IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

JANICE G. SHIMIZU,
Defendant-Appellant.

OPINION

Cite as: 2017 Guam 11

Supreme Court Case No.: CRA15-034
Superior Court Case No.: CM1046-13

Appeal from the Superior Court of Guam
Argued and submitted on May 20, 2016
Dededo, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.[1]

CARBULLIDO, J.:

[1] Defendant-Appellant Janice G. Shimizu appeals from a judgment of conviction finding her guilty of two counts of Family Violence (as a Misdemeanor). She argues that the conviction must be reversed because the statute under which she was convicted, 9 GCA § 30.10(a)(2), is facially invalid. The People assert that threats of violence are not protected speech and that 9 GCA § 30.10(a)(2) is not void for vagueness. For the reasons set forth below, we reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] The facts of this case are essentially undisputed. Defendant-Appellant Janice G. Shimizu was at the home of her mother, Rita Shimizu ("Rita"), to do some agreed-upon yardwork. Shimizu became upset after performing the yard work and "not being provided the soda and cigarettes she had requested." Record on Appeal ("RA"), tab 51 at 2 (Dec. & Order, Apr. 24, 2015). Shimizu's daughter, Jana Carriaga, who lived with Rita, called her aunt, Judy Ayuyu (Shimizu's sister), to report the argument between Shimizu and Rita. Ayuyu testified that she heard "yelling and arguing" in the background of the telephone call. Transcript ("Tr.") at 52 (Jury Trial, Dec. 16, 2014). Ayuyu immediately drove to her mother's house, which was five minutes away from her house. There, Ayuyu approached Shimizu and asked, "Sister, what's going on?", to which Shimizu responded, "You're not my sister. . . . Get out of my face." *Id.* at 54. Ayuyu then told Shimizu, "No, you need to get out of here," and Shimizu responded, "No, get out or else I'll kill you. . . . Matter of fact, I'll kill all of you." *Id.* at 55. After these statements, Shimizu then proceeded to look through her purse. At this point, Ayuyu told

[1] The signatures in this opinion reflect the titles of the Justices at the time this matter was considered and determined.

Carriaga to call the police. Ayuyu and Carriaga joined Rita inside the house, locking both doors as they waited for the police to arrive.

[3] Ayuyu testified that after Shimizu's statements, "I was scared. I mean, I have a family, and I don't know, you know, if she was capable of doing something, or just to scare us away, or -- I mean, I was terrified." *Id.* at 56. She testified that she panicked when Shimizu started looking through her purse "[b]ecause I didn't know what she ha[d] in it. I mean, that's what scared me the most. I didn't know what was in her purse." *Id.* at 56-57. When asked what was going through her mind at the time, Ayuyu replied, "I don't know whether, you know, she has a gun, a knife that she could just pull out and then just start attacking. That's -- That's why I told [Carriaga] to just call the cops right away . . . ." *Id.* at 57.

[4] On cross-examination, Ayuyu admitted that when Shimizu made the statements, Shimizu neither raised a fist nor lunged at her, and that the threat "wasn't coming at [her]." *Id.* at 62-64.

[5] Carriaga testified that when her mother made the statements, she was scared "because I couldn't see really, exactly what she was doing at her purse, behind her truck" and "I didn't know what could happen next. I mean, I guess -- I mean, I don't know. I was just scared, and I'm -- when -- when I don't know what's going to happen next, it worries me, and I guess I get anxious." *Id.* at 17. Carriaga further testified that she has anxiety medicine and that she took one before Ayuyu arrived. *Id.* at 18. When asked whether, at the time, she was scared Shimizu would hurt her, Carriaga testified, "I wasn't sure. I was just -- I was so worried. I started -- When I talked to the police, I was walking away, further away from the car, like, towards the road. I didn't know what was going to happen next." *Id.* at 18. When asked whether she had been scared that Shimizu would hurt her aunt, Carriaga testified, "I was scared that she could possibly hurt all of us because of the threat that was made." *Id.* She testified that "it was a

strong belief" that Shimizu could hurt them, because "my mom's not usually the type to say something and not do it." *Id.* at 18-19.

[6] On cross-examination, Carriaga was asked what she meant by her earlier statement that she "couldn't be sure" whether Shimizu really wanted to hurt her, to which she responded, "All I'm saying is that it could have been possible." *Id.* at 24. Carriaga also testified that she told police that Shimizu carries a knife with her, which factored into her fear that day. *Id.* at 25.

[7] The police arrived and searched Shimizu. No weapons were found.

[8] Shimizu was charged with two counts of Family Violence (as a Misdemeanor) for placing Carriaga and Ayuyu in fear of bodily injury. She was also charged with Harassment (as a Misdemeanor) for her conduct towards her mother, Rita. After trial by a jury of six, she was found guilty of both counts of Family Violence.

[9] Shimizu subsequently filed a motion for judgment of acquittal notwithstanding the verdict, arguing that Guam's Family Violence statute requires proof that injury was imminent, and that the statute on its face is unconstitutionally vague and overbroad. RA, tab 45 (Mot. J. Acquittal Notwithstanding Verdict, Dec. 24, 2014). The trial court denied Shimizu's motion, and she timely filed her notice of appeal.

II. JURISDICTION

[10] This court has jurisdiction over an appeal from a final judgment of conviction pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-46 (2017)), 7 GCA §§ 3107(b) and 3108(a) (2005), and 8 GCA §§ 130.10 and 130.15(a) (2005).

III. STANDARD OF REVIEW

[11] "The constitutionality of a statute is a question of law reviewed *de novo*." *People v. Perez*, 1999 Guam 2 ¶ 6 (collecting cases).

IV. ANALYSIS

[12] Shimizu was charged with Family Violence under 9 GCA § 30.20(a), which provides that "[a]ny person who intentionally, knowingly, or recklessly commits an act of family violence, as defined in § 30.10 of this Chapter, is guilty of a misdemeanor, or of a third degree felony." 9 GCA § 30.20(a) (as amended by Guam Pub. L. 32-017:1, Apr. 11, 2013). Section 30.10 defines "family violence" as follows:

> (a) *Family violence* means the occurrence of one (1) or more of the following acts by a family or household member, but does not include acts of self-defense or defense of others:
>
> (1) Attempting to cause or causing bodily injury to another family or household member;
>
> (2) Placing a family or household member in fear of bodily injury.

9 GCA § 30.10(a) (2005).[2] Shimizu was charged under section 30.10(a)(2), for placing Carriaga and Ayuyu in fear of bodily injury. RA, tab 2 at 1-2 (Magistrate's Compl.).

[13] Shimizu argues that section 30.10(a)(2) is facially invalid. She argues that to pass constitutional muster, section 30.10(a)(2) must include proof of an imminent physical threat. Appellant's Br. at 9, 11 (Feb. 2, 2016). "Otherwise," she maintains, "the statute would proscribe all fears of family members, real or imagined . . . ." *Id.* at 9. She further contends:

> Without this necessary element, the statute fails to describe conduct which the Guam Legislature has authority to proscribe because causing a fear of the possibility of bodily injury, without a fear of impending bodily injury, is a harm so amorphous and, yet, so ubiquitous that holding a defendant responsible would violate his rights to due process. Moreover, the statute's imposition of a mere "reckless" intent, as opposed to specific intent, further attenuates the connection

[2] During the pendency of this case, 9 GCA § 30.10 was amended to add a new subitem (a)(3), further defining "family violence" as including "[k]nowingly or intentionally, against the will of another, impeding the normal breathing or circulation of the blood of a family or household member by applying pressure to the throat or neck or by blocking the nose or mouth of a family or household member." 9 GCA § 30.10(a)(3) (added by Guam Pub. L. 33-205:2, Dec. 15, 2016). As the incident underlying this case occurred in December 2013, prior to the amendment of the statute, and in any event, Shimizu was charged under 9 GCA § 30.10(a)(2), our holding today speaks only to the constitutionality of 9 GCA § 30.10(a)(2). We do not discuss the propriety of 9 GCA § 30.10(a)(3).

> between a defendant's actions (in this case, mere words) and the alleged resulting harm (in this case, fear of bodily injury).
>
> Legislatures cannot protect citizens from all imaginable fears since any attempt to do so would be so imprecise in its definition and so draconian in its effect that it would not be rationally related to its authority to promote the general welfare. Likewise, defendants can not [sic] be held responsible for all fears however slight, fleeting or unreasonable they may be without violating their due process rights.

Id. at 11-12 (citations omitted). Shimizu concludes that the statute is therefore "facially invalid for vagueness or overbroad in its proscription of innocent conduct because it does not require an imminent threat of bodily harm." *Id.* at 12 (citing U.S. Const. amends. V, XIV).

[14] The People respond that threats of violence are not protected speech under the U.S. Constitution. The People argue that Shimizu's statements fall under a category of unprotected speech deemed "true threats" because her statements constituted a "serious expression of an intent to commit an act of unlawful violence to a . . . group of individuals." Appellee's Br. at 3, 5 (Mar. 22, 2016) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)). As to Shimizu's "void for vagueness" argument, the People counter that "[t]he statute is simple on its face" and "applies to acts and words." *Id.* at 8. The People assert that "[i]t is left up to a jury to determine the (1) mens rea of the defendant and (2) credibility and reasonability (in relation to the defendant's conduct) of the family member's fear." *Id.* at 9.

[15] In its Decision and Order denying Shimizu's motion for judgment of acquittal notwithstanding the verdict, the trial court determined that the statute did not impinge upon Shimizu's First Amendment rights because her statements fell under the category of "true threats" that do not enjoy First Amendment protection. RA, tab 51 at 6-8 (Dec. & Order) (citing *Watts v. United States*, 394 U.S. 705, 707-08 (1969)). The court found that like the statute in *Watts*, which proscribed knowing and willful threats to take the life of or inflict bodily harm

upon the President or other officer next in the order of succession, 9 GCA § 30.10(a)(2) does not require a showing of imminence.[3] *Id.* at 7-8.

[16] As to Shimizu's facial challenge to the statute, the trial court ruled that the statute, "[w]hile disconcertingly broad, . . . does not irrationally or unreasonably proscribe all of a recipient's subjective fears but is limited to those knowingly, intentionally or recklessly caused," and "is further limited to a specifically defined group."[4] *Id.* at 8-9. Furthermore, the court determined, "[r]eckless as defined by statute is also limited to an objective standard." *Id.* at 9 (citing 9 GCA § 4.30 (2005)).

[17] Whether or not Shimizu's statements constituted a "true threat," she could not be convicted under 9 GCA § 30.10(a)(2) if the statute is unconstitutional on its face. As the United States Supreme Court held in *Lanzetta v. New Jersey*, "[i]f on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." 306 U.S. 451, 453 (1939) (citations

[3] The trial court elaborated:

> Here how a true threat should be statutorily defined is comparatively sufficient to *Watts*. The statutory necessity of showing the immediacy of the spoken harm or the reasonable or specific intent of the speaker or the belief of the recipient, in *Watts* is notably silent. The U.S. statute, 8 U.S.C. § 871(a), that the U.S. Supreme Court reviews in *Watts* simply requires that a threat of harm against the person of the President be willfully or knowingly spoken. Guam's statute goes further by proscribing speech which causes family members to fear bodily injury. Accordingly while Guam's statute is disturbingly broad, it is facially constitutionally sound.

RA, tab 51 at 8 n.4 (Dec. & Order) (citations omitted).

[4] Interestingly, while deeming the statute "disconcertingly broad" but not going so far as to call it overbroad, the trial court, in a footnote, gave an example of the type of conduct that could possibly be proscribed by the statute as written:

> Given that the law identifies as a legitimate protectable interest, the subjective fears of a family member, the law in essence criminalizes acts which might also be characterized as mean-spirited teasing. If, for example, a family member who is extremely afraid of spiders receives a gift of realistic plastic spiders from another sibling, the gifting sibling, under a strict reading of the statute, could be charged with a felony.

RA, tab 51 at 9 n.5 (Dec. & Order) (citations omitted).

omitted). Thus, it appears that both the trial court's and the People's contentions regarding the "true threat" nature of Shimizu's statements are misplaced given Shimizu's challenge of the facial validity of the statute.

[18] Imprecise laws can be attacked on their face under two different doctrines: overbreadth and vagueness.[5] "[W]hen a statute is attacked as being both facially overbroad and vague, courts should divide overbreadth and vagueness analysis into a two-part test. Overbreadth is examined first, then vagueness." John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. Rev. 53, 62 (2004) (footnotes omitted).

[19] As Shimizu challenges 9 GCA § 30.10(a)(2) on both overbreadth and vagueness grounds, each is discussed in turn.

A. Overbreadth

[20] "[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1973)). "A statute is struck down for 'overbreadth' if it 'does not aim specifically at the evils within the allowable area of state control but sweeps within its ambit other [constitutionally protected] activities.' That is, if a statute's language, given its normal meaning, is so broad that the statute's sanctions may unnecessarily apply to conduct that the state is not entitled to regulate, it is overbroad." Decker, *supra*, at 55-56 (alteration in original) (citations and footnotes omitted).

[5] To explain the inherent difference between vagueness and overbreadth as simply as possible, "vagueness pertains to a lack of clarity in the actual content of a statute. In contrast, overbreadth is present when a statute's language is so far reaching that it applies to conduct the state is not entitled to regulate." John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. Rev. 53, 61 (2004).

[21] Lower courts have grappled with whether to apply the overbreadth doctrine in non-First Amendment cases in light of the inconsistent line of U.S. Supreme Court decisions on the issue, with courts either accepting, rejecting, or simply ignoring the Court in its application of overbreadth. *See id.* at 98-102.

[22] While the present case is somewhat framed as a First Amendment case (in that the conduct in question here involved speech), Shimizu's overbreadth argument concerns the application of the statute to cases that may not even involve speech. She offers as an example a hypothetical of a battered wife being fearful every time her abusive husband walks through the door and posits that, under the plain language of 9 GCA § 30.10(a)(2), the husband's act of walking through the door violates the statute. *See* Appellant's Br. at 12.

[23] Although the statute can be applied to conduct classified as speech, we do not believe it falls squarely within the First Amendment arena. Because the First Amendment is not clearly implicated in this case, and given the inconsistency in the case law concerning the use of the overbreadth doctrine outside the First Amendment context, we are reluctant to apply the doctrine in this case. We determine that we need not reach the issue of whether the overbreadth doctrine applies because, as discussed below, the statute in question is void for vagueness.

B. Vagueness

[24] This court has yet to declare a statute unconstitutionally vague. Prior to the case at hand, this court has had only one other occasion in which it addressed the "void for vagueness" doctrine. Interestingly, the case in which the "void for vagueness" doctrine was analyzed also involved Guam's Family Violence Act. In *People v. Perez*, the defendant challenged the constitutionality of the Family Violence Act, 9 GCA § 30.10 *et seq.*, on "void for vagueness" and

Separation of Powers grounds. *See* 1999 Guam 2 ¶ 1. This court laid out the test for determining whether a statute is void for vagueness:

> "Generally stated, the void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, it has been recognized that the more important aspect of [the] vagueness doctrine "is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.

Id. ¶ 7 (citations omitted). The court then quoted the language of 9 GCA §§ 30.10(a) and 30.20(a), including the language in section 30.10(a)(2) at issue in the present case. *Id.* ¶ 9. The court proceeded to apply the "void for vagueness" doctrine to the portion of the Family Violence Act that allows a defendant to move for a reduction of a felony Family Violence charge to a misdemeanor, noting the list of seven factors a court must consider in ruling on such a motion. *Id.* ¶ 12. The court stated that the prosecutor likewise "must take into consideration those [same] factors . . . because failure to do so would clearly make a felony charge of Family Violence vulnerable to a successful motion to reduce." *Id.* The court concluded:

> Thus, we disagree with Appellant's conclusion that the Family Violence Act is unconstitutionally vague. We hold that the statute adequately informs an individual of the proscribed activity; and more importantly, that it provides specific guidelines that discourage the arbitrary enforcement of the statute by the prosecuting attorney. This is accomplished by delineating factors, relative to the determination of whether a felony or misdemeanor charge of Family Violence proceeds through the court system, that the prosecutor must take into account when making the charging decision.

Id. ¶ 13.

[25] In the proceedings below, Shimizu challenged the applicability of *Perez* to her case because, she contended, *Perez* did not specifically analyze the constitutionality of section 30.10(a)(2), the subsection under which she was convicted. RA, tab 51 at 4 (Dec. & Order). It is

unclear whether the trial court agreed with Shimizu's arguments regarding the inapplicability of *Perez*. Arguably, the court found merit in her arguments because it did not rely on the holding in *Perez* in its decision to deny Shimizu's motion for judgment of acquittal notwithstanding the verdict.

[26] Although *Perez* in broad language held that the Family Violence Act is not unconstitutionally vague, it did so without analyzing the specific language in section 30.10(a) defining "family violence." Rather, the court focused its analysis on the part of the Act specifically at issue in that case: the provision that a person who commits family violence is guilty of a misdemeanor or of a third degree felony. *See* 1999 Guam 2 ¶¶ 9-13. Thus, we find it worthwhile to revisit the "holding" in *Perez*.

[27] The "void for vagueness doctrine" is a long-standing principle in due process jurisprudence. As the U.S. Supreme Court held in *Lanzetta*,

> If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926): 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'

306 U.S. at 453 (citations omitted).

[28] "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory

enforcement." *Morales*, 527 U.S. at 56 (citation omitted). "[A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." *Id.* (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966)). "[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law." *Id.* at 58.

1. Fair Notice

[29] *Morales* involved a gang loitering ordinance that defined "loitering" to mean "to remain in any one place with no apparent purpose." *Id.* at 50-51 & n.14 (quoting Chi., Ill., Mun. Code § 8-4-015(c)(1) (1992)). "The Illinois Supreme Court recognized that the term 'loiter' may have a common and accepted meaning," but the definition as provided in the ordinance did not. *Id.* at 56. "It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an 'apparent purpose.'" *Id.* at 56-57.

[30] The U.S. Supreme Court found the ordinance impermissibly vague for "fail[ing] to give the ordinary citizen adequate notice of what is forbidden and what is permitted." *Id.* at 60. "Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of 'loitering,' but rather about what loitering is covered by the ordinance and what is not." *Id.* at 57. Furthermore,

> [t]he Constitution does not permit a legislature to "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." This ordinance is therefore vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all."

Id. at 60 (citations omitted).

[31] Like the loitering ordinance in *Morales*, 9 GCA § 30.10(a)(2) fails to provide fair notice to ordinary citizens of what conduct is prohibited by the statute. The phrase "[p]lacing a family or household member in fear of bodily injury," 9 GCA § 30.10(a)(2), is not vague in the sense that it does not have a common and accepted meaning. It is easy for a person to understand what the phrase means in its ordinary sense. However, as a guide to what conduct is forbidden or permitted by the statute, section 30.10(a)(2) utterly fails. As written, there is too much uncertainty about what conduct is covered by the statute and what is not. The Legislature cannot conceivably have meant to criminalize each instance in which a citizen places a family or household member in fear of bodily injury. The *mens rea* requirement in 9 GCA § 30.20(a) is not enough to save this ambiguity, for even some intentional causing of fear in a family member can be innocent, as illustrated in the examples below. *See infra*.

[32] The Court in *Morales* noted the precedent set by a number of state courts that have upheld loitering ordinances combined with some other overt act or evidence of criminal intent. 527 U.S. at 57 & n.25 (citations omitted). The Court also noted, however, that state courts have uniformly invalidated loitering ordinances "that do not join the term 'loitering' with a second specific element of the crime." *Id.* at 57-58.

[33] Like the category of statutes noted in *Morales* that were struck down as unconstitutional, no standard of conduct is specified in section 30.10(a)(2). Section 30.10(a)(2) does not require an overt act, criminal intent, that the fear be reasonable, or that the fear be one of imminent bodily injury. In the court's research on the issue, we struggled to find a family violence or domestic abuse statute with terms as broad as ours. Instead, each statute we have seen requires either imminence, reasonable fear, or both. *See, e.g.*, N.M. Stat. Ann. § 40-13-2(D)(2)(d) (West 2010) (defining "domestic abuse" to include "(d) a threat causing imminent fear of bodily injury

by any household member"); Neb. Rev. Stat. Ann. § 42-903(1)(b) (West 2012) ("Abuse means . . . . (b) Placing, by means of credible threat, another person in fear of bodily injury. . . . [C]redible threat means a verbal or written threat, . . . and conduct that is made by a person with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family."); R.I. Gen. Laws Ann. § 15-15-1(2)(ii) (West 2006) ("'Domestic abuse' means . . . (ii) Placing another in fear of imminent serious physical harm."); N.C. Gen. Stat. Ann. § 50B-1(a)(2) (West 2015) ("Domestic violence means . . . (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment . . . that rises to such a level as to inflict substantial emotional distress."); 23 Pa. Stat. and Cons. Stat. Ann. § 6102(a)(2) (West 2008) (defining "abuse" of family to include "[p]lacing another in reasonable fear of imminent serious bodily injury").

[34] Without more, 9 GCA § 30.10(a)(2) is impermissibly vague in that it does not adequately inform citizens of what conduct is prohibited by the statute. Specifically, in this case, it did not inform Shimizu whether telling a family member "get out of my face or else I'll kill you" and then looking in her purse is conduct prohibited by the statute. Although the statute clearly proscribes placing a family member in fear of bodily injury, it did not provide her with standards to govern her conduct, such as requiring that the fear be reasonable or that the fear be that of imminent bodily injury. Although her conduct may have been a clear violation of other laws, such as terrorizing,[6] it would not have been clear to her that her conduct was prohibited by 9 GCA § 30.10(a)(2) given that the statute reaches a substantial amount of conduct, both innocent

[6] "A person is guilty of terrorizing if he communicates to any person a threat to commit or to cause to be committed a crime of violence dangerous to human life, against the person to whom the communication is made or another, and the natural and probable consequence of such a threat, is to place the person to whom the threat is communicated or the person threatened in reasonable fear that crime will be committed." 9 GCA § 19.60(a) (2005).

and criminal alike. Her conduct raises too many unanswered questions as to what would be enough to constitute a violation of the statute. What if she did not look through her purse and just made the statements? Or if instead she simply said, "Get out of my face" or "Get out of my face or else"? Or if she was already looking in her purse when she made the statement? Or what if her daughter or sister were irrationally fearful individuals? The statute provides no help in distinguishing between each of these variations, thereby making it difficult to know where to draw the line in any given situation.

[35] We now turn to the second reason a statute may be invalidated for vagueness: where it violates "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (citation omitted).

2. Arbitrary and Discriminatory Enforcement

[36] As this court noted in *Perez*, "it has been recognized that the more important aspect of [the] vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.'" 1999 Guam 2 ¶ 7 (quoting *Kolender*, 461 U.S. at 358). "[V]agueness is dangerous because it permits arbitrary enforcement of the law, violating the basic principles of the Fourteenth Amendment." Decker, *supra*, at 60 (footnote omitted). "A law must provide 'ascertainable standards of guilt' that guide the arm of enforcement." *Id.* at 61 (quoting *Winters v. New York*, 333 U.S. 507, 515 (1948)). "The absence of an ascertainable standard of guilt in a given legal proscription gives police officers, prosecutors, and the triers of fact unlimited discretion to apply the law and, thus, there is a danger of arbitrary and discriminatory enforcement of such a law." *Id.* (footnote omitted).

[37] Section 30.10(a)(2) does not provide any guidelines whatsoever to govern law enforcement. On the one hand, this unlimited discretion is helpful in that it allows law enforcement to decide not to arrest or prosecute conduct that, though technically a violation of the statute, is otherwise innocent (such as the plastic spider prank suggested by the trial court). On the other hand, the unfettered discretion poses a clear danger of arbitrary and discriminatory enforcement of the statute. Because a substantial amount of conduct is implicated by the broad terms of the statute, it is essentially up to law enforcement to decide which violations are worthy of punishment and which are not.

[38] Also, the statute provides essentially no guidance to triers of fact. So long as the prosecution proves that some intentional, knowing, or reckless conduct on the part of the defendant causes fear of bodily injury in a family member, the defendant must be found guilty under the Act. Thus, even if there had been no rummaging through a purse (assuming that qualifies as an "overt act"), Shimizu might have been found guilty. Even if Shimizu somehow proved that her daughter or sister were irrationally fearful people, she still technically would be guilty under the statute.

[39] Accordingly, we hold that 9 GCA § 30.10(a)(2) is vague on its face as it provides neither fair notice as to the type of conduct prohibited by the statute nor minimal guidelines to govern law enforcement. The trial court's findings that there was sufficient evidence of imminence and that the victims' fear was reasonable are irrelevant because the jury was instructed on neither concept. The jury was not instructed that the victims' fear must have been reasonable or that the fear must have been that of imminent bodily injury. The judge's determination that sufficient evidence existed to satisfy proof of those issues is of no relevance because he was not the trier of fact in this case, and neither was listed as an element of the offense.

[40] To the extent *People v. Perez*, 1999 Guam 2, suggests that 9 GCA § 30.10(a)(2) is not unconstitutionally vague, we overrule.

V. CONCLUSION

[41] For the foregoing reasons, we hold that 9 GCA § 30.10(a)(2) is facially invalid because it is unconstitutionally vague. It provides neither fair notice to ordinary citizens of what conduct is prohibited or permitted by the statute, nor minimal guidelines to govern law enforcement. Accordingly, we **REVERSE.**

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice