No. SD36601

IN THE

Missouri Court of Appeals

Southern District

STATE OF MISSOURI,

Respondent,

v.

JOSHUA S. COLLINS,

Appellant.

Appeal from the Circuit Court of Greene County
31st Judicial Circuit
The Honorable Thomas E. Mountjoy, Judge

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF FACTS

Mr. Joshua Collins ("Defendant") appeals a Greene County Circuit Court judgment convicting him of tampering with a judicial officer and second-degree harassment, for which he received a total sentence of 2 years' imprisonment. (D15).

Defendant was charged with the class D felony of tampering with a judicial officer in Count I, for engaging in conduct reasonably calculated to harass A.G., a probation and parole officer, with the purpose to harass, by sending Facebook messages and a voicemail to A.G., accusing A.G.'s children of engaging in crimes; and the class E felony of first-degree harassment in Count II, for sending Facebook messages and a voicemail to A.G., accusing A.G.'s children of engaging in crimes, without good cause and with the purpose of causing emotional distress to A.G., thereby causing A.G. to suffer emotional distress; for events occurring on or about May 11, 2019. (D2). The jury found Defendant guilty of the charged offense in Count I and the lesser-included offense of second-degree harassment in Count II. (D13, pp. 10-11; Tr. 417). The trial court followed the jury's recommendations and sentenced Defendant to 2 years' imprisonment for Count I and 1 year's incarceration for Count II, with the sentences to be served concurrently. (D15; Tr. 467, 531-32).

Defendant challenges the sufficiency of the evidence only as to his conviction for Count II. (Def's Br. 10-11). Viewed in the light most favorable to

the verdict, the evidence presented at trial showed the following:

A.G. ("Victim") testified that she was a probation and parole officer. (Tr. 348). Victim explained that her duties as a probation and parole officer included supervising people who were on probation or parole, ensuring that they are compliant with the conditions of their release, and notifying either the Parole Board or the court of any behavior that is not compliant. (Tr. 348).

Victim testified that she began supervising Defendant in January 2019 following his conviction for fourth-degree domestic assault, which was a third or subsequent offense. (Tr. 350). Victim testified that Defendant struggled to comply with some of the requirements of his probation. (Tr. 371). Victim also testified that she was required as Defendant's probation officer to inquire into Defendant's dating life, that she had checked his romantic status on Facebook, and that someone in her office had asked one of Defendant's friends if she and Defendant were romantically engaged. (Tr. 373, 375).

On Sunday, May 12, 2019, Victim received a call from the center responsible for monitoring Defendant's alcohol monitor because it had indicated the presence of alcohol in Defendant's system. (Tr. 351-52, 372-74). Victim then spoke with Defendant over the phone. (Tr. 351-52). Defendant was "very angry" and "told [Victim] the same types of things that he had sent [her] on Facebook and that he left on [her] . . . voicemail at work, about [her] adult children." (Tr. 352).

Because Defendant told Victim that he had looked at her Facebook page, Victim checked her Facebook account and found that Defendant had sent her a friend request on the previous evening of May 11, 2019. (Tr. 353-57; State's Ex. 1). Victim also found that Defendant had sent her some messages over Facebook shortly after sending the friend request. (Tr. 353-54, 357, 359). Print-outs of the messages were admitted into evidence and published during trial. (Tr. 357-58; State's Ex. 2). The messages stated, "Hey[.] I hired a P.I. Omg you should see what I found[.] Decided too [sic] check you out like you check me out[.] You should call me cause your sons this [sic] selling meth[.] I got pics[.] She's doing blow jobs too[.] Lol[.] I have so much too [sic] give Jones[.]" (State's Ex. 2). Victim testified that "Jones" was Judge Jones, who was assigned to Defendant's domestic-assault case and had ordered that Defendant be supervised on probation. (Tr. 353, 359-60). Victim also testified that she had two sons and a daughter between the ages of 19 and 24 years old, whom she had never discussed with Defendant. (Tr. 365, 370-71). Victim testified that the Facebook messages were "the same things that [Defendant] was saying in the interaction that [she] had with him on the Command Center call." (Tr. 358).

Victim testified that after seeing the messages, she contacted her adult children and advised them to make their Facebook accounts as secure and as private as possible because Defendant "had been looking at everyone's Facebook . . . ." (Tr. 360-61). Victim also contacted her supervisor and showed

the messages to him. (Tr. 361). Victim then filed a police report in accordance with her supervisor's advice. (Tr. 361).

When Victim went to work the following morning, she met with her supervisor and made sure that Defendant was "no longer on [her] badge." (Tr. 362). Victim subsequently found that Defendant had also left her a voicemail on her work phone on the evening of May 11. (Tr. 362-63). Victim testified that Defendant was "saying the same things that were in these Facebook messages and . . . the phone conversation[ ] on Sunday morning." (Tr. 362). A copy of that voicemail was admitted into evidence and published during trial. (Tr. 362-64; State's Ex. 3). In the voicemail, Defendant told Victim that he would like her to contact him regarding her son's involvement with a "meth-head." (State's Ex. 3). Defendant also stated that Victim's other son was "basically a date raper [sic]." (Tr. 364; State's Ex. 3). Defendant again told Victim to contact him. (State's Ex. 3). Defendant told Victim that he had a "P.I." (State's Ex. 3). Defendant concluded by stating, "You follow me, I'll follow you," and calling Victim a "b****." (State's Ex. 3).

Victim testified that Defendant's messages and voicemail made her feel "scared," "nervous," and "worried," particularly for her children. (Tr. 367-68). Victim explained that she supervised Defendant "for a violent offense" and that she was not certain of Defendant's intentions. (Tr. 367, 374). Victim testified that she had supervised between 250 and 300 individuals during her time as a

probation and parole officer and that none of them had ever made accusations regarding her children. (Tr. 368).

Defendant did not testify or present any evidence on his own behalf. (Tr. 378-81).

ARGUMENT

I. (Overbreadth)

The trial court did not err in denying Defendant's motion to dismiss because section 565.091 was not unconstitutionally overbroad, in that the statute prohibits communications that are made without good cause, and thus not constitutionally protected, and that are intended to cause emotional distress to another person, which the Supreme Court of Missouri has narrowly construed as the sort of acts that inherently tend to inflict injury or provoke violence and which are therefore unprotected by the First Amendment.

A. The record regarding this claim.

On January 3, 2020, Defendant filed a "Motion to Dismiss and to Declare Sections 565.090 and 575.095 (As Regards Harassment) Unconstitutional." (D1, p. 13; D3). The motion alleged that section 565.090 was "facially unconstitutional because of [its] substantial overbreadth . . . ." (D3, p. 1). The motion also cited section 565.091 in its argument that the "section" was constitutionally overbroad on its face. (D3, p. 2). The motion alleged that "[u]nless this Court gives the statutes a narrowing construction limiting the scope of the conduct proscribed to unprotected speech, these statutes will criminalize all sorts of protected speech seen in protests, pickets, in the

newsmedia, etc., as well as in the harsh criticisms that are often part of normal human interactions." (D3, p. 3). The motion further argued that "the reasonable person standard adopted in the good cause definition may also criminalize constitutionally protected speech." (D3, p. 3).

On January 21, 2020, a hearing was held on Defendant's motion. (D1, p. 13). A transcript of that hearing has not been included in the record. On January 22, 2020, the trial court overruled Defendant's motion. (D1, p. 14).

During trial, after all the evidence had been presented but before the case had been submitted to the jury, Defendant renewed his "Motion to Dismiss and to Declare Sections 565.090 and 575.095 (As Regards Harassment) Unconstitutional." (D1, p. 17; Tr. 384-89). The trial court overruled Defendant's motion, stating that it had "previously considered the written motion . . . and reviewed the case law submitted, as well as the statutes involved" and that it didn't "find any reason to change that ruling . . . ." (D1, p. 17; Tr. 388-89).

Defendant's motion for a new trial included claims that the trial court erred in denying Defendant's Motion to Dismiss on First Amendment grounds and his renewed Motion to Dismiss upon the completion of evidence. (D11, p. 2).

B. This Court has jurisdiction because Defendant's constitutional challenge is merely colorable.

"The Missouri Supreme Court has exclusive jurisdiction in cases involving the validity of a state statute under article V, section 3 of the Missouri Constitution." *State v. Frye*, 566 S.W.3d 658, 666 n.4 (Mo. App. W.D. 2019). "However, a party's mere assertion that a statute is unconstitutional does not deprive the court of appeals of jurisdiction." *Id.* "The allegation concerning the statute's constitutional validity must be real and substantial for jurisdiction to vest in the Supreme Court." *Id.* "If the challenge is merely colorable, the court of appeals has jurisdiction." *Id.*

> A constitutional challenge is real and substantial when 'upon preliminary inquiry, the contention discloses a contested matter of right, involving some fair doubt and reasonable room for controversy; but, if such preliminary inquiry discloses the contention is so obviously unsubstantial and insufficient, either in fact or law, as to be plainly without merit and a mere pretense, the claim may be deemed merely colorable.'

State v. Newlon, 216 S.W.3d 180, 185 (Mo. App. E.D. 2007) (quoting *Sharp v. Curators of University of Missouri*, 138 S.W.3d 735, 738 (Mo. App. E.D. 2003)). "Stated another way, a claim is real and substantial if it presents an issue of first impression." *Id.*; *see also In re G.P.C.*, 28 S.W.3d 357, 362 (Mo. App. E.D.

2000) ("No real and substantial constitutional question exists after the state supreme court has ruled on an issue. The appeals court must follow the law established by the Missouri Supreme Court."); *Frye*, 566 S.W.3d at 666 n.4 (holding that the defendant's constitutional challenge was merely colorable "[b]ecause the Missouri Supreme Court has considered the constitutionality of language . . . at issue here . . . .").

Here, as discussed *infra*, the Supreme Court of Missouri has sufficiently ruled on the constitutionality of the applicable language here, such that Defendant's claim is not a matter of first impression. *See State v. Vaughn*, 366 S.W.3d 513, 521 (Mo. banc 2012). Therefore, this Court has jurisdiction to dispose of Defendant's claim. *See Frye*, 566 S.W.3d at 666 n.4.

C. Standard of review.

"Whether a statute is constitutional is reviewed *de novo*." *Vaughn*, 366 S.W.3d at 517. "Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision." *Id*.

"When a party is asserting his First Amendment rights, the party may attack an overly broad statute even though his conduct could have been regulated by a statute drawn with the requisite narrow specificity." *State v. Carpenter*, 736 S.W.2d 406, 407 (Mo. banc 1987). "[T]his expansive remedy" has been provided "out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech . . . ."

Virginia v. Hicks, 539 U.S. 113, 119 (2003). "[H]owever, there comes a point at which the chilling effect of an overbroad law . . . cannot justify prohibiting all enforcement of that law—particularly a law that reflects 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Therefore, "[i]nvalidation for overbreadth is 'strong medicine that is not to be casually employed.'" *Vaughn*, 366 S.W.3d at 518 (quoting *United States v. Williams*, 553 U.S. 285, 292 (2008)). "[T]he function of the overbreadth doctrine 'attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from pure speech toward conduct . . . .'" *State v. Moore*, 90 S.W.3d 64, 67 (Mo. banc 2002) (quoting *State v. Helgoth*, 691 S.W.2d 281, 285 (Mo. banc 1985)). "Where conduct and not merely speech is regulated, a statute must be substantially overbroad, not only in an absolute sense but also relative to the statute's plainly legitimate sweep." *Vaughn*, 366 S.W.3d at 518.

"If the statute may fairly be construed in a manner which limits its application to a 'core' of unprotected expression, it may be upheld against the charge that it is overly broad." *Moore*, 90 S.W.3d at 67 (quoting *Carpenter*, 736 S.W.2d at 408 (Blackmar, J., dissenting)). "If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted." *Vaughn*, 366 S.W.3d at 517 (quoting *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007)). "A limiting

construction may be imposed only if it is readily susceptible to such a construction." *Id*.

D. The trial court did not err in denying Defendant's motion to dismiss because section 565.091 was not unconstitutionally overbroad.

"The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within narrowly limited classes of speech." *Vaughn*, 366 S.W.3d at 518. (quoting *Hess v. Indiana*, 414 U.S. 105, 107 (1973)); *see also Virginia v. Black*, 538 U.S. 343, 358 (2003) ("The protections afforded by the First Amendment . . . are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution."). "Unprotected speech includes 'the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'" *State v. Blankenship*, 415 S.W.3d 116, 120 (Mo. banc 2013) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *State v. Wooden*, 388 S.W.3d 522, 526 (Mo. banc 2013) (quoting *Chaplinsky*, 315 U.S. at 572). "Resort to epithets or personal abuse is not in any proper sense communication of information or

opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)); *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988) ("Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude . . . .").

"[T]he First Amendment also permits a State to ban a 'true threat,'" which "encompass[es] those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359. "The speaker need not actually intend to carry out the threat." *Id.* "Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" *Id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)). Relatedly, "[E]xtortionate threats, which are true threats" are "not protected speech." *United States v. Coss*, 677 F.3d 278, 289 (6th Cir. 2012); *see also Posner v. Lewis*, 965 N.E.2d 949, 953 (N.Y. 2012) ("[It] has been consistently held that blackmail and extortion are not protected speech[.]").

"The first step in overbreadth analysis is to construe the challenged statute." *Vaughn*, 366 S.W.3d at 518. "If the statute may fairly be construed in

a manner which limits its application to a 'core' of unprotected expression, it may be upheld against the charge that it is overly broad." *Id.* (quoting *State v. Moore*, 90 S.W.3d 64, 67 (Mo. banc 2002)).

Section 565.091 provided that "[a] person commits the offense of harassment in the second degree if he or she, without good cause, engages in any act with the purpose to cause emotional distress to another person." § 565.091, RSMo 2016. "Emotional distress" was defined as "something markedly greater than the level of uneasiness, nervousness, unhappiness, or the like which are commonly experienced in day-to-day living." § 565.002(7), RSMo 2016.

In *Vaughn*, the Supreme Court of Missouri considered an overbreadth challenge to similar language in section 565.090.1(6), RSMo. Cum. Supp. 2008, which prohibited a person from "without good cause engag[ing] in any other act with the purpose to frighten, intimidate, or cause emotional distress to another person, caus[ing] such person to be frightened, intimidated, or emotionally distressed, and such person's response to the act is one of a person of average sensibilities considering the age of such person." *Id.* at 521 (quoting § 565.090.1(6), RSMo Cum. Supp. 2008). The Court held that "[t]he prohibition against 'any other act [done] with the purpose to frighten, intimidate, or cause emotional distress' punishes actions 'which by their very occurrence inflict injury or tend to incite an immediate breach of the peace.'" *Id.* (quoting

Chaplinsky, 315 U.S. at 571-72). Moreover, consistent with the current definition of "emotional distress," the Court construed the required intended effect to be "substantial," which it held "prevent[ed] the statute's application to a number of generally harmless acts." *Id*. at 521 n.6. Additionally, the Court held that "because the exercise of constitutionally protected acts clearly constitutes 'good cause,' the restriction of the statute to unprotected fighting words comports with the legislature's intent." *Id*. at 521. The Court concluded that "[a]s construed, the statute applies only to acts outside of the First Amendment's protection" and thus was "not overly broad." *Id*.

The Court's holding in *Vaughn* is controlling as to the statutory provision in this case because it employs substantially the same language as that which was upheld in *Vaughn* as constitutional. Specifically, section 565.091 retains the requirements that the defendant act with the purpose to cause emotional distress to the person and that he does so "without good cause." § 565.091, RSMo 2016. Thus, under *Vaughn*, section 565.091 "limits its application to a 'core' of unprotected expression" and is "not overly broad." *Vaughn*, 366 S.W.3d at 521; *cf. Frye*, 566 S.W.3d at 668-69.

Defendant nevertheless argues that the differences present in the current provision render it unconstitutionally overbroad. (Def's Br. 18-21). Defendant first argues that because section 565.091 proscribes "any act" rather than "any other act" and contains no other subsections specifically applicable to

communications, it cannot be construed to apply to only conduct, as was the statute in *Vaughn*. (Def's Br. 19). *See* § 565.090.1(6), RSMo Cum. Supp. 2008; § 565.091, RSMo 2016; *Vaughn*, 366 S.W.3d at 521. The State agrees that section 565.091 applies to both conduct and communications. Indeed, it is reasonable to construe the current provision as inclusively proscribing communications that were explicitly prohibited under other subsections of the previous statute, such as "communicat[ing] a threat to commit a felony." *See* § 565.090.1(1), RSMo Cum. Supp. 2008. But section 565.091 may nevertheless still be upheld against the charge that it is overly broad, as long as it applies to a limited core of unprotected expression. *See Moore*, 90 S.W.3d at 67.

Defendant argues that the statute cannot be narrowly construed to apply to unprotected expression because section 565.091 does not require that the victim actually suffer emotional distress. (Def's Br. 20-21). But this is inconsistent with *Vaughn*, which held that "[t]he prohibition against 'any other act [done] *with the purpose to . . . cause emotional distress*' punishes actions 'which by their very occurrence inflict injury or tend to incite an immediate breach of the peace,'" and that "[s]uch activity is unprotected by the First Amendment." *Vaughn*, 366 S.W.3d at 521 (emphasis added). Moreover, section 565.090 provides that a person commits the offense of first-degree harassment "if he or she, without good cause, engages in any act with the purpose to cause emotional distress to another person, and such act does cause such person to

suffer emotional distress." § 565.090, RSMo 2016. Given second-degree harassment's status as a lesser-included offense of first-degree harassment, it is entirely consistent with the legislature's intent to narrowly construe section 565.091 as proscribing the same constitutionally unprotected acts prohibited as constituting first-degree harassment, which under *Vaughn* inherently tend to inflict injury or provoke violence, but which are nevertheless unsuccessful in actually causing the harmful effect. *See Vaughn*, 366 S.W.3d at 521; *Cf. United States v. Ackell*, 907 F.3d 67, 76 (1st Cir. 2018) (holding that the lack of a requirement of actual resulting harm for a conviction of stalking under the federal statute did not render it overly broad under the First Amendment).

Defendant also notes that the current provision does not contain the previously utilized terms of "frighten" or "intimidate" in addition to the required intended effect of "emotional distress." (Def's Br. 20). *See* § 565.090.1(6), RSMo Cum. Supp. 2008; § 565.091, RSMo 2016. But because "fright" and "intimidation" constituted mere alternatives to "emotional distress" in the previous statute, and none of those terms were held by *Vaughn* to be overly broad, omission of the two alternative effects does not require a different construction of the prohibited activity. *See* § 565.090.1(6), RSMo Cum. Supp. 2008; § 565.091, RSMo 2016; *Vaughn*, 366 S.W.3d at 521. Moreover, the definition of "emotional distress" reasonably includes "fright" and "intimidation" and thus reasonably retains its application to "the sort of acts

that inherently tend to inflict injury or provoke violence." *See* § 565.002(7), RSMo 2016; *Vaughn*, 366 S.W.3d at 521.

Finally, Defendant argues that section 565.091 is unconstitutional because it "applies to all communication and conduct that is intended to cause emotional distress" and therefore "touches on many constitutionally protect[ed] acts," such as protests at an abortion clinic, neo-Nazi marches in Jewish neighborhoods, cross burning, flag burning, and protests by the Westboro Baptist Church at soldiers' funerals. (Def's Br. 21). *See Snyder v. Phelps*, 562 U.S. 443, 451-59 (2011); *Hustler*, 485 U.S. at 53 ("[W]hile such a bad motive[—the intent to inflict emotional distress—]may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures."). But section 565.091 explicitly excludes acts supported by "good cause," and *Vaughn* held that "the exercise of constitutionally protected acts clearly constitutes 'good cause.'" § 565.091, RSMo 2016; *Vaughn*, 366 S.W.3d at 521. Indeed, the Supreme Court recognized that the plain and ordinary meaning of "good cause" included "a cause or reason sufficient in law." *Id*. at 522 (quoting *State v. Davis*, 469 S.W.2d 1, 5 (Mo. 1971)). Because section 565.091 excluded any acts done with "good cause," and therefore excluded any constitutionally protected acts, Defendant's overbreadth challenge must fail.

Defendant nevertheless argues that "good cause is controlled by a reasonable person standard and many reasonable people hold views that are incompatible with the First Amendment." (Def's Br. 22). But *Vaughn* held both that "[g]ood cause" means "a cause that would motivate a reasonable person of like age under the circumstances under which the act occurred" and that "the exercise of constitutionally protected acts clearly constitutes 'good cause[.]'" *Vaughn*, 366 S.W.3d at 521-22. Therefore, under *Vaughn*, a "reasonable person" acts with "good cause" when his or her act is constitutionally protected.

Because section 565.091 is limited in its application to a core of unprotected expression and is not substantially overbroad, if at all, Defendant has failed to show that the "strong medicine" of invalidation for overbreadth, rather than the common course of as-applied challenges, is necessary to safeguard against the violation of any related First Amendment rights.

Defendant's first point should be denied.

II. (Sufficiency of Evidence)

There was sufficient evidence to reasonably support a finding that Defendant's communications to Victim were the sort of acts that inherently tend to inflict injury or provoke violence. (Responds to Defendant's Points II and III.)

A. Standard of review.

When considering sufficiency-of-evidence claims, this Court's review is limited to determining whether the evidence is sufficient for a reasonable fact-finder to find each essential element of the crime beyond a reasonable doubt. *See State v. Nash*, 339 S.W.3d 500, 508–09 (Mo. banc 2011); *State v. Freeman*, 269 S.W.3d 422, 425 (Mo. banc 2008). "This is not an assessment of whether the [appellate court] believes that the evidence at trial established guilt beyond a reasonable doubt." *Nash*, 339 S.W.3d at 509. "[A]ll evidence favorable to the State is accepted as true, including all favorable inferences drawn from the evidence." *Id.* "All evidence and inferences to the contrary are disregarded." *Id.* "As such, [the appellate court] will not weigh the evidence anew since 'the fact-finder may believe all, some, or none of the testimony of a witness when considered with the facts, circumstances and other testimony in the case.'" *Freeman*, 269 S.W.3d at 425 (quoting *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002)); *see also State v. O'Brien*, 857 S.W.2d 212, 215–16 (Mo. banc

1993) ("To ensure that the reviewing court does not engage in futile attempts to weigh the evidence or judge the witnesses' credibility, courts employ 'a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.'") (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

"An appellate court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *State v. Chaney*, 967 S.W.2d 47, 53 (Mo. banc 1998) (quoting *Jackson*, 443 U.S. at 326). Appellate courts do not act as a "'super juror with veto powers,' but give great deference to the trier of fact." *Chaney*, 967 S.W.2d at 52 (quoting *State v. Grim*, 854 S.W.2d 403, 414 (Mo. banc 1993)); *see also Nash*, 339 S.W.3d at 509. *Grim* abolished the application of the "equally valid inferences rule," which stated that "where two equally valid inferences can be drawn from the same evidence, the evidence does not establish guilt beyond a reasonable doubt." *Chaney*, 967 S.W.2d at 54.

Circumstantial evidence is given the same weight as direct evidence in considering the sufficiency of the evidence. *Grim*, 854 S.W.2d at 406.

B. There was sufficient evidence to reasonably support a finding that Defendant engaged in an act that inherently tended to inflict injury or provoke violence.

Defendant does not claim that there was insufficient evidence of any written element of the offense of second-degree harassment, such as acting with the purpose to cause emotional distress to Victim. (Def's Br. 10-11). Nor does he claim that his alleged acts were constitutionally protected and that the statute was unconstitutional as applied to him. (Def's Br. 10-11). Instead, Defendant claims that there was insufficient evidence that his alleged acts fell under the particular category of unprotected speech as construed by this Court. (Def's Br. 10-11).

As to Defendant's Point II, the State has agreed that section 565.091 applies both to conduct and communications. *See supra* at pp. 20-21. Similarly, the State agrees that Defendant's conviction for second-degree harassment is based on his communications to Victim, rather than his non-expressive conduct, though those communications were constitutionally unprotected.

As to Defendant's Point III, there was sufficient evidence to reasonably support a finding that Defendant engaged in an act that inherently tended to inflict injury or provoke violence. *See Vaughn*, 366 S.W.3d at 521 (quoting *Chaplinsky*, 315 U.S. at 571-72) (construing the applicable statutory language to apply only to "actions 'which by their very occurrence inflict injury or tend

to incite an immediate breach of the peace'"); *Wooden*, 388 S.W.3d at 527 (quoting *Chaplinsky*, 315 U.S. at 572) ("Speech that causes a fear of physical harm is not speech protected by either the United States or Missouri constitutions. Rather, it falls into the category of words '[that] by their very utterance inflict injury or tend to incite an immediate breach of the peace' . . . .").

Defendant concedes on appeal that "[he] was clearly frustrated that his probation officer, [Victim], was supervising him[,] which included checking on [Defendant's] personal life." (Def's Br. 27). Indeed, Victim testified that Defendant had struggled to comply with some of the requirements of his probation, that she had checked his romantic status on Facebook in accordance with her duties as his probation officer, and that someone in her office had asked one of Defendant's friends if she and Defendant were romantically engaged. (Tr. 371, 373, 375). Defendant was "very angry" as a result. (Tr. 352). Defendant's subsequent communications with Victim, including his Facebook messages to her, referenced the fact that she had "check[ed] [him] out," and Defendant told Victim that he had "[d]ecided to[ ] check [her] out" as a result. (State's Ex. 2).

Defendant told Victim that he had "hired a P.I." and that "[she] should see what [he] found." (State's Ex. 2, 3). Defendant claimed that "[Victim's] son[ ] [was] selling meth," that her son was involved with a "meth-head," that "[s]he's

doing blow jobs too," and that Victim's other son was "basically a date raper [sic]." (Tr. 364; State's Ex. 2, 3). Victim testified that she had two sons and a daughter between the ages of 19 and 24 years old, and that she had never before discussed them with Defendant. (Tr. 365, 370-71). Victim also testified that Defendant told her that he had looked at her Facebook page, which was corroborated by evidence that Defendant had sent Victim a friend request on Facebook on the evening of May 11, 2019. (Tr. 353-57; State's Ex. 1). Defendant further told Victim, "You follow me, I'll follow you," and called Victim a "b****." (State's Ex. 3). Defendant communicated this to Victim through multiple Facebook messages, a voicemail on her work phone, and directly over the phone. (Tr. 352-54, 357-59, 362-64; State's Ex. 2, 3).

Victim testified that Defendant's communications to her made her feel "scared," "nervous," and "worried," particularly for her children. (Tr. 367-68). Victim explained that she supervised Defendant "for a violent offense" and that she was not certain of Defendant's intentions. (Tr. 367, 374). Victim testified that after seeing the messages, she immediately contacted her children to notify them of Defendant's comments and warn them about Defendant. (Tr. 360-61). Victim also immediately contacted her supervisor and filed a police report. (Tr. 361).

The evidence was sufficient to establish Defendant's anger at Victim for "check[ing] [him] out" and that he responded with the purpose to cause her

emotional distress as a result. (State's Ex. 2). Further, given the nature of the accusations Defendant communicated to Victim; the offensive manner in which he conveyed those accusations; his reference to Victim as a "b****"; the fact that the communications concerned Victim's children, whom Victim had never discussed with Defendant; Defendant's contact with Victim through her personal Facebook account; Defendant's warning that he would "follow [Victim]"; Victim's knowledge of Defendant's extensive history of violence; the fact that Defendant made these communications through multiple means; and Victim's immediate responses, which were made out of fear; there was sufficient evidence that Defendant's acts were "the sort of acts that inherently tend to inflict injury or provoke violence." *See State v. Starkey*, 380 S.W.3d 636, 643 (Mo. App. E.D. 2012) (holding that "[t]he evidence was sufficient to submit to the jury the issue of [the defendant] harassing [the victim]," given that "the content of [the defendant's] communications, along with their repetition, frequency, and reach into his private life worried [the victim] to the point that he, his family, and his staff kept watch for [the defendant]"); *Wooden*, 388 S.W.3d at 528 ("The lack of specific threats is also unpersuasive. . . . Nothing in this Court's precedent or the plain meaning of the statute indicates that the only way a person can be put in reasonable apprehension of harm is through specific threats.").

Defendant's second and third points should be denied.

III. (Double Jeopardy)

The trial court did not err in accepting the jury's verdict and entering a judgment of conviction for both tampering with a judicial officer and second-degree harassment because second-degree harassment was not a lesser-included offense of tampering with a judicial officer, and thus convictions for both offenses did not violate double jeopardy.

A. The record regarding this claim.

On January 23, 2020, Defendant filed a motion to dismiss Count II on the basis of double jeopardy. (D1, p. 14; D5). The motion alleged that "Count 2 should be regarded as a lesser included of Count 1, with the only difference being that Count 1 has the additional element that the alleged victim be a judicial officer." (D5, p. 1). The motion alleged that "it is not logically possible for the fact finder to find Defendant [guilty] of Count 1 without also finding Defendant guilty of [C]ount 2." (D5, p. 2).

During a pretrial hearing on January 27, 2020, the trial court took up Defendant's motion. (D1, p. 15; Tr. 1-10). Defense counsel recognized that the previous version of harassment had been held not to be a lesser-included offense of tampering with a judicial officer in *State v. Hause*, 371 S.W.3d 836 (Mo. App. W.D. 2012), but he argued that the subsequent change in the statute for harassment rendered that case inapplicable. (Tr. 3-4). Defense counsel

argued that second-degree harassment was a lesser-included offense of both first-degree harassment and tampering with a judicial officer and that Count II should therefore be dismissed. (Tr. 4-5). Defense counsel emphasized that Defendant was "charged with tampering with a judicial officer by . . . acting with the purpose to harass . . . ." (Tr. 9). After taking it under advisement, the trial court denied Defendant's motion to dismiss Count II. (D1, p. 15).

On February 9, 2020, after the jury found Defendant guilty as charged in Count I and of the lesser offense of second-degree harassment in Count II, Defendant filed another motion to dismiss Count II on the basis of double jeopardy. (D1, pp. 16-17). The motion similarly alleged that "Count 2 should be regarded as a lesser included of Count 1 . . . ." (D12, p. 1). The motion alleged that "[a]lthough the sentences are structured differently in the two statutes, the only substantive difference between the two charges is that Count 1 alleges that [Victim] was a probation and parole officer, while Count 2 does not." (D12, p. 2).

Before sentencing Defendant, the trial court took up Defendant's motion to dismiss Count II. (D1, p. 18; Tr. 475-79). Defense counsel argued that "the verdict, as returned, convicts [Defendant] twice for the same thing." (Tr. 476-77). The prosecutor argued that the word "harass," as used in the tampering offense, was not defined by the separate harassment statute and that therefore the offense of harassment was not a lesser-included offense of tampering with

a judicial officer. (Tr. 478-79). The trial court overruled the motion. (D1, p. 18; Tr. 479).

B. Standard of review.

"Appellate review of double jeopardy claims is de novo." *State v. Daws*, 311 S.W.3d 806, 808 (Mo. banc 2010).

C. Defendant's convictions for both tampering with a judicial officer and second-degree harassment did not violate double jeopardy because second-degree harassment is not a lesser-included offense of tampering with a judicial officer.

"[T]he federal double jeopardy clause protects defendants . . . from multiple punishments for the same offense." *State v. McTush*, 827 S.W.2d 184, 186 (Mo. banc 1992). "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *State v. Hardin*, 429 S.W.3d 417, 422 (Mo. banc 2014) (quoting *Missouri v. Hunter*, 459 U.S. 359, 366 (1983)). "Double jeopardy analysis regarding multiple punishments is, therefore, limited to determining whether cumulative punishments were intended by the legislature." *McTush*, 827 S.W.2d at 186.

"Although the statutes under which [Defendant] was convicted are silent on the question of whether the legislature intended to punish the conduct

cumulatively, the Missouri legislature has elsewhere expressed its general intent regarding cumulative punishments." *Id.* at 187; *see* § 565.091, RSMo 2016; § 575.095, RSMo 2016. "When the same conduct of a person may establish the commission of more than one offense he or she may be prosecuted for each such offense. Such person may not, however, be convicted of more than one offense if . . . [o]ne offense is included in the other, as defined in section 556.046 . . . ." § 556.041(1), RSMo 2016. "An offense is so included when . . . [i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged . . . ." § 556.046.1(1), RSMo 2016.

"Analysis under . . . § 556.046.1(1) . . . focuses on the statutory elements of the offenses rather than upon the evidence actually adduced at trial." *McTush*, 827 S.W.2d at 188; *see also State v. Wright*, 608 S.W.3d 790, 795 (Mo. App. E.D. 2020) (quoting *State v. Horton*, 325 S.W.3d 474, 479 (Mo. App. E.D. 2010)) ("The elements of the two offenses must be compared in theory without regard to the specific conduct alleged."); *Hardin*, 429 S.W.3d at 424 ("[A]n indictment-based application of this definition [of a lesser-included offense] has been expressly rejected."). "If each offense is established by proof of an element not required by the other offense, then neither offense is an included offense within the meaning of § 556.046.1(1), and the limitation on convictions for multiple offenses codified at § 556.041(1) does not apply." *McTush*, 827 S.W.2d at 188.

"If each offense requires proof of a fact that the other does not, then the offenses are not lesser included offenses, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Id*. "An offense is a lesser included offense if it is impossible to commit the greater without necessarily committing the lesser." *Hardin*, 429 S.W.3d at 422 (quoting *State v. Derenzy*, 89 S.W.3d 472, 474 (Mo. banc 2002)).

Section 575.095 provided that:

> A person commits the offense of tampering with a judicial officer if, with the purpose to harass, intimidate *or influence* a judicial officer in the performance of such officer's official duties, such person:
>
> (1) Threatens or causes harm to such judicial officer or members of such judicial officer's family;
>
> (2) Uses force, threats, or deception against or toward such judicial officer or members of such judicial officer's family;
>
> (3) *Offers, conveys or agrees to convey any benefit direct or indirect upon such judicial officer or such judicial officer's family*;
>
> (4) Engages in conduct reasonably calculated to harass or alarm such judicial officer or such judicial officer or such judicial

officer's family, including stalking pursuant to section 565.225 or 565.227.

§ 575.095, RSMo 2016 (emphasis added).

Section 565.091 provided that "[a] person commits the offense of harassment in the second degree if he or she, without good cause, engages in any act with the purpose to cause emotional distress to another person." § 565.091, RSMo 2016. "Emotional distress" was defined as "something markedly greater than the level of uneasiness, nervousness, unhappiness, or the like which are commonly experienced in day-to-day living." § 565.002(7), RSMo 2016.

While tampering with a judicial officer *may* be established with proof of a "purpose to harass," it may also be established with proof of the alternative "purpose to . . . influence." *See* § 575.095, RSMo 2016. "Influence" was not defined by statute. *See* § 575.010, RSMo 2016; § 556.061, RSMo 2016. "When a term is not defined by statute, this Court will give the term its 'plain and ordinary meaning as derived from the dictionary.'" *State v. Smith*, 595 S.W.3d 143, 146 (Mo. banc 2020) (quoting *Mo. Pub. Serv. Comm'n v. Union Elec. Co.*, 552 S.W.3d 532, 541 (Mo. banc 2018)). The verb "influence" means "to have an effect on the condition or development of." WEBSTER'S NEW INT'L DICTIONARY 1160 (3d ed. 1986). Thus, an act done with the purpose to "influence" is specifically intended to have an effect on the judicial officer's performance of

his or her official duties, while the mere purpose to "harass" may not. *See Hause*, 371 S.W.3d at 841. That "harass" and "influence" have different meanings is further supported by the statute's use of both terms. *See State v. Bouse*, 150 S.W.3d 326, 335 (Mo. App. W.D. 2004) ("[W]e must presume that each word of a statute has separate and individual meanings.").

Additionally, one of the four separate methods by which one can commit the offense of tampering with a judicial officer is to "[o]ffer[ ], convey[ ], or agree[ ] to convey any benefit . . . upon such judicial officer . . . ." § 575.095(3), RSMo 2016. Thus, one could commit the offense of tampering with a judicial officer by agreeing to convey money to a judicial officer with the purpose to influence the judicial officer in the performance of his official duties. Clearly, such an act would differ from one done with the purpose to cause emotional distress. Therefore, contrary to Defendant's claim, it is not "impossible to commit the crime of tampering with a judicial officer without committing the offense of harassment in the second degree." (Def's Br. 12).

Defendant's analysis relies in part on the offenses "as charged." (Def's Br. 30). This method of analysis has been expressly rejected by the Supreme Court of Missouri. *See Hardin*, 429 S.W.3d at 423-24 ("[The defendant] assumes that whether the offense . . . is included . . . depends on how the . . . offense is indicted, proved, or submitted to the jury. [The defendant's] assumption does

not comport with this Court's historical understanding of lesser-included offenses.").

Because a conviction for the offense of tampering with a judicial officer did not require proof of the same facts required for a conviction of second-degree harassment, second-degree harassment was not an "included offense" within the meaning of section 556.046.1(1), and thus convictions for both offenses are in accordance with the espoused intent of the legislature and did not violate double jeopardy. *See McTush*, 827 S.W.2d at 188. Accordingly, the trial court did not err in accepting the jury's verdict and convicting Defendant of both tampering with a judicial officer and second-degree harassment.

Defendant's final point should be denied.

CONCLUSION

This Court should affirm Defendant's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 7,794 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word 2016 software; and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

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