

ORIGINAL

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

FILED
JAN 17 2012

STATE OF MISSOURI,)
)
Respondent,)
)
v.)
)
DAVID HUDSON)
)
Appellant.)

LAURA ROY
CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. ED96609 **92344**

FILED

FEB 6 2012

APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT **CLERK, SUPREME COURT**
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 29
THE HONORABLE MICHAEL STELZER, JUDGE

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

The State of Missouri charged that Appellant, David Hudson, committed the class A misdemeanor of domestic assault in the third degree pursuant to Section 565.074, RSMo 2000, alleging that Mr. Hudson attempted to cause physical injury to B.R. by striking her. The State also charged the class A misdemeanor of harassment, Section 565.090.1(5) RSMo. Cum. Supp. 2011, alleging "the defendant knowingly made repeated unwanted communications to B.R. by sending text messages and calling her."

A jury found Mr. Hudson guilty of both charged crimes. The court sentenced Mr. Hudson to concurrent terms of one year in jail. This timely-filed appeal followed. This appeal involves the challenge to a statute, and would ordinarily fall under the jurisdiction of the Supreme Court of Missouri. However, a case is pending in the Supreme Court of Missouri that raises the same challenge. *State v. Danny Vaughn* (SC91670) (argued and submitted on December 13, 2011). At this time, it appears this Court will apply the eventual holding in *Vaughn* to Count II to this case when this case is submitted. Thus, this case does not involve any issues reserved for the exclusive jurisdiction of the Supreme Court of Missouri. Jurisdiction lies in the Missouri Court of Appeals, Eastern District. Mo. Const., Art. V, Sec. 3, RSMo.

STATEMENT OF FACTS

The State of Missouri charged that Mr. Hudson committed the crimes of: (1) the class A misdemeanor of domestic assault in the third degree pursuant to Section 565.074, RSMo 2000, alleging that Mr. Hudson attempted to cause physical injury to B.R. by striking her, as well as (2) the class A misdemeanor of harassment, Section 565.090.1(5) RSMo. Cum. Supp. 2011, alleging “the defendant knowingly made repeated unwanted communications to B.R. by sending text messages and calling her.” L.F. 23, 24.

B.R., a forty-year-old woman, testified at trial that Mr. Hudson was her boyfriend for three months. Tr. 125. She had a toddler-aged son, as well as a 15-year-old daughter. Tr. 124. Her dating relationship with Mr. Hudson started out well, but soon she found him to be jealous and abusive. Tr. 125. On September 14, 2010, during a fight at her apartment, he shoved the back of her head as she turned to leave. Tr. 126. She was carrying her son. Tr. 127. Her head, as well as her son’s head, hit the wall. Tr. 127. B.R. called the police to report this alleged assault. Tr. 127. The police officer who arrived did not see any injury to B.R. or her son, but she told him her head hurt. Tr. 143. She considered this shoving incident to be the end of their relationship. Tr. 130.

About a month later, between October 15 and 17, 2010, Mr. Hudson sent her text messages. Tr. 130. During the same time, she received phone calls from an unknown number, which she did not answer, but which she believed to be from Mr. Hudson. Tr. 152. She did not respond to any of the text messages, but called Mr. Hudson on one occasion. Tr. 130. She did not want him to call or text her during this time period. Tr. 130. A police officer briefly viewed the text messages that appeared to be from Mr. Hudson on B.R.'s phone. Tr. 157. One of them called B.R. a bitch. Tr. 157. Another said something about Mr. Hudson having the HIV virus. Tr. 157. Mr. Hudson made a statement to a police officer later that he had indeed texted her the weekend of October 15, 2010, but had been drunk. Tr. 163.

The jury found Mr. Hudson guilty of both charged crimes. Tr. 182. The court sentenced Mr. Hudson to concurrent terms of one year in jail. L.F. 112. This appeal followed. L.F. 113.

POINTS RELIED ON

I - The trial court erred in overruling Mr. Hudson's motion for judgment of acquittal at the close of all the evidence, in entering judgment on the jury's verdict of guilty of the crime of harassment, an alleged violation of Section 565.090, RSMo. Cum. Supp. 2011, because the rulings violated Mr. Hudson's right to due process of law as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State presented no evidence, or evidence from which reasonable inferences could be drawn, that Mr. Hudson was aware that his communications with B.R. on October 15 and 17, 2010, were unwanted.

Section 565.090.1(5), RSMo. Cum. Supp. 2011

State v. Smith, 33 S.W.3d 648 (Mo. App. W.D. 2000)

State v. Grim, 854 S.W.2d 403 (Mo. banc 1993)

U.S. Const. Amend. V, XIV

Mo. Const. Art. I, Sec. 10

II – Section 565.090.1(5), RSMo. Cum. Supp. 2011, criminalizing knowingly making “repeated unwanted communications to another person,” is unconstitutional, in that it is overbroad and void for vagueness, violating the First, Fifth, and Fourteenth Amendments to the U.S. Constitution and Article I, sections 8 and 10 of the Missouri Constitution, because the provision fails to give a person of common intelligence fair notice of forbidden conduct, and criminalizes a broad category of communications between people, which implicates constitutionally protected speech.

Section 565.090.1(5), RSMo. Cum. Supp. 2011

State ex rel. Bloomquist v. Schneider, 244 S.W.3d 139 (Mo. banc 2008)

State v. Allen, 905 S.W.2d 874 (Mo. banc 1995)

State v. Carpenter, 736 S.W.2d 406 (Mo. banc 1987)

Rule 30.20

U.S. Const. Amend. I, V, XIV

Mo. Const. Art. I, Secs. 8 and 10

ARGUMENT

I - The trial court erred in overruling Mr. Hudson's motion for judgment of acquittal at the close of all the evidence, in entering judgment on the jury's verdict of guilty of the crime of harassment, an alleged violation of Section 565.090, RSMo. Cum. Supp. 2011, because the rulings violated Mr. Hudson's right to due process of law as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State presented no evidence, or evidence from which reasonable inferences could be drawn, that Mr. Hudson was aware that his communications with B.R. on October 15 and 17, 2010, were unwanted.

Preservation. At the close of the evidence, trial counsel made a motion for judgment of acquittal. Tr. 167-168; L.F. 95-96. That motion was denied. L.F. 95. A point challenging the sufficiency of the evidence to support the conviction was included in the motion for new trial, though not required for preserving the point. Rule 29.11(d); *State v. Washington*, 92 S.W.3d 205, 207 (Mo. App. W.D. 2002); L.F. 109. The issue is preserved for appellate review.

Standard of Review. "The state has the burden and must prove each and every element of a criminal case." *State v. Smith*, 33 S.W.3d 648, 652 (Mo. App. W.D. 2000). Review of claims challenging the sufficiency of the evidence is

limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). The reviewing court views the evidence in a light most favorable to the verdict, considering all favorable inferences and disregarding all evidence and inferences contrary to the verdict. *Id.* “While reasonable inferences may be drawn from both direct and circumstantial evidence, these inferences must be logical, reasonable, and drawn from established fact.” *State v. Hembree*, 349 S.W.3d 483, 485 (Mo. App. S.D. 2011). In “reviewing the evidence this Court cannot supply missing evidence or give the State the benefit of unreasonable, speculative or forced inferences.” *Id.* (citation omitted).

Discussion. Section 565.090, RSMo. Cum. Supp. 2011, states that a person commits the crime of harassment if he or she

(1) Knowingly communicates a threat to commit any felony to another person and in so doing frightens, intimidates, or causes emotional distress to such other person; or

(2) When communicating with another person, knowingly uses coarse language offensive to one of average sensibility and thereby puts such person in reasonable apprehension of offensive physical contact or harm; or

(3) Knowingly frightens, intimidates, or causes emotional distress to another person by anonymously making a telephone call or any electronic communication; or

(4) Knowingly communicates with another person who is, or who purports to be, seventeen years of age or younger and in so doing and without good cause recklessly frightens, intimidates, or causes emotional distress to such other person; or

(5) Knowingly makes repeated unwanted communication to another person; or

(6) Without good cause engages in any other act with the purpose to frighten, intimidate, or cause emotional distress to another person, cause 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.¹

Section 565.090.1. Mr. Hudson was charged under subsection (5), alleging he “knowingly made repeated unwanted communication to B.R. by sending text messages and calling her.” L.F. 24. The verdict director

¹ L.2008, S.B. Nos. 818 & 795, § A, rewrote the section, which prior thereto read:

“1. A person commits the crime of harassment if for the purpose of frightening or disturbing another person, he

(1) Communicates in writing or by telephone a threat to commit any felony; or

(2) Makes a telephone call or communicates in writing and uses coarse language offensive to one of average sensibility; or

(3) Makes a telephone call anonymously; or

(4) Makes repeated telephone calls.”

submitted to the jury instructed the jury to find Mr. Hudson guilty of this charge if it found, beyond a reasonable doubt, “the defendant knowingly made repeated unwanted telephone calls and text message to [B.R.]” L.F.

88. An element of the crime is that the defendant knows or is aware that his communications to another person are “unwanted.” Section 565.090.1(5).

On this charge, the State presented limited evidence. It presented no evidence, or evidence from which reasonable inferences could be drawn, that Mr. Hudson was aware that his text messages to B.R. on the weekend of October 15 were unwanted. Section 565.090.1(5).

B.R. testified that the weekend of October 15, 2010 “he just constantly was texting me, constantly texting me. I was not responding to his text messages. I did not want him to contact me.” Tr. 130. She called him on one occasion after they were no longer dating, though the record does not reflect when that was, or what was said. Tr. 133-134. She was clear in her testimony that she did not want him to call her. Tr. 133. But in response to his text messages the weekend of October 15, 2010, she did not text him back telling him not to contact her. Tr. 130, 133-134. There is no evidence of any statements made by Mr. Hudson evidencing his

knowledge of whether or not B.R. wanted to hear from him the weekend of October 15, 2010.

Without this evidence, the State did not address an element of the crime. While the jury was entitled to draw reasonable inferences from the evidence, such inferences must come from evidence that the State actually presents. There was simply no evidence presented that went to this element, and the State made no effort to address this element in argument. The State made a compelling argument that B.R. did not want to hear from Mr. Hudson (Tr. 171), but presented no evidence or argument that Mr. Hudson was aware of this fact.

To satisfy its burden, the State would need to adduce evidence from B.R. on the issue of whether she told Mr. Hudson not to contact her; if she did, then the State would have proven that element. It chose not to ask that question. Therefore, it must be inferred from that omission that the answer would have been that she did not tell him that, or that otherwise the State was unaware that this was an element of the crime it must prove.

The evidence was, in fact, that she did not respond to his text messages and had talked to him only once since their breakup. Tr. 130, 133-134. There is nothing in the record as to the content of that conversation.

Because there is no reasonable inference from the evidence supporting the knowledge or *mens rea* element of the harassment conviction, the conviction violates Mr. Hudson's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Section 10 of the Missouri Constitution. This conviction must be vacated.

II - Section 565.090.1(5), RSMo. Cum. Supp. 2011, criminalizing knowingly making “repeated unwanted communications to another person,” is unconstitutional, in that it is overbroad and void for vagueness, violating the First, Fifth, and Fourteenth Amendments to the U.S. Constitution and Article I, sections 8 and 10 of the Missouri Constitution, because the provision fails to give a person of common intelligence fair notice of forbidden conduct, and criminalizes a broad category of communications between people, which implicates constitutionally protected speech.

Preservation and Standard of Review. Mr. Hudson did not challenge the statute on these grounds; review is for plain error. Rule 30.20. There is a pending case in the Supreme Court of Missouri that will decide whether this provision, Section 565.090.1(5) RSMo. Cum. Supp. 2011, is void, either on vagueness or overbreadth grounds. *State v. Danny Vaughn* (SC91670) (argued and submitted on December 13, 2011).

If this provision is found to be unconstitutional in the *Vaughn* case, this Court must vacate the conviction. In *State v. Mitchell*, the Supreme Court of Missouri held that the defendant had not waived his objections to the constitutionality of the statute under which he was convicted by pleading guilty. 563 S.W.2d 18, 22 (Mo. banc 1978). “The invalidity of such an act on constitutional grounds goes to the subject matter of the prosecution and may be

raised at any stage of the proceeding, even by a collateral attack after conviction." *Id.* (internal citations and quotations omitted); *Dorsey v. State*, 115 S.W.3d 842, 844 n. 2 (Mo. banc 2003); *see also State v. Molsbee*, 316 S.W.3d 549, 554 (Mo. App. W.D. 2010); *State v. Gonzales*, 253 S.W.3d 86 (Mo. App. E.D. 2008) (both noting that a "change of law" is an exception to the general rule that constitutional challenges are waived if not raised at the earliest opportunity). The law is clear that "[s]olely prospective application of a decision [holding a statute to be unconstitutional] is the exception not the norm because it involves judicial enforcement of a statute after the statute has been found to violate the Constitution." *State ex rel. Bloomquist v. Schneider*, 244 S.W.3d 139, 143 -144 (Mo. banc 2008) (citing *Trout v. State*, 231 S.W.3d 140, 148 (Mo. banc 2007)).

Discussion. On a challenge that a statute is unconstitutionally vague, the language is to be treated by applying it to the facts at hand. *Prokopff v. Whaley*, 592 S.W.2d 819, 825 (Mo. banc 1980). "A statute that fails to clearly define proscribed conduct violates the Due Process Clause and is void for vagueness." *State v. Allen*, 905 S.W.2d 874, 876 (Mo. banc 1995). "The void for vagueness doctrine ensures that laws give fair and adequate notice of proscribed conduct." *State v. Brown*, 140 S.W.3d 51, 54 (Mo. banc 2003). "A criminal statute must be sufficiently focused to warn of both its reach and coverage." *U.S. v. National*

Dairy Product Corp., 372 U.S. 29, 33 (1963). The test for vagueness is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct “when measured by common understanding and practices.” *Brown*, 140 S.W.3d at 54.

An overbroad statute implicates the First Amendment where it involves constitutionally protected speech. *Reno v. ACLU*, 521 U.S. 844, 871-872 (1997) (invalidating indecent communication on the internet because the restrictions were content-based and had a chilling effect on free speech). A criminal statute must be scrutinized with even more care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application. *State v. Carpenter*, 736 S.W.2d 406 (Mo. banc 1987). “The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas and images.” *Reno*, 521 U.S. at 872; *see also Cohen v. California*, 403 U.S. 15 (1971) (California peace disturbance statute held overbroad; challenged by defendant who wore a jacket displaying “Fuck the Draft” in a courthouse corridor); and *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (ordinance prohibiting three or more people meeting on the sidewalks and conducting themselves in a manner annoying to people passing by was unconstitutionally overbroad).

Under this standard, Section 565.080.1(5) is overbroad. It criminalizes a broad swath of communications between people based only upon one of the parties deeming the conversation “unwanted.” The statute criminalizes a virtually limitless amount of constitutionally-protected speech. Such speech – which would include often “unwanted” conversations with co-workers, family members, and strangers – occurs daily. It would be difficult to write a more overbroad statute than the one at issue.

Further, the statute is unconstitutionally vague. A statute which fails to clearly define proscribed conduct violates the Due Process Clause and is void for vagueness. *Allen*, 905 S.W.2d at 876. Under this standard, a statute criminalizing “repeated unwanted communications” is vague. This statute fails to give “a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.” *Allen*, 905 S.W.2d at 877 (*quoting United States v. Harriss*, 347 U.S. 612, 617 (1954)). Similar to the arguments supporting the overbreadth of the statute, there are numerous examples of repeated “unwanted communications” in daily life that would be criminalized under this statute, such as repeated personal telephone calls, political telephone calls during elections season, or telemarketing calls. Under a plain reading of this provision, a huge number of communications in an individual’s daily life might be “unwanted” and fall

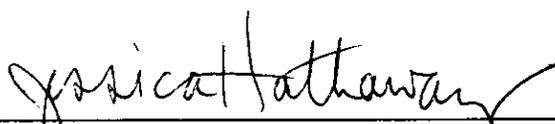
under this statute, and it would be impossible to consistently conform one's conduct to the law. Further "repeated" is left to the imagination – could the calls be 50 years apart, for example? And without a clear order to stop, one would have no idea that one was breaking the law. One could make three phone calls to an individual over ten years and fall under this statute, for example. The provision is frightening in its breadth and vague reach.

Section 565.090.1(5), RSMo. Cum. Supp. 2011, criminalizing knowingly making "repeated unwanted communications to another person," is unconstitutional, in that it is overbroad and void for vagueness, violating the First, Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, sections 8 and 10 of the Missouri Constitution. This conviction must be vacated on these grounds.

CONCLUSION

For the reasons stated in Points I and II of this brief, Appellant asks this court to vacate his conviction for the class A misdemeanor of harassment.

Respectfully submitted,



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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) and Special Rule 361, I hereby certify that on January 17, 2012, a true and correct copy of the foregoing brief was hand-delivered to the Office of the Circuit Attorney, 1414 Market Street, Suite 401, St. Louis, Missouri, 63101. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Book Antiqua 13 point font, and does not exceed the greater of 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains 3,667 words. Finally, I hereby certify that the copies of this brief sent by electronic mail pursuant to Local Rule 363 have been electronically scanned for viruses and found to be virus-free.



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APPENDIX

Sentence and Judgment A1

Section 565.090.1(5) RSMo. Cum. Supp. 2011 A2

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

STATE OF MISSOURI

Plaintiff,

Date Apr 8, 2011

vs.

Cause No. 1022-CR05477

David Hudson

SS#
Defendant

FILED
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APR - 8 2011

SENTENCE AND JUDGMENT

Defendant appears in person and by attorney, Meegie Biesenthal, Missouri appears by Assistant Circuit Attorney, Nikki Moody BY DEPUTY

[] PSI report received and examined by the Court.

Whereupon, said defendant is informed by this Court that he/she has heretofore on the 9 day of March 2011:
 been found guilty by the Jury Court of domestic assault 3rd & harassment, a Class A/A ~~[(felony, misdemeanor)]~~ committed on 9/15/10 & 10/15/10 and being now asked by the Court if he/she has any legal cause to show why sentence and judgment should not be pronounced against him/her according to the law, and still failing to show such cause, it is therefore the Sentence, Order and Judgment of this Court that David Hudson, Defendant, in accordance with the punishment hereto assessed by the ~~[(jury), Court]~~ be and is hereby ordered committed to the:

[] Missouri Department of Corrections and Human Resources;
 St. Louis Medium Security Institution;
for a period of 1 year for the offense of domestic assault third; and 1 year for the offense of harassment; said sentences to be served ~~[(concurrently), [(consecutively)]]~~.

[] The Court suspends the ~~[(imposition), (execution)]~~ of sentence. Defendant is to be placed on probation per line below checked condition(s), for a period of _____

CONDITIONS OF PROBATION/SENTENCE

- [] Fine is assessed at \$ _____
- Court cost to be taxed against defendant and execution issued thereon.
- Court cost waived.
- Clerk's \$5.00 Crime Victim Compensation Fee is assessed against defendant and execution issued thereon.
- VCCF of \$ 10.00 is assessed against the defendant.
- [] Probation is to be supervised by the State Board of Probation and Parole.
- [] Amounts due are payable through the Office of Probation and Parole.
- [] Defendant to appear for payment on _____
- [] Other: CREDIT FOR TIME SERVED

Defendant advised of his/her rights under Rule 24.035/29.15; (no probable cause found) (probable cause found).

Nikki Moody 63105 Attorney For The State
David Hudson Defendant
Meegie Biesenthal 62146 Attorney For the Defendant

SO ORDERED: M. Jane Schweitzer
Judge Judge's No. 246



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at office in the city of St. Louis, this _____ day of _____, 20____.

M. JANE SCHWEITZER
Circuit Clerk

By: 112 Deputy Clerk

tion; or

(3) Such officer's stepchild, while the marriage creating that relationship exists.

4. Tampering with a judicial officer is a class C felony.

(L. 1989 S.B. 215 & 58, A.L. 1995 H.B. 424, A.L. 1997 S.B. 367, A.L. 2009 H.B. 62)

565.085. Crime of endangering a corrections employee — definitions — penalty. — 1. An offender or prisoner commits the crime of endangering a corrections employee, a visitor to a correctional facility, or another offender or prisoner if he or she attempts to cause or knowingly causes such person to come into contact with blood, seminal fluid, urine, feces, or saliva.

2. For the purposes of this section, the following terms mean:

(1) "Corrections employee", a person who is an employee, or contracted employee of a subcontractor, of a department or agency responsible for operating a jail, prison, correctional facility, or sexual offender treatment center or a person who is assigned to work in a jail, prison, correctional facility, or sexual offender treatment center;

(2) "Offender", a person in the custody of the department of corrections;

(3) "Prisoner", a person confined in a county or city jail.

3. Endangering a corrections employee, a visitor to a correctional facility, or another offender or prisoner is a class D felony unless the substance is uninfected in which case it is a class A misdemeanor. If an offender or prisoner is knowingly infected with the human immunodeficiency virus (HIV), hepatitis B or hepatitis C and exposes another person HIV or hepatitis B or hepatitis C by committing the crime of endangering a corrections employee, a visitor to a correctional facility, or another offender or prisoner, it is a class C felony.

(L. 2005 H.B. 700)

565.090. Harassment. — 1. A person commits the crime of harassment if he or she:

(1) Knowingly communicates a threat to commit any felony to another person and in so doing frightens, intimidates, or causes emotional distress to such other person; or

(2) When communicating with another person, knowingly uses coarse language offensive to one of average sensibility and thereby puts such person in reasonable apprehension of offensive physical contact or harm; or

(3) Knowingly frightens, intimidates, or causes emotional distress to another person by anonymously making a telephone call or any electronic communication; or

(4) Knowingly communicates with another person who is, or who purports to be, seventeen years of age or younger and in so doing and without good cause recklessly frightens, intimidates, or causes emotional distress to such other person; or

(5) Knowingly makes repeated unwanted communication to another person; or

(6) Without good cause engages in any other act with the purpose to frighten, intimidate, or cause emotional distress to another person, cause 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.

2. Harassment is a class A misdemeanor unless:

(1) Committed by a person twenty-one years of age or older against a person seventeen years of age or younger; or

(2) The person has previously pleaded guilty to or been found guilty of a violation of this section, or of any offense committed in violation of any county or municipal ordinance in any state, any state law, any federal law, or any military law which, if committed in this state, would be chargeable or indictable as a violation of any offense listed in this subsection.

In such cases, harassment shall be a class D felony.

3. This section shall not apply to activities of federal, state, county, or municipal