STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2105

State of Minnesota,
Respondent,

vs.

Jason Elliot Peterson,
Appellant.

Filed December 9, 2019
Reversed
Bratvold, Judge

Rice County District Court
File No. 66-CR-17-294

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John L. Fossum, Rice County Attorney, Terence Swihart, Assistant County Attorney, Faribault, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Bjorkman, Judge; and Jesson, Judge.

S Y L L A B U S

Minnesota Statutes § 609.749, subd. 2(4) (2016), which criminalizes stalking by telephone, violates the First Amendment to the United States Constitution because it is facially overbroad, proscribes a substantial amount of protected speech, and cannot be remedied by narrowing its construction or severing language.

O P I N I O N

BRATVOLD, Judge

Appellant Jason Elliot Peterson challenges his judgments of conviction for two counts of stalking under Minn. Stat. § 609.749, subd. 2(4). The jury heard evidence that, in August and September 2016 and January 2017, Peterson repeatedly called and left voicemails for several employees of the Rice County Sheriff's Department and Social Services Department, complaining about his 2002 family-law case and causing those employees to feel frightened.

On appeal, Peterson contends that his convictions must be reversed for three reasons: (1) Minn. Stat. § 609.749, subd. 2(4), the stalking-by-telephone statute, is unconstitutional under the First Amendment to the United States Constitution; (2) the district court failed to obtain a valid waiver of his right to counsel; and (3) the district court deprived him of his right to testify by excluding his testimony about his reasons for making the telephone calls and leaving the voicemails. Peterson also argues his sentence was improper and we must remand for resentencing. We determine the stalking-by-telephone statute is substantially overbroad in violation of the First Amendment; we therefore reverse Peterson's judgments of conviction. We do not reach the other three issues raised in Peterson's appeal.

FACTS

On August 29, 2016, Peterson telephoned the Rice County Sheriff (the sheriff) and left a voicemail message. The sheriff "immediately" returned Peterson's call, and Peterson began "swearing and yelling," and threatened to "arrest" him. The sheriff ended the phone

call and called Peterson two days later; in that call, Peterson was "hostile" and again said that he would "arrest" the sheriff. On September 6, 2016, Peterson called an employee at the Minnesota Bureau of Criminal Apprehension (BCA employee) with questions about "arrest[ing]" the sheriff and, again, swore during the call; the BCA employee reported Peterson's call to the sheriff.

On September 23, 2016, a Rice County Sheriff's Deputy (the deputy) served Peterson at his home with legal pleadings in an unrelated civil case. After knocking on the door and making contact with Peterson, the deputy explained he had paperwork to drop off. Peterson became "very vocal" and stated that "me and [the sheriff] are gonna be butting heads pretty godd-mn hard if he doesn't get ahold of me" and that "[the sheriff] can run but he cannot f-cking hide." The deputy reported Peterson's statements to the sheriff. The sheriff became concerned about his own safety and his family's safety. He showed his wife Peterson's photo so she could be "on extra alert" and "take extra measures."

Several times during January 2017, particularly on January 19 and 20, Peterson called and left voicemails with Rice County employees. Peterson left six voicemails for a child-protection social worker. In the voicemails, Peterson stated, "I'm coming for your asses," and said he would "call the lawyer" and "have [her] ass arrested" if he did not receive a return phone call. Peterson's voicemails had over 20 expletives. The child-protection social worker testified that "each [voicemail] increased with—was more threatening than the first."

In late January 2017, Peterson placed phone calls to three Rice County employees. One employee testified that Peterson's demeanor was "angry and threatening"; she felt

Peterson may come to her office and hurt someone. A second employee testified Peterson was "extremely angry," "swearing a lot," stated he "would come into [their] office and raise hell" if her supervisor "didn't call [Peterson] back exactly at three" and "he would kick the sheriff's ass and [another employee's] as well." This employee became "concerned for [her] coworkers and for [her]self." A third employee testified that Peterson told her over the phone "you won't know what day or time or when I may come." The third employee testified she felt her personal safety was at risk; she asked law enforcement to escort her to and from work.

The state charged Peterson with two counts of violating Minn. Stat. § 609.749, subd. 2(4), stalking by repeatedly making telephone calls on or about September 23, 2016 (count one); and stalking by repeatedly making telephone calls on or about January 26, 2017 (count two). Peterson moved to dismiss the complaint, arguing count one lacked probable cause and that Minn. Stat. § 609.749, subd. 2(4), was constitutionally overbroad facially and as applied to him. After a contested omnibus hearing, the district court determined probable cause existed, the statute was constitutional, and Peterson's conduct involved threats not protected by the First Amendment.

Although a lawyer represented Peterson for many pretrial proceedings, Peterson represented himself at the two-day jury trial. The sheriff, the sheriff's wife, the deputy, the BCA employee, and five Rice County employees testified at trial to the facts summarized above. The state played for the jury the six voicemails and the deputy's digital recording of his encounter with Peterson.

Peterson testified in his own defense. Peterson admitted to threatening the sheriff when the deputy visited his home and stated that he intended to "shake [the sheriff] up a little bit." When asked whether he placed the phone calls and left the alleged voicemails, Peterson responded, "Yeah, I'm surprised you don't have the other ones." Peterson admitted he swore during the phone calls, and stated he "stand[s] by" the January voicemails. Peterson testified that "[he] did call [Rice County employees] repeatedly" because he wanted "to get answers . . . on what happened" in his 2002 family-law case, which resulted in changes to custody and visitation.

The jury found Peterson guilty of both counts of stalking by telephone under Minn. Stat. § 609.749, subd. 2(4). The district court sentenced Peterson to 365 days in jail on each count, consecutive, and stayed execution of his sentence on count two. This appeal follows.

ISSUE

Is Minnesota Statutes section 609.749, subdivision 2(4), facially overbroad in violation of the First Amendment and, if so, is a judicial remedy available to correct the constitutional defect?

ANALYSIS

Peterson argues that Minnesota Statutes section 609.749, subdivision 2(4), the stalking-by-telephone statute, unconstitutionally restricts speech protected by the First Amendment. In his reply brief, Peterson relies on the Minnesota Supreme Court's recent decision in *In re Welfare of A.J.B.*, 929 N.W.2d 840 (Minn. 2019). *A.J.B.* was filed after Peterson's conviction and after Peterson appealed to this court. *A.J.B.* held that Minn. Stat. § 609.749, subd. 2(6) (2014), the stalking-by-mail statute, prohibited and

chilled protected expression and that the statute "facially violates the First Amendment overbreadth doctrine." 929 N.W.2d at 856.

The state argues we should uphold the stalking-by-telephone statute based on our decision in *State v. Hall*, which affirmed a conviction of stalking by telephone and held the provision was "not unconstitutionally overbroad on its face." 887 N.W.2d 847, 858 (Minn. App. 2016), *review denied* (Minn. Feb. 22, 2017). It is true that the supreme court decision in *A.J.B.*, which was filed after *Hall*, makes no reference to our decision in *Hall* or to the stalking-by-telephone statute. *See A.J.B.*, 929 N.W.2d at 840-57. Yet, as discussed in more detail below, the stalking-by-mail statute that the supreme court declared unconstitutional in *A.J.B.* is strikingly similar to the stalking-by-telephone statute challenged in this appeal. *Compare* Minn. Stat. § 609.749, subd. 2(6), *with* Minn. Stat. § 609.749, subd. 2(4).

Thus, we begin our analysis of the issue by discussing *A.J.B.* Next, we apply the four-step overbreadth analysis and determine the stalking-by-telephone statute is unconstitutionally overbroad and cannot be judicially remedied. Lastly, we expressly overrule our decision in *Hall*.

A.J.B. was a high school student, who created an anonymous Twitter account and posted roughly 40 tweets within a few hours about a fellow student, M.B. 929 N.W.2d at 844. A.J.B.'s tweets included "cruel and egregious insults" and urged M.B. to commit suicide. *Id.* at 845. The state charged A.J.B. with two counts of stalking by mail under Minn. Stat. § 609.749, subd. 2(6), and one count of mail harassment under Minn. Stat.

§ 609.795, subd. 1(3) (2014).[1] *See A.J.B.*, 929 N.W.2d at 845. The juvenile court found him guilty on all three charges and adjudicated him delinquent. *Id.* On appeal to this court, we upheld the constitutionality of the stalking-by-mail statute. *Id. See In re Welfare of A.J.B.*, 910 N.W.2d 491, 502-03 (Minn. App. 2018), *rev'd A.J.B.*, 929 N.W.2d 840.

The supreme court granted review and reversed. *A.J.B.*, 929 N.W.2d at 845-46. The supreme court held that the stalking-by-mail statute was unconstitutionally overbroad because it proscribed a substantial amount of protected speech and that it could not be judicially remedied by narrowing its construction or severing language. *Id.* at 856-57.[2]

With *A.J.B.* firmly in mind, we turn to the constitutionality of the stalking-by-telephone statute. We review the constitutionality of a statute de novo. *State v. Hensel*, 901 N.W.2d 166, 170 (Minn. 2017). Generally, Minnesota Statutes are presumed constitutional, but "statutes allegedly restricting First Amendment rights are not so presumed." *Dunham v. Roer*, 708 N.W.2d 522, 562 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006).

A statute that regulates speech "must not be overly broad." *State v. Crawley*, 819 N.W.2d 94, 102 (Minn. 2012). A statute is overbroad if "it prohibits constitutionally

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[1] *A.J.B.* includes a citation to the 2018 stalking-by-mail statute, but *A.J.B.* analyzes the 2014 stalking-by-mail statute.

[2] The supreme court also held that the mail-harassment statute, Minn. Stat. § 609.795, subd. 1(3), is not constitutionally overbroad because it can be narrowed by severing "problematic language." *A.J.B.*, 929 N.W.2d at 844, 863. Because the supreme court could not determine whether A.J.B.'s adjudication for mail harassment was based on the severed language, the court reversed and remanded that adjudication for further proceedings in juvenile court. *Id.* at 864.

protected activity, in addition to activity that may be prohibited without offending constitutional rights." *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998). The amount of protected speech or expressive conduct that is prohibited must be substantial. *Id.* Overbroad statutes have a "potential chilling effect" on "the exercise of protected speech." *Id.*; *see Virginia v. Hicks*, 539 U.S. 113, 119, 123 S. Ct. 2191, 2196 (2003) ("The threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech.").

A.J.B. clarified the four steps required for an overbreadth analysis. *See A.J.B.*, 929 N.W.2d at 847-48. First, we interpret the challenged statute. *Id.* at 847. Second, we determine whether the statute's "reach is limited to unprotected categories of speech or expressive conduct." *Id.* Third, if we conclude that the statute is not limited to unprotected speech or expressive conduct, then we ask whether a "substantial amount" of protected speech is criminalized. *Id.* Fourth, we evaluate whether the court is able to narrow the statute's construction or sever specific language to cure constitutional defects. *Id.* at 848.

A. Interpretation of the stalking-by-telephone statute

Our goal in interpreting a statute is to ascertain the legislature's intent. *Crawley*, 819 N.W.2d at 102; *see also* Minn. Stat. § 645.16 (2018). We interpret the "plain and ordinary meaning of undefined words" according to "the dictionary definitions" and "apply them in the context of the statute." *State v. Haywood*, 886 N.W.2d 485, 488 (Minn. 2016); *see also* Minn. Stat. § 645.08(1) (2018) (stating "words and phrases" in statutes are to be construed "according to their common and approved usage").

The stalking-by-telephone provision states:

> A person who stalks another by committing any of the following acts is guilty of a gross misdemeanor:
>
> . . .
>
> (4) repeatedly makes telephone calls, sends text messages, or induces a victim to make telephone calls to the actor, whether or not conversation ensues.

Minn. Stat. § 609.749, subd. 2(4). "Stalking" is defined in subdivision 1 of the same section:

> [T]o engage in conduct which the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim regardless of the relationship between the actor and victim.

Id., subd. 1.

The statutory definition of "stalking," however, contains several key terms that are not defined anywhere in section 609.749. We therefore turn to the common meaning of these key terms. "Frightened" is defined as "fill[ed] with fear." *The American Heritage Dictionary of the English Language* 703 (5th ed. 2011). "Threatened" means to have "cause[ed] (someone) to feel that his or her power, social standing, or self-esteem is in danger of being diminished." *Id.* at 1813. "Oppressed" is defined as to have "caus[ed someone] to feel worried or depressed." *Id.* at 1237. "Persecuted" means to feel "oppress[ed] or harass[ed] with ill-treatment" or "annoy[ed] persistently." *Id.* at 1316. Lastly, "intimidated" is defined as "[t]o make timid; fill with fear." *Id.* at 918.

Reading the unambiguous language of the stalking-by-telephone statute together with the common meaning of its terms in context, we conclude that to be convicted under the stalking-by-telephone statute, the state must prove beyond a reasonable doubt that

(1) a defendant knew or had reason to know that his conduct would cause the victim to feel fear, loss of power, worry, or ill-treated; and (2) the defendant's conduct caused this reaction in the victim. The provision also describes what specific conduct amounts to the crime of stalking by telephone: repeatedly making telephone calls, sending text messages, or inducing a victim to call the defendant, "whether or not conversation ensues." Minn. Stat. § 609.749, subds. 1, 2(4).

As mentioned above, the stalking-by-telephone statute is similar to the stalking-by-mail statute examined in *A.J.B.*[3] We see four important similarities. First, the stalking-by-mail statute proscribes conduct similar to the stalking-by-telephone statute because it states that a person who stalks another by "repeatedly mail[ing] or deliver[ing] or caus[ing] the delivery by any means, including electronically, of letters, telegrams, messages, packages . . . or any communication made through any available technologies or other objects" is guilty of a gross misdemeanor. Minn. Stat. § 609.749, subd. 2(6). Second, the stalking-by-mail statute and the stalking-by-telephone statute both require the conduct to be done "repeatedly," defined as "occurring again and again." *American Heritage*, *supra* at 1489; *State v. Collins*, 580 N.W.2d 36, 42 (Minn. App. 1998) (defining repeatedly as "more than once" in Minn. Stat. § 609.749), *review denied* (Minn. July 16, 1998).

[3] We note that the legislature amended section 609.749 and made those amendments effective July 1, 2019. 2019 Minn. Laws 1st Spec. Sess. ch. 5, art. 2, §§ 17-21, at 967-71. The 2019 amendments changed "stalking" to "harass" in subdivision one and "stalks" to "harasses" in subdivision two and became effective after *A.J.B.* was decided on June 19, 2019. *Id.* at 967-68. No other substantive changes were made. We conclude that the 2019 amendments do not affect our analysis of the issue on appeal.

Third, the stalking-by-mail statute and the stalking-by-telephone statute both have the same mens rea element, which *A.J.B.* held "is broad." 929 N.W.2d at 850. The "knows or has reason to know" standard is equivalent to negligence, and *A.J.B.* held that this standard "means a person may be convicted" of stalking-by-mail "even though the person does not intend or even know that his communication would frighten, threaten, oppress, persecute, or intimidate the victim." *Id.* Fourth, *A.J.B.* also held that subdivision one incorporates an actus rea element with "several broad and unqualified terms: frighten, threaten, oppress, persecute, or intimidate." *Id.* at 854. Thus, the stalking-by-mail and stalking-by-telephone statutes both require the state to prove the victim's reaction, which *A.J.B.* held "limits the statute." *Id.* at 850.

B. The stalking-by-telephone statute and protected speech

In the second step of the overbreadth analysis, we consider whether the stalking-by-telephone statute criminalizes speech that is protected by the First Amendment. *A.J.B.* held that the stalking-by-mail provision is "closely tethered to speech or expressive activities" because the statute criminalizes stalking by letters, telegrams, messages, and "any communication," all of which are "purely expressive." 929 N.W.2d at 849. The stalking-by-telephone provision is somewhat different. While it criminalizes text messages and telephone calls that are "purely expressive" and plainly protected by the First Amendment, it also criminalizes telephone calls "whether or not conversation ensues," and thus includes "missed," "hang up," or "breather" calls. Minn. Stat. § 609.749, subd. 2(4). When preceded by a telephone call or text message that informs the victim who is calling or why, we conclude that a missed call may also constitute expressive conduct.

We conclude that the stalking-by-telephone statute has broad language that restricts protected speech for three reasons. First, the stalking-by-telephone provision does not criminalize only speech linked to criminal conduct because it criminalizes repeated telephone calls and text messages regardless of the content of the telephone call or text message. And telephone calls are a common way of expressing political and other protected communications. The supreme court identified the same defect in the stalking-by-mail statute. *See A.J.B.*, 929 N.W.2d at 852 (holding stalking-by-mail statute "criminalizes the communication itself; it does not criminalize the communication because its only purpose is to induce or commence a separate crime").

We recognize that the stalking-by-telephone statute also criminalizes stalking conduct, and the supreme court has upheld statutes that criminalize conduct when it is "directly linked to and designed to facilitate the commission of a crime." *State v. Washington-Davis*, 881 N.W.2d 531, 538 (Minn. 2016) (upholding promotion-of-prostitution statute because it regulates speech "aimed at furthering the commission of a crime"); *see also State v. Muccio*, 890 N.W.2d 914, 924 (Minn. 2017) (upholding solicitation-of-children statute because it regulates communication that "is both linked to and designed to facilitate the commission of the later crime"). But, based on the supreme court's analysis in *A.J.B.*, we conclude that the stalking-by-telephone statute is not limited to criminalizing conduct directly linked to facilitating a crime.[4]

[4] Some of Peterson's statements may amount to "true threats," and thus, fall outside of First Amendment protection. True threats are "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." *Virginia v. Black*, 538 U.S. 343, 359,

Second, the stalking-by-telephone statute has a mens rea element that is satisfied by proof of negligence and therefore criminalizes both intentional and unintentional speech. *A.J.B.* examined the same mens rea language used in the stalking-by-mail statute and held that "a person may be convicted" under this negligence standard "even though the person does not intend or even know that his communication would frighten, threaten, oppress, persecute, or intimidate the victim." 929 N.W.2d at 850. Moreover, the negligence standard expressly references "under the circumstances," which, *A.J.B.* reasoned, means "that what the actor should have known about the victim's reaction must be judged relative to the existing conditions and the context of the communications (including the victim's specific circumstances) when made." *Id.* By incorporating a negligence standard, the stalking-by-telephone statute reaches a wide range of protected communications that have unintended, albeit reasonably foreseeable, consequences.

Third, the stalking-by-telephone statute requires the state to prove the victim's reaction to the defendant's stalking was "to feel frightened, threatened, oppressed, persecuted, or intimidated." Minn. Stat. § 609.749, subd. 1. While a burden on the state, this aspect is also concerning because these terms are not only undefined but also broad. The supreme court has determined that a similar term—"disturb"—did not "place any meaningful limitation on the statute's scope." *Hensel*, 901 N.W.2d at 172 (considering

123 S. Ct. 1536, 1548 (2003); *see Crawley*, 819 N.W.2d at 118 (recognizing true threats as a category of unprotected speech). We note that true threats may be prosecuted under other subdivisions. *See* Minn. Stat. § 609.749, subd. 2(1) (stating an individual is guilty of stalking when he or she "directly or indirectly, or through third parties, manifests a purpose or intent to injure the person, property, or rights of another by the commission of an unlawful act").

"disturb" in the disorderly-conduct statute and severing the provision as overly broad in violation of the First Amendment). Thus, requiring proof of the victim's reaction does not restrict the protected communications that the stalking-by-telephone statute reaches; it is only an ancillary requirement.

And by requiring proof of the victim's reaction, the stalking-by-telephone statute allows the state to offer evidence of a broad subjective harm. *A.J.B.* examined the same subjective harm element and was troubled because "[t]he victim's feeling of fright, threat, oppression, persecution, or intimidation need not be objectively reasonable." *A.J.B.*, 929 N.W.2d at 850; *see also id.* at 855 (noting federal stalking statute has more restrictive "substantial" harm element).

Because the stalking-by-telephone provision is not limited to prohibiting conduct directly linked to criminal activity, reaches negligent expressive communication such as telephone calls and text messages, and allows the state to prove its case by a victim's subjective reaction to the defendant's conduct, we conclude that the provision prohibits speech protected by the First Amendment.

C. Overbreadth concern with the stalking-by-telephone statute

Because the challenged statute criminalizes protected speech, we move to the third step: whether the statute prohibits "a substantial amount of constitutionally protected speech." *See Washington-Davis*, 881 N.W.2d at 539. We conclude that it does.

A scenario that is parallel to one discussed in *A.J.B.* is of concern here. An irate constituent makes repeated phone calls to her elected representative to complain about the legislator's failure to enact gun control and to announce she will defeat the legislator in the

next election, intending to cause or knowing her conduct may cause the legislator to feel "frightened, threatened, oppressed, persecuted or intimidated." *See A.J.B.*, 929 N.W.2d at 853. Even if the constituent leaves only one voice message to this effect and then follows up with incomplete or missed calls and no additional voice messages, the constituent may be charged with stalking-by-telephone. Yet this type of political speech "reside[s] at the core of protected First Amendment speech." *See id.*

Other examples illustrate the sweeping reach of the stalking-by-telephone statute. A resident may be charged with stalking by telephone for repeatedly telephoning a business to complain about pollution and to announce a social media campaign boycotting their products, where the resident "knows or should know that the complaint[] will cause the business owner to suffer emotional distress due to the economic impact of a possible boycott." *See People v. Relerford*, 104 N.E.3d 341, 354 (Ill. 2017) (vacating criminal convictions and holding stalking and cyberstalking laws are facially overbroad under the First Amendment).

Similarly, a worried parent who repeatedly telephones or sends text messages to his child who "has recently moved out of the family home," could be prosecuted under the stalking-by-telephone statute even if the parent did not intend to make the child feel "oppressed, persecuted, or intimidated," but the child felt oppressed, and even if no conversation ensued between them. *See Provo City v. Whatcott*, 1 P.3d 1113, 1115 (Utah Ct. App. 2000). The parent's "conscious disregard of the substantial likelihood that the call would annoy [the child] would bring the call within the statute's ambit." *Id.* (reversing

criminal conviction and holding telephone harassment law is facially overbroad under the First Amendment).

Thus, the supreme court's conclusion in *A.J.B.* about the stalking-by-mail statute applies to the stalking-by-telephone statute: "Due to the substantial ways" in which the stalking-by-telephone provision "can prohibit and chill protected expression, we conclude that the statute facially violates the First Amendment overbreadth doctrine." *See A.J.B.*, 929 N.W.2d at 856; *see also Machholz*, 574 N.W.2d at 419 ("A statute should only be overturned as facially overbroad when the statute's overbreadth is substantial.").

D. Judicial remedy

In the fourth step of the overbreadth analysis, we consider whether we can narrow the statute's construction or sever problematic language to save the statute. *A.J.B.*, 929 N.W.2d at 848. In its brief to this court, the state does not suggest that we narrow the construction or sever specific language.

A statute will not be struck down "when a limiting construction has been or could be placed on the challenged statute." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916 (1973); *see also Hensel*, 901 N.W.2d at 175 (stating a narrowing construction is appropriate "if it remedies the statute's constitutional defects"). A statute's offending language may be severed unless the "valid provisions" and the "void provisions" are "so essentially and inseparably connected," or if the "remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." *State v. Melchert-Dinkel*, 844 N.W.2d 13, 24 (Minn. 2014).

In *A.J.B.*, the supreme court was unable to apply a narrowing construction or sever language to save the stalking-by-mail statute. 929 N.W.2d at 857. We are similarly unable to save the stalking-by-telephone statute for two reasons. First, we would have to alter the negligent-mens rea standard. *See* Minn. Stat. § 609.749, subd. 1. But doing so would also change the mens rea standard for the six remaining types of stalking prohibited by the legislature. *Id.*, subd. 2. *A.J.B.* rejected this option and we reject it here. 929 N.W.2d at 856 ("We conclude that there are legitimate reasons to doubt that the Legislature would have enacted Minn. Stat. § 609.749, subd. 1, without the negligence standard.").

Second, the aim of a narrowing construction is to construe the statute in a way that differentiates "between conduct and content" so that only conduct itself, and not the conduct's expression, is criminalized. *Hensel*, 901 N.W.2d at 178. The supreme court's analysis in *Hensel* is instructive. The court examined the disorderly-conduct statute and held that language prohibiting "disturbances" at an assembly or meeting is overly broad under the First Amendment because protected expression includes disturbing statements at assemblies or meetings. *Id.*

The supreme court considered whether it could limit the statute's construction to criminalize only conduct that disturbs a meeting. *Id.* Because the disorderly-conduct statute included a negligence standard for the mens rea element, the court concluded that a conduct-only construction would not save the statute because it "may deter individuals from engaging in expressive conduct protected by the First Amendment." *Id.* In other words, the supreme court concluded that criminal sanctions for disturbing conduct would chill protected expression at assemblies and meetings. *See id.*

A narrowing construction of the stalking-by-telephone statute that separates conduct from content fails for the same reasons that the supreme court articulated in *Hensel*. Doing so would not alter the negligence mens rea standard, thus a narrowing construction would not alleviate the statute's chilling effect. *See id.* at 178.

To be clear, we acknowledge that Peterson's behavior is upsetting and inappropriate, and that the state has an interest in prohibiting this type of conduct. But the state may not do so by criminalizing a substantial amount of protected speech in an overly broad statute. We conclude that we are unable to limit the scope of the stalking-by-telephone statute by narrowing its construction or severing language. Therefore, we hold that Minn. Stat. § 609.749, subd. 2(4), is unconstitutionally overbroad. *See State v. Turner*, 864 N.W.2d 204, 210 (Minn. App. 2015) ("A statute is invalid if its terms leave no room for a narrowing construction.").

E. *A.J.B.*'s impact on our decision in *Hall*

The district court rejected Peterson's challenge and upheld the constitutionality of the stalking-by-telephone statute in reliance on this court's decision in *Hall*. 887 N.W.2d at 847. While Peterson's case was on appeal, the supreme court issued its decision in *A.J.B.* We are bound by supreme court precedent. *See State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018) ("The court of appeals is bound by supreme court precedent, as it has repeatedly acknowledged."). "[W]hen the supreme court has already construed a statute, this court is bound by that interpretation." *State v. Rohan*, 834 N.W.2d 223, 227 (Minn. App. 2013), *review denied* (Minn. Oct. 15, 2013). Having carefully compared the stalking-by-mail statute discussed in *A.J.B.* with the stalking-by-telephone statute

challenged in this appeal, we recognize that *Hall* upheld the stalking-by-telephone provision for reasons later rejected by the supreme court. *See A.J.B.*, 929 N.W.2d at 853-54. Therefore, we expressly overrule *Hall*.

D E C I S I O N

Minn. Stat. § 609.749, subd. 2(4), is unconstitutionally overbroad because it prohibits a substantial amount of protected speech in violation of the First Amendment, and it is not susceptible to a judicial remedy. Therefore, we invalidate the statute and reverse the judgments of conviction. Because we determine the stalking-by-telephone statute is overbroad on its face, we need not reach the other issues Peterson raises in support of reversal or resentencing.

Reversed.