UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2750

September Term, 2014

JAMES ARMSTEAD

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Kenney, James A., III
(Retired Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: April 8, 2016

Following a bench trial in the Circuit Court for Anne Arundel County, James Armstead, appellant, was convicted on one count of telephone misuse.[1] The circuit court sentenced appellant to serve three years incarceration, all but six days suspended, and three years of unsupervised probation. In his timely filed appeal, appellant presents two questions for our consideration, which we have reordered:

1. Did the trial court err in permitting the charging document to be amended over defense's objection?

2. Was the evidence insufficient to sustain the conviction for telephone misuse?

Discerning neither reversible error nor abuse of discretion, we shall affirm the judgments of the circuit court.

BACKGROUND

William Regan, the named victim in the instant case, is employed as a traffic clerk in the District Court for Anne Arundel County in Annapolis, Maryland. As part of his duties, Regan, along with others, answers phone calls made to that court. Beginning in early June of 2014, appellant began frequently calling the court regarding a 2005 case that he thought was still showing on his record even though he believed it had been expunged.[2] Each time

[1]The court granted appellant's motion for judgment of acquittal as to the charge of harassment.

[2]It is unclear whether the record of the charges against appellant has been expunged. Regan testified that when he checked the case number provided by appellant, the record had not been expunged. Appellant and his wife both testified that they possessed documents verifying that the expungement had gone through. A copy of appellant's record that was

(continued...)

appellant called, his call was directed to the clerk's office, where Regan frequently answered the phone.[3] Each time appellant called and Regan answered, Regan looked up the case number and tried to answer appellant's questions.[4] Regan gave appellant the phone numbers of other individuals who might be able to assist him, as well.[5] During the phone calls, appellant was loudly aggressive, ranting, clearly upset and irritated. During the first few weeks of June, Regan estimated that he received more than fifty calls from appellant. Each call normally lasted between eight and ten minutes, although there were several shorter calls where appellant called only to request that Regan give him the court liaison's phone number again.

[2](...continued)
submitted as an exhibit did not include any references to sexual assault charges. The application for statement of charges prepared by Corporal Pat Donahue repeatedly states that appellant's record was expunged. Corporal Donahue is sometimes referred to as Detective Donahue; we will refer to him as "Donahue."

[3]Appellant testified that when he called the circuit court, he was told to contact the "expungement people" at the District Court to correct the mistake. Regan was not the only employee of the clerk's office who answered appellant's calls; calls were directed randomly to one of six clerks.

[4]During each call, Regan looked up the case, verified that the case originated in the District Court, and attempted to answer appellant's questions about the case. Each time appellant called, Regan answered the same questions and provided the same information.

[5]Specifically, Regan transferred appellant's call to his supervisor in the clerk's office and gave appellant the number for the court liaison, Donahue.

On June 10, 2014, appellant called the main telephone line at the District Court more than ten times.[6] Appellant prefaced several of his calls with an acknowledgment that he "knew [he wasn't] supposed to be calling here." Several times, appellant became verbally abusive, blaming Regan for his legal difficulties and threatening to sue Regan and others.[7] Regan, "flustered" by the phone calls, reported them to his supervisor. He admitted that he never told appellant to stop calling the court.

As noted, one of the people to whom Regan directed appellant's call was Donahue, the District Court liaison officer. Donahue recalled that when he first spoke to appellant on June 3, 2014, appellant was very upset and needed some time to calm down. During that call, Donahue told appellant that he would look into the matter and instructed appellant not to call the court again until he heard back from Donahue.[8] After making some phone calls

[6]On June 10, 2014, appellant called the District Court at 9:00, 9:20, 9:22, 9:26, 10:07, 10:09, 10:11, 10:23; 11:28, 11:30, 11:49; and 11:52. Regan testified that he fielded ten calls made by appellant, only four of which he logged.

[7]Regan reported that appellant stated: "This is bullshit. This is your fucking fault. This is your fault."

[8]Appellant explained that he was upset because the Housing Authority ("H.A.") continued to deny housing to him because of a 2005 sexual assault case that was still documented in the H.A. records even though appellant had paperwork verifying that he had been acquitted and his record had been expunged. Appellant believed that because of the documents memorializing the expunged charge, he could not get public housing and was placed on a "banned list" maintained by the H.A. The H.A. still used the charge as a basis for banning appellant from its property and for filing trespassing charges against him when he was found on the premises of H.A. owned apartments. When Donahue contacted a (continued...)

regarding appellant's concerns, Donahue next spoke with appellant around 8:45 a.m., on June 10, 2014. When Donahue related what he had learned to appellant, appellant became irate and began cursing, screaming, and hollering to the point where Donahue could not even understand what he was saying. Donahue reiterated that appellant was not to call the court again and then hung up on him. Appellant then called the main number for the District Court more than ten times that day. Again, many of those calls were answered by Regan. That afternoon, Donahue filed a Statement of Charges against appellant alleging telephone misuse and harassment.

At appellant's trial, Regan identified appellant in court as the individual who had called the District Court on June 10, 2014. Appellant, who suffers from a learning disability that limits his ability to read and write, admitted that he called the court multiple times on June 10, 2014, but denied that he intended to annoy anybody. He insisted that he was just trying to talk to "the detective" so that he could fax him the paperwork he had regarding the charges that had been expunged. According to appellant, he and his wife have made numerous efforts to try to resolve the matter, including contacting the Criminal Justice Information Service (CJIS) in Reisterstown regarding the expungement.

[8](...continued)
representative at the H.A., the representative indicated that there were several reasons that the H.A. did not think appellant should be removed from the "banned list" including threats appellant had made to H.A. employees.

DISCUSSION

I. Amendment of Charging Document

On June 10, 2014, a Statement of Charges was filed against appellant in the District Court alleging, in pertinent part, that on or about June 10, 2014, appellant "did use telephone equipment for repeated calls, with intent to annoy the Annapolis District Court Clerk's office." Three days prior to appellant's trial, the State filed a motion to amend the charging document by replacing all references to the "Annapolis District Court Clerk's Office" with "Kyle Regan." On the morning appellant's trial was scheduled to begin, appellant's attorney filed an "Opposition to Motion to Amend Charging Document and Motion to Dismiss Charging Document for Failure to Charge an Offense," asserting that (a) a proper charging document for the crime of telephone misuse must name a "person" rather than a governmental entity; and, (b) the State's attempt to amend the charging document to name Regan instead of the "Annapolis District Court Clerk's office" was improper because it changed the nature of the alleged offense. The circuit court granted the State's motion to amend, stating:

> I think you're absolutely right, [Defense Counsel], that these charges of harassment and telephone misuse must be directed towards a person. It can't be towards the government unit which is the Clerk's Office. I think the State recognizes that, which is why they moved to amend.
>
> The Court will find and will grant the Motion to Amend, and the Court does find on Rule 4-204 that the character of the events has not been charged [*sic*]. The character of the events is still harassment and telephone misuse.

> Now I note that the State will need to prove … specific intent as to that one victim. General intent will not be enough. That's an entirely different issue because the way that the charge was written, it was a specific intent to harass the Annapolis District Court Clerk's Office. But in this case the Court believes that amending it to, say, Kyle Regan, is not inappropriate and does not change the character of the offense charged because the offense doesn't change.
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> * * *
>
> I agree with [Defense Counsel] that the charge, as originally drafted, was not proper.

Subsequently, each count in the Statement of Charges was amended by replacing "Annapolis District Court Clerk's office" with "Kyle Regan."

Maryland Rule 4-202(a) provides that a charging document must include: (1) "the name of the defendant"; (2) "a concise and definite statement of the essential facts of the offense"; and (3) "with reasonable particularity, the time and place the offense occurred." Not all of the elements of a crime need be expressly set forth in the charging document. *See Jones v. State*, 303 Md. 323, 337 (1985) (upholding a short form theft indictment even though it did not specify how and with what intent the defendant "stole" the victim's property); *State v. Morton*, 295 Md. 487, 494-95 (1983) (holding that the manner and means of commission of a crime need not be alleged). Maryland courts have emphasized that "every criminal charge must, first, characterize the crime; and, second, it must provide such description of the criminal act alleged to have been committed as will inform the accused of the specific conduct with which he is charged, thereby enabling him to defend against the

accusation and avoid a second prosecution for the same criminal offense." *In re Roneika S.*, 173 Md. App. 577, 591 (2007) (quoting *Williams v. State*, 302 Md. 787, 790 (1985)). "The Rule does not require that any victim be named or identified." *Denicolis v. State*, 378 Md. 646, 662 (2003).

A charging document may be amended in accordance with Maryland Rule 4-204, which provides:

> On motion of a party or on its own initiative, the court at any time before verdict may permit a charging document to be amended except that if the amendment changes the character of the offense charged, the consent of the parties is required.

It is well established that a charging document "may be corrected without the defendant's consent if the amendment does not alter any of the elements of the offense and results in no prejudice" to the accused.[9] *Tapscott v. State*, 106 Md. App. 109, 134 (1995).

"Matters relating to the character of the offense are those facts that must be proved to make the act complained of a crime." *Thompson v. State*, 181 Md. App. 74, 98-99 (2008) (internal quotation marks omitted) (citation omitted). This Court has previously advised that the essential elements of the crime of telephone misuse are that the calls were repeated and

[9]Amendments deemed unrelated to the "character of the offense," and therefore not dependent upon the defendant's consent, include "clerical correction[s] with respect to the name of a defendant, the substitution of one name for another as a robbery victim, a change in the description of money, changing the name of the owner of property in a theft case, and changing the date of the offense." *Holbrook v. State*, 133 Md. App. 245, 259 (2000) (quoting *Albrecht v. State*, 105 Md. App. 45, 68 (1995)).

were made with the intent to annoy. *See Caldwell v. State*, 26 Md. App. 94, 107 (1975) (considering the substantively identical predecessor statute); *see also Deibler v. State*, 365 Md. 185, 201 (2001) (explaining that the telephone misuse statute "requires proof of three things: criminal agency—that the defendant made the calls; that there were 'repeated calls'; and that the calls were made with one of the requisite intents."). Identity of the victim is not an essential element of the crime of telephone misuse. *See id*. (omitting the victim's identity in its recitation of the essential elements of the offense). *See also Denicolis*, 378 Md. at 661-62 (opining that the State's failure to identify a victim in a charging document was not a jurisdictional defect that could be raised at any time; instead, it was "the proper subject of a motion under Rule 4-252(a). . . . That kind of failure would result [in the failure to allege an offense] only if the name or identification of the victim is an element of the crime").

In this case, all of the *essential* elements of the offense, including appellant's criminal agency, were set forth in the charging document. The charging document fully advised appellant of what crime he was alleged to have committed, and how, when, and where he allegedly committed it. Naming a non-person as the victim was incorrect, but even the complete failure to name an individual victim would not have resulted in the charging of appellant with a non-crime.[10] Md. Rule 4-202(a). Under these circumstances, because the

[10]Under other circumstances the distinction between a defect in the charging document and a failure of the charging document to charge a cognizable offense could be more legally significant. Maryland Rule 4-252 provides that "[a] motion asserting failure of the charging (continued...)

identity of the victim is not an essential element of the crime of telephone misuse, the State's motion to amend the charging document to substitute Kyle Regan as the alleged victim instead of the Annapolis District Court Clerk's office, did not alter any essential elements of the offense and, therefore, did not require appellant's consent.[11] *Tapscott*, 106 Md. App. at

[10](...continued)
document to show jurisdiction in the court or to charge an offense may be raised and determined at any time." Md. Rule 4-252(d). On the other hand, a motion asserting "[a] defect in the charging document other than its failure to show jurisdiction in the court or its failure to charge an offense" must be made within 30 days of the earlier of (a) the entry of appearance of counsel or (b) the defendant's first appearance before the circuit court. Md. Rule. 4-252(a)(2), (b). Thus, a defendant may waive any argument based upon a defect in the charging document if a proper motion is not timely filed. Md. Rule 4-252(a).

In this case, the docket entries reflect that appellant's first attorney entered his appearance in this case on October 31, 2014. At that time, defense counsel filed an "omnibus" motion, but did not, therein, allege there was any defect in the charging document. The first time appellant raised the specific allegation that the charging document was defective because it named "the Annapolis District Court Clerk's Office" instead of an individual person was when he filed his motion in opposition to the State's motion to amend the charging document, on February 12, 2015. Because the time for filing such a claim expired on December 1, 2014, and there was no good cause to waive the requirements of Rule 4-252, appellant's motion alleging defect was not timely. *See Ford v. State*, 90 Md. App. 673, 694 (1992) (holding that the failure to allege a non-jurisdictional defect in a charging document is waived if it is not made in timely fashion), *aff'd.*, 330 Md. 682 (1993). However, because the State did not raise any objection to the timeliness of appellant's defect argument at the hearing on the State's motion to amend the charging document and the circuit court proceeded to review the matter on the merits, the State has waived any timeliness argument for the purposes of appellate review. *See State v. Brown*, 200 Md. App. 47, 51 (2011) (considering State's appellate challenge to defense argument regarding the validity of criminal information where defense motion was untimely and was made orally rather than in writing as required by the Rule).

[11]After granting the State's motion to amend the charging document to name Regan (continued...)

134 (holding that a charging document "may be corrected without the defendant's consent if the amendment does not alter any of the elements of the offense and results in no prejudice" to the accused). *See also Gyant v. State*, 21 Md. App. 674, 685 (1974) ("The count in question charged robbery with a deadly weapon both before and after the amendment. The amendment simply changed the victim of the robbery."). For the foregoing reasons we conclude that the circuit court did not err or abuse its discretion by granting the State's motion to amend the charging document.

II. Sufficiency of the Evidence of Telephone Misuse

Because Mr. Armstead had a bench trial, defense counsel did not need to make a motion for judgment of acquittal to preserve a challenge to the sufficiency of the evidence. *Ennis v. State*, 306 Md. 579, 595 (1986). Here, defense counsel did in fact move for judgement of acquittal, which the court granted as to the charge of harassment on the grounds that appellant had a "legal purpose" for calling the District Court. The circuit court denied the motion as to the charge of telephone misuse, explaining:

> [The Court]: All right. I'm going to deny the motion as to misuse of telephone facilities and equipment. You can look at it, intent, from the surrounding circumstances and the light most favorable to the State, at this

[11](...continued)
as the victim instead of the clerk's office, the court offered appellant an extension of time or a continuance to make any necessary changes in his defense in light of the amended charges. After consulting with his attorney, appellant declined to postpone the case. Consequently, appellant cannot now claim that he was prejudiced because he had no opportunity to prepare an effective defense to the amended charges.

> point in time, a James Armstead who was linked by Kyle Regan and a supervisor and . . . Donahue was making repeated calls that dealt with an interview which certainly disturbed or irritated Kyle Regan. So I think there's enough to keep it alive on 3-804(a)(ii).

After the defense presented its case, the court concluded that appellant was guilty of telephone misuse:

> [The Court]: All right. I've read the statute multiple times and . . . determine the meaning and it's written very different from 3-803 which is what he was also charged with. And a person may not use telephone facilities or equipment to make repeated calls.
>
> There's no question that repeated calls were made. There's no question it came through the telephone. And the question is . . . whether it was with the intent to annoy another because that is how the charge was specifically written. It did not mention harassment, embarrassment, obscenity or anything like that. Simply whether it was to annoy.
>
> Annoying conduct is that type of conduct where you disturb or irritate someone by repeated acts. And in this case, it's very clear to the Court that [appellant] has, by his repeated acts, certainly annoyed the victim in this case. The fact that it's sort of a random call when it comes in, I don't think is dispositive. The question is more from [appellant's] perspective, what was he doing when he was calling?
>
> I agree with you, [defense counsel], that difficult people need respect, but respect is a two-way street. And it's very clear to me that with [appellant] being told not to call, acknowledging he was not supposed to call, and calling repeatedly in the manner that he did, agitated, upset, irate, at times obscene, that it was with the intent to annoy Mr. Regan and . . . the Court finds the [appellant] guilty.

Appellant now contends that the evidence presented at his trial was insufficient to support his conviction for telephone misuse. Specifically, appellant asserts that the evidence

was insufficient to demonstrate, beyond a reasonable doubt, that appellant called the District Court with the specific intent to annoy Mr. Regan.

As the Court of Appeals has recently reiterated, the standard for appellate review of evidentiary sufficiency in cases tried before the bench:

> is whether, after viewing the evidence in the light most favorable to the [State], any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In so evaluating, [w]e do not re-weigh the evidence, but we do determine whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.

Wagner v. State, 445 Md. 404, 417 (2015) (alterations in original) *(*internal quotation marks and citations omitted) (quoting *State v. Smith*, 374 Md. 527, 533-34 (2003)). In other words, the question is not whether we would draw the same inferences from the evidence.

Section 3-804(a)(2) of the Criminal Law Article codifies the offense of telephone misuse. Md. Code (2002, 2012 Repl. Vol.), §3-804 of the Criminal Law Article ("Crim."). Relevant to this case, the Code provides, "[a] person may not use telephone facilities or equipment to make . . . repeated calls with the intent to annoy, abuse, torment, harass, or embarrass another[.]" Crim. §3-804(a)(2); *see also Deibler*, 365 Md. at 201 (explaining that the telephone misuse statute "requires proof of three things: criminal agency—that the defendant made the calls; that there were 'repeated calls'; and that the calls were made with one of the requisite intents.").

After being amended, the Statement of Charges in this case alleged that, on June 10, 2014, appellant made repeated phone calls "with intent to annoy" Regan. Appellant does not challenge the trial court's findings that he was the individual who made the phone calls to the District Court on June 10, 2014, or the court's characterization of the calls as "repeated." It is not alleged that appellant was simply a difficult person to deal with—and that alone would not constitute telephone misuse. The telephone misuse statute "obviously requires the State to prove that an accused had the specific intent to annoy, abuse, torment, harass or embarrass the person who receives the calls." *Caldwell*, 26 Md. App. at 104 (considering Art. 27 §555A(2), the predecessor to Crim. §3-804). Thus, the question now before us is whether the evidence presented was sufficient to convince a reasonable trier of fact beyond a reasonable doubt that appellant acted with the specific intent to annoy the person who received his calls, in this event, Regan.

Intent is a state of mind that ordinarily cannot be proven with direct evidence. *Buck v. State*, 181 Md. App. 585, 641 (2008) ("[B]ecause intent is a subjective concept and, without the cooperation of the accused, cannot be directly and objectively proven, its presence must be shown by established facts which permit a proper inference of its existence") (citation omitted) (internal quotation marks omitted). Therefore, when considering intent, the fact finder must examine the individual's acts and statements in the context of the surrounding circumstances. *See e.g. Jones v. State*, 213 Md. App. 208, 218

(2013) ("In determining a defendant's intent, the trier of fact can infer the requisite intent from surrounding circumstances such as the accused's acts, conduct and words.") (citations omitted) (internal quotation marks omitted), *aff'd.*, 440 Md. 450 (2014). It is well established that a fact finder may infer that a person ordinarily "intends the natural and probable consequences" of his or her acts. *Id*. (citations omitted); *Buck*, 181 Md. App. at 642.

The evidence presented demonstrated that appellant made more than fifty aggressive, expletive-laden phone calls to the Anne Arundel County District Court during a ten day period in early June of 2014, including the ten calls at issue in the case, which were all placed within a period of three hours on June 10, 2014. Regan testified that appellant's calls would "start off just aggressive and then just get worse from there[,]" with "[c]ursing" and getting "more aggressive" and "louder." Appellant would ask the same questions and repeat the same angry comments over and over again, sometimes for eight to ten minutes before Regan could interject a single comment or question.

Factors the trial court could consider in weighing whether the evidence established that appellant acted with the requisite intent included: (1) the fact that the calls were made to the District Court's main phone number;[12] (2) the fact that Regan was one of several

[12]The fact that appellant called a public number for a government body and that the phone was answered by a civil servant does not grant appellant, or anyone else, *carte blanche* to engage in abusive, harassing behavior. *See Von Lusch v. State*, 31 Md. App. 271, 278 (1976) ("[T]he fact that the recipient of the calls is a public official does not immunize the caller from the statute's sanctions."), *rev'd on other grounds*, 279 Md. 255 (1977). There is (continued...)

people in the clerk's office to whom appellant's phone calls were randomly directed;[13] (3) the fact that Regan was actually annoyed by appellant's repeated phone calls;[14] and, (4) the fact that Donahue twice instructed appellant not to call the court house any more, the last time immediately prior to his multiple calls on June 10, 2014.[15] *See Deibler*, 365 Md. at 202 ("Courts have looked, among other things, to the number of calls, when during the day or night they were made, the period during which the calls were made, whether the calls were clustered or strung out over a period of time, the relationship between the caller and the victim, the nature and content of any message imparted during the calls, whether the caller

[12](...continued)
no exemption in the statute for harassment, nor annoyance, aimed at government employees. Crim. §3-804.

[13]The telephone misuse statute does not require that the intent to annoy, abuse, torment, harass, or embarrass a named individual be the *sole* intent possessed by the telephoning party. Crim. §3-804(a)(2); *see also von Lusch v. State*, 39 Md. App. 517, 524, *cert. denied*, 283 Md. 740 (1978) (considering predecessor statute). It is reasonable to infer that any intent to annoy that appellant possessed was not directed solely at Regan, but more broadly at any of the several individuals in the District Court who answered one of his frequent telephone rants, including Donahue and those persons other than Regan who answered the phone in the clerk's office. The fact that appellant's intent was greater than that with which he was charged does not negate his guilt for the more specific intent concerning only Regan.

[14]The telephone misuse statute requires only that the caller possess the requisite intent to annoy, abuse, torment, harass or embarrass, not that the person who receives the calls is actually annoyed, abused, tormented, harassed, or embarrassed. Crim. §3-804.

[15]The plain language of the telephone misuse statute does not require that the accused must be told to stop calling. Crim. §3-804.

remained anonymous, and, though not controlling, the effect of the calls on the victim, in determining the caller's intent.") (citations omitted).

We are persuaded that the evidence was sufficient to support an inference that, during a relatively brief period of time on June 10, 2014, appellant, having been told not to call and acknowledging that he was not supposed to be calling, deliberately intended to annoy the District Court employees with whom he spoke, in this case Regan, by making multiple confrontational, belligerent, and repetitive phone calls to the same phone number. Perhaps he also wanted to compel someone to assist him in resolving the problems he continued to suffer as a result of the expungement issue, but annoying Regan, who received the calls, was the natural and probable consequence of his actions.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.