's admission of evidence of many incidents demonstrating her problematic and deteriorating behavior in the neighborhood toward various neighbors over a span of several years. Wilson objected to the evidence under Texas Rules of Evidence 403 and 404(b) before and during trial and received running objections to the State's use of the evidence throughout the trial, preserving her challenge for appellate review. *See Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012) (citing TEX. R. APP. P. 33.1(a)(1)(A)).

Rule 404(b) provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." TEX. R. EVID. 404(b). The Supreme Court of the United States has explained that

> Rule 404(b) is rooted in the common-law tradition of disallowing the prosecution for using any evidence of a defendant's evil character to establish probability of his guilt. . . . The state may not show defendant's prior trouble with the law, specific criminal acts, or ill

> name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."

Michelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 218 (1948), *quoted in Old Chief v. United States*, 519 U.S. 172, 182, 117 S. Ct. 644, 650-51 (1997). Rule 404(b) further provides that evidence may be admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." TEX. R. EVID. 404(b); *see Old Chief*, 519 U.S. at 187, 117 S. Ct. at 653. For purposes of justifying the admission of extraneous-offense evidence, intent is a contested issue if the required intent for the primary offense cannot be inferred from the act itself or if the defendant presents evidence to rebut the inference that the required intent existed. *Caro v. State*, 771 S.W.2d 610, 617 (Tex. App. – Dallas 1989, no pet.); *McGee v. State*, 725 S.W.2d 362, 364 (Tex. App. – Houston [14th Dist.] 1987, no pet.).

Wilson complains that the extraneous-offense evidence was inadmissible character-conformity evidence that labeled Wilson as a neighborhood troublemaker who should be convicted for her other bad behavior even if the telephone calls themselves were not

harassing in nature. The State, on the other hand, argues that the extraneous-offense evidence was relevant to prove Wilson's intent to harass – an essential element of the offense – even if the calls otherwise seemed infrequent and innocuous.

In the first appeal, the Court of Criminal Appeals observed that the surrounding facts and circumstances are relevant to the issue of intent. In her concurring opinion in this case, Justice Cochran explained that

> A telephone harassment common plan or scheme might take the form of numerous telephone calls within a short period of time, all relating to a single objective, or they might be calls that are repeated over a long period of time, but still relating to a single objective or goal.
>
> For example, a person might make various unwanted telephone calls, in-person harassing statements, derogatory social-media posts, false reports to the police, animal control, or CPS, and perhaps play practical jokes on the victim – all interspersed over a year or more – with the ultimate goal of publicly humiliating the victim, making that person lose her job, making her move, or literally driving her crazy. The telephone calls might be repeated only three or four times, but, coupled with the evidence of other types of harassment, they are sufficient to prove the person's scheme or plan and his intent to harass the victim.

Wilson, 448 S.W.3d at 429 (Cochran, J., joined by Johnson and Alcala, JJ., concurring). Although Wilson's multiple disparate acts were not similar to the telephone calls on their face, the calls were part of a common scheme or plan to harass. The circumstances surrounding the 2006 peace bond hearing showed Wilson's motive for turning on Bailey, and, in many of the incidents in which Wilson exhibited animosity toward Ballard, it was directed to some extent at Bailey as well. The evidence of Wilson's harassing conduct toward Bailey and Ballard also tends to prove intent.

Even if evidence is admissible under Rule 404(b), it may be inadmissible under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, considerations of undue delay, or needless presentation of cumulative evidence. *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007); *see* TEX. R. EVID. 403. We accord the trial court substantial discretion in balancing the Rule 403 factors, mindful that "the mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred." *Montgomery*, 810 S.W.2d at 380.

Rule 403 favors admissibility of relevant evidence, and the presumption is that generally, relevant evidence will be more probative than unfairly prejudicial. *Id.* Unfair prejudice does not mean the

evidence injures the opponent's case – "the central point of offering evidence." *Rogers v. State*, 991 S.W.2d 263, 266 (Tex. Crim. App. 1999). "Rather[,] it refers to 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Id.* (quoting *Cohn v. State*, 849 S.W.2d 817, 820 (Tex. Crim. App. 1993)).

Although not limited to the following enumerated factors, courts should balance the following factors under a Rule 403 analysis: (1) the probative value of the evidence; (2) the potential of the evidence to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. *Prible v. State*, 175 S.W.3d 724, 733 (Tex. Crim. App. 2005). The trial court is presumed to have conducted the proper balancing test if it overrules a 403 objection, regardless of whether it conducted the test on the record. *See Williams v. State*, 958 S.W.2d 186, 195-96 (Tex. Crim. App. 1997).

The evidence of Bailey's friendship with Wilson, and its ending – due, in substantial part, to Bailey's participation in the Ballards' peace bond hearing, coupled with evidence of Wilson's bad conduct toward Bailey for the years following the hearing – led to their interactions at the time Wilson made the telephone calls. After the peace bond hearing, Wilson perceived Bailey as being aligned with Ballard and against Wilson. As a result, this evidence is probative of Wilson's intent to harass Bailey.

We do not reach the question of whether the trial court erred in admitting the remaining extraneous-acts evidence – involving Wilson's conduct toward the HOA representative and his wife and in HOA meetings, the signs outside of her home, and her bad behavior toward other neighbors – because, even assuming it did, it did not affect her substantial rights. *See* TEX. R. APP. P. 44.2(b) (stating that non-constitutional error "that does not affect substantial rights must be disregarded."). The erroneous admission of evidence does not affect substantial rights "if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect." *Solomon v. State*, 49 S.W.3d 356, 365 Tex. Crim. App. 2001), *quoted in Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002); *Martinez v. State*, No. 01-10-00622-CR, 2011 WL 5026457, at *4 (Tex. App. – Houston Oct. 20, 2011, pet. ref'd) (mem. op., not designated for publication). In determining the extent to which the error influenced the jury, we consider the entire record, the nature of the evidence supporting the verdict, the character of the alleged error and its connection with other evidence in the case, and whether the State emphasized the error. *Motilla*, 78 S.W.3d at 355-56. The remaining extraneous-acts evidence was not highly inflammatory and did not take a substantial amount of time for the State to present, and was in many ways repetitive of the un-neighborly conduct that Wilson had engaged in toward Bailey and Ballard.

At Wilson's request, the trial court gave the jury a limiting instruction, informing the jurors about the purpose of the evidence and warning that they should not consider it for any purpose unless from the evidence presented it found beyond a reasonable doubt that Wilson had committed the extraneous acts. This instruction minimized the prejudice associated with the extraneous-acts evidence. *See Miller v. State*, 196 S.W.3d 256, 268 (Tex. App. – Fort Worth 2006, pet. ref'd); *Simpson v. State*, 886 S.W.2d 449, 452 (Tex. App. – Houston [1st Dist.] 2003, pet. ref'd); *see also Robinson v. State*, 701 S.W.2d 895, 899 (Tex. Crim. App. 1985) ("A proper instruction on the limited use of an extraneous offense will also lessen the prejudice."). We must presume that the jury followed the trial court's instruction. *See Gamez v. State*, 737 S. W.2d 315, 324 (Tex. Crim. App. 1987). We thus reject Wilson's extraneous-offense evidentiary challenge.

C. Exclusion of interview recording

Relying on the rule of optional completeness, Wilson proffered the audio recording of Officer Stevenson's interview with Nicole Bailey in connection with her cross-examination of the officer. Wilson contends that the trial court erred in excluding the tape because it would have shown that Bailey was not as upset and traumatized by Wilson's actions closer in time to their occurrence as she seemed during her trial testimony.

The rule of optional completeness "is designed to reduce the possibility of the jury receiving a false impression from hearing only a part of some act, conversation, or writing." *Walters v. State*, 247 S.W.3d 204, 218 (Tex. Crim. App. 2007), *quoted in Peña v. State*, 353 S.W.3d 797, 814 (Tex. Crim. App. 2011). Wilson did not seek to impeach Bailey with the recording, and the State did not offer any part of the recording during Officer Stevenson's direct testimony. Stevenson testified that, during the interview, Bailey "exhibited an array of emotions from laughing to crying to telling me she is scared." This is a reasonably accurate description of the recorded interview. We hold that the trial court acted within its discretion in determining that the evidence presented by the State did not create a false impression that admission of the recording would have corrected.

III. First Amendment Challenges

In a supplemental brief after remand, Wilson brings both facial and as-applied First Amendment challenges to the telephone harassment statute, claiming that it is void for vagueness and overbreadth.[1] Wilson acknowledges that, generally, a defendant may

[1] Wilson attempted to raise her First Amendment challenges in a motion for rehearing in the Court of Criminal Appeals. A majority of the Court denied the motion without opinion. *See Wilson v. State*, 448 S.W.3d 418, 430 (Tex. Crim. App. 2014) (denial of rehearing, followed by dissent from denial by Alcala, J., joined by Johnson and Cochran, JJ.).

not raise a facial challenge based on constitutional vagueness or overbreadth for the first time on appeal. *See Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009). Wilson did not raise her facial challenge in the trial court or in this court on direct appeal. But, relying on an opinion dissenting from the denial of her motion for rehearing in the Court of Criminal Appeals, in which the dissenting justices raised the potential for constitutional infirmity in connection with the statute, she requests that we allow supplemental briefing on the issue on remand. *See Wilson*, 448 S.W.3d at 430 (Alcala, J., joined by Johnson and Cochran, JJ., dissenting from denial of rehearing).

Generally, an appellant must raise an issue in her principal brief to have it reviewed on appeal. *See* TEX. R. APP. P. 38.3; *Barrios v. State*, 27 S.W.3d 313, 322 (Tex. App. – Houston [1st Dist.] 2000, pet. ref'd). If an issue is raised later in the appellate proceedings, Rule 38.7 provides that a "brief may be amended or supplemented whenever justice requires, on whatever reasonable terms the court may prescribe." TEX. R. APP. P. 38.7. We therefore consider whether justice requires us to address the constitutional claims in Wilson's supplemental briefing even though she did not raise them until the case was on rehearing in the Court of Criminal Appeals. We conclude that well-established error preservation rules requiring that such complaints be made both in the trial court and in the initial briefing on appeal preclude our consideration of these arguments on remand.

A. Facial challenge

First, the Texas Court of Criminal Appeals has held that an appellant may not raise a facial challenge to the constitutionality of a statute for the first time on appeal. *Karenev*, 281 S.W.3d at 434. The Court of Criminal Appeals premised its holding in *Karenev* on the doctrine that "[s]tatutes are presumed to be constitutional until it is determined otherwise" and "[t]he State and the trial court should not be required to anticipate that a statute may later be held to be unconstitutional." *Id.*

Wilson concedes that she did not assert her facial First Amendment challenge in the trial court. But she contends that the rationale that *Karenev* applies to the State and the trial court should also apply to her – namely, that she should not be required to have anticipated that the Court of Criminal Appeals would re-interpret the telephone harassment statute in a way that arguably gives rise to the constitutional infirmity that she asserts. She claims that, as a result of the Court's disavowal of its opinion in *Scott*, in which it had offered a definition for the statute's use of the term "repeated," it is now impossible to know what timing, frequency, and content of calls will make the caller subject to criminal prosecution.

But any constitutional infirmity would lie with the statute as written at the time of Wilson's offense, and the members of the high court disagreed as to the importance of the disavowed definition from *Scott*, with the majority concluding that it did not shed light

on the statutory elements of criminal telephone harassment. *Compare Wilson*, 448 S.W.3d at 422 (majority opinion) (finding *Scott* "neither controlling nor persuasive" and describing its definition of "repeated" as ambiguous, inartful, and confusing) *with id.* at 427 (Cochran, J., joined by Johnson and Alcala, JJ., concurring) (taking issue with majority's rejection of discussion "repeated in *Scott*" and opining that majority's "new definition clearly invites a vagueness and overbreadth challenge to the statute").

Further, Wilson declined to advance a facial challenge to the telephone harassment statute's constitutionality in the trial court because, she contends, it would have been futile. Futility does not excuse the requirement that a party must raise a constitutional challenge to a statute in the trial court to preserve it for appellate review. *See Sanchez v. State*, 120 S.W.3d 359, 365-67 (Tex. Crim. App. 2003); *Schuster v. State*, 435 S.W.3d 362, 364-65 (Tex. App. – Houston [1st Dist.] 2014, no pet.). Accordingly, we hold that Wilson waived her facial challenge and thus decline to consider it, because it was first raised in supplemental briefing on remand.

B. As-applied challenge

Second, with respect to her as-applied challenge, Wilson could have presented her claim on direct appeal to this court. After the State presented its case in the trial court, Wilson moved to dismiss the charge against her, contending that the statute, as applied in

the case against her, violated her First Amendment rights. The trial court denied the motion. Wilson did not address this preserved challenge in her principal brief to this Court. As a result, we have no basis for finding that justice requires consideration of this argument now and decline to consider it.

Conclusion

We affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.

Do not publish. TEX. R. APP. P. 47.2(b).

[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0755-13

ELISA MERRILL WILSON, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FIRST COURT OF APPEALS FORT BEND COUNTY

KEASLER, J., delivered the opinion of the Court, in which KELLER, P.J., and MEYERS, PRICE, and HERVEY, JJ., joined. KELLER, P.J., filed a concurring opinion in which JOHNSON, J., joined. COCHRAN, J., filed a concurring opinion in which JOHNSON, and ALCALA, JJ., joined. WOMACK, J., concurred.

OPINION

(Filed Sep. 17, 2014)

Elisa Wilson appealed her telephone-harassment conviction claiming that the evidence was legally insufficient to establish that she made repeated telephone communications in a manner reasonably likely

to annoy or alarm another. The court of appeals acquitted Wilson, finding that Wilson's calls were neither repeated nor reasonably likely to harass or annoy. We hold that (1) the phrase "repeated telephone communications" does not require the communications to occur within a certain time frame in relation to one another, and (2) a facially legitimate reason for the communication does not negate *per se* an element of the statute. We reverse and remand.

BACKGROUND

Complainant Nicole Bailey moved into the Kelliwood Terrace subdivision in Fort Bend County in 2000. She became acquainted and frequently socialized with Wilson, her next-door neighbor. By 2009, however, their relationship had soured and eventually led to Bailey filing a criminal complaint alleging that she was the victim of Wilson's harassment.

The information charging Wilson with harassment under Texas Penal Code § 42.07(a)(4)[1] stated that "Elisa Merrill Wilson . . . on or about April 06, 2009 [through] March 03, 2010, did then and there

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[1] TEX. PENAL CODE § 42.07(a)(4) (West 2010) ("A person commits an offense, if with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:

. . .

(4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another[.]").

. . . with intent to harass, annoy, alarm, abuse, torment or embarrass Nicole Bailey, make repeated telephone communications to Nicole Bailey in a manner reasonably likely to harass or annoy or alarm or abuse or torment or embarrass or offend the said Nicole Bailey." The evidence at trial focused on six voicemail messages that Wilson left on Bailey's phone over a period of ten months. The jury heard testimony from Bailey regarding various interactions between the two during that time period.

On April 6th, 2009, Wilson left a message saying that a neighbor's dog was in her yard and that Bailey should inform the dog's owner. On June 11th, Wilson left a message stating that debris from construction being done on Bailey's driveway was running into a storm drain. Around the same time as this message, Wilson confronted Bailey on Bailey's driveway, yelling at her and taking pictures of her. Additionally, police and environmental authorities visited Bailey regarding the drainage, but no fines or sanctions were imposed. Bailey stated that the message and the related events left her "[a]nnoyed, intimidated, frightened, frustrated, [and] tired."

On August 30th, Wilson again confronted Bailey and Bailey's boyfriend in a grocery store. Bailey testified that she and her boyfriend did not respond to Wilson's shouts and immediately went to the front of the store to check out. However, Wilson followed them and continued to yell, accusing Bailey of being a prostitute and Bailey's boyfriend of being a "pimp" and a "drug dealer." On August 31st, the following

day, Wilson left a message apologizing, but also stating that she had felt like Bailey had been attacking her. Bailey testified that she and her boyfriend had done nothing to provoke Wilson's behavior, and that this incident and the subsequent message made her feel harassed, annoyed, and alarmed. Six days later, on September 5th, Wilson left another message, demanding that Bailey never talk to her or approach her in public again.

On December 23rd, Wilson left a message complaining that the work Bailey was doing on her driveway was in violation of deed restrictions. On February 5th, 2010, Wilson left a message stating that her security cameras had observed Bailey leaving a newspaper on Wilson's lawn, and that Bailey should come retrieve it. Bailey testified that she had not left a newspaper on Wilson's lawn and that the message was an attempt to get her to come onto Wilson's property. She further testified that on the same day, Bailey and her boyfriend had encountered Wilson on the street in front of Bailey's house and that Wilson began screaming profanities and making accusations similar to those made in the grocery store in August. Bailey stated that these events made her feel alarmed and offended.

The jury found Wilson guilty of telephone harassment, and she was sentenced to twelve months' community supervision. Wilson appealed, arguing that the evidence did not support the jury's verdict because calls occurring over a period of ten months did not constitute "repeated" communications as

required by statute, and because her messages were not objectively annoying, offensive, embarrassing, or abusive.[2] The court of appeals agreed.[3] The court first stated that those messages that were not within a thirty-day period of each other were not in close enough proximity to be considered a single episode, and thus did not constitute "repeated" communications.[4] The court did identify two messages, those from August 31st and September 5th, that were within a thirty-day period. However, the court stated that the fact that Wilson made the September 5th message for a facially legitimate reason "negat[ed] any reasonable inference that Wilson left the message with the intent to harass Bailey, or that it was made in a manner reasonably likely to harass or annoy her."[5] As a result, the court held that no rational fact finder could have found Wilson guilty, and rendered a judgment of acquittal.

"REPEATED" COMMUNICATIONS

A person commits the offense of telephone harassment if she, "with intent to harass, annoy, alarm, torment, or embarrass another . . . makes repeated

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[2] *Wilson v. State*, 431 S.W.3d 92, 94 (Tex. App. – Houston [1st Dist.] 2013).

[3] *Id.* at *3.

[4] *Id.* at *1-2 (citing *Scott v. State*, 322 S.W.3d 662, 669 n. 12 (Tex. Crim. App. 2010)).

[5] *Id.* at *2.

telephone communications . . . in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another."[6] The main question we are presented with today is whether any or all of the six telephone messages left by Wilson over a period of ten months constitute "repeated" communications.

The court of appeals cited to this Court's decision in *Scott v. State*[7] in holding that the messages that were not within thirty days of one another were not repeated communications.[8] In *Scott*, we acknowledged that the offense of telephone harassment requires an actor to make "repeated telephone calls to the victim; one telephone call will not suffice."[9] The Court affixed the following annotation to this statement:

> The term "repeated" is commonly understood to mean "reiterated," "recurring," or "frequent." Here, we believe that the Legislature intended the phrase "repeated telephone communications" to mean "more than one telephone call in close enough proximity to properly be termed a single episode," because it is the frequent repetition of harassing telephone calls that makes them intolerable and justifies their criminal prohibition.[10]

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[6] TEX. PENAL CODE § 42.07(a)(4) (West 2010).

[7] *Scott*, 322 S.W.3d at 662.

[8] *Wilson*, 2013 WL 1912451, at *2.

[9] *Scott*, 322 S.W.3d at 669.

[10] *Id.* at 669 n.12 (citations omitted).

We find the *Scott* footnote neither controlling nor persuasive. First, *Scott* did not require this Court to determine whether "repeated" requires the actor's calls to exist in "close enough proximity to properly be termed a single episode." In that case, the issue before the Court concerned whether § 42.07(a)(4) unconstitutionally infringed upon First Amendment rights.[11] The Court concluded that it did not because "the statutory subsection does not implicate the free-speech guarantee of the First Amendment."[12] We agree with the parties that the footnote was dicta because it was unnecessary to *Scott*'s reasoning or conclusion.

Second, the footnote contains no persuasive value because it lacks relevant reasoning. We take no issue with the definitions it offered from common dictionaries. However, the pronouncement of what the Legislature intended in passing § 42.07(a)(4) without any statutory interpretation is unsupportable. The *Scott* Court relied on a 1989 law-review article to support its definitive statement that "the Legislature intended the phrase 'repeated telephone communications' to mean 'more than one telephone call in close enough

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[11] *Id.* at 669-70.

[12] *Id.* (holding that the statute's offenders "will have only the intent to inflict emotional distress for its own sake" and if conduct was communicative conduct, it "invades the substantial privacy interests of another (the victim) in an essentially intolerable manner.").

proximity to properly be termed a single episode[.]' "[13] This definition does not come from the statutory text at issue or extratextual sources indicative of the Texas Legislature's intent. It was instead taken from a model statute proposed by the article's author in which the author defined "repeated telephone calls" as "mean[ing] more than one call in close enough proximity to rightly be termed a single episode."[14] Other than the similarly worded "repeated" phrase, there is no connection between the proposed statute and § 42.07(a)(4). Moreover, the article's proposed statute could not have influenced Texas's harassment statute because § 42.07(a)(4) was enacted approximately six years before the article was published.[15]

Third, the Court's definition of repeated itself causes confusion. Defining repeated to mean more than one call in close enough proximity to properly be termed a single episode merely begs the question and offers no definition at all. How are courts to define a single episode? The Court was unclear whether this was an inartful reference to "criminal episode" found in Chapter 3 of the Penal Code or something else

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[13] *Id.* at 669, n.12 (citing M. Sean Royall, Comment, *Constitutionally Regulating Telephone Harassment: An Exercise in Statutory Precision*, 56 U. CHI. L. REV. 1403, 1430 (1989)).

[14] Royall, *supra* note 12, at 1425 ("(g) The term 'repeated telephone calls' means more than one call in close enough proximity to rightly be termed a single episode.").

[15] *See* Acts of 1983, 68th Leg., R.S., ch. 411, § 1, p. 2204, 2204-2206 (effective Sept. 1, 1983).

entirely.[16] As Presiding Judge Keller's dissent in *Scott* pointed out, "Would once a day for a month constitute 'a single episode?'" The *Scott* majority's reasoning provides no answer.[17]

We accordingly disavow the troublesome footnote and turn to the rules of statutory construction to determine what the Legislature meant by "repeated telephone communications." In construing a statute, we limit our analysis to the plain meaning of the text, unless the language is ambiguous or the plain meaning leads to absurd results that the Legislature could not have possibly intended.[18] When we are called upon to go beyond the plain meaning of the text, we may consider various extratextual factors, including but not limited to the objective the statute seeks to attain, the circumstances under which the statute was enacted, legislative history, former statutory

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[16] *See* TEX. PENAL CODE § 3.01 (West 2012) ("In this chapter, 'criminal episode' means the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances: (1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or (2) the offenses are the repeated commission of the same or similar offenses.").

[17] *Scott*, 322 S.W.3d at 672 (Keller, P.J., dissenting).

[18] *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

provisions, and the consequences of a particular construction.[19]

We must initially determine whether § 42.07(a)(4)'s undefined use of "repeated" is ambiguous. Neither party contends that it is ambiguous *per se*, but each suggests the Court adopt different definitions. The State offers a number of definitions of the word "repeated," including "said, made, done, or happening again, or again and again"[20] and "renewed or recurring again and again."[21] The State argues that the recurrence of Wilson's telephone calls satisfies the dictionary definitions of "repeated" because it was behavior that recurred "again." Wilson too asserts that "repeated" is unambiguous, but urges this Court to adopt the definition of "repeated" used in our dicta in *Scott*: "'reiterated,' or 'frequent.'"[22] Wilson states that this definition reflects the Legislature's unambiguous attempt to exclude actions not in close proximity.

Common to all issues of potential statutory ambiguity, whether a statutory term or phrase is

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[19] *Ex parte Rieck*, 144 S.W.3d 510, 512 (Tex. Crim. App. 2004); *see also* TEX. GOV'T CODE § 311.023 (West 2012).

[20] WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1533 (Unabridged 2nd ed. 1983).

[21] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1924 (Unabridged 2002).

[22] *Scott*, 322 S.W.3d at 669 n. 12 (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 998 (1988); 2 OXFORD ENGLISH DICTIONARY 2494 (1971)).

ambiguous depends upon the guidance sought from the statute. The statute's use of "repeated" simply speaks in terms of the number of telephone communications, it does not attempt to define the required frequency of the communications or temporal proximity of one communication to another.[23] Finding § 42.07(a)(4)'s use of "repeated" ambiguous in describing these specific characteristics of the communication asks too much of the term. It would require presuming that the Legislature intended to define and regulate this type of harassing conduct by a particular frequency or temporal standard – a notion unsupported by the statute's plain language. We find the court of appeals' treatment of telephone communications occurring outside a thirty-day period from each other is inconsistent with § 42.07(a)(4)'s plain language.

It is unquestioned that "repeated" means, at a minimum, "recurrent" action or action occurring "again." To resolve the question presented, we need not go any further than we did in *Scott*, that "one telephone call will not suffice" and a conviction secured by evidence of a single communication will not stand.[24] The communications' periodic frequency or

[23] *Cf.* TEX. PENAL CODE § 25.072 (West 2012) ("REPEATED VIOLATION OF CERTAIN COURT ORDERS OR CONDITIONS OF BOND IN FAMILY VIOLENCE CASE. (a) A person commits an offense if, during a period that is 12 months or less in duration, the person two or more times engages in conduct that constitutes an offense under Section 25.07.").

[24] *Scott*, 322 S.W.3d at 669.

the temporal relationship of each communication are characteristics that may further describe the communications' nature, but we do not find those characteristics necessary to the definition of repeated. This is not to say that such things will be irrelevant. Although the State may legally obtain a harassment conviction under § 42.07(a)(4)'s prohibited repeated-telephone-communications theory on the bare minimum of two telephone communications, we think it exceedingly rare that the State will be able to sufficiently prove that the defendant made those communications with the intent to harass, annoy, alarm, abuse, torment, or embarrass another.[25] As with all prosecutions, the State may rely upon the circumstances surrounding a defendant's actions to prove his intent. The total number of communications (provided it is greater than one) and the frequency and the temporal relationship of the communications are more appropriately considered evidentiary matters that may be probative of both the defendant's intent and whether the communications are made in a manner prohibited by the statute.

In her concurrence, Judge Cochran alleges that our statutory interpretation of the term repeated invites a constitutional vagueness and overbreadth challenge to the statute.[26] Whatever the merits of Judge Cochran's concerns, they are not implicated in

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[25] *See* TEX. PENAL CODE § 42.07(a) (West 2012).

[26] *Post*, at 2 (Cochran, J., concurring).

Wilson's legal-sufficiency challenge. Moreover, while we have a duty to interpret statutes in a way as to preserve their constitutionality, we can do so only to the extent that our interpretative authority permits.[27] The explanation of how § 42.07(a)(4)'s constitutionality allegedly hangs on *Scott* footnote's definition of repeated itself is forced to alter the footnote's substance by inserting the word "criminal" in the footnote's "criminal episode" phrase and then interpret that phrase, as amended, to mean "common scheme or plan."[28] Like the *Scott* footnote, Judge Cochran's approach does not provide any persuasive authority as to why "repeated" should be defined this way consistent with legislative intent nor any argument that this statute is "readily subject" to such an interpretation without exceeding our interpretative authority.

LEGAL SUFFICIENCY OF THE EVIDENCE

Evidentiary sufficiency challenges are reviewed under the standard set forth by the United States Supreme Court in *Jackson v. Virginia*: "Considering all of the evidence in the light most favorable to the verdict, was a jury rationally justified in finding guilt

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[27] *Long v. State*, 931 S.W.2d 285, 295 (Tex. Crim. App. 1996) (holding that this Court may only narrowly construe a statute to preserve its constitutionality when it is "readily subject" to such a construction.)

[28] *Post*, at 4-5 (Cochran, J., concurring).

beyond a reasonable doubt."[29] This requires us to assess the evidence in the light most favorable to the prosecution.[30] We will uphold the verdict unless a rational factfinder must have had reasonable doubt with respect to any essential element of the offense.[31]

The court of appeals dismissed the probativeness of Wilson's voicemail concerning the runoff from Bailey's driveway construction project because the call's facially legitimate reason "negat[ed] any reasonable inference that Wilson left the message with the intent to harass Bailey, or that it was made in a manner reasonably likely to harass or annoy her."[32] We disagree with this conclusion for two main reasons and conclude, by way of an alternate holding, that the court's sufficiency analysis was flawed. First, a plain-language reading of § 42.07(a)(4) does not excuse from criminal culpability the act of making prohibited repeated telephone communications if the content of the communications is facially "legitimate," however that term may be defined. Second, the existence of evidence that may support the conclusion that the call had a facially legitimate purpose does not legally negate the prohibited intent or manner of

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[29] *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010).

[30] *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009) (quoting *Jackson*, 443 U.S. at 319).

[31] *Laster*, 275 S.W.3d at 518; *Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992).

[32] *Wilson*, 2013 WL 1912451, at *3.

the call. Benign content does not always prove benign intent, nor the objective harmlessness of its delivery. Determining the evidence's sufficiency with respect to Wilson's intent of the communication required the court of appeals to consider all the evidence presented at trial and the rational inferences drawn from it.[33] By analyzing only testimony suggesting the benign intent of the call, "the court failed to properly consider the combined and cumulative force of the evidence and to view the evidence in the light most favorable to the jury's guilty verdict."[34]

We find the evidence legally sufficient. From the content of the six calls over the ten-month period, combined with evidence of Wilson's combative conduct and verbal abuse toward Bailey, the jury could have rationally found that Wilson, with the intent to harass, annoy, alarm, abuse, torment, or embarrass Bailey, made repeated telephone communications to Bailey in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend her.

CONCLUSION

Because we find the evidence legally sufficient, we reverse the court of appeals' judgment acquitting

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[33] *See, e.g.*, *Merritt v. State*, 368 S.W.3d 516, 526 (Tex. Crim. App. 2012).

[34] *Merritt*, 368 S.W.3d at 526 (citing *Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007)).

the defendant. The case is remanded to the court of appeals to address Wilson's remaining issues.

DELIVERED: September 17, 2014

PUBLISH

KELLER, P.J., filed a concurring opinion in which JOHNSON, J., joined.

In *Scott v. State*, this Court upheld the telephone harassment statute, holding that the statute does not implicate the First Amendment.[1] Two of the reasons given in support of upholding the statute have been abandoned by the Court today. The Court in *Scott* interpreted the term "repeated" to mean that the telephone calls at issue must be in close enough temporal proximity "to be properly termed a single episode."[2] Today, the Court says that "repeated" simply means that "one telephone call will not suffice." The Court in *Scott* also contended that, "in the usual case, persons whose conduct violates § 42.07(a)(4) will not have an intent to engage in the legitimate communication of ideas, opinions, or information; they will have only the intent to inflict emotional distress for its own sake."[3] Today, the Court says that the facially

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[1] 322 S.W.3d 662, 669 (Tex. Crim. App. 2010).

[2] *Id.* at 669 n. 12.

[3] *Id.* at 670.

legitimate purpose of the call does not negate the prohibited intent or manner of the call.

I cannot quarrel with the Court's holdings; I anticipated both in my dissent in *Scott*.[4] But I do not share the Court's optimism that it will be "exceedingly rare that the State will be able to sufficiently prove that the defendant made [two telephone] communications with the intent to annoy, harass, alarm, abuse, torment, or embarrass another."

At the time *Scott* was decided, I said that "[t]he mischief this statute can create is enormous,"[5] and the present case has only reinforced that conclusion. The message the telephone harassment statute provides to the public is, "If you have any disagreements with your neighbor, and you have called her on the telephone once, do not ever call her on the telephone again, or you will be exposed to criminal liability." Even worse, because the statute is not limited to calls made to someone's home phone or even to a personal phone, the "only one phone call" rule applies to any phone conversation, anywhere – including a phone call made to a public official at his government office. In light of the Court's abandonment of some of the rationales in *Scott*, we ought to, when the issue is

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[4] *Id.* at 673 (criticizing the Court's definition of "repeated"), 676-77 ("nothing in the statute limits its application to those occasions when the actor's sole intent is to inflict emotional distress") (Keller, P.J., dissenting).

[5] *Id.* at 676.

raised again, re-evaluate our holding in that case. Because the continuing viability of *Scott* is not currently before us, and because the Court correctly applies the statute to the facts in this case, I concur in the Court's judgment.

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Publish

COCHRAN, J., filed a concurring opinion in which JOHNSON and ALCALA, JJ., joined.

I agree with the majority that the evidence is sufficient to support appellant's conviction for telephone harassment. I respectfully disagree that the term "repeated" in the telephone-harassment statute means just "more than one telephone call."[1] We ought not jettison the discussion of the term "repeated" from our prior telephone-harassment decision, *Scott v. State*,[2] particularly since the majority's new definition

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[1] *See* Majority Op., at 10 (stating that "the State may legally obtain a harassment conviction under § 42.07(a)(4)'s prohibited repeated-telephone-communications theory on the bare minimum of two telephone communications").

[2] 322 S.W.3d 662, 669 n.12 (Tex. Crim. App. 2010). In *Scott*, we noted:

> The term "repeated" is commonly understood to mean "reiterated," "recurring," or "frequent." *Webster's Ninth New Collegiate Dictionary* 998 (1988); 2 *Oxford English Dictionary* 2494 (1971). Here, we believe that the Legislature intended the phrase "repeated telephone communications" to mean "more than one telephone

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clearly invites a vagueness and overbreadth challenge to the statute.[3] The federal courts declared our previous telephone-harassment statute unconstitutionally vague,[4] and, under the majority's interpretation, they will surely be asked to do so again.[5] As Presiding Judge Keller notes, under the majority's interpretation, any two annoying calls made by a single person to another person over any undefined period of time

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> call in close enough proximity to properly be termed a single episode," because it is the frequent repetition of harassing telephone calls that makes them intolerable and justifies their criminal prohibition. *See* M. Royall, *Constitutionally Regulating Telephone Harassment: An Exercise in Statutory Precision*, 56 U. CHI. L. REV. 1403, 1430 (1989) ("Prudence may justify a hands-off policy for single calls made with the intent to harass, but as harassing calls are repeated the state interest in intervening to protect the recipient becomes more compelling.").

Id. I think that our discussion in *Scott*, albeit *dicta*, was important to preserve the constitutionality of the harassment statute against a vagueness or overbreadth challenge.

[3] Indeed, one of the issues presented in *Scott* was whether the term "repeated" in the telephone harassment statute was unconstitutionally vague. *See id.* at 667.

[4] *See Kramer v. Price*, 712 F.2d 174, 178 (5th Cir. 1983) (holding Texas telephone-harassment statute unconstitutionally vague for failing to (1) construe the terms "annoy" and "alarm" in a manner that would lessen their inherent vagueness, and (2) specify whose sensibilities must be offended).

[5] *See Alexander v. Johnson*, 217 F. Supp. 2d 780, 800 (S.D. Tex. 2001) (discussing, in *dicta*, possible constitutional deficiencies of the Texas telephone-harassment statute and the vagueness of its terms).

suffices to create criminal liability.[6] I do not think that this is what the Legislature intended, and I do not think that such a position can withstand constitutional scrutiny.

I believe that the Legislature intended the term "repeated" to mean, just as we said in *Scott*, sufficiently "recurring" or "frequent" to constitute a single episode, *i.e.*, a single criminal episode "committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan."[7] In *Scott*, we provided this narrowing interpretation of the telephone-harassment statute to preserve its constitutionality against a "vagueness" challenge and to satisfy First Amendment guarantees.[8]

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[6] *See* Concurring Op. at 2 (Keller, P.J., concurring) (noting that the majority's message to the public concerning the telephone-harassment statute is, "'If you have any disagreements with your neighbor, and you have called her on the telephone once, do not ever call her on the telephone again, or you will be exposed to criminal liability.'").

[7] TEX. PENAL CODE § 3.01(1).

[8] *Scott*, 322 S.W.3d at 669; *see also People v. Astalis*, 172 Cal. Rptr. 3d 568, 575 (Cal. App. Dep't Super. Ct. 2014) ("Narrowly interpreted to preserve its constitutionality under the First Amendment, a person violates the [telephone harassment] statute only when he or she (1) makes 'repeated' contacts, meaning 'recurring' or 'frequent' contacts; (2) with the specific intent to 'annoy,' meaning intentionally engaging in 'conduct designed to disturb, irritate, offend, injure, or at least tend to injure, another person,' or with the specific intent to 'harass,' meaning engaging in 'a knowing and willful course of conduct directed at

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The purpose of the telephone-harassment statute is to protect an individual's privacy rights from another person's unwanted or offensive speech. "There is simply no right to force speech into the home of an unwilling listener."[9] On the other hand, criminal statutes that restrict First Amendment liberties must be narrowly tailored and specific to avoid the potential for chilling protected speech.[10] A law could be void

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a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.' "); *State v. Alexander*, 888 P.2d 175, 182 (Wash. Ct. App. 1995) (rejecting vagueness challenge to use of the word "repeatedly" in telephone-harassment statute as its definition was clear to "persons of common intelligence" and noting that "Webster's defines 'repeated' as 'said, made, or done again, or again and again.' ").

[9] *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988) (explaining that "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.").

[10] Under the vagueness doctrine, judicial scrutiny is most rigorous when the law in question impinges on First Amendment freedoms. *See Smith v. Goguen*, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts."). Courts impose heightened scrutiny on statutes affecting the First Amendment because prohibitions of uncertain scope may have a "chilling effect" on the exercise of protected rights. As the Supreme Court stated in *Baggett v. Bullitt*, 377 U.S. 360 (1964), vague statutes cause citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked," restricting their conduct "to that which is unquestionably safe. Free speech may not be so inhibited." *Id.* at 372. Thus, the requirement of specificity is enforced with special

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for vagueness for either one of two independent reasons: "First, [the statute] may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement."[11]

To avoid invalidating legislative enactments, courts may construe statutes that raise First Amendment concerns narrowly to clarify potentially vague statutory terms. That is precisely what we did in *Scott* in explaining that the purportedly vague term of "repeated" meant that criminal liability may be imposed only when the defendant makes multiple harassing telephone communications frequently or as part of a "single [criminal] episode,"[12] *i.e.*, pursuant to "a common scheme or plan." A telephone harassment common plan or scheme might take the form of numerous telephone calls within a short period of time, all relating to a single objective, or they might be calls that are repeated over a long period of time, but still relating to a single objective or goal.

For example, a person might make various unwanted telephone calls, in-person harassing statements, derogatory social-media posts, false reports to the police, animal control, or CPS, and perhaps play

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rigor when it serves to avoid the incidental impairment of First Amendment freedoms.

[11] *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

[12] *Scott*, 322 S.W.3d at 669 & n.12.

practical jokes on the victim – all interspersed over a year or more – with the ultimate goal of publicly humiliating the victim, making that person lose her job, making her move, or literally driving her crazy. The telephone calls might be repeated only three or four times, but, coupled with the evidence of other types of harassment, they are sufficient to prove the person's scheme or plan and his intent to harass the victim.

I agree with the majority that, in this case, the full history of the rocky relationship between appellant and Nicole Bailey proves that appellant made "repeated" harassing telephone calls to Ms. Bailey over the space of a year, and those six telephone calls were made pursuant to a common scheme or plan to "harass, annoy, alarm, abuse, torment, or embarrass" her neighbor.[13] Like the jury, I have listened to those

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[13] As the State Prosecuting Attorney (SPA) notes,

> Appellant's activities extended beyond the phone messages. Appellant told several neighbors that Bailey was a prostitute, a "porn queen," running an internet pornography ring, "Mafia-related," and dealing drugs, "you name it." Appellant would walk around in front of and behind Bailey's house blowing a whistle that could be heard inside, yelling at her and calling her names. Appellant threw firecrackers in Bailey's pool and on her car, leaving burn marks on it. Appellant called the police and said Bailey had killed herself; the officers were irritated but not surprised that the call was unfounded and, at Bailey's request, told appellant not to contact Bailey again.

SPA'S Brief at 6.

telephone calls, and, like the jury, I conclude that appellant intended to harass and embarrass her neighbor with her repeated telephone calls and her other aberrant behavior.

The law does not require that the repeated calls be made within a certain time frame, as long as they are all part of the same episode, scheme, or plan. Here, the evidence clearly supports the jury's verdict that appellant purposely set out to intimidate, harass, and alarm several of her neighbors. One of them she literally drove out of the neighborhood.[14] She went after Ms. Bailey in the neighborhood, in stores, and by invading her privacy through repeated harassing telephone calls. The evidence supporting appellant's criminal conviction is not just sufficient, it is overwhelming.

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[14] The evidence showed that appellant harassed another neighbor, Stephanie Ballard, so much that, after a peace bond was denied and a civil suit deemed insufficient, she moved and tried to keep her new address secret. But appellant tracked her down at her church and then called her on her new unlisted telephone number. The harassment began after appellant's lawyer sent Mrs. Ballard a letter seeking damages for an "assault" that occurred when Mr. Ballard did not hug appellant at the Baileys' Christmas party. Thereafter, someone made three false allegations against Mrs. Ballard to CPS, including one complaint that alleged Ms. Bailey ran a pornography site using Mrs. Ballard's children. One day after Mrs. Ballard called the police because appellant was taking pictures of her children playing outside, a false report was made to Animal Control that Mrs. Ballard was letting her chihuahua/dachshund "run rabid" around the neighborhood. Both Mr. and Mrs. Ballard had their car tires punctured.

I therefore concur in the majority's judgment, although I cannot join its opinion.

Filed: September 17, 2014
Publish

Opinion issued May 9, 2013.

[SEAL]

In The

Court of Appeals

For The

First District of Texas

NO. 01-11-01125-CR

ELISA MERRILL WILSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 2
Fort Bend County, Texas
Trial Court Case No. 10CCR149142

OPINION

The State prosecuted Elisa Wilson for misdemeanor telephonic harassment of her former neighbor, Nicole Bailey. *See* TEX. PENAL CODE ANN. § 42.07(a)(4) (West 2011). A jury found Wilson guilty, and the trial court assessed punishment of 180 days in jail, probated for twelve months.

On appeal, Wilson complains that the evidence does not support the jury's finding that she made repeated telephone calls that were reasonably likely

to annoy another, as required under the statute, because the calls that she made were neither repeated nor annoying, offensive, embarrassing, or abusive. We reverse and render a judgment of acquittal.

Background

Bailey moved into a Fort Bend County subdivision in 2000. She became acquainted with her neighbors, Adam and Stephanie Ballard, as well as Wilson and her husband. The neighbors became friends and socialized frequently. By late 2005, however, both Stephanie Ballard and Bailey's relationships with Wilson had become strained. By 2009, they had become acrimonious.

The information against Wilson charged that, "on or about April 6, 2009 thr[ough] March 3, 2010, [Wilson] did then and there, with intent to harass, annoy, alarm, abuse, torment or embarrass Nicole Bailey, make repeated telephone communications to Nicole Bailey in a manner reasonably likely to harass or annoy or alarm or abuse or torment or embarrass or offend the said Nicole Bailey." The jury heard evidence that Wilson left six telephone messages for Bailey, on April 6, 2009, June 11, 2009, August 31, 2009, September 5, 2009, December 23, 2009, and February 5, 2010. In these messages, Wilson:

- said that she saw a dog in her yard that looked like the Ballards' dog and asked Bailey to let them know that Adam could come pick it up if they were missing their dog.

- told Bailey that she did not want Bailey to talk to her or approach her in public ever again.
- referred to an incident that occurred on August 30, 2009, in which Wilson followed Bailey through a grocery store screaming at her; Wilson said that she was caught off guard and thought "it was an attack," and stated that she was calling to say she was sorry.
- complained that the work Bailey was having done on her driveway was against the deed restrictions.
- told Bailey that she saw what looked like cement debris from the driveway job that needed to be cleaned up, and that she was asking her "nicely this time."
- reminded Bailey that Wilson had surveillance cameras, told Bailey that she could "come pick up her newspaper," and warned Bailey to leave her alone and not "accost" or "harass" her any more.

Wilson left all of the voicemail messages in the afternoon or early evening. Bailey did not respond to any of them.

Evidentiary Sufficiency

Standard of review

We review evidentiary sufficiency challenges under the *Jackson* standard. *See Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) ("[T]he

Jackson v. Virginia legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt.") (referring to *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781 (1979)). Under this standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational fact finder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

Viewed in the light most favorable to the verdict, the evidence is insufficient when either: (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense; or (2) the evidence conclusively establishes a reasonable doubt. *See Laster*, 275 S.W.3d at 518. This standard applies equally to both direct and circumstantial evidence. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995); *Ervin v. State*, 331 S.W.3d 49, 55 (Tex. App. – Houston [1st Dist.] 2010, pet. ref'd).

We do not weigh any evidence or evaluate the credibility of any witnesses, as this was the function of the fact finder. *Williams*, 235 S.W.3d at 750. Instead, we determine whether both the explicit and

implicit findings of the fact finder are rational by viewing all the evidence admitted at trial in the light most favorable to the verdict and resolving any inconsistencies in the evidence in favor of the verdict. *Adelman v. State*, 828 S.W.2d 418, 422 (Tex. Crim. App. 1992).

Telephonic harassment

"A person commits [the offense of harassment] if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." TEX. PENAL CODE ANN. § 42.07(a)(4). The jury heard evidence of the neighbors' acrimonious relationship, but the mere act of "making repeated telephone calls is not, by its nature, criminal, nor is it a criminal act merely because of the circumstances during which it is conducted." *Blount v. State*, 961 S.W.2d 282, 284 (Tex. App. – Houston [1st Dist.] 1997, pet. ref'd).

Rather, "the Legislature intended the phrase 'repeated telephone communications' to mean 'more than one telephone call in close enough proximity to properly be termed a single episode,' because it is the frequent repetition of harassing telephone calls that makes them intolerable and justifies their criminal prohibition." *Scott v. State*, 322 S.W.3d 662, 669 n.12 (Tex. Crim. App. 2010). In contrast to actionable

"repeated telephone communications," the telephone harassment statute does not support a criminal conviction when the defendant's calls to the complainant are "separated by periods of months or years." *United States v. Darsey*, 342 F. Supp. 311, 313 (E.D. Pa. 1972); *see also Brumit v. State*, No. 05-92-02325-CR, 1994 WL 370106, at *6 (Tex. App. – Dallas July 13, 1994) (not designated for publication) (looking to common usage of the word "repeated," as meaning "done, made, or said again and again") (quoting WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY 1216 (1989)). *Cf.* FTC Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097-02, 50105 (Dec. 13, 1988) (defining "repeatedly" as "calling with excessive frequency under the circumstances"). "The statutory subsection, by its plain text, is directed only at persons who, with the specific intent to inflict emotional distress, repeatedly use the telephone to invade another person's personal privacy and do so in a manner reasonably likely to inflict emotional distress." *Scott*, 322 S.W.3d at 669-70.

Analysis

Wilson left just two of the six messages over a thirty-day period – on August 31, 2009 and September 5, 2009. Both specifically related to Bailey's driveway construction project. In the second message, Wilson reported that she saw cement in the gutters that needed to be cleaned up. Bailey testified that a mixture of dust from the cement and water was running down the gutter, and that she and her crew

cleaned it. Even if the August 31 and September 5 calls occurred "in close enough proximity to properly be termed a single episode," Bailey's own testimony acknowledged a legitimate reason for the September 5th call, which negates any reasonable inference that Wilson left the message with the intent to harass Bailey, or that it was made in a manner reasonably likely to harass or annoy her. *See Blount*, 961 S.W.2d at 284 (noting that "culpability is required as to the result of the conduct," by showing that actor wants to cause the result of harassing or annoying his victim).

The four remaining messages occurred too far apart over the ten-month period to be considered "part of a single episode." *Cf. id.* ("Although two calls in one night and two calls sometime during the month before are not many calls, under the legal sufficiency standard, we find there is sufficient evidence to support the finding of repeated calls."). Considering the evidence in the light most favorable to the verdict, we hold that no rational fact finder could have found beyond a reasonable doubt that Wilson made repeated telephone communications with the intent to harass Bailey. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789.

Conclusion

We hold that legally sufficient evidence does not support Wilson's conviction for telephonic harassment.

We therefore reverse the trial court's judgment and render a judgment of acquittal.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.

Publish. TEX. R. APP. P. 47.2(b).

[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0755-13

ELISA MERRILL WILSON, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S MOTION FOR REHEARING

ALCALA, J., filed an opinion dissenting to the denial of Appellant's Motion for Rehearing in which JOHNSON and COCHRAN, J.J., joined.

DISSENTING OPINION

(Filed Dec. 10, 2014)

I respectfully dissent from this Court's decision to deny the motion for rehearing filed by Elisa Merrill Wilson, appellant. I would grant rehearing to address appellant's challenge to the constitutionality of the telephone harassment statute as it has now been interpreted by this Court to permit, for the first time, a conviction based on only two telephone calls that

might occur months, years, or perhaps even decades, apart.[1]

In *Scott v. State*, this Court stated, "Here, we believe that the Legislature intended the phrase 'repeated telephone communications' to mean 'more than one telephone call *in close enough proximity* to properly be termed a single episode,' because it is the frequent repetition of harassing telephone calls that makes them intolerable and justifies their criminal prohibition." *Scott v. State*, 322 S.W.3d 662, 669 n.12 (Tex. Crim. App. 2010) (emphasis added). In reliance on this Court's statement of the law in *Scott*, and citing to an opinion by a federal district court for authority on the period of time that could be considered to be "in close enough proximity," the court of appeals determined that the statute would not support a conviction when the defendant's calls to the complainant were "separated by periods of months or years." *Wilson v. State*, 431 S.W.3d 92, 95 (Tex. App. – Houston [1st Dist.] 2013). Now, within a relatively short period of time, this Court has changed its mind.

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[1] The statute of limitations for telephone harassment, a class B misdemeanor, is two years. *See* TEX. PENAL CODE § 42.07(c); TEX. CODE CRIM. PROC. art. 12.02. So long as one call occurred within the limitations period, the evidence would likely be legally sufficient, under this Court's current formulation of the law, for a call in 2000 and a call in 2014. *See, e.g.*, *Tita v. State*, 267 S.W.3d 33, 35 n.1 (Tex. Crim. App. 2008) (noting that the limitations period for aggregated theft begins to run on the date of the last theft, i.e., the end date of a "scheme or continuing course of conduct").

Wilson v. State, No. PD-0755-13, 2014 WL 4627264, at *4-5 (Tex. Crim. App. Sept. 17, 2014). In an about-face from our recent precedent in *Scott*, this Court now describes the applicable law by noting that "the phrase 'repeated telephone communications' does not require the communications to occur within a certain time frame in relation to one another." *Id.* at *1. Had this Court taken its current position in *Scott*, then the First Court of Appeals would not have focused on the fact that appellant "left just two of the six messages over a thirty-day period" in reaching its decision that the evidence was insufficient. *Wilson*, 431 S.W.3d at 96.

Now that this Court, for the first time in this case, has changed its position regarding the requirements for establishing the offense of telephone harassment, appellant has filed a meritorious motion for rehearing in which she argues that this Court's current interpretation "has created a vagueness and overbrea[d]th problem with the statute, which must now be raised by appellant." Appellant explains that "under the *Scott* interpretation of the statute there was no clear vagueness or overbrea[d]th problem[,] but under the *Wilson* interpretation there is." Because there had been no reason to challenge the vagueness or overbreadth of the telephone harassment statute as this Court had interpreted its requirements in *Scott*, appellant had no reason to assert that challenge until this Court's reformulation of the law in this case. Appellant should not be faulted for failing to raise what would have been a frivolous

argument under the law as it existed when she filed her appeal, an argument that would have essentially asked this Court to cling to its existing precedent and not to change it.

Appellant did not have a crystal ball to look into the future and see that this Court would reinterpret the telephone harassment statute in her case. For that reason, I would grant appellant's motion for re-hearing and address both the merits of the initial appeal and her current argument that permitting a conviction for telephone calls that are not in close proximity renders the statute unconstitutionally vague and overbroad.

Filed: December 10, 2014

Publish

[SEAL] COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS AT HOUSTON

ORDER ON MOTION FOR REHEARING

Case number: 01-11-01125-CR

Style: *Elisa Merrill Wilson, Appellant v. The State of Texas, Appellee*

Type of motion: Motion for rehearing

Party filing motion: Appellant

It is **ordered** that the motion for rehearing is **denied**.

Judge's signature: /s/ Jane Bland
Acting for the Court

Panel consists of: Chief Justice Radack and Justices Bland and Huddle

Date: April 30, 2015

[SEAL] COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS AT HOUSTON

ORDER ON MOTION

Case number: 01-11-01125-CR

Style: *Elisa Merrill Wilson v. The State of Texas*

Date motion filed: January 15, 2015

Party filing motion: Appellant

Appellant's motion for leave to file supplemental brief on remand is **granted**. The State's response, if any, is due by **February 10, 2015**.

Judge's signature: /s/ Jane Bland
Acting individually

Panel consists of Chief Justice Radack and Justices Bland and Huddle.

Date: January 22, 2015

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CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
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9/16/2015 **COA No. 01-11-01125-CR**
Tr. Ct. No. 10CCR149142
WILSON, ELISA MERRILL **PD-0623-15**

On this day, the Appellant's petition for discretionary review has been refused.

JUDGE ALCALA WOULD GRANT

Abel Acosta, Clerk

TIMOTHY A. HOOTMAN
2402 PEASE
HOUSTON, TX 77003
* DELIVERED VIA E-MAIL *