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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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In the

TEXAS COURT OF CRIMINAL APPEALS

Austin, Texas

STATE OF TEXAS,
Appellant-Petitioner

v.

DAI'VONTE E'SHAUN TITUS ROSS,
Appellee-Respondent

On the State's petition for discretionary review from
The Fourth Court of Appeals, San Antonio, Texas

Appellate Cause No. 04-00821-CR

Tried in the County Court at Law No. 15, Bexar County, Texas

Trial Cause No. 519657

State's Petition for Discretionary Review

ORAL ARGUMENT REQUESTED

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County Court at Law No. 15
Bexar County, Texas

Panel for the Fourth Court of Appeals

THE HONORABLE SANDEE BRYAN MARION, *Chief Justice*
THE HONORABLE REBECA C. MARTINEZ, *Justice*
THE HONORABLE IRENE RIOS, *Justice and author of the opinion*

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STATEMENT REGARDING ORAL ARGUMENT

The court of appeals' published opinion concludes that the term "alarm" is "an undefined term of indeterminate or variable meaning" and is "inherently vague" as it appears the disorderly conduct by display of firearm statute. TEX. PENAL CODE § 42.01(a)(8). These conclusions are significant because the term appears in a similar context in other statutes. *See* TEX. PENAL CODE §§ 22.11(a) (harassment of public servant), 42.07(a) (harassment), & 43.22(a) (obscene display or distribution). Because this holding implicates other statutes, the State respectfully requests oral argument.

STATEMENT OF THE CASE

According to the trial court, Penal Code section 42.01(a)(8), disorderly conduct by displaying a firearm, "seems to be a little vague in and of itself" in light of the recently enacted open carry law (R.R. at 10–11). Following this reasoning, the trial court sustained Appellee's motion to quash based on the Sixth Amendment and analogous provisions of the Texas Constitution and Code of Criminal Procedure (C.R. at 66–69; R.R. at 11–12). The court of appeals used First Amendment precedent to affirm this ruling. The present allegation does not involve speech; it involves conduct—displaying a firearm in a manner calculated to alarm. In applying free speech precedent to Appellee's notice-based motion to quash, the court of appeals erred in three ways: First, it erred by concluding that the term "alarm" is "an undefined term of indeterminate or variable meaning." Second, it erred by confusing the due process and First Amendment notice the legislature owes an ordinary person on the street with the Sixth Amendment notice the prosecution owes a defendant accused of a crime. These types of "notice" are inherently different. Third, the court of appeals conflated conduct with speech by concluding that the term "alarm," as it appears in the disorderly conduct statute, is vague. The State petitions this Court to hold that the term "alarm" is not vague as used in the disorderly conduct statute. Absent the erroneous reasoning of the court of appeals, the present information gives sufficient notice because it tracks the language of the applicable statute. Therefore, the trial court's order quashing the information should be reversed.

STATEMENT OF PROCEDURAL HISTORY

Proceedings in the Trial Court

The State charged Dai'Vonte E'Shaun Titus Ross, hereinafter referred to as Appellee, by complaint and information with intentionally or knowingly displaying a firearm in a public place in a manner calculated to alarm (C.R. at 7, 8). *See* TEX. PENAL CODE § 42.01(a)(8). The State appealed the trial court's order granting Appellee's motion to quash the information for lack of notice (C.R. at 66–69, 81).

Proceedings in the Court of Appeals

In a published opinion, the court of appeal affirmed the trial court's order on August 2, 2017 (Appendix A). *State v. Ross*, No. 04-16-00821-CR, ___ S.W.3d ___ (Tex. App.—San Antonio 2017, pet. filed). On September 1, 2017, the court of appeals denied the State's motion for rehearing (Appendix B).

Proceedings in this Court

The State now seeks discretionary review of the decision of the court of appeals. *See* TEX. R. APP. P. 66.1. This petition is timely if filed by November 1, 2017. *See* TEX. R. APP. P. 68.2(a) & 4.1(a).

GROUNDS FOR REVIEW

Ground One: Does an information that tracks the language of section 42.01(a)(8) provide a defendant sufficient notice that he displayed a firearm in a manner calculated to alarm?

Ground Two: Did the court of appeals err by applying a First Amendment and Fourteenth Amendment rule to a Sixth Amendment complaint?

Ground Three: Is the term "alarm" within the context of section 42.01(a)(8) inherently vague?

ARGUMENT

Appellee was charged by information for intentionally or knowingly displaying a firearem in a manner calculated to alarm at the 300 block of Ferris Avenue in Bexar County, Texas (C.R. at 7). TEX. PENAL CODE § 42.01(a)(8). In a pretrial motion based on the Sixth Amendment and analogous rules, Appellee asked the trial court to quash an information for lack of notice (C.R. at 66–69). The State argued that the information was sufficient because it tracked the language of the statute and that the additional language requested by Appellee was evidentiary in nature (R.R. at 7). The trial court granted the motion, noting that section 42.01(a)(8) "seems to be a little vague in and of itself" (C.R. at 10–11). The Fourth Court of appeals affirmed that ruling.

In the first ground, the State asks this Court to conclude that the information tracking the language of the statute gave Appellee sufficient Sixth Amendment notice of the nature of the accusation that he displayed a firearm in a manner calculated to alarm. In ground two the State asks this Court to disavow the court of appeals reliance on First Amendment precedent to resolve this appeal. In the third ground, the State asks this Court to reverse the court of appeals conclusion that the term "alarm" is "inherently vague" in the context of the disorderly conduct statute.

Ground One: Does an information that tracks the language of section 42.01(a)(8) provide a defendant sufficient notice that he displayed a firearm in a manner calculated to alarm?

The court of appeals' express holding in this case is that the term "alarm" is "an undefined term of indeterminate or variable meaning." *Ross*, No. 04-16-00821-CR, at *8 (citing *State v. Mays*, 967 S.W.2d 404, 407 (Tex. Crim. App. 1998)). The court of appeals did not cite to any previous Sixth Amendment case law to support this proposition. This holding is significant because the term "alarm" appears in multiple statutes within the Penal Code. *See* TEX. PENAL CODE §§ 22.11(a) (harassment of public servant), 42.07(a) (harassment), & 43.22(a) (obscene display or distribution). Therefore, the court of appeals has decided an important question of state and federal law that should be reviewed by this Court. TEX. R. APP. P. 66.3(b).

"Alarm" is not an "undefined term of indeterminate or variable meaning."

This case should be governed by two rules: (1) a charging document that tracks the language of the statute is sufficient to give Appellee notice; and (2) the State need not allege additional facts when the offense is limited to acts committed intentionally or knowingly. *State v. Mays*, 967 S.W.2d 404, 406 (Tex. Crim. App. 1998); TEX. CODE CRIM. PROC. art. 21.15. The court of appeals could not locate any case law interpreting the Sixth Amendment or analogous rules to support its

conclusion. To fill this gap, it relied on First Amendment precedent that interpreted the meaning of "alarm" in the context of free speech. *See* Grounds Two and Three, *infra*.

"Alarm," as used in section 42.01(a)(8), has a plain meaning supported by common sense—a person his "alarmed" by the display of a firearm when they fear the actor will discharge the firearm or threaten to discharge the firearm. Therefore, an actor calculates to alarm another person by displaying a firearm if he displays it in manner with the intent to cause another to fear that the firearm will discharge or that the actor will threaten to discharge it.

The court of appeals' opinion raises questions about other statutes that similarly use the term alarm. Is the State required to allege particular words in a harassment information? *See* TEX. PENAL CODE § 42.07(a) (offense committed if person communicates in various ways with intent to *alarm*). Must it allege with greater particularity how a defendant spits at a corrections officer? *See id.* § 22.11(a) (offense committed if person spits on corrections officer with intent to *alarm*). Should the State describe the subject matter within an obscene photograph when charged with obscene display or distribution? *See id.* at § 43.22(a) (offense committed if obscene photograph is displayed and actor is reckless about a person being *alarmed*).

The reasoning of the court of appeals' opinion adds an additional element to the offense.

The court of appeals found the State's information insufficient because "[c]onduct that [alarms] some people does not [alarm] others." *Ross*, No. 04-16-00821-CR, at *7 (citing *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (alterations in original)). The relevant statute, however, does not require Appellee to alarm anybody; it merely requires his calculation to alarm. TEX. PENAL CODE § 42.01(a)(8).

The Sixth Amendment requires the State to give notice of the "nature and cause of the accusation." U.S. CONST. amend. VI. The nature of section 42.01(a)(8) is focused on the intent and calculation of the actor, not the resulting condition of the observer. The reasoning of the court of appeals, therefore, requires the State to give notice beyond the nature of the alleged offense.

By tracking the language of the statute, the State has given notice to Appellee of all necessary elements. By designating which public place Appellee displayed the firearm, the State has left no question as to which particular display it is prosecuting. Ultimately, both the trial court and the court of appeals want the State to allege what particular actions or gestures Appellee engaged in while displaying his firearm, i.e., whether he twirled the gun, waved it in the air, pointed

it at people, etc. (R.R. at 9–11). This additional information is evidentiary and need not be pled.

Ground Two: Did the court of appeals err by applying a First Amendment and Fourteenth Amendment rule to a Sixth Amendment complaint?

By using First Amendment precedent to resolve a Sixth Amendment complaint, the court of appeals has "decided an import question of state and federal law that has not been, but should be, settled by this Court." TEX. R. APP. P. 66.3(b). And while neither the trial court nor the court of appeals expressly found section 42.01(a)(8) to be unconstitutionally vague, the court of appeals concluded the term "alarm" was "inherently vague" based on the First Amendment precedent from this Court and the Supreme Court. *State v. Ross*, No. 04-16-00821-CR, at *7–8. Both the trial court and court of appeals reasoned that section 42.01(a)(8) was vague because Texas is an open carry state (R.R. at 10–11). *Ross*, No. 04-16-00821-CR, at *8. Therefore, court's reasoning logically dictates a conclusion that the statute is unconstitutionally vague because it necessarily states that a person openly carrying a firearm in compliance with the law does not have fair notice as to whether his conduct is prohibited. TEX. R. APP. P. 66.3(d).

Due Process/First Amendment notice and Sixth Amendment notice are different because they protect different rights.

The Constitution provides for two different types of notice in criminal matters. Due process requires that a criminal law be sufficiently clear to provide a person of ordinary intelligence adequate notice of what is prohibited. *Long v. State*, 931 S.W.2d 285, 287 (Tex. Crim. App. 1996) (citing *Grayned v. Rockford*, 408 U.S. 104, 108 (1972)). This type of notice requires greater specificity when a criminal statute penalizes speech. *Long*, *supra*, at 287–88 (citing *Grayned*, *supra*, at 109). This protection ensures a person has fair notice of what activities are prohibited by law so that he may conduct himself accordingly and avoid arrest or prosecution.

The Sixth Amendment, on the other hand, requires the State to give the accused notice of the "nature and cause of the accusation." U.S. CONST. amend. VI. The purpose of the Sixth Amendment (and analogous State law) is to give a defendant notice "with reasonable certainty with what he is being charged so that he can prepare his defense." *Eastep v. State*, 941 S.W.2d 130, 132 (Tex. Crim. App. 1997). The notice must be clear enough to enable to the defendant to anticipate the State's evidence. *Garcia v. State*, 981 S.W.2d 683, 85 (Tex. Crim. App. 1998). But the State does not have to plead facts that are evidentiary in nature so long as its allegation tracks the language of the statute. *State v. Mays*,

967 S.W.2d 404, 406 (Tex. Crim. App. 1998). The State may need to provide additional information in charging instrument when the statutory language fails to be completely descriptive. *State v. Zuniga*, 512 S.W.3d 902, 907 (Tex. Crim. App. 2017). This "notice" right protects a defendant from a trial by ambush.

The distinction between these two rights is significant. When a statute is vague on its face or as applied to a particular case, a person cannot be prosecuted under that statute regardless of the specificity of the charging document. A legislator's failure to provide notice in this context is fatal to a criminal case and cannot be cured by any remedial action. Due process or the First Amendment is violated once a person is arrested or charged pursuant to the vague or overly broad statute. Obtaining a dismissal in court does not undo or erase the violation; it merely contains it to the arrest and accusation.

Conversely, when the prosecution fails to give proper notice through its charging document, it may be cured by amendment and the criminal case may proceed if the defendant can prepare his defense. A violation of this sort of notice does not occur unless a defendant is tried with an inadequate charging instrument. If the charging instrument is amended, no violation occurs.

Furthermore, a person on the street in most cases can only rely on the specificity and clarity of a law to understand the delineation between legal and illegal conduct. A charged criminal defendant, however, does not need to rely

solely on the charging document to prepare his defense: he may request a witness list, *Martinez v. State*, 867 S.W.2d 30, 39 (Tex. Crim. App. 1993); he may request discovery of the prosecution's evidence, TEX. CODE CRIM. PROC. art. 39.14(a); then, he may, with the benefit of counsel, independently investigate the validity of the charges against him.

The reasoning of the lower courts does not match the remedy provided to Appellee.

In this case, the courts found a Sixth Amendment notice violation but used Due Process and First Amendment reasoning. The trial court's ruling and the court of appeals' opinion suggest that section 42.01(a)(8) did not give Appellee fair notice as to what kind of conduct was prohibited when he displayed his firearm at the 300 block of Ferris Avenue on June 8, 2016. Both courts concluded that section 42.01(a)(8) was particularly vague in the aftermath of the recently enacted open carry law (R.R. at 10–11). *Ross*, No. 04-16-00821-CR, at *8. If the term "alarm" is vague under due process or the First Amendment, then the trial court should have dismissed the information. The trial court, however, seemingly declined to find the statute unconstitutional (R.R. at 11 ["I don't know if it's unconstitutionally vague …"]) and the court of appeals decision appears to only require the State to replead its case with greater specificity.

The reasoning and remedy underlying these rulings are inconsistent. The reasoning is that Appellee could not have possibly known what type of conduct was illegal because license holders are now free to openly carry handguns in public, provided that they are in a holster. *See* TEX. PENAL CODE § 46.035(a).[1] The lower courts' remedy is to order the prosecution to better describe the vaguely prohibited conduct in which Appellee already engaged. This Court needs to pull this First Amendment square peg out of the Sixth Amendment round hole.

Ground Thee: Is the term "alarm" within the context of section 42.01(a)(8) inherently vague?

The court of appeals held that the term "alarm" is "inherently vague." *Ross*, No. 04-16-00821-CR, at *7–8 (citing *May v. State*, 765 S.W.2d 438, 440 (Tex. Crim. App. 1989)). This holding is in conflict with the holdings of the Supreme Court, this Court, and at least two courts of appeals. TEX. R. APP. P. 66.3(a) & (c).

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[1] A person must be at least 21 to openly carry a handgun. TEX. GOV'T CODE § 411.172(a)(2). And they may only display the handgun if it is "carried in a shoulder or belt holster by the license holder." TEX. PENAL CODE § 46.035(a). Texas law does not prohibit a person of any age from carrying a rifle or shotgun in public. The information does not specify whether Appellee is a license holder or whether he displayed a handgun or other type of firearm. The trial court's docket sheet indicates that Appellee was 19 at the time of the alleged offense (C.R. at 6), thereby making him ineligible to display a holstered handgun as a license holder.

The court of appeals also observed the reasoning of the Fort Worth Court of Appeals' recent opinion in *Lovett v. State*, 523 S.W.3d 342 (Tex. App.—Fort Worth 2017, pet. ref'd). *Ross*, No. 04-16-00821-CR, at *8 (citing *Lovett*). *Lovett* examines whether evidence in a particular case was legally sufficient to support a verdict and should offers no guidance on the outcome of this appeal.

The term "alarm" in not vague in this statute because it is tied to the subjective intent of the actor, not the varying sensitivities of the general public.

To reach its conclusion, the court of appeals relied on precedent concluding that terms such as "alarm" and "annoy" were unconstitutionally vague when used in statutes that implicated speech. *See Ross*, No. 04-16-00821-CR, at *5 (citing *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Kramer v. Price*, 712 F.2d 174 (5th Cir. 1983), *subsequently vacated*, 716 S.W.2d 284 (5th Cir. 1983), *district court aff'd*, 723 F.2d 1164 (5th Cir. 1984); *May v. State*, 765 S.W.2d 438 (Tex. Crim. App. 1989)). Critical to the court of appeals' opinion is the notion that "[c]onduct that [alarms] some people does not [alarm] others." *Ross*, No. 04-16-00821-CR, at *7 (citing *Coates*, 402 U.S. at 614 (alterations in original)).

In this respect the disorderly conduct statute is materially different from the statutes at issue in *May*, *Kramer*, and *Coates*. In *May* and *Kramer*, the statute required an individual to actually be alarmed by the actor's speech. *See Kramer*, 712 F.2d at 176 (quoting prior harassment statute); *May*, 765 S.W.2d at 439–40 (citing and quoting *Kramer* and the prior harassment statute). In *Coates*, the ordinance required an actor to not annoy a "person passing by." *Coates*, 402 U.S. at 611–12. Section 42.01(a)(8), however, does not require a bystander to actually be alarmed because the statute turns on the actor's intent and calculation. If a hypothetical defendant mildly taps on the grip of a holstered pistol with the intent

of alarming the Cowardly Lion, he is just as guilty of the offense as another defendant who waves a machine gun in Rambo's face with the same intent but without achieving any reaction. *See Sanchez v. State*, 995 S.W.2d 677, 689–90 (Tex. Crim. App. 1999) (concluding that term "unwelcome sexual advances" was not vague because it was tied to a defendant's intent). A person who displays a gun in public with no intent to alarm is not guilty of this offense even if their manner of display is considered egregious by on-lookers.

The legislature's use of the term "calculate" further narrows the actor's culpability to cause alarm.

The court of appeals' opinion also fails to take into account how the term "calculate" is used in section 42.01(a)(8). The term "calculate" within this section goes beyond simple intent; it requires the actor to engage in some deliberation about causing alarm by displaying his firearm. *See Ex parte Poe*, 491 S.W.3d 348, 354 (Tex. App.—Beaumont 2016, pet. ref'd) ("'Calculated' is defined as 'planned or contrived so as to accomplish a purpose or achieve an effect: thought out in advance: deliberately planned." (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 1376 (2002)). The use of "calculate" in subsection (a)(8) restricts this offense to only those intentional acts done with deliberation. This language gives an ordinary person on the street additional assurance (beyond the requirement of intent) that the term "alarm" will not be vaguely applied to his conduct.

The court of appeals' opinion is in conflict with the Supreme Court's decision in *Colten v. Kentucky*, and this Court's decision in *Scott v. State*.

Despite the Fifth Circuit's proclamation that the term "alarm" is "inherently vague," this Court and the Supreme Court have arrived at the opposite conclusion in other cases where "alarm" was tied to the actor's intent. In *Colten v. Kentucky*, 407 U.S. 104 (1972), the Supreme Court upheld Kentucky's disorderly conduct statute because it required in part that a person have intent to cause "inconvenience, annoyance, or *alarm*." *Id*. at 110 (emphasis added). The Court accepted the Kentucky Supreme Court's reasoning "that citizens who desire to obey the statute will have no difficulty in understanding it." *Id.*

Likewise, in *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010), this Court concluded that the current harassment statute's requirement of "specific intent" to inflict emotional distress on the listener did not implicate the First Amendment. *Id*. at 669–71. Judge Johnson additionally noted that "[t]here is not ambiguity of intent in the mind of the speaker, and intent undergirds the offense." *Id*. at 671 (Johnson, J., concurring). The court of appeals conclusion of the "inherent vagueness" of the term "alarm," as used in section 42.01(a)(8), is incompatible with the holdings of *Colten* and *Scott*.

The court of appeals' holding is in conflict with at least two other courts of appeals.

Additionally, the court of appeals acknowledged in its own opinion that it was in conflict with the opinions of other courts of appeals that have interpreted the same statute. *Ross*, No. 04-16-00821-CR, at *6–7 (citing *Roberts v. State*, No. 01-16-00059-CR, 2016 Tex. App. LEXIS 12598, 2016 WL 6962308 (Tex. App.—Houston [1st Dist.] Nov. 29, 2016, pet. ref'd) (not designated for publication); *Ex parte Poe*, 491 S.W.3d 348 (Tex. App.—Beaumont 2016, pet. ref'd). In *Roberts*, the Houston Court of Appeals concluded that the defendant's particular actions in displaying the firearm were evidentiary in nature and were not required to be pled in the information. *Roberts*, No. 01-16-00059-CR, 2016 Tex. App. LEXIS 12598, 2016 WL 6962308, at *11–12. Similarly, in *Poe*, the Beaumont Court of Appeals concluded that the term "alarm" was not vague because it required the State to meet a higher burden of mental state by combining intent with calculation. *Poe*, 491 S.W.3d at 354–55,[2]

A firearm has a very simple purpose. And the term "alarm," when used in the context of displaying a firearm, has an obvious meaning—a person is alarmed by the display of a firearm when they fear the firearm will be used in a dangerous

[2] Even the Fourth Court of Appeals has concluded that the term "alarm" is not vague in the context of indecent exposure. *Ex parte Ports*, 21 S.W.3d 444, 446 (Tex. App.—San Antonio 2000, pet. ref'd).

manner such as a discharge or threat of discharge. *See Poe*, 491 S.W.3d at 354 (defining "alarm" as "fear or terror resulting from a sudden sense of danger." (internal citation omitted)). However "inherently vague" the term "alarm" may be in the context of a phone call or loitering, it is not vague when somebody is intentionally flashing their gun in public to cause fear and excitement because "intent undergirds the offense." *Scott*, 322 S.W.3d at 671 (Johnson, J., concurring).

PRAYER FOR RELIEF

The Petitioner-State prays that this Court grant the petition for review and reverse the judgment and opinion of the court of appeals and remand this case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nathan E. Morey, assistant district attorney for Bexar County, Texas, certify that a copy of the foregoing petition has been delivered by email to Mac Bozza and the Office of the State Prosecuting Attorney on October 24, 2017 in accordance with Rules 6.3(a), 9.5(b), and 68.11 of the Texas Rules of Appellate Procedure.

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CERTIFICATE OF COMPLIANCE

I, Nathan E. Morey, certify that, pursuant to Texas Rules of Appellate Procedure 9.4(i)(2)(D) and 9.4(i)(3), the above petition for discretionary review, excluding the cover page, identity of parties, table of contents, index of authorities, certificate of service, and certificate of compliance, contains less than 4,150 words according to the "word count" feature of Microsoft Office.

/s/ *Nathan E. Morey*

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APPENDIX A
Opinion of the Court of Appeals

Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-16-00821-CR

The **STATE** of Texas,
Appellant

v.

Dai'Vonte E'Shaun Titus **ROSS**,
Appellee

From the County Court at Law No. 15, Bexar County, Texas
Trial Court No. 519657
The Honorable Robert Behrens, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: August 2, 2017

AFFIRMED

Dai'Vonte E'Shaun Titus Ross was charged with disorderly conduct for displaying a firearm in a public place in a manner calculated to alarm. The State of Texas appeals the trial court's order granting Ross's motion to quash. The State contends the trial court erred in granting the motion because the information provided sufficient notice by tracking the language of the statute. We affirm the trial court's order.

BACKGROUND

The information charging Ross with disorderly conduct stated:

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

Ross filed a motion to quash the information asserting his constitutional right to be fairly informed of the charge was denied "by the failure of the Information to allege an essential element of the offense, namely the manner and means by which the offense was allegedly committed."

At the hearing on the motion, Ross's attorney argued tracking the language of the statute is only sufficient when the statute is completely descriptive of the offense and asserted tracking the language of the statute was not sufficient in this case because Texas is an open-carry state. The State responded that Ross was requesting the State to plead facts that are evidentiary in nature. Ross's attorney replied, "In an open-carry state at what point is it now in a manner calculated to alarm?" At the conclusion of the hearing, the trial court announced it would give the State an opportunity to amend, but if the State chose not to amend, the motion would be granted. The trial court explained, "it seems to me, by specifying a manner calculated to cause alarm, that a person should at least have some basis to determine their defense and, you know, what it is that I'm particularly having to defend against, what was that manner." After the State chose not to amend the information, the trial court signed an order granting the motion, and the State appeals.

SUFFICIENT NOTICE AND STANDARD OF REVIEW

"The Texas and United States Constitutions grant a criminal defendant the right to fair notice of the specific charged offense." *State v. Barbernell*, 257 S.W.3d 248, 250 (Tex. Crim. App. 2008); *see also State v. Castorena*, 486 S.W.3d 630, 632 (Tex. App.—San Antonio 2016, no pet.). To provide fair notice, "'[t]he charging instrument must convey sufficient notice to allow

the accused to prepare a defense.'" *Barbernell*, 257 S.W.3d at 250 (quoting *Curry v. State*, 30 S.W.3d 394, 398 (Tex. Crim. App. 2000)); *see also Castorena*, 486 S.W.3d at 632. An information is deemed to provide sufficient notice if it "charges the commission of an offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged." TEX. CODE CRIM. PROC. ANN. art. 21.11 (West 2009); *see id*. at art. 21.23 (providing that rules regarding allegations in an indictment and the certainty required also apply to an information).

In most cases, an information that tracks the statutory text of an offense provides sufficient notice. *Barbernell*, 257 S.W.3d at 251; *Curry*, 30 S.W.3d at 398. Tracking the statutory language will be insufficient, however, if the statute defines the manner or means of commission in several alternative ways. *Curry*, 30 S.W.3d at 398. In such a case, the information must identify which of the alternative statutory manner or means is charged. *Curry*, 30 S.W.3d at 398; *State v. Mays*, 967 S.W.2d 404, 407 (Tex. Crim. App. 1998). Similarly, "[a] statute which uses an undefined term of indeterminate or variable meaning requires more specific pleading in order to notify the defendant of the nature of the charges against him." *Mays*, 967 S.W.2d at 407. Stated differently, more specificity is necessary when a term "is so vague or indefinite as to deny the defendant effective notice of the acts he allegedly committed." *Daniels v. State*, 754 S.W.2d 214, 220 (Tex. Crim. App. 1988); *Thomas v. State*, 621 S.W.2d 158, 163 (Tex. Crim. App. [Panel Op.] 1980). Otherwise, definitions of terms are generally regarded as evidentiary matters, and the State is not required to allege facts in an information that are merely evidentiary in nature. *Smith v. State*, 309 S.W.3d 10, 14 (Tex. Crim. App. 2010); *Barbernell*, 257 S.W.3d at 251; *Curry*, 30 S.W.3d at 398.

Whether an information provides sufficient notice is a question of law. *Smith*, 309 at 13; *Barbernell*, 257 S.W.3d at 251; *Castorena*, 486 S.W.3d at 632. Therefore, we review a trial court's

decision to quash an information for failure to provide sufficient notice de novo. *Smith*, 309 S.W.3d at 13-14; *Barbernell*, 257 S.W.3d at 251-52; *Castorena*, 486 S.W.3d at 632.

DISCUSSION

Section 42.01(a)(8) of the Texas Penal Code provides that a person commits the offense of disorderly conduct "if he intentionally or knowingly displays a firearm or other deadly weapon in a public place in a manner calculated to alarm." TEX. PENAL CODE ANN. § 42.01(a)(8) (West 2016). The information in this case tracked the statutory language by providing:

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

As clarified at the hearing on Ross's motion to quash, Ross asserted the information did not provide sufficient notice because the term "alarm" is vague or indeterminate; therefore, the information needed to contain more specificity to provide Ross with notice of how the manner in which he displayed the firearm was "calculated to alarm."

The State contends the trial court erred in granting the motion to quash because the information tracked the language of the statute. In addition, the State contends the term "alarm" did not require further specificity based on the holdings of our sister courts in *Roberts v. State*, No. 01-16-00059-CR, 2016 WL 6962308 (Tex. App.—Houston [1st Dist.] Nov. 29, 2016, pet. ref'd) (not designated for publication), and *Ex parte Poe*, 491 S.W.3d 348 (Tex. App.—Beaumont 2016, pet. ref'd). Ross cites *May v. State*, 765 S.W.2d 438 (Tex. Crim. App. 1989), as support for the trial court's determination that the term "alarm" was vague, thereby requiring greater specificity in the information.

A. *May v. State*

In *May v. State*, the Texas Court of Criminal Appeals addressed whether the provision of the Texas Penal Code defining the offense of harassment was unconstitutionally vague. 765 S.W.2d at 439. The offense was defined to include telephone communications which "intentionally, knowingly, or recklessly annoy[] or alarm[] the recipient." *Id*. The court held the statute was inherently vague "in attempting to define what annoys and alarms people" and by failing "to specify whose sensitivities are relevant." *Id*. at 440. As support for its holding, the court cited the Fifth Circuit's decision in *Kramer v. Price*, 712 F.2d 174 (5th Cir. 1983).

In *Kramer*, the Fifth Circuit addressed whether Texas's harassment statute was unconstitutionally vague because of its use of the terms "annoy" and "alarm." 712 F.2d at 176. The court noted a statute is unconstitutionally vague "if it fails to draw reasonably clear lines between lawful conduct and unlawful conduct" and fails "to provide citizens with fair notice or warning of statutory prohibitions so that they may act in a lawful manner." *Id*. The court then noted the United States Supreme Court struck down a statute using the word "annoy" in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). *Id*. at 177. In *Coates*, the ordinance at issue "made it a criminal offense for three or more individuals to assemble on public sidewalks and conduct themselves in a manner that might annoy passersby." *Kramer*, 712 F.2d at 177. In holding the ordinance to be unconstitutionally vague, the United States Supreme Court first recognized the term "annoy" was vague because "[c]onduct that annoys some people does not annoy others." *Id*. (quoting *Coates*, 402 U.S. at 614). In addition, the Court held the ordinance failed to specify whose sensitivities were relevant, i.e., "'the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man.'" *Id*. at 177-78. The Fifth Circuit then concluded Texas's harassment statute "suffer[ed] from the same infirmities as the ordinance in *Coates*," reasoning:

> The Texas courts have made no attempt to construe the terms "annoy" and "alarm" in a manner which lessens their inherent vagueness. Of greater importance, the Texas courts have refused to construe the statute to indicate whose sensibilities must be offended. *Coates* recognized that a statute is unconstitutionally vague when the standard of conduct it specifies is dependent on each complainant's sensitivity. Whereas *Coates* specified that a passerby's sensitivity must be offended, the statute in this case makes no attempt at all to specify whose sensitivity must be offended. In the absence of judicial clarification, enforcement officials, as well as the citizens of Texas, are unable to determine what conduct is prohibited by the statute.

Id. at 178 (internal citations omitted).

B. Roberts v. State

In *Roberts v. State*, Walter Lee Roberts was charged by information with disorderly conduct, "[s]pecifically, the information alleged 'that in Harris County, Texas, Walter Lee Roberts, hereafter styled the Defendant, heretofore on or about March 5, 2015, did then and there unlawfully intentionally and knowingly display a deadly weapon, namely, a firearm, in a public place and in a manner calculated to alarm.'" 2016 WL 6962308, at *1. Similar to the argument made in Ross's motion to quash, Roberts argued the information was void because it failed to allege the manner and means of the offense. *Id*. at *4. Specifically, Roberts argued the information should have alleged he "displayed a deadly weapon in a manner calculated to alarm, 'namely by pointing a shotgun at Etoinne Ternoir.'" *Id*.

The Houston court first noted section 42.01(a)(8) does not require that the offense be committed against a specific person; therefore, the information did not have to identify the complainant. *Id*. at *5. Furthermore, the court held "specifically alleging that Appellant pointed a shotgun at the complainant is evidentiary in nature" and was not required to be included in the information. *Id*. We read this holding to mean how the deadly weapon was displayed such that its manner was "calculated to alarm" is evidentiary in nature and not required to be included in an information.

C. Ex parte Poe

In *Ex parte Poe*, Derek Ty Poe was charged by information with disorderly conduct by intentionally and knowingly displaying a deadly weapon, namely a firearm, in a public place and in a manner calculated to alarm. 491 S.W.3d at 350-51. Poe filed an application for pretrial writ of habeas corpus asserting section 42.01(a)(8) is unconstitutionally vague, arguing, among other issues, that the terms "displaying," "manner," "calculated," and "alarm" are undefined. *Id*. at 351. Specifically, Poe argued, "the statute 'provides no guidance or explanation as to what facts or circumstance[s] must exist in order to determine if a defendant's conduct was done with the specific intent showing that he calculated his display of a firearm to be alarming.'" *Id.* Poe further argued "the word 'alarm' is 'inherently subjective[.]' and … 'there is a great degree of variance of human perception of which conduct is alarming[.]'" *Id.*. at 354.

The Beaumont court rejected Poe's argument, noting the term "alarm" has a commonly known and accepted usage and meaning as 'fear or terror resulting from a sudden sense of danger.'" *Id*. (quoting Webster's Third New Int'l Dictionary 48 (2002)). Therefore, the court held Poe had not met his burden to prove the statute is unconstitutionally vague. *Id*. at 355.

D. Analysis

To the extent our sister courts' opinions in *Roberts* and *Poe* are read to hold the term "alarm" as used in section 42.01(a)(8) is not an undefined term of indeterminate or variable meaning, we disagree. In *Coates*, the United States Supreme Court held the term "annoy" was vague because "[c]onduct that annoys some people does not annoy others." *Coates*, 402 U.S. at 614. Similarly, the term "alarm" is vague because "[c]onduct that [alarms] some people does not [alarm] others." *Id*.

In *May*, the Texas Court of Criminal Appeals recognized the term "alarm" is inherently vague. 765 S.W.2d at 440 (quoting *Kramer*, 712 F.2d at 178). Absent further guidance from the

Texas Court of Criminal Appeals, we hold tracking the language of section 42.01(a)(8) in an information is not sufficient notice because the statute "uses an undefined term of indeterminate or variable meaning," thereby requiring "more specific pleading in order to notify the defendant of the nature of the charges against him." *Mays*, 967 S.W.2d at 407. Stated differently, more specificity is necessary because the term "alarm" "is so vague or indefinite as to deny the defendant effective notice of the acts he allegedly committed." *Daniels*, 754 S.W.2d at 220; *Thomas*, 621 S.W.3d at 163. Because Texas is an open-carry state, an individual is entitled to openly display a firearm in public. Therefore, when a defendant is charged with disorderly conduct under section 42.01(a)(8), he is entitled to notice of how the manner in which he displayed a firearm was calculated to "alarm" because absent such notice the defendant would be unable to prepare a defense. *See Barbernell*, 257 S.W.3d at 250 (noting "charging instrument must convey sufficient notice to allow the accused to prepare a defense"); *cf. Lovett v. State*, Nos. 02-16-00094-CR & 02-16-00095-CR, 2017 WL 2590221, at *4 (Tex. App.—Fort Worth June 15, 2017, pet. filed) (noting "the mere presence of a firearm or deadly weapon in public cannot possibly supply the requisite *mens rea* for a disorderly-conduct conviction, or else anyone participating in Texas's embrace of lawful open carry would be guilty the moment he stepped outside his home visibly armed").

CONCLUSION

The trial court's order granting Ross's motion to quash is affirmed.

Irene Rios, Justice

PUBLISH

APPENDIX B

Order of the Court of Appeals on the State's Motion for Rehearing

Fourth Court of Appeals
San Antonio, Texas

September 1, 2017

No. 04-16-00821-CR

The **STATE** of Texas,
Appellant

v.

Dai'Vonte E'Shaun Titus **ROSS,**
Appellee

From the County Court at Law No. 15, Bexar County, Texas
Trial Court No. 519657
The Honorable Robert Behrens, Judge Presiding

O R D E R

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

The State's has filed a Motion for Rehearing and the motion is DENIED.

Irene Rios, Justice

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 1st day of September, 2017.

Keith E. Hottle
Clerk of Court