In the
Court of Appeals
Fifteenth District of Texas at Arlington

No. 15-14-00053-CR

DIXIE HERBSTER
Appellant

V.

THE STATE OF TEXAS
Appellee

On Appeal from the 202nd District Court
Tarrant County, Texas
The Honorable Richard Cockrell
Trial Court No. 39920

Before Tucker, C.J., Wright, J. and Franks, J.
Opinion by Tucker, Chief Justice, Wright, J., concurring, Franks, J., dissenting

OPINION

A jury convicted Dixie Herbster of the offenses of burglary of a habitation and harassment. *See* TEX. PENAL CODE ANN. §§ 30.02, 42.07 (West 2008). Punishment was assessed at five years' imprisonment for the burglary offense and 180 days in jail for the harassment offense, with the sentences to run concurrently. In five issues on appeal, Herbster argues that: (1) the evidence is insufficient to support her conviction for the offense of harassment; (2) the harassment statute is unconstitutional; (3) the evidence is insufficient to support her conviction for the offense of burglary of a habitation; (4) the trial court's jury instructions regarding the burglary offense constituted an impermissible comment on the weight of the evidence; and (5) the trial court erred in failing to submit criminal trespass as a lesser-included offense of burglary. We agree with Herbster that the evidence is insufficient to support her conviction for the offense of harassment and render a judgment of acquittal for that offense. We also agree with Herbster that the evidence is insufficient to establish the elements of burglary of a habitation. However, we reform the judgment to reflect conviction of theft of property worth more than $50.00 but less than $500.00, and remand the case for a new punishment hearing.

FACTUAL AND PROCEDURAL BACKGROUND

Based on conduct resulting from an acrimonious relationship between Dixie and her ex-husband Dan Herbster, Dixie was charged with the offenses of burglary of a habitation and harassment.[1] The State's indictment for the offense of burglary alleged that:

> on or about February 14, 2014, Dixie Herbster knowingly and intentionally entered a habitation located at 1415 Lake House Drive, Mapleton, Texas without the effective consent of the owner, Dan Herbster, and committed theft of the following: a diamond and emerald ring, one bottle of Jack Daniels liquor, one

[1] We refer to Dixie and Dan Herbster by their first names throughout the opinion to avoid confusion.

> bottle of Crane Lake Chardonnay, one bottle of Two Buck Chuck Pinot Noir, and one bottle of Bailey's Irish Cream.

The State's information for the offense of harassment alleged that:

> on or about January 17, 2014, Dixie Herbster, with intent to harass, annoy, alarm, abuse, torment, and embarrass Dan Herbster, hereinafter referred to as complainant, did make repeated communications to the complainant, to wit: telephone calls and/or electronic communications, in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, and offend the complainant.

Prior to trial, Dixie filed a motion to quash the information, arguing that Section 42.07 of the Texas Penal Code, the statute under which she was charged for the harassment offense, was unconstitutional on its face because it was both unduly vague and overbroad and infringed on the First Amendment right to free speech. Following a hearing at which only argument was presented, the trial court denied the motion to quash, and the case proceeded to trial.

The State's first witness at trial was Dan Herbster, the current mayor of the town of Mapleton. Dan testified that he and Dixie were happily married for over fourteen years until suicide tragically claimed the life of their only son, Tommy. Understandably, after Tommy's death, Dixie was inconsolable with grief. According to Dan, Dixie turned to the bottle and began abusing prescription medication, causing their marriage to suffer. Their frequent fights often resulted in Dixie blaming Dan for Tommy's suicide. Dan stated that Dixie was diagnosed with bipolar disorder and post-traumatic stress disorder in 2008. After two years of suffering their strained marriage, Dan and Dixie decided to separate.

Dan told the jury that he moved out of the marital home and into a small lake house he had built during the marriage on a lot that he had purchased with "mostly" separate property funds. According to Dan, he and Dixie were cordial during the initial separation. Dan testified that he supported Dixie and allowed Dixie to visit the lake house often because his intention was

for the separation to be temporary. Soon, however, it became clear to Dan that the relationship could not be salvaged, and the couple began only communicating briefly over the phone and through social media.

Dan eventually moved on with his life. He excelled in his political career, ultimately becoming the mayor of his town. In 2013, he began dating Dixie's former best friend, Nora. Dan believed that the knowledge of this relationship drove Dixie into a jealous rage. Despite Dixie's disapproval, Dan proposed to Nora on New Year's Day 2014. Nora accepted, and on January 17, 2014, Dan, who had not seen Dixie in over two years, served Dixie with divorce papers. Dan testified that Dixie responded by calling him and Nora on their home phone late at night and leaving a message in which Dixie indicated that she was drunk and cursed them both for their betrayal.[2] Later that night, Dixie left what Dan characterized as an "inappropriate" post on his official mayoral Facebook page.[3] Dan testified that he felt harassed, threatened, and intimidated by both the voicemail message and the Facebook post. Nevertheless, Dan claimed that he was "empathetic" to Dixie's problems.

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[2] A copy of the voicemail message was admitted into evidence. On the message, Dixie says:

> I just downed an entire bottle of vodka and am angry as hell. Damn you, Dan, and damn your slut Nora as well! She is nothing but a dirty whore! And you are a lying, cheating bastard! I wish I could send you both straight to hell! Oh, and by the way, I really don't like your politics, 'Mr. Mayor.' I intend to run against you during the next election.

[3] A copy of the Facebook post was admitted into evidence. It read, in its entirety:

> I love you, Dan. I don't know why you are hurting me this way. Don't you remember all the romantic, sensual nights we enjoyed together? All the drama we shared over the years—does it mean nothing to you? I know this—your treatment of me is misogynistic. You hate women, don't you, Dan? I know you do. Nora will learn the truth soon enough. So will all the women in Mapleton. Your policies as mayor have been anti-woman, and when I run against you, I will proclaim that fact to the entire town. My policies as mayor will be pro-woman, and when all is said and done, even your precious Nora will vote for me. Get ready for the battle of your life, you liberal bastard. This freedom-loving American has had enough of your sorry-ass tax-and-spend mayoral administration, and I'm ready for war!!! To quote the legendary Patty Smyth, "Sometimes love just ain't enough." I'm "shooting at the (Facebook) walls of heartache. Bang, bang! I am the Warrior! Well I am the Warrior, and heart to heart I'll win! Will you survive?"

Dan testified that Dixie called him approximately two weeks later on his office phone at City Hall. Dixie immediately apologized for her earlier behavior but told Dan that she "honestly" didn't like his politics and was still mad at him for "breaking her heart and the hearts of women everywhere," especially those in Mapleton. Dixie told Dan that she still intended to run against him in the next election unless he "cleaned up" City Hall and also publicly apologized for "cheating on her" with "that slut Nora." Dan testified that this call made him feel angry. Dan told Dixie that he loved Nora, was "proud" of his record as mayor, and had nothing to apologize for, either politically or personally. In response to what Dan characterized as Dixie's "threat" to run against him, he told her, "Bring it on, baby. You're not a serious candidate—your Tea Party sympathies won't play well here in Mapleton, and you know it. You're just saying that you'll run for mayor in order to harass me. But I'm not afraid of you." Dan testified, however, that he was secretly "terrified" of his ex-wife, because of her mental health, drug abuse, and the fact that she had "dirt" on him from their younger years.[4] The call eventually turned into what Dan called "a screaming match" after Dixie expressed hatred for both Dan and Nora. Dan told Dixie that it was time for her to "let go of the past" and let go of him, which sent Dixie "over the edge."

According to Dan, Dixie made a "passing threat" that she would confront Nora, who had moved into the lake house, and would tell her "the truth about why Tommy killed himself." Dixie added, "Oh yeah, and don't forget, I still have some of your belongings, including that old shotgun of yours. I probably should return it to you." Concerned about the effects of her continued drug abuse on her mental condition, Dan testified that he told Dixie to stay away from him, stay away from Nora, and stay away from the lake house. On February 12, 2014, Dixie left

[4] On cross-examination, Dan admitted that the "dirt" to which he was referring was his own history of mental illness, drug abuse, and anger issues from when he and Dixie were in law school together.

a second and final post on Dan's Facebook page. Dan testified that this second post made him feel harassed, tormented, annoyed, alarmed, offended, embarrassed, and abused.[5]

During cross-examination, Dan admitted that the deed on the lake house contained both his and Dixie's names, that he had initially built the home as a surprise for Dixie, and that, prior to the last phone conversation between he and Dixie, he had never before expressly limited her access to the lake house. However, he testified that Dixie had always understood that the lake house was his during the separation.

Nora testified briefly about her past relationship with Dixie. Nora claimed that after Dan's proposal, Dan had given her a diamond and emerald ring as a gift, which she insured under her name. In return, Nora booked a mini-vacation so that she and Dan could celebrate Valentine's Day in the Bahamas. Nora testified that when she and Dan returned from their Valentine's vacation, they found the lake house door unlocked and the home in total disarray. The drawers had been ransacked and open bottles of liquor from their liquor cabinet had been strewn about. Dan asked Nora to look around to see if anything else had been stolen. When Nora reported that the diamond and emerald ring he had given her was missing, Dan knew that Dixie must have raided the lake house. He called the police department and had Dixie arrested.

Against her counsel's advice, Dixie testified in her defense. She explained that she had learned through Facebook that Dan and Nora were going out of town from February 12-16 to celebrate Valentine's Day. On February 13, Dixie decided that she could not live without Dan, sank into a deep depression, and made the drunken decision to break into the lake house to find old pictures that would remind Dan that they were once happy and to convince him to take her back.

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[5] The final Facebook post read, in its entirety, "I will never stop loving you, Dan. Goodbye."

Dixie testified that she drove to the lake house after midnight and used the key that Dan had given her many years ago to enter the home. She told the jury that she started rummaging around to try to find old pictures of the two and became hysterically upset upon discovering that the only pictures in the house were of Dan and Nora's adventures as a couple. Dixie testified that she blamed her state of mind on her bipolar disorder. Dixie admitted that, while feeling defeated, she broke into Dan's liquor cabinet and began imbibing. She testified that she was thoroughly drunk and not in the "right state of mind" when she decided to somehow "get back at Nora." Dixie came across Nora's jewelry box, peered inside, and was shocked to discover that it contained a diamond and emerald ring that Dixie's grandmother had bequeathed to her. Dixie grabbed the ring and left. At trial, Dixie introduced a copy of her grandmother's will describing the specific bequest of a diamond and emerald ring to her.

Dixie never specifically denied Dan's testimony that the lake house was purchased with separate property funds. Instead, she testified that Dan had built the lake house for her as a Christmas surprise during their happy years. After the State rested, Dixie moved for a directed verdict on the grounds that she also owned the lake house and that there was no evidence that she intended to enter the lake house with the intent to commit theft. The trial court overruled Dixie's motion and proceeded with a charge conference.

At the charge conference, Dixie objected to the trial court's inclusion of the following instruction regarding the burglary allegation, alleging that it constituted an improper comment on the weight of the evidence: "Property purchased with separate property funds remains the separate property of the spouse. Therefore, the lake house is Dan's separate property and you are instructed that Dan is the owner of the property." Dixie also requested that the charge include theft of property as a lesser included offense. The State objected to the inclusion of the lesser

charge, arguing, "Your Honor, there has been no evidence showing that if Dixie is guilty she is guilty only of theft. The fact of the matter is that it is undisputed that the house is Dan's because it was purchased with his separate property. Dixie hadn't been to the lake house in years. She knew she wasn't supposed to be there. But she broke into the house, trashed it, and stole their liquor." The trial court denied Dixie's request to submit the issue of theft of property valued at more than $50.00 but less than $500.00. As submitted, the jury found Dixie guilty of burglary of a habitation. The jury also found Dixie guilty of the offense of harassment as alleged.

Dixie subsequently filed a motion for new trial, arguing, among other grounds, that Texas Penal Code Section 42.07 was vague as applied to her conduct, *i.e.*, that the statute failed to give her a reasonable opportunity to know that the conduct for which she was charged was prohibited. The motion for new trial was overruled by operation of law. This appeal followed.

STANDARD OF REVIEW

In evaluating the sufficiency of the evidence, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of burglary of a habitation beyond a reasonable doubt. *See Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Our rigorous legal sufficiency review focuses on the quality, rather than the quantity, of the evidence presented. *Brooks*, 323 S.W.3d at 917–18 (Cochran, J., concurring). We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19).

We measure the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Id*.

HARASSMENT

A person commits the offense of harassment if, "with intent to harass, annoy, alarm, torment, or embarrass another," she "makes repeated telephone communications" or "sends repeated electronic communications . . . in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." TEX. PENAL CODE ANN. § 42.07(a)(4), (7). "Although the conduct for committing harassment by electronic or telephone communication may be different, the two methods set forth in the statute are different manners and means of committing the same offense, not distinct and separate offenses." *Perone v. State*, No. 14-12-00969-CR, 2014 WL 1481318, at *2 (Tex. App.—Houston [14th Dist.] Apr. 15, 2014, no pet.) (citing *Lewis v. State*, 88 S.W.3d 383, 394 (Tex. App.—Fort Worth 2002, pet. ref'd)). "Accordingly, the evidence is sufficient to uphold appellant's harassment conviction if, under the applicable standard of review, a rational juror could find beyond a reasonable doubt that appellant committed this offense by either means." *Id*. On appeal, Dixie argues that the evidence is insufficient to prove that (1) her communications were made "repeatedly," and (2) she intended her communications to harass, annoy, alarm, abuse, torment, embarrass, or offend the complainant or that they were made in a manner reasonably calculated to have any of those effects.

In *Scott v. State*, the Court of Criminal Appeals attempted to define the term "repeated" for purposes of the harassment statute. *See* 322 S.W.3d 662, 669 n.12 (Tex. Crim. App. 2010). The court noted that "[t]he term 'repeated' is commonly understood to mean 'reiterated,' 'recurring,' or 'frequent.'" *Id*. Therefore, in the court's view, "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." *Id*. However, in *Wilson v. State*, the court disavowed this definition. *See* 448 S.W.3d 418, 423 (Tex. Crim. App. 2014). Instead, the court defined "repeated" to mean "at a minimum, 'recurrent' action or action occurring 'again.'" *Id*. at 424. The court added that "'one telephone call will not suffice' and a conviction secured by evidence of a single communication will not stand." *Id*. Therefore, "the State may legally obtain a harassment conviction . . . on the bare minimum of two [] communications." *Id*.

Here, Dixie made only two telephone calls and sent only two Facebook posts. Thus, under either Section 42.07(a)(4) or (a)(7), Dixie made only the "bare minimum" number of communications required under the statute. *See id*. However, that does not end our inquiry. If some of those communications were not sufficiently "harassing" in nature, then they cannot be used to convict Dixie. In *Scott*, the Court of Criminal Appeals defined the terms "harass," "annoy," "alarm," "abuse," "torment," "embarrass," and "offend" in the context of the harassment statute:

> "Harass" means "to annoy persistently." "Annoy" means to "wear on the nerves by persistent petty unpleasantness." "Alarm" means "to strike with fear." "Abuse" means "to attack with words." "Torment" means "to cause severe distress of the mind." "Embarrass" means "to cause to experience a state of self-conscious distress." "Offend" means "to cause dislike, anger, or vexation."

322 S.W.3d at 669 n.13 (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 47, 68, 88, 405, 552, 819, 1245 (1988)).

Considering the above definitions, and employing an objective "reasonable person" standard, we do not believe that all of Dixie's communications were prohibited under the statute. The first Facebook post appears to have been primarily a political comment on Dan's policies as mayor and to have been made at least partly in jest—after all, Dixie was quoting the lyrics to a cheesy (and awesome) song from the 1980s—while the second Facebook post was nothing more than a short declaration of Dixie's undying love for Dan. Although perhaps a bit sad, we do not see how a rational jury could find that the second post rises to the level of communication that could "harass," "annoy," "alarm," "abuse," "torment," "embarrass," or "offend" the complainant. As for the two telephone communications, the voicemail would seem clearly to meet the definition of "harassing" communication. However, the later conversation on Dan's office phone seemed to be primarily a discussion about politics that turned personal only after Dan taunted Dixie with her "Tea Party sympathies." It appears that Dixie's sole intent in making that call was to apologize for her earlier behavior and to talk politics, not to harass Dan.

In summary, we conclude that there was only one communication by Dixie that the jury could have reasonably found to have risen to the level of prohibited communication under the harassment statute. As the Court of Criminal Appeals held in *Wilson*, one communication "will not suffice." 448 S.W.3d at 424. We sustain Dixie's first issue. Therefore, we need not consider Dixie's second issue relating to the constitutionality of the harassment statute. We reverse the judgment of the district court convicting Dixie of the offense of harassment and render a judgment of acquittal for that offense.

BURGLARY OF A HABITATION

The elements of the offense of burglary of a habitation are set forth in Section 30.02(a) of the Texas Penal Code. TEX. PENAL CODE ANN. § 30.02(a). A person commits the offense of burglary of a habitation if, without the owner's effective consent, she "enters a building or habitation and commits or attempts to commit a felony, theft, or an assault." *Id.* § 30.02(a)(3). On appeal, Dixie argues that the evidence is insufficient to support her conviction because: (1) she also owns the habitation, (2) she did not enter the habitation with the intent to commit theft, (3) the ring belongs to her, and (4) she only "sipped from" the bottles mentioned in the State's indictment.

Burglary is entry into a habitation without the "effective consent of the owner." *Id.* § 30.02(a). An "owner" is defined as "a person who has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor." *Id*. § 1.07(a)(24) (West 2011). In the trial court, Dixie argued that the lake house was presumptively her community property. The determination of whether the lake house was community property or separate property is a question of law.

Property possessed by either spouse during or on dissolution of marriage is presumed to be community property. TEX. FAM. CODE ANN. § 3.003(a) (West 2006). To rebut this presumption, the person seeking to prove the separate character of the property must do so by clear and convincing evidence. *Id.* § 3.003(b). "'Clear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Id.* § 101.007 (West 2008).

The State argues that Dan's testimony established that the lake house was built with separate property funds and that he had the greater right of possession. The State also argues

that, before the burglary, Dixie had not set foot on the lake house in years and that Dan prayed for the lake house to be deemed his separate property in the divorce proceedings. The State also points out that Texas law supports the idea that a spouse can commit burglary by entering the habitation of another spouse. *See Stanley v. State*, 631 S.W.2d 751, 753 (Tex. Crim. App. 1982); *Davis v. State*, 799 S.W.2d 398, 399-400 (Tex. App.—El Paso 1990, pet. ref'd).

Dixie argues that Dan admitted that the entire lot was not purchased and the home was not entirely built with separate property funds and that property purchased with separate and community funds is owned by the separate and community estates as tenants in common. *Cockerham v. Cockerham*, 527 S.W.2d 162, 168 (Tex. 1975). She further argues that the deed on the lake house contains her name and that it was initially given to her as a gift.

Percentages of ownership are determined by the amount of funds contributed by each estate to the total purchase price. *Gleich v. Bongio*, 99 S.W.2d 881, 883 (1937). "When a spouse uses separate property to acquire land during marriage and takes title to the land in the names of both the husband and Dixie, it is presumed that the interest placed in the nonpurchasing spouse is that of a gift." *In re Marriage of Greenslate*, No. 06-00-00117-CV, 2001 WL 691472, at *3 (Tex. App.—Texarkana Jun. 21, 2001, no pet.) (not designated for publication) (citing *Cockerham*, 527 S.W.2d at 168); *Purser v. Purser*, 604 S.W.2d 411, 414 (Tex. Civ. App.—Texarkana 1980, no writ). "The taking of title in both names does not change the result of tracing, but creates a presumption of a gift of one half of the separate property." *Greenslate*, 2001 WL 691472, at *3 (citing *In re Marriage of Thurmond*, 888 S.W.2d 269, 275 (Tex. App.—Amarillo 1994, writ denied)). This presumption can be rebutted by evidence clearly establishing there was no intent to make a gift. *Cockerham*, 527 S.W.2d at 168. Typically, any doubt as to

the character of property should be resolved in favor of the community estate. *Garza v. Garza*, 217 S.W.3d 538, 548 (Tex. App.—San Antonio 2006, no pet.).

Here, although Dan testified that he purchased the lot and built the home with "mostly" separate property funds, the records that would typically be required in a civil case to meet the clear and convincing standard were not made a part of this criminal trial. In any event, the lake house was deeded to Dan and Dixie, and the evidence from both suggested that the lake house and lot was initially a gift to Dixie. Unlike in *Stanley*, here, no temporary injunction had been issued in the pending divorce case that addressed ownership of the lake house or prohibited Dixie from entering the property. 631 S.W.2d at 752. When there is a bona fide dispute regarding ownership of the property, the trier of fact cannot find that entry onto the property is without effect consent beyond a reasonable doubt. *See Hann v. State*, 771 S.W.2d 731, 733–34 (Tex. App.—Fort Worth 1989, no pet.). Simply put, we hold that the evidence was legally insufficient to meet the State's burden to prove beyond a reasonable doubt that Dan had a greater right to possession of the lake house. Thus, Dixie's burglary conviction cannot stand.

Dixie argues that she is entitled to an acquittal if the evidence is insufficient to prove burglary of a habitation, or that she should receive a new trial at the very least. Dixie would have been entitled to an acquittal had this case been decided last year. However, in *Thornton v. State*, the Texas Court of Criminal Appeals explained:

> after a court of appeals has found the evidence insufficient to support an appellant's conviction for a greater-inclusive offense, in deciding whether to reform the judgment to reflect a conviction for a lesser-included offense, that court must answer two questions: 1) in the course of convicting the appellant of the greater offense, must the jury have necessarily found every element necessary to convict the appellant for the lesser-included offense; and 2) conducting an evidentiary sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial, is there sufficient evidence to support a conviction for that offense? If the answer to either of these questions is no, the court of appeals is not authorized to reform the judgment. But if the answers to both are

> yes, the court is authorized—indeed required—to avoid the "unjust" result of an outright acquittal by reforming the judgment to reflect a conviction for the lesser-included offense.

Thornton v. State, 425 S.W.3d 289, 299-300 (Tex. Crim. App. 2014) (citation omitted); *see Canida v. State*, 434 S.W.3d 163, 166 (Tex. Crim. App. 2014).

Here, the State alleged that Dixie committed burglary by entering the lake house and committing theft. Thus, in the course of convicting Dixie of the burglary charge, the jury must have necessarily found that she had committed theft. Further, Dixie admitted to imbibing the liquor bottles and requested the trial court to submit the issue of theft of property valued at more than $50.00 but less than $500.00, thereby admitting that the value of the liquor exceeded $50.00. *See Dunn v. State*, 176 S.W.3d 880, 881 (Tex. App.—Fort Worth 2005, no pet.) ("When a defendant requests the inclusion of a jury instruction on a lesser-included offense, he is estopped from challenging on appeal both the legal and the factual sufficiency of the evidence to support his conviction of that lesser-included offense."). Therefore, to avoid the unjust result of an outright acquittal, we (1) reform the judgment to reflect a conviction for theft in an amount more than $50.00 but less than $500.00, and (2) remand the issue of punishment to the trial court.

Having sustained Dixie's third issue, we need not address Dixie's remaining issues relating to the burglary offense.

Stanley Tucker

Chief Justice

WRIGHT, Justice (Concurring)

I join the Chief Justice's opinion in its entirety regarding the burglary-of-a-habitation conviction. And I also agree with the Chief Justice that Dixie is entitled to an acquittal on the harassment charge because the evidence is insufficient to support her conviction for that offense. I write separately to express my opinion that the harassment statute is unconstitutional on its face and as applied to Dixie. Although we do not reach these issues today because of our resolution of Dixie's sufficiency challenge, it is my belief that Presiding Judge Keller's dissenting opinion in *Scott v. State* resolved the constitutional question correctly, and I would follow it here. *See* 322 S.W.3d 662, 671–77 (Tex. Crim. App. 2010) (Keller, P.J., dissenting). It appears that at least one judge on the Court of Criminal Appeals might be open to re-considering the constitutionality of the statute. *See Wilson v. State*, 448 S.W.3d 418, 430 (Tex. Crim. App. 2014) (Alcala, J., dissenting to denial of reh'g).

Finally, even if *Scott* withstands subsequent scrutiny, that case did not consider an "as applied" challenge to the constitutionality of the statute. *See Scott*, 322 S.W.3d at 665 ("Notably, Scott did not argue that § 42.07 was vague as applied to his conduct, i.e., that the statute failed to give him a reasonable opportunity to know that the conduct for which he was charged was prohibited."). Here, Dixie has raised such a challenge. She argued in the court below that the statute was unconstitutional as applied to her because of the political content of her communication with Dan and because the statute did not give her a reasonable opportunity to know what she could and could not say to her ex-husband, who also happened to be the town's mayor. On this record, I would be inclined to agree with Dixie that the statute, even if not unconstitutional on its face, is unconstitutional under the circumstances presented here.

Denny Wright

Justice

FRANKS, Justice (Dissenting)

Our criminal justice system is based on the fundamental principles that an accused is presumed innocent until proven guilty and that the burden of proof rests solely on the State to show otherwise. In 1979, in *Jackson v. Virginia*, the Supreme Court held that a person convicted in state court is entitled to a judgment of acquittal under the due process protections of the United States Constitution if, after viewing all the evidence in the light most favorable to the prosecution, no reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. 443 U.S. 307, 318–19 (1979). Thus, if the evidence is legally insufficient to prove the crime, the case should not even be submitted to a jury. Accordingly, due process, as interpreted by the Texas Court of Criminal Appeals, required that a defendant be acquitted in a case where the State simply did not meet its threshold burden of legal sufficiency—until the unfortunate decisions of *Thornton* and *Candia* in 2014, which ironically purport to use the *Jackson* legal sufficiency standard. *See Watson v. State*, 204 S.W.3d 404, 423 (Tex. Crim. App. 2006) ("If the evidence is legally insufficient, the defendant is entitled to an acquittal by the appellate court, and he cannot be retried.").

I question the Texas Court of Criminal Appeals' departure from settled law that was created with the rights of an accused in mind. *Thornton* and *Canida* stand for the proposition that appellate courts should play the role of the fact-finder to find a defendant guilty of lesser-included offense based on a jury's erroneous verdict on a question that should never been submitted to a jury in the first place. Thus, instead of rendering an acquittal, or holding the State to its responsibilities by sending the matter back for a new trial, appellate courts are now made to forgive the State's failures, do the State's work by creating a proper lesser-included charge, and

play the role of the jury in convicting the defendant of something he was never indicted for. In other words—appellate courts are now to serve as the arm that hands over the apple to the State so it can take a second bite.

Using the unfortunate language in the Texas Court of Criminal Appeal's recent rulings in *Thornton* and *Canida*, the majority has decided to reform the judgment, and, consequently, has ruled that it need not address Dixie's remaining points of error.[6] Yet, this case is not is like *Thornton* or *Canida*. Unlike in those cases, Dixie had specifically requested that the lesser-included offense of theft be submitted to the jury. The trial court refused. Essentially, instead of determining that the trial court erred in its refusal, which would entitle Dixie to—at the very least—a new trial, the majority has decided to mitigate the trial court's error. Thus, even though the State objected to the inclusion of the lesser-included offense, it will receive the benefit of the majority's ruling reforming the judgment to that conviction. This cannot be the proper analysis or the proper result.

Regarding the harassment conviction, my dissent is simple. According to *Wilson v. State*, "the State may legally obtain a harassment conviction . . . on the bare minimum of two [] communications." 448 S.W.3d 418, 424 (Tex. Crim. App. 2014). I believe that in this case we have at least two communications that qualify. Moreover, according to *Scott v. State*, the harassment statute does not implicate the free-speech guarantee of the First Amendment. 322 S.W.3d 662, 669 (Tex. Crim. App. 2010). Therefore, although I sympathize with the concerns of the concurring justice regarding the constitutionality of the statute, our hands are tied. In order to

[6] Personally, I question whether *Thornton* and *Canida* are still the law, considering this subsequent language in the recent *Thomas* opinion: "There are two types of variances in an evidentiary-sufficiency analysis: material variances and immaterial variances. . . . [A] material variance renders a conviction infirm, and the only remedy is to render an acquittal." *Thomas v. State*, 444 S.W.3d 4, 9 (Tex. Crim. App. 2014) (internal citations omitted).

prevail on her constitutional challenge, Dixie would have to prove that the harassment statute is unconstitutional as applied to her conduct. I do not believe that she has done so here.

For the above reasons, I respectfully dissent.

Lisa Franks

Justice

Date Submitted: November 11, 2014
Date Decided: November 16, 2014