

**In the Court of Appeals
for the
Fifteenth District of Texas,
Toyahville, Texas**

**Dixie B. Herbster,
Appellant**

versus

**The State of Texas,
Appellee**

**On Appeal from the 83rd District Court
Luna County, Texas
The Honorable Brock Goulett**

BEFORE KELLY, J., RUDNICKI, J., AND VOGELSANG, CJ.

VOGELSANG, Chief Justice, in which RUDNICKI, J. joins.

A jury convicted Dixie Herbster of the offense of burglary. *See* Tex. Penal Code Ann. § 30.02(a) (West 2003). Punishment was assessed at forty years' imprisonment. In two issues on appeal, Herbster asserts that (1) the district court abused its discretion in denying her motion to suppress, and (2) the court's charge enabled the jury to convict her based on less than a unanimous verdict. We will affirm the judgment.

BACKGROUND

The jury heard evidence that, on the night of December 24, 2007, Herbster broke into the home of her ex-husband, Dan. Two years earlier, when they were still married, Dixie and Dan were third-year law students at the University of South Central Texas. Over the Christmas break, they had gone to the law school to study. Unfortunately for Dixie, as a result of a severe winter storm, she had slipped on ice on the law school grounds and was seriously injured. She subsequently sued the law school for damages resulting from her injuries. Ultimately, she lost. The defeat left her very bitter, and Dan divorced her soon thereafter.

Dan testified at trial. According to Dan, on the night of the burglary, he had gone to bed sometime around midnight. He was awakened at approximately 3:00 a.m. by a sound coming from downstairs. When he went downstairs to investigate, he turned on the lights and saw that much of his personal property was missing, including his computer, his television, his DVD player, and his sound system. As he began to look around, he heard a familiar voice behind him say, "Don't move. Turn around slowly, with your hands up." Dan did as he was told. When he turned around, he was shocked to

see Dixie standing several feet away, pointing a gun at his chest. He asked her, “Dixie, what are you doing here?” Over objection by defense counsel, Dan proceeded to testify about what Dixie had told him. Dan recounted,

She told me, ‘I’m broke, baby. I don’t have a job, and my life is a mess. In fact, for all intents and purposes, my life ended that night two years ago when I was injured. I lost that lawsuit, failed the bar exam, and turned to drugs. But look at you, honey buns. You couldn’t be happier. You’ve got a great job at a prestigious law firm and are making tons of money. If we were still married, that money would be just as much mine as it is yours. But, no, you had to go and divorce me. Well, it’s payback time, you selfish bastard. I’m taking all of your valuable stuff, selling it, and moving to Canada. Maybe that way I can have a fresh start.’

Dan replied, “You’re never going to get away with this, Dixie. I’ll just call the cops the second you walk out that door.” Dixie responded, “Well, then, I guess I just have to make sure that doesn’t happen. Turn around.” Dan testified that Dixie then walked up to him and hit him hard in the back of his head with her gun. Dan collapsed to the ground, unconscious.

Dan regained consciousness several hours later. He immediately proceeded to call the police and report the burglary.

On cross-examination, Dan’s account of what transpired was apparently cast into doubt when Dan admitted that he had been drinking heavily that night, and he could not remember everything that occurred. Dan also admitted that he hated Dixie. However, he claimed that he was telling the truth about what Dixie had told him.

As Dan was reporting the burglary, Dixie was making her way north toward the Texas – Oklahoma border in a rental car. As she approached a small town that was along her route, she found herself behind a pickup truck that was going at least 10 miles per hour below the posted speed limit of 55 mph. The road at that point was one lane in both directions, and, because the road was winding, it was not safe for her to pass. Dixie understood how important it was for her not to draw attention to herself or be pulled over (all of Dan’s stuff was in her trunk), so she was being very careful to obey all traffic laws. However, as the car in front of her continued to drive below the speed limit, she started to lose her temper and began to tail the car.

As Dixie reached the town, the road became two lanes as she approached a stop light. Unbeknownst to her, a police vehicle had just pulled out of a parking lot and was now behind her. Dixie got into the left-hand lane and began to drive beside the other vehicle, preparing to pass. However, before she could do so, the light turned red. She immediately hit her brakes and stopped at the light. The other vehicle also stopped at the intersection. The driver of the other vehicle rolled down his window and indicated for Dixie to do the same. She did so. The other driver, a gruff-looking man in his fifties, with a long, red beard and anger in his eyes, did not appear to be in the Christmas spirit.

The man yelled at Dixie, “Hey b****, why were you tailing me back there? It’s Christmas. I don’t have nowhere to be. I was just taking my time and enjoying the country roads. You should do the same. Instead, you ruined my day. What do you have to say for yourself?” Dixie turned to the other driver with fury in her eyes, and immediately recognized him as Willy Redbeard, the former groundskeeper at the law school where she had been injured. For years, Dixie had blamed her injury on Redbeard’s installation of an “ice ramp” on the law school grounds. Dixie did not say a word to Redbeard, but extended her middle finger toward him in an obscene gesture. Upon seeing this, Redbeard looked even angrier and became visibly agitated. He said to Dixie, “That’s not smart, lady. For all you know, I could have a gun in my car. I ought to” However, before he could finish his sentence, the light turned green and Dixie drove away.

Almost immediately thereafter, Dixie heard a police siren. Dixie looked behind her and saw a police vehicle with its overhead lights activated. She decided that the best course of action was to immediately pull over, explain the situation, and hope that the officer would give her a warning and let her be on her way. After Dixie pulled over, police officer Jason Owens got out of his vehicle and approached Dixie’s car. “Roll down your window,” he commanded. Dixie complied. Officer Owens then said, “License and registration, please.” Dixie again complied. Owens asked, “What happened back there, ma’am? Why did you give that man the finger?” Dixie explained exactly what had happened and what Redbeard had said to her. Dixie also explained how she knew Redbeard. Dixie expected the officer to be sympathetic and let her go. Instead, the officer commanded her to get out of her car. He told her that she was under arrest for the offense of disorderly conduct, placed her in handcuffs, and read her the *Miranda* warnings.

After placing Dixie in his patrol car, Officer Owens proceeded to inventory her vehicle. He opened the trunk and discovered several items of expensive personal property. He returned to his vehicle and asked Dixie, “What’s all that stuff in your trunk?” Dixie answered, “Christmas presents, Officer.” Suspecting theft, Owens called police headquarters and was informed of the burglary report out of Luna County. He proceeded to take Dixie into the police station for questioning.

At the station, after again advising Dixie of her rights, the police were able to get a confession out of her. However, Dixie’s account of what had happened at Dan’s house was different than Dan’s version. In the written confession, Dixie explained:

On the night of December 24, 2007, I was very lonely. I missed my ex-husband, Dan. I decided to go to his house and try to reason with him that we should get back together. I still loved him very much. When I broke into the house, I did not intend to steal anything or hurt Dan in any way. I only wanted to talk to him. When I entered the house, I saw Dan passed out on the couch. I approached him and immediately smelled a strong odor of alcohol on his breath. I proceeded to wake him up. I told him, “Dan, honey, it’s Christmas Eve. I miss you.” Dan, however, was drunk

and looked very angry. He yelled at me, “What are you doing here? Get out of my house!” He then proceeded to attack me. After we struggled for several minutes, I reached for the nearest candlestick and hit him over the head with it. I knocked him unconscious. I felt terrible about that, but I knew I was only acting in self-defense. I realized at that moment that things were over with Dan, and that we would never get back together. I began to cry. I then looked around and noticed how much nice stuff Dan had acquired since we divorced. I thought to myself, “All of this should be mine.” So I decided, at that moment, to steal whatever I could from Dan. I loaded up as much as I could into my car and drove away.

Dixie went on to explain in her confession the circumstances surrounding the traffic stop, summarized above.

The State charged Dixie with burglary. The indictment contained two paragraphs. In the first paragraph, the State alleged that Dixie, with intent to commit the felony offense of aggravated robbery, entered a habitation without the effective consent of the owner. This paragraph corresponded with the language in penal code section 30.02(a)(1). In the second paragraph, the State alleged that Dixie intentionally or knowingly entered a habitation, without the effective consent of the owner, and attempted to commit or committed the felony offense of aggravated robbery. This paragraph corresponded with the language in penal code section 30.02(a)(3).

Dixie pleaded not guilty to the charges against her. Prior to trial, Dixie filed a motion to suppress. In the motion, Dixie alleged that the traffic stop was illegal because Officer Owens did not have reasonable suspicion or probable cause to believe that Dixie had committed a criminal offense. Specifically, Dixie claimed that her conduct toward the other driver, “although rude, offensive or even vulgar, did not constitute the crime of disorderly conduct.” Therefore, Dixie asserted, the traffic stop and subsequent arrest were illegal, and all of the evidence obtained as a result of the stop and arrest should be suppressed.

At the hearing on the motion to suppress, Officer Owens testified that, because his car window was down, he had heard everything Redbeard had said to Dixie and had seen the gesture Dixie had made to Redbeard. Owens decided to take action. He testified, “I had seen what she had done, and had seen and heard the reaction it had caused in Redbeard. I was worried that if I did not act, Redbeard would take matters into his own hands, and who knows what could have happened then.” Owens explained that he was friends with Redbeard, and he knew the man had a volatile, explosive personality. Owens also testified that “the only reason” he initiated the traffic stop was because of the obscene gesture Dixie had made. He did not observe her violating the speed limit or any other traffic law.

Willy Redbeard also testified at the hearing. Redbeard admitted to making the comments that Dixie had accused him of making. He testified that he was in a “really bad mood” that day, and, when Dixie had tailed his vehicle, he became infuriated. Then,

when Dixie gave him the finger, he “completely lost his cool.” Redbeard explained that he recognized Dixie from the lawsuit that had been brought against his former employer, the law school. Once the lawsuit had been filed, the law school fired him, and he had held a grudge against Dixie ever since then. Thus, Redbeard testified, seeing Dixie give him the finger “made my blood boil.” However, when asked what would have happened if Officer Owens had not intervened and pulled Dixie over, Redbeard testified, “Well, even though I really wanted to retaliate, I don’t think I would have done anything. I would never hurt a woman, no matter what she said or did to me. I certainly wasn’t going to shoot her or anything like that, although I did have a hunting rifle in my car.” Redbeard added, “I was seriously offended by that gesture, but the most I probably would have done is get her license plate number and call the cops. Thankfully, because Officer Owens pulled her over, I didn’t have to do anything.” When asked if he was “certain” he would not have done anything, Redbeard testified, “No. I was furious, so who knows what could have happened. Since losing my job, I do have serious anger issues.”

At the conclusion of the hearing, the district court denied the motion to suppress, without entering findings of fact or conclusions of law.

The case proceeded to trial. The State’s witnesses were Dan and Officer Owens. In addition to their testimony, the relevant portions of which are summarized above, the State admitted the confession into evidence. No witnesses testified for the defense.

The jury charge set out the State’s allegations as specified in the indictment. In two paragraphs, the charge instructed the jury that it could find Dixie guilty of the offense of burglary if it believed beyond a reasonable doubt that *either* she (1) entered a habitation without the effective consent of the owner, with the intent to commit the felony offense of aggravated robbery; *or* (2) intentionally or knowingly entered a habitation, without the effective consent of the owner, and attempted to commit or committed the felony offense of aggravated robbery. Again, these paragraphs corresponded with the language in penal code sections 30.02(a)(1) and 30.02(a)(3). Dixie did not object to the jury charge.

In the State’s closing argument, the prosecutor referred to the jury charge. The prosecutor stated the following: “Now, ladies and gentlemen of the jury, you have to be unanimous in finding Dixie Herbster guilty of the offense of burglary. However, you do not have to be unanimous about the manner or means in which she committed the offense. Keep that in mind as you’re deliberating.” The prosecutor did not elaborate to the jury on what she meant by “manner or means.” In his closing argument, defense counsel made no mention of the unanimity requirement.

After deliberating for six hours, the jury returned a verdict of guilty. No jury poll was requested by the defense. Dixie was subsequently convicted and sentenced. This appeal followed.

DISCUSSION

Motion to suppress

In her first point of error, Herbster asserts that the district court abused its discretion in denying her motion to suppress.

A trial court's ruling on a motion to suppress is reviewed on appeal for abuse of discretion. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). The trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given to their testimony. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). When, as in this case, the trial court has not made specific findings of fact, we must view the evidence in the light most favorable to the trial court's ruling. *Torres v. State*, 182 S.W.3d 899, 902 (Tex. Crim. App. 2005). We give trial courts almost complete deference in determining historical facts, but we review de novo the trial court's application of the law. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000).

A police officer may lawfully conduct a temporary detention if there is reasonable suspicion to believe that the detained person is violating the law. *Neal v. State*, 256 S.W.3d 264, 280 (Tex. Crim. App. 2008); *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005). Reasonable suspicion exists if the officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that a particular person actually is, has been, or soon will be engaged in criminal activity. *Neal*, 256 S.W.3d at 280. "This is an objective standard that disregards any subjective intent of the officer making the stop and looks solely to whether an objective basis for the stop exists." *Ford*, 158 S.W.3d at 492. In making this determination, we consider the totality of the circumstances. *Neal*, 256 S.W.3d at 280. "Additionally, it is unnecessary to prove that a defendant has violated a statute in order to have reasonable suspicion to detain him." *Ste-Marie v. State*, 32 S.W.3d 446, 449 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

A person commits the offense of disorderly conduct if he intentionally or knowingly makes an offensive gesture or display in a public place, and the gesture or display tends to incite an immediate breach of the peace. *See* Tex. Penal Code Ann. § 42.01(a)(2). The determination of whether an act amounts to a breach of the peace is done on a case-by-case basis, looking to the facts and circumstances surrounding the act. *Turner v. State*, 901 S.W.2d 767, 770 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd).

Herbster claims that her act of "giving the finger" to Redbeard did not amount to a breach of the peace in this particular case. As support for her argument, Herbster relies on *Coggin v. State*, 123 S.W.3d 82 (Tex. App.—Austin 2003, pet. ref'd), and *State v. Rivenburgh*, 933 S.W.2d 698 (Tex. App.—San Antonio 1996, no pet.). However, we find neither case to be controlling here.

In *Coggin v. State*, the issue was whether the evidence was sufficient to prove, beyond a reasonable doubt, that the defendant had committed the offense of disorderly conduct. 123 S.W.3d at 90. The evidence showed that the defendant, a motorist, had gestured with his raised middle finger at another motorist whom the defendant was passing on the highway. *Id.* at 86. The appeals court concluded that the evidence was legally insufficient to support a conviction for disorderly conduct. *Id.* at 92. The decision turned on the specific circumstances surrounding the conduct: “[G]iven the circumstances—the brief exposure to the gesture as one car passed the other, made stranger to stranger, causing momentary hostility on [the other motorist]’s part—we cannot conclude that appellant’s conduct tends to incite an immediate breach of the peace.” *Id.* However, the court also stated, “We agree that the gesture—repugnant, distasteful, and crass as it is—could tend to incite an immediate breach of the peace in a different context.” *Id.* at 91.

In *Rivenburgh v. State*, the issue was whether the evidence supported a trial court’s implied finding that an officer lacked “probable cause” to stop the defendant for committing the offense of disorderly conduct. 933 S.W.2d at 700. The evidence showed that the defendant, a motorist who was stopped at a red light, did not move when the light turned green. *Id.* Other, unspecified motorists started honking their horns, and the defendant made a “vulgar gesture with her middle finger” and mouthed an obscenity in her rear view mirror. *Id.* Observing the defendant’s actions, the officer conducted a traffic stop. *Id.* During the stop, the officer determined that the defendant was intoxicated, and arrested her for that offense. *Id.* The defendant filed a motion to suppress, which the trial court granted. *Id.* In affirming, the appeals court concluded that the record, viewed in the light most favorable to the trial court’s decision, supported the trial court’s implied finding that the officer did not have probable cause to stop the defendant for committing the offense of disorderly conduct. *Id.* at 701. The appeals court explained,

Though it may even rise to the level of common knowledge that this gesture and these words mouthed by a Texas motorist has led to breaches of the peace and even the loss of life, the trial court could have found that the gesture did not tend to incite an immediate breach of the peace at this time and place.

Id.

The issue before us is different from the issues in *Coggin* and *Rivenburgh*. The issue is not whether the evidence was sufficient to prove, beyond a reasonable doubt, that Herbster committed the offense of disorderly conduct. Nor is the issue whether the evidence could support a finding that Officer Owens lacked probable cause to arrest Herbster for committing the offense of disorderly conduct. Rather, the issue is whether the record supports the trial court’s finding that Owens had reasonable suspicion to detain Herbster. *See Ste-Marie*, 32 S.W.3d at 449 (“The issue before us is one of reasonable suspicion, not whether appellant is guilty of disorderly conduct.”).

In considering the totality of the circumstances summarized above, we conclude that the record supports the trial court's finding that Officer Owens had reasonable suspicion to detain Herbster for the offense of disorderly conduct. Therefore, the trial court did not abuse its discretion in denying Herbster's motion to suppress. We overrule Herbster's first issue.

Jury unanimity

In her second issue, Herbster asserts that the jury charge violated her right to a unanimous verdict because the charge allowed the jury to convict her of the offense of burglary without requiring the jury to unanimously agree whether she violated subsections (a)(1) or (a)(3) of the statute. The State responds that the charge merely allowed the jury to choose between alternative manners and means by which the offense of burglary can be committed or proven.

We review claims of jury charge error under the two-pronged test set out in *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). We first determine whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If error exists, we then evaluate the harm caused by the error. *Id.* The degree of harm required for reversal depends on whether that error was preserved in the trial court. When error is preserved in the trial court by timely objection, the record must show only "some harm." *Almanza*, 686 S.W.2d at 171. By contrast, unobjected-to charge error requires reversal only if it resulted in "egregious harm." *See Neal v. State*, 256 S.W.3d 264, 278 (Tex. Crim. App. 2008).

"Under our state constitution, jury unanimity is required in felony cases, and, under our state statutes, unanimity is required in all criminal cases." *Ngo*, 175 S.W.3d at 745; *see* Tex. Const. art. V, § 13; Tex. Code Crim. Proc. Ann. art. 36.29(a) (West Supp. 2007), arts. 37.02, 37.03, 45.034-.036 (West 2006). Unanimity ensures that all jurors reach a consensus on the same act for a conviction. *Francis v. State*, 36 S.W.3d 121, 125 (Tex. Crim. App. 2000) (op. on reh'g). Allowing a jury to choose from several separate acts, each of which is a violation of a specific statute, without requiring the jury to agree on which act was committed, violates the unanimity requirement. *Ngo*, 175 S.W.3d at 747-48 (Tex. Crim. App. 2005); *Martinez v. State*, 212 S.W.3d 411, 416 (Tex. App.—Austin 2006, pet. ref'd). However, allowing a jury to choose between alternative theories of how an offense was committed does not run afoul of the unanimous-verdict requirement. *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991); *Martinez*, 212 S.W.3d at 416. If an indictment alleges differing means of committing an offense, a trial court does not err by charging the jury in the disjunctive. *Jones v. State*, 184 S.W.3d 915, 922 n.6 (Tex. App.—Austin 2006, no pet.).

Recently, the court of criminal appeals has written extensively on the distinction between statutes that list separate offenses and statutes that list alternate "manner or means" of committing a single offense. *See Landrian v. State*, No. PD-1561-07, 2008 Tex. Crim. App. LEXIS 1183 (Tex. Crim. App. Oct. 8, 2008); *Huffman v. State*, No. PD-1539-07, 2008 Tex. Crim. App. LEXIS 1180 (Tex. Crim. App. Oct. 1, 2008); *Pizzo v.*

State, 235 S.W.3d 711 (Tex. Crim. App. 2007); *Stuhler v. State*, 218 S.W.3d 706, 717-19 (Tex. Crim. App. 2007); *Jefferson v. State*, 189 S.W.3d 305 (Tex. Crim. App. 2006). The unifying theme in all of these opinions appears to be an attempt to identify the “gravamen” or “focus” of the offense. See *Huffman*, 2008 Tex. Crim. App. LEXIS 1180, at *10-11 (“The common thread in all of these cases seems to be ‘focus’ . . . If the focus of the offense is the result—that is, the offense is a ‘result of conduct’ crime—then different types of results are considered to be separate offenses, but different types of conduct are not. On the other hand, if the focus of the offense is the conduct—that is, the offense is a ‘nature of conduct’ crime—then different types of conduct are considered to be separate offenses.”).

Therefore, in order to resolve this issue, we must examine the burglary statute and identify the focus or gravamen of the offense. Section 30.02 of the penal code provides, in relevant part:

A person commits an offense if, without the effective consent of the owner, the person:

(1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or

(2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or

(3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

Tex. Penal Code Ann. § 30.02(a). In *DeVaughn v. State*, 749 S.W.2d 62 (Tex. Crim. App. 1988), the court of criminal appeals explained that “[t]here are three distinct ways in which one may commit the offense of burglary”:

First, the offense may be committed by intentionally or knowingly entering a building or habitation not then open to the public, without the effective consent of the owner and with the intent to commit a felony or theft. Second, one may commit burglary by intentionally or knowingly remaining concealed in a building or habitation, without the effective consent of the owner, and with the intent to commit a felony or theft. Finally, one may commit burglary by intentionally and knowingly entering a building or habitation, without the effective consent of the owner, and committing or attempting to commit a felony or theft.

Id. at 64-65 (internal citations omitted). The court went on to explain that, under subsections (a)(1) and (a)(2), “the intent to commit a felony or theft must exist at the moment of the entry,” and that “the offense is complete upon the entry; a completed felony or theft is unnecessary.” *Id.* at 65.

Subsection (a)(3) is different in that, instead of having to prove specific intent to commit a felony, theft, or assault at the time of entry, the State can prove the defendant, after entry, proceeded to actually commit or attempt to commit a felony, theft, or assault. Thus, subsection (a)(3) “includes as burglary the conduct of one who enters without effective consent but, lacking intent to commit any crime upon his entry, subsequently forms that intent and commits or attempts to commit a felony or theft. [It] dispenses with the need to prove intent at the time of the entry when the actor is caught in the act.” *Id.*

This does not mean that the conduct proscribed by subsections (a)(1) and (a)(3) are separate offenses. Rather, “[t]he gravamen of the offense of burglary clearly remains entry of a building or habitation without the effective consent of the owner, accompanied by either the required mental state, under §§ 30.02(a)(1) and (2) . . . or the further requisite acts or omissions, under § 30.02(a)(3).” *Id.*

Following the reasoning in *DeVaughn*, at least three of our sister courts have concluded that subsections (a)(1) and (3) are not separate offenses. *See Martinez v. State*, No. 03-07-00391-CR, 2008 Tex. App. LEXIS 8592, at *17-18 (Tex. App.—Austin Nov. 14, 2008, no pet.h.); *Ramos v. State*, No. 04-05-00543-CR, 2006 Tex. App. LEXIS 5139, at *3-4 (Tex. App.—San Antonio June 14, 2006, pet. ref’d) (mem. op., not designated for publication); *Yates v. State*, No. 05-05-00140-CR, 2005 Tex. App. LEXIS 9468, at *6-9 (Tex. App.—Dallas Nov. 10, 2005, no pet.) (mem. op., not designated for publication). Today, we do the same. We conclude that subsections (a)(1) and (a)(3) specify alternate manners or means in which one may commit the offense of burglary. Therefore, the court’s charge did not violate Herbster’s right to a unanimous verdict. We overrule Herbster’s second issue.

CONCLUSION

Having concluded that the district court did not abuse its discretion in denying Herbster’s motion to suppress, and that Herbster was not denied her right to a unanimous verdict, we affirm the judgment of the district court.

KELLY, Justice (Dissenting)

I would reverse the judgment of the district court and remand for a new trial.

First, I believe the district court erred in denying the motion to suppress. While the majority engages in a reasonable-suspicion analysis of the traffic stop, I believe this analysis misses the mark. Officer Owens testified that “the only reason” he stopped Herbster was for the offense of disorderly conduct. At the time Herbster was stopped, there was no further investigation to be undertaken. Either Herbster committed the offense of disorderly conduct prior to being stopped by the officer, or she did not.

Therefore, the question in my mind is whether Officer Owens had probable cause to arrest Herbster for the offense of disorderly conduct. *See Rivenburgh*, 933 S.W.2d at 700.

A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view. Tex. Code Crim. Proc. Ann. art. 14.01(b). To justify a warrantless arrest, the State has the burden to prove probable cause existed when the officer made the arrest. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Probable cause for an arrest exists when the facts and circumstances within the knowledge of the arresting officer and of which he has reasonably trustworthy information are sufficient in themselves to warrant in a person of reasonable caution the belief that a person has or is committing an offense. *Brinegar v. United States*, 338 U.S. 160 (1949).

In this case, the facts and circumstances were not sufficient in themselves to warrant a belief that Herbster had or was committing the offense of disorderly conduct.

A person commits the offense of disorderly conduct if he intentionally or knowingly makes an offensive gesture or display in a public place, and the gesture or display tends to incite an *immediate breach of the peace*. *See* Tex. Penal Code Ann. § 42.01(a)(2) (emphasis added).

Texas courts have defined and interpreted the term “breach of the peace” to mean an act that “disturbs or threatens to disturb the tranquility enjoyed by the citizens.” *Woods v. State*, 213 S.W.2d 685, 687 (Tex. Crim. App. 1948). “Actual or threatened violence is an essential element of a breach of the peace.” *Id.* In order to violate 42.01(a)(2), the offensive gesture or display must amount to “fighting words.” *See Estes v. State*, 660 S.W.2d 873, 875 (Tex. App.—Fort Worth 1983, pet. ref’d) (holding that section 42.01(a)(1) and (2) apply only to fighting words). The Supreme Court has defined “fighting words” as “personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” *Cohen v. California*, 403 U.S. 15, 20 (1971). The test is whether the words, “when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” *Id.*; *see also Virginia v. Black*, 538 U.S. 343 (2003).

Whether particular words constitute fighting words is a question of fact. *Coggin*, 123 S.W.3d at 90. This “requires careful consideration of the actual circumstances surrounding the expression, asking whether the expression ‘is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.’” *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). Language that is merely harsh and insulting does not generally rise to the level of fighting words; derisive or annoying words only rise to such level when they plainly tend to excite the addressee to a breach of the peace. *Coggin*, 123 S.W.3d at 90. It is not enough that the words merely arouse anger or resentment. *Id.* Anything short of the use of fighting words does not constitute a violation of the statute. *Id.*

Unlike the majority, I find the analysis in *Coggin* persuasive and would follow it in this case. For Officer Owens to have had probable cause to arrest Herbster for the offense of disorderly conduct, there needed to be a showing that Herbster's behavior tended to incite an immediate breach of the peace. "Giving the finger" to Redbeard does not rise to that level, at least not on the facts before us.

I also disagree with the majority's conclusion on the jury unanimity issue. Relying on a case from the 1980s that had nothing to do with the issue of jury unanimity, the majority identifies the gravamen of the offense of burglary as the illegal entry. I respectfully disagree. If an illegal entry was all that was required for one to commit the offense of burglary, then there would be no distinction between a burglary and a simple trespass. Clearly, something more than an illegal entry is required in order for one to commit the offense of burglary.

In order to determine what this "something more" is, we need to examine the burglary statute using what the court of criminal appeals has termed "the eighth grade grammar test." This test requires us to diagram the burglary statute and identify its grammatical parts. See *Landrian*, 2008 Tex. Crim. App. LEXIS 1183, at *14-15 (applying "eighth grade grammar test" to offense of aggravated assault); *Pizzo*, 235 S.W.3d at 717 (applying test to "sexual contact with a child" statute); *Stuhler*, 218 S.W.3d at 718-19 (applying test to "injury to a child" statute); see also *Ngo*, 175 S.W.3d at 745 n.24 ("A handy, though not definitive, rule of thumb is to look to the statutory verb defining the criminal act [which] . . . is generally the criminal act upon which all jurors must unanimously agree.").

Using the eighth grade grammar test, it appears to me that the burglary statute prohibits three separate acts: (1) entering a building or habitation with the intent to commit a felony, theft, or assault; (2) remaining concealed in a building or habitation with the intent to commit a felony, theft, or assault; and (3) entering a building or habitation and committing or attempting to commit a felony, theft, or assault. Notably, an "illegal entry" is not even required to violate subsection (a)(2), which I believe casts doubt on the majority's conclusion that an illegal entry is the gravamen of the offense. I believe the charge in this case is very similar to the charge in *Ngo v. State*, in which the court of criminal appeals held that the credit card abuse statute specified separate criminal acts. See 175 S.W.3d at 744.

Of course, because Herbster failed to object to the jury charge, reversal is not required unless Herbster suffered "egregious harm," whatever that term might mean.¹ Generally speaking, "[j]ury charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory." *Allen v. State*, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008).

¹ Our sister court has recently written on the difficulty appellate courts encounter in consistently identifying what rises to the level of "egregious harm." See *Ruiz v. State*, No. 03-06-00067-CR, 2008 Tex. App. LEXIS 9491, at *10 n.1 (Tex. App.—Austin December 18, 2008).

The purpose of the egregious-harm inquiry is to ascertain whether the defendant has incurred actual, not just theoretical, harm. *Almanza*, 686 S.W.2d at 174. Admittedly, it is a “difficult standard.” *Ellison v. State*, 86 S.W.3d 226, 227 (Tex. Crim. App. 2002). Our inquiry is factual in nature and turns on the unique circumstances of this case. *See id.* We are to consider (1) the entire jury charge, (2) the state of the evidence, including the contested issues and the weight of the probative evidence, (3) the parties’ arguments, and (4) any other relevant information revealed by the record of the trial as a whole. *Allen*, 253 S.W.3d at 264; *Olivas v. State*, 202 S.W.3d 137, 144 (Tex. Crim. App. 2006).

In this case, I believe a review of the entire record clearly demonstrates that Herbster suffered actual, and not just theoretical, harm. Because Herbster was deprived of her right to a unanimous verdict, I believe reversal is required and a new trial is demanded.

For the above reasons, I respectfully dissent.