APPENDIX

APPENDIX A

IN THE 367TH DISTRICT COURT
DENTON COUNTY, TEXAS

Case No. F-2013-1478-E
Count (COUNT II)
Incident No./TRN: 912081559X-D005
State ID No.: TX50096333

THE STATE OF TEXAS

v.

WENDEE LONG

JUDGEMENT OF CONVICTION BY JURY

Judge Presiding: HON MARGARET BARNES

Attorney for State: MATTHEW SHOVLIN AND/OR LINDSEY SHEGUIT

Date Judgement Entered: 10/10/2013

Attorney for Defendant: BARRY SORRELS

Offense for which Defendant Convicted: UNLAWFUL INTERCEPTION OF ORAL COMMUNICATION (COUNT II)

Charging Instrument: INDICTMENT

Statue for Offense: 16.02 (COUNT II) Penal Code

Date of Offense: 2/7/2012 (COUNT II)

Degree of Offense: 2ND DEGREE FELONY (COUNT II)

Plea to Offense: NOT GUILTY

Verdict of Jury: GUILTY OF COUNT II (9/25/2013)

Findings on Deadly Weapon: N/A

Plea to 1st Enhancement Paragraph: N/A

Plea to 2nd Enhancement Paragraph/Habitual: N/A

Findings on 1st Enhancement Paragraph: N/A

Findings on 2nd Enhancement/Habitual Paragraph: N/A

Punished Assessed by: JURY

Date Sentenced Imposed: 10/10/2013

Date Sentence to Commence: 10/10/2013

Punishment and Place of Confinement: FIVE (5) YEARS INSTITUTIONAL DIVISION, TDCJ (COUNT II)

THIS SENTENCE SHALL RUN CONCURRENTLY

☒ SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR THREE (3) YEARS (COUNT II)

Fine: $1,000.00

Court Costs: $268.00

Restitution: $ N/A

Restitution Payable to:

☐ VICTIM (see below)

☐ AGENCY/AGENT (see below)

$_____ Reimburse compensation paid by Denton County to any appointed counsel on this cause.

All payments previously made to the above assessments are ORDERED credited to the above amounts.

Sex Offender Registration Requirements do not apply to the Defendant. TEX. CODE CRIM. PROC. Chapter 62.

The age of the victim at the time of the offense was N/A.

If the Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

Time Credited:

From	to	From	to	From	to
From	to	From	to	From	to

If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.

DAYS NOTES:

All pertinent information, names and assessments indicated above are incorporated into the language of the judgement below by reference

This cause was called for trial in Denton County, Texas. The State appeared by her District Attorney.

Counsel/Waiver of Counsel (select one)

☒ Defendant appeared in person with Counsel.

☐ Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

It appeared to the Court that Defendant was mentally competent and had pleaded as shown above to the charging instrument. Both parties announced ready for trial. A jury was selected, impaneled, and sworn. The INDICTMENT, was read to the jury, and Defendant entered a plea to the charged offense. The Court received the plea and entered it of record.

The jury heard the evidence submitted and argument of counsel. The Court charged the jury as to its duty to determine the guilt or innocence of Defendant, and the jury retired to consider the evidence. Upon returning

to open court, the jury delivered its verdict in the presence of Defendant and defense counsel, if any.

The Court received the verdict and ORDERED it entered upon the minutes of the Court.

Punishment Assessed by Jury / Court / No election (select one)

☒ Jury: Defendant entered a plea and filed a written election to have the jury assess punishment. The jury heard evidence relative to the question of punishment. The Court charged the jury and it retired to consider the question of punishment. After due deliberation, the jury was brought into Court, and, in open court, it returned its verdict as indicated above.

☐ Court. Defendant elected to have the Court assess punishment. After hearing evidence relative to the question of punishment, the Court assessed Defendant's punishment as indicated above.

☐ No Election. Defendant did not file a written election as to whether the judge or jury should assess punishment. After hearing evidence relative to the question of punishment, the Court assessed Defendant's punishment as indicated above.

The Court FINDS Defendant committed the above offense and ORDERS, ADJUDGES AND DECREES that Defendant is GUILTY of the above offense. The Court FINDS the Presentence Investigation, if so ordered, was done according to the applicable provisions of TEX. CODE CRIM. PROC. Art.42.12 § 9.

The Court ORDERS Defendant punished as indicated above. The Court ORDERS Defendant to pay all fines, court costs, and restitution as indicated above.

Punishment Options (select one)

☒ Confinement in State Jail or Institutional Division: The Court ORDERS the authorized agent of the State of Texas or the Sheriff of this County to take, safely convey, and deliver Defendant to the Director, Institutional Division, TDCJ (COUNT II). The Court ORDERS Defendant to be confined for the period and in the manner indicated above. The Court ORDERS Defendant remanded to the custody of the Sheriff of this county until the Sheriff can obey the directions of this sentence. The Court, ORDERS that upon release from confinement, Defendant proceed immediately to the Office of District Clerk, Denton County, Texas. Once there, the Court ORDERS Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, restitution and any additional fees incurred as ordered by the Court above.

☐ County Jail—Confinement / Confinement in Lieu of Payment: The Court ORDERS Defendant immediately committed to the custody of the Sheriff of Denton County, Texas on the date the sentence is to commence. Defendant shall be confined in the Denton County Jail for the period indicated above. The Court ORDERS that upon release from confinement, Defendant shall proceed immediately to the Office of District Clerk, Denton County, Texas. Once there, the Court ORDERS Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, restitution and any additional fees incurred as ordered by the Court above.

☐ Fine Only Payment. The punishment assessed against Defendant is for a FINE ONLY. The Court ORDERS Defendant to proceed immediately to the Office of the Denton County, District Clerk. Once there, the Court ORDERS Defendant to pay or make

arrangements to pay all fines and court costs as ordered by the Court in this cause

Execution / Suspension of Sentence (select one)

☐ The Court ORDERS Defendant's sentence EXECUTED.

☒ The Court ORDERS Defendant's sentence of confinement SUSPENDED. The Court ORDERS Defendant placed on community supervision for the adjudged period (above) so long as Defendant abides by and does not violate the terms and conditions of community supervision. The order setting forth the terms and conditions of community supervision is incorporated into this judgment by reference.

The Court ORDERS that Defendant is given credit noted above on this sentence for the time spent incarcerated.

Furthermore, the following special findings or orders apply:

(a) Commit no offense against the laws of this State or of any other state or of the United States;

(b) Avoid the use of illegal narcotics, barbiturates, or controlled substances;

(c) Avoid persons or places of disreputable or harmful character;

(d) Report to the Community Supervision and Corrections Department of Denton County, Texas, immediately folowing this hearing, and no less than monthly thereafter, or as scheduled by the court or supervision officer and obey all rules and regulations of the department;

(e) Pay to the Community Supervision and Corrections Department of Denton, Texas, a supervision fee

in the amount of $50.00 on or before the 20th day of November, 2013 and pay $50.00 on or before the 20th day of each month thereafter during the period of community supervision.

(f) Permit the supervision officer to visit her at her home or elsewhere;

(g) Work faithfully at suitable employment as far as possible;

(h) Remain within the State of Texas during the pendency of the term of community supervision unless given permission to leave the State in writing by the Court;

(i) Pay the fine in the amount of $1,000.00 to the office of the District Clerk of Denton County, Texas, said fine to be paid INSTANTER; however, if applying for a payment plan, you are Ordered to immediately report to the Denton County Collections Compliance Department located in the Courts Building at 1450 E. McKinney, Suite 1400 and make payments in accordance with the terms and conditions agreed upon;

(j) Pay the Court Costs in the amount of $ 268.00 and any fee incurred herein to the office of the District Clerk of Denton County, Texas, P.O. Box 2146, Denton County, Texas 76202, said court costs and fee to be paid INSTANTER; however, if applying for a payment plan, you are Ordered to immediately report to the Denton County Collections Compliance Department located in the Courts Building at 1450 E. McKinney, Suite 1400 and make payments in accordance with the terms and conditions agreed upon;

(j-1) Pay a time payment fee of $25.00 to the District Clerk of Denton County not earlier than 31 days nor more than 120 days from the date of this

judgment if within thirty days from the date of this judgment the defendant has not paid in full all of the fine, court costs, and restitution ordered in this judgment;

(k) Pay to the District Clerk of Denton County, P.O. Box 2146, Denton, Texas 76202 the sum of $____ to reimburse Denton County for compensation paid to *appointed counsel* to be paid INSTANTER; however, if applying for a payment plan, you are Ordered to immediately report to the Denton County Collections Compliance Department located in the Courts Building at 1450 E. McKinney, Suite 1400 and make payments in accordance with the terms and conditions agreed upon;

(k-1) Pay to the District Clerk of Denton County, P.O. Box 2146, Denton, Texas 76202 the sum of $____ to reimburse Denton County for compensation paid to a *foreign language interpreter* in this case. Said sum to be paid INSTANTER; however, if applying for a payment plan, you are Ordered to immediately report to the Denton County Collections Compliance Department located in the Courts Building at 1450 E. McKinney, Suite 1400 and make payments in accordance with the terms and conditions agreed upon;

(l) Pay restitution in the amount of $-0- as determined by the Denton County Community Supervision Department; said amount of restitution or property due (to be delivered to the Denton County Community Supervision and Corrections Department for transfer to the victim or other person OR to be made directly to the victim or other person) in installments of $-0- per month, beginning on the 20th day of November, 2013, and a like payment on the same day of each month thereafter until fully paid. If ordered to pay restitution

payments in installments, the defendant shall pay a $12.00 restitution fee within 90 days of this order;

(m) Support her dependents;

(n) Within 30 days from the date of this Judgment provide the Denton County Community Supervision and Corrections Department with a copy of any Court order currently in effect which directs you to pay child support. If any such order exists, pay in full, at the times the same is ordered, any and all Court ordered child support, unless otherwise excused by the Court, and provide written verification of such payments to the Denton County Community Supervision and Corrections Department upon request by your Probation Officer;

(o) Do not own or possess a firearm;

(p) Notify the community supervision officer of any change of address or employment within five days prior to such change;

(q) The defendant shall servedays in the Denton County Jail beginning instanter with ___ days of credit for time served;

(r) Pay $50.00 fee to the Denton County Crime Stoppers Program through the Denton County Community Supervision Department within 90 days after being placed on community supervision;

(s) Defendant is to complete 100 hours of Community Service Restitution at a community service project or projects for an organization or organizations approved by the judge and designated by the Denton County Community Supervision Department, to be completed at a rate of not less than four hours per week starting by but not later than 60 days from the date of community supervision;

(t) Submit to testing for alcohol or drug usage at the request of a community supervision officer. Pay the cost for these tests within thirty (30) days of giving the specimen;

(u) Within sixty (60) days, the defendant shall complete a drug/alcohol evaluation through an agency which offers such services and approved by her community supervision officer and provide written proof of compliance to the supervision officer within 10 days of completion. If treatment is deemed necessary, the defendant shall abide by any and all treatment directives, comply with the rules and regulations of the approved agency, pay all costs incurred for such services. Continue in said treatment until successfully completed as stated by the counselor with the agreement of this community supervision officer.

(v) Consume no alcoholic beverages;

(w) As a condition for receiving Community Supervision in this case, the defendant has irrevocably waived extradition to the State of Texas from any jurisdiction in or outside the United States in the event a Motion to Revoke or Adjudicate Community Supervision is filed. As a condition of Community Supervision, therefore, she is prohibited from contesting extradition to the State of Texas for any alleged violation of such Community Supervision;

(x) Furnish a sample of her breath, blood, or urine to any peace officer who has probable cause to believe the probationer has committed any crime in chapter 49 of the Texas Penal Code and who requests such a sample;

(y) Take all medications as prescribed.

(z) Defendant shall immediately submit a DNA sample as directed by the Denton County Community Supervision and Corrections Department;

(aa) Beginning INSTANTER, Probationer shall secure-a transdermal ankle monitoring device and maintain same for remaining period of probation or until released by the Court. Probationer will pay all costs associated with the monitor. Probationer will not tamper with monitor or obstruct the monitor. Probationer will not miss any communication times set out in the participation agreement, which shall include daily downloads. Probationer will abide by all rules set out by the participant agreement. Probationer will show monitor to supervising officer at each contact.

(bb) Pay a laboratory fee of $____ to the Denton County Community Supervision and Corrections Department within 120 days of the date of this order for testing performed by _____.

(cc) Have no direct or indirect contact with the victim, or the immediate family of the victim;

(dd) Complete an Ethics Management Course to be chosen by the defendant and approved by the supervision officer;

(ee) Write a letter of apology to the victim, Lelon Townsend, to be approved and delivered by the supervision officer;

Signed and entered on October 10, 2013

/s/ Margaret Barnes
MARGARET BARNES
Judge Presiding

I AM THE PERSON WHO RECEIVED THIS JUDGEMENT AND SENTENCE ASSESSED ON THIS DATE. /s/ [Illegible] [right thumb print]

APPENDIX B

IN THE EIGHTH COURT OF APPEALS OF TEXAS

[Filed 4/21/2014]

No. 08-13-00334-CR

WENDEE LONG

Appellant

vs.

THE STATE OF TEXAS

Appellee

ON APPEAL FROM THE 367TH DISTRICT COURT OF DENTON COUNTY, TEXAS, CAUSE NO. F-2013-1478-E, THE HONORABLE MARGARET BARNES PRESIDING

APPELLANT'S BRIEF ON DIRECT APPEAL

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Issue Presented

To be guilty of unlawfully intercepting, or disclosing, an oral communication, the State is required to prove that the person who uttered that communication had a reasonable expectation of privacy. A public employee in a public school does not have such an expectation. Did the trial court therefore err in overruling Long's motions for a directed verdict, judgment of acquittal, and new trial, and was the evidence thus legally insufficient, where the intercepted speech was a high school basketball coach's locker-room tirade?

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Identity of Parties and Counsel

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Statement of the Facts and Case

Long's daughter placed an iPhone in a high school locker room immediately before halftime of a girls basketball game, and again when the game ended, in the hopes of obtaining evidence of the abusive male coach. (RR4: 56-57, 62). She was successful, and Long sent the tapes to the school board. (SX10).

For her concern, Long was indicted on August 1, 2013, for the twin felonies of improper photography and unlawful interception of an oral communication. (CR: 6); *see* TEX. PEN. CODE § 21.15 & 16.02. A jury trial was held September 23 through September 25, 2013, at the conclusion of which Long made a motion for a directed verdict, arguing that "[n]othing is subject to privacy, not in a classroom setting." (RR4: 241). The court nonetheless denied the motion, and the jury then found Long not guilty as to the photography charge but guilty as to interception charge. (RR1: 4-7; CR: 88). Long filed a motion for a judgment of acquittal, again arguing that the complainant had no expectation of privacy and that Long therefore committed no crime, but the trial court again denied the motion. (CR: 79-84; RR6: 5-6). Long then agreed to a plea bargain offered by the State in which she would be sentenced to five years' confinement, probated for three years, and a $1,268 fine. (RR6: 7). Long did not waive her right to appeal, and filed notice of as much on October 10, 2013. (RR6: 8; CR: 85). Finally, On October 29 she filed a motion for new trial, again unsuccessfully arguing that she could not be guilty of the offense because the complainant had no reasonable expectation of privacy. (CR: 98-103).

Summary of the Argument

To be guilty of unlawfully intercepting or disclosing an oral communication, the State was required to

prove that the complainant justifiably expected his harangue to be private. A person is justified in that expectation if it is reasonable, and an individual has a reasonable expectation of privacy when he has both (1) an actual subjective expectation of privacy in the speech, and (2) that subjective expectation is one that society is willing to recognize as reasonable.

In this case, the State's evidence shows the complainant had neither. As to the latter, the activity of teaching in a public classroom does not fall within the expected zone of privacy. And as to the former, the complainant conceded that he recognized his halftime speeches could be intercepted at any time. Accordingly, because the complainant had no justifiable expectation of privacy in the intercepted communication, Long committed no crime and the trial court thus erred in overruling her motions for a directed verdict, a judgment of a acquittal, and a new trial. Additionally, the evidence is legally insufficient to support the verdict.

Argument

> The complainant had no reasonable expectation that his intercepted communication was private, and, accordingly, the trial court erred in overruling Long's motions for a directed verdict, a judgment of acquittal, and a motion for new trial. For the same reason, the evidence was legally insufficient to support the verdict.

◆ ◆ ◆

There is no real dispute as to the facts in this case. All parties agree Long's daughter recorded the complainant's halftime diatribe, and that Long then disseminated the recording to the school board with

the hopes of stopping his abuse. But, to be guilt of unlawfully intercepting or disclosing an oral communication, the State was required to prove that the complainant justifiably expected his harangue to be private. *See* TEX. PEN. CODE § 16.02; TEX. CODE CRIM. PROC. art. 18.20. A person is justified in that expectation if it reasonable. *See Ex parte Graves*, 853 S.W.2d 701, 706 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd) (no justifiable expectation of privacy because no reasonable expectation of privacy in jail phone calls); *Meyer v. State*, 78 S.W.3d 505, 509 (Tex. App.—Austin 2002, pet. ref'd) ("Because we conclude that appellant did not have a reasonable expectation of privacy under the circumstances shown here, we hold that appellant was not reasonably justified in the expectation that the statements he made while sitting in the patrol car would not be intercepted."). And an individual has a reasonable expectation of privacy when he has both (1) an actual subjective expectation of privacy in the speech, and (2) that subjective expectation is one that society is willing to recognize as reasonable. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996); *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

Here, the State's evidence shows the complainant had neither. Accordingly, Long argued in a motion for directed verdict, in a motion for judgment of acquittal, and finally in a motion for new trial that, even accepting the State's version of the facts, as a matter of law Long committed no crime. (RR4: 236-244; RR5: 6; CR: 79, 98). The trial court rejected Long's motions, though, and the jury found her guilty.

Long implores this Court that the trial court erroneously overruled each of these motions. Additionally, Long urges this Court that, for the same reason, the evidence was legally insufficient to find she had

committed a crime. Though this is really only one argument for this Court to consider, the standards of review vary. Accordingly, and to avoid the risk of rejection for combining independent grounds together, Long will set them out separately. *Belton v. State*, 900 S.W.2d 886, 902 (Tex. App.—El Paso 1995, pet. ref'd) (a multifarious point of error presents nothing for review).

I. *Issue One*: the trial court erred in overruling Long's motion for a directed verdict because the complainant had no justifiable expectation that only his students would acquire the contents of his communication

a. Standard of Review

To review a motion for directed verdict, this Court ordinarily uses the same standard of review it uses in reviewing the sufficiency of the evidence. *See Havard v. State*, 800 S.W.2d 195, 199 (Tex. Crim. App. 1989). And, in determining the legal sufficiency of the evidence to support a criminal conviction, the question is, of course, whether, after viewing all the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

"[I]n reviewing a trial court's directed verdict based on non-evidentiary grounds," however, "[t]he de novo review is the proper standard to be employed." *Graham v. Atl. Richfield Co*., 848 S.W.2d 747, 750 (Tex. App.—Corpus Chrisit 1993, pet. ref'd) (citing *McCarley v. Hopkins*, 687 S.W.2d 510, 512 (Tex. App.—Houston [1st Dist.] 1985, no writ)). Indeed, the Court of Criminal Appeals has made clear to courts of appeals to review de novo both questions of law and mixed

questions of law and fact not turning on evaluations of credibility and demeanor. *See, e.g., Johnson v. State*, 954 S.W.2d 770, 771 (Tex. Crim. App. 1997); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). And here, Long argued in her motion for a directed verdict that "[a]s a matter of law, it's permissible to tape a teacher in a classroom setting," and that, accordingly, the complainant could have no justifiable expectation of privacy." (RR4: 238-239). In fact, whether society is willing to recognize a particular set of circumstances as involving a reasonable expectation of privacy has always been treated as a question of law by the United States Supreme Court. *See Minnesota v. Olson*, 495 U.S. 91, 96–100 (1990) (overnight guest has a reasonable expectation of privacy in the home in which he stays); *Skinner v. Railway Labor Exec. Assn.*, 489 U.S. 602, 616–617 (1989) (a person has a reasonable expectation of privacy with regard to tests of his blood and urine); *Florida v. Riley*, 488 U.S. 445, 449–452 (1989) (no reasonable expectation of privacy from aerial surveillance of areas open to view from the air); *Calif. v. Greenwood*, 486 U.S. 35, 40–43 (1988) (no reasonable expectation of privacy in discarded garbage); *O'Connor v. Ortega*, 480 U.S. 709, 716–719 (1987) (whether there is a reasonable expectation of privacy in the government workplace and the extent of that privacy must be determined on a case-by-case basis; the Court determined that there was a reasonable expectation of privacy under the circumstances presented); *Hudson v. Palmer*, 468 U.S. 517, 525–528 (1984) (no reasonable expectation of privacy in prison cell); *Oliver v. United States*, 466 U.S. 170, 178–181 (1984) (no reasonable expectation of privacy in open fields, but there is a reasonable expectation of privacy in curtilage surrounding the home); *Michigan v. Clifford*, 464 U.S. 287, 292, 295 (1984) (whether a

reasonable expectation of privacy remains in a home damaged by fire depends upon the extent of damage; the Court found that there was a reasonable expectation of privacy under the circumstances presented).

In all of the above-cited cases, the Supreme Court decided on a de novo basis whether the fact situation presented gave rise to an expectation of privacy that society is willing to recognize as reasonable. This Court should in this case, as well. *See also State v. Hardy*, 963 S.W.2d 516, 523 (Tex. Crim. App. 1997) (whether particular historical facts give rise to protected reasonable expectation of privacy under Fourth Amendment law is a question of law to be reviewed de novo on appeal).

b. The complainant, a public school teacher, had no expectation of privacy when in his classroom that society recognizes as reasonable

Though society's recognition of an expectation of privacy is the second prong of the test for whether an individual had a reasonable expectation of privacy, if failed then the first prong – whether the complainant actually had such an expectation – is irrelevant. Because that is the case here, Long will address at the outset society's lack of recognition of such a right.

When reviewing de novo, a directed verdict is proper "when the law applied to the undisputed facts mandates a particular result." *Graham*, 848 S.W.2d at 750 (citing *McCarley*, 687 S.W.2d at 512). And in this case, even under the State's rosy view of the facts, the complainant – a public school employee instructing students on school grounds – had no reasonable expectation of privacy, nor a justifiable expectation that his communication was not subject to interception.

As an initial matter, it is clear that the coach-complainant's halftime speech was the equivalent of a teacher's speech in a classroom. The complainant himself testified that his presence in the locker room made it his classroom:

> Q: I mean, it's a – it's a – it's a convenient space for you, who are supposed to be an educator, to meet with your – the young ladies that are in a public school where you're a public teacher; is that right?
>
> A: That's correct.
>
> Q: It's a classroom basically; would you agree?
>
> A: Sometimes it is, yes.

(RR4: 159-160). He clarified by confirming that those times when it is instead "considered a private dressing room where girls dress and undress, [he] wouldn't have even – not have even been in there." (RR4: 160). A student, too, testified that the locker room was not private by virtue of the complainant's presence alone. (RR4: 82).

As to whether a teacher has a reasonable expectation of privacy in his classroom, then, as best as Long can identify only one Texas court has considered the question. Its decision, though, is directly contrary to the trial court's ruling here, and is especially forceful in light of the similar factual pattern. In that case, the teacher-appellant argued "she had an expectation of privacy in her classroom to be free from intrusion by videotaping, and that by videotaping her performance, over her objection, the school district violated her right of privacy as well as its own policy." *Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107, 110-11 (Tex. App.—

Houston [1st Dist.] 1990, writ denied). The Houston court swiftly dismissed the complaint, noting she "ha[d] not cited any authority, and [the court had] found none, relating to her claim of 'involuntary videotaping' of her performance as a teacher." *Id*. at 111. Nor could she. "To fall within the 'zone of privacy,' the activity must be one about which the individual possesses a reasonable expectation of privacy in the activity," and "[t]he activity of teaching in a public classroom does not fall within the expected zone of privacy." *Id*. (citing *Katz v. United States*, 389 U.S. 347, 351 (1967)). Supporting this holding, the court noted the teacher "was videotaped in a public classroom, in full view of her students, faculty members, and administrators. At no point, did the school district attempt to record [her] private affairs." *Id*.

The several other jurisdictions that have evaluated the issue have unanimously agreed. A California court of appeals, for instance, found that a teacher's expectations that her communications would be confined to the classroom unreasonable, as such communications "will virtually never be confined to the classroom," and that students "will, and usually do, discuss a teacher's communications and activities with their parents, other students, other teachers, and administrators." *Evens v. The Superior Court of Los Angeles County*, 77 Cal.App.4th 320, 325, 91 Cal.Rptr.2d 497 (2d Dist 1999).

The federal district court for Northern District of Illinois then cited *Evens* and adopted its holding:

> What is said and done in a public classroom is not merely liable to being overheard and repeated, but is likely to be overheard and repeated. A classroom in a public school is not the private property of any teacher. A

> classroom is a public space in which government employees communicate with members of the public. There is nothing private about communications which take place in such a setting.

Plock v. Bd. of Educ. of Freeport Sch. Dist. No. 145, 545 F. Supp. 2d 755, 758 (N.D. Ill. 2007) (citing *Evens*, 77 Cal.App.4th 320, 325).

Most significant is the Wisconsin Supreme Court's decision in *State v. Duchow*, 310 Wis.2d 1 (2008). In that case, that court found that a verbally abusive school bus driver "had no reasonable expectation in the privacy of his threats and abuse. . . on the school bus" because it "was public property, being operated for a public purpose." *Id*. at 26.

Duchow followed a Pennsylvania federal district court that held school bus drivers enjoyed a diminished expectation of privacy similar to that of teachers in classrooms. *Goodwin v. Moyer*, 549 F.Supp.2d 621 (M.D.Pa.2006). In *Goodwin*, a school bus driver sued various school district officials, claiming that the installation of a video camera on his school bus invaded his privacy. *Id*. at 625–26. The court held that the presence of a video camera did not violate the bus driver's reasonable expectation of privacy. *Id*. at 633. In so holding, the court reasoned that society, as well as the government, retains an interest in ensuring that the children and the bus driver alike are protected from "misdeeds" against each other. *Id*.

Long respectfully urges this Court that it is clear that society recognizes no expectation of privacy by a public employee on public school property. On this basis, alone, then, the complainant had no reasonable expectation of privacy, and thus no justifiable

expectation that his communication was not subject to interception. Accordingly, the law, even when applied to the undisputed facts, mandates an acquittal, and the trial court erred in overruling Long's motion for a directed verdict. *Graham*, 848 S.W.2d at 750 (citing *McCarley*, 687 S.W.2d at 512). This Court should reverse the trial court's judgment and enter a verdict of acquittal. *See State v. Moreno*, 294 S.W.3d 594, 599 (Tex. Crim. App. 2009) (directed verdict is equivalent of acquittal).

c. The complainant, by his own admission, did not have a subjective expectation of privacy in his classroom, either

Even if this Court were to find that the complainant's subjective expectation of privacy was recognized by society as legitimate, review of the record reveals this is the rare case where the complainant did not even have an actual subjective expectation of privacy. *See* 40 George E. Dix & John M. Schmolesky, *Texas Practice: Criminal Practice And Procedure* § 8:24 (3d ed. 2011) ("In practice, concern focuses almost exclusively upon the second of the two requirements distinguished by Justice Harlan – the objective requirement that a defendant's expectation of privacy have been reasonable."). As noted above, the complainant conceded the locker room was only a private location when the girls were undressing and he was not present, and that at other times it was a classroom. (RR4: 159-160). The complainant further testified that it was "not uncommon" or "common" for people to hear him yelling at his students, but that "most of the time" he could overhear the opposing team's coach in the neighboring locker room, and that he "wasn't really caring" if an opposing team overheard him. (RR4: 166-167). Finally, the complainant admitted that he was

"sure [it was] quite possible" someone could have video recorded his halftime lectures before. (RR4: 146).

The complainant's recognition, and indifference at the recognition, that his communications could have been intercepted at any time clearly reflects he had no actual expectation of privacy, reasonable or otherwise. Thus, on this basis, or that previously identified, or both, this Court should find that the complainant had no justifiable expectation of privacy in the intercepted communication, that Long therefore committed no crime, and to then reverse the trial court's judgment and enter a verdict of acquittal. *Villarreal*, 935 S.W.2d at 138 (to show reasonable expectation of privacy must have actual expectation of privacy).

II. *Issue Two*: the evidence was legally insufficient because the complainant had no justifiable expectation that only his students would acquire the contents of his communication

If this Court were to reject Long's assertion that whether the complainant had a reasonable expectation of privacy is a question of law to be reviewed de novo, and instead review Long's claim as a challenge to the sufficiency of the evidence, the standard of review is the familiar *Jackson v. Virginia* examination: this Court must consider all of the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, a jury was rationally justified in finding guilt beyond a reasonable doubt. *Jackson*, 443 U.S. at 318–19; *Adames v. State*, 353 S.W.3d 854, 859–60 (Tex. Crim. App. 2011). The jury is the sole judge of credibility and weight to be attached to the testimony of witnesses, and the jury is permitted to draw multiple reasonable inferences from facts as long as the evidence presented at trial supports each. *Jackson*,

443 U.S. at 319; *see Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007).

For all those reasons identified in Long's first issue, though, there is absolutely no evidence that the complainant had a reasonable expectation of privacy. And when there is no reasonable expectation of privacy, the complainant cannot have been justified in such an expectation, and the State could not have proven every element of the offense beyond a reasonable doubt. The total lack of evidence of any reasonable expectation demands reversal under any standard, then. *See, e.g., Christensen v. State*, 240 S.W.3d 25, 37 (Tex. App.—Houston [1st Dist.] 2007) (evidence legally insufficient where no evidence to support an element of the offense). Accordingly, Long respectfully requests this court to reverse her conviction and render a judgment of acquittal. *See Burks v. United States*, 437 U.S. 1, 17 (1978) (an appellate finding that evidence is "legally insufficient" in a technical sense is the equivalent of acquittal); *Greene v. Massey*, 437 U.S. 19 (1978) (re-trial not permissible after reviewing court has determined evidence is insufficient.).

III. *Issue Three*: the trial court erred in overruling Long's motion for a judgment of acquittal because the complainant had no justifiable expectation that only his students would acquire the contents of his communication

Long filed a motion for a judgment of acquittal on October 4, 2013, restating her same argument and asserting that "the elements of the offenses for which Long was indicted [could not have been] satisfied." (CR: 84). Because a challenge of the trial court's denial of a motion for instructed verdict is, in effect, a challenge to the legal sufficiency of the evidence supporting the conviction, this Court must again review

the evidence under the legal sufficiency standard of in the light most favorable to the verdict and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *See Williams v. State* 937 S.W.2d 479, 482 (Tex. Crim. App. 1996); *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000).

Because this is the same standard used in reviewing Long's second claim of error, for the sake of brevity Long simply urges this Court that, for all those reasons urged in her first issue, and as incorporated in her second issue, the trial court erred in overruling Long's motion for a judgment of acquittal. Long respectfully requests this court to reverse the judgment and enter a verdict of acquittal.

IV. *Issue Four*: the trial court erred in overruling Long's motion for a new trial because the complainant had no justifiable expectation that only his students would acquire the contents of his communication

Long filed a motion for a new trial on October 29, 2013, restating her same argument and asserting that "the elements of the offenses for which Long was indicted [could not have been] satisfied." (CR: 103). When deciding a motion for new trial such as this that essentially challenges the legal sufficiency of the evidence, the trial court applies the appellate legal sufficiency standard of review. *State v. Provost*, 205 S.W.3d 561, 567 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *State v. Savage*, 905 S.W.2d 272, 274 (Tex. App.—San Antonio 1995), aff'd, 933 S.W.2d 497 (Tex. Crim. App. 1996). When reviewing the trial court's determination, this Court also uses that standard. *State v. Moreno*, 297 S.W.3d 512, 522 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd.).

Because this is the same standard used in reviewing Long's second and third claims of error, for the sake of brevity Long simply urges this Court that, for all those reasons urged in her first issue, and as incorporated in her second issue, the trial court erred in overruling Long's motion for a new trial. Long respectfully requests this court to reverse the judgment and enter a verdict of acquittal.

V. Conclusion

The evidence presented in this case totally failed to show that the complainant uttered the intercepted communication with a justifiable expectation of its privacy. Accordingly, Long committed no crime, and the trial court erred in overruling her motions for a directed verdict, a judgment of acquittal, and a new trial. Additionally, the evidence is legally insufficient to support the verdict. Thus, Long respectfully requests this Court to reverse the judgment and enter a verdict of acquittal.

Respectfully submitted,

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Certificate of Service

I, the undersigned, hereby certify that a true and correct copy of the foregoing Appellant's Brief was e-mailed to Charles Orbison, Denton County Asst. District Attorney, at charley.orbison@dentoncounty.com, on April 21, 2014.

/s/ Bruce Anton
Bruce Anton

Certificate of Compliance

Pursuant to TEX. R. APP. P. 9.4(i)(3), undersigned counsel certifies that this brief complies with:

1. the type-volume limitation of TEX. R. APP. P. 9.4(i)(2)(B) because this brief contains 3,541 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).
2. the typeface requirements of TEX. R. APP. P. 9.4(e) and the type style requirements of TEX. R. APP. P. 9.4(e) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011 in 14-point Century.

/s/ Bruce Anton
Bruce Anton

APPENDIX C

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

No. 08-13-00334-CR

WENDEE LONG,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

Appeal from the 367th Judicial District Court of
Denton County, Texas (TC# F-2013-1478-E)

OPINION

The issue in this case of first impression is whether the following incidents constitute crimes under Texas's criminal wiretap statute: the surreptitious recording—later disclosed to a third party—of a public high school basketball coach's half-time and post-game speeches to his team in the visiting locker room of a public high school. In essence, a person violates the wiretap statute by intentionally recording, or intentionally disclosing the contents of, a "wire, oral, or electronic communication." *See* TEX.PENAL CODE ANN. § 16.02(b)(1), (b)(2)(West Supp. 2014). For purposes of the wiretap statute, an "oral communication" is one "uttered by a

person *exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation*." [Emphasis added]. *See* TEX.PENAL CODE ANN. § 16.02(a); TEX.CODE CRIM. PROC.ANN. art. 18.20, § 1(2)(West 2015). The threshold question, as framed by the parties, is whether the coach had a *reasonable expectation of privacy under the circumstances*. We conclude that he did not and, therefore, that the recordings in dispute are not "oral communications" covered by Section 16.02 of the Texas Penal Code, the statute used to convict Wendee Long. Accordingly, we reverse Long's conviction and render judgment acquitting her of the charged offense.

FACTUAL AND PROCEDURAL BACKGROUND

Lelon "Skip" Townsend was hired in 2011 to coach the Argyle High School girls' basketball team. Townsend was, in his own words, an intense coach, who preached discipline and accountability. Not surprisingly, reports of Townsend berating and belittling players in practice began surfacing the following school year. Long, a member of the Argyle School Board, was concerned about the reports, and she grew increasingly concerned when parents began contacting her to complain of Townsend's treatment of their children. Long's daughter had also been a member of the basketball team before quitting after the first regular season game.

On February 7, 2012, the Argyle High School girls' basketball team traveled to Sanger to play the Sanger High School girls' basketball team for the district title. Long's daughter attended the game as a spectator and, with the assistance of a Sanger student, obtained access to the visiting locker room before halftime for the purpose of surreptitiously videotaping Townsend. Long's daughter taped an iPhone to the inside of a

locker and set it to record. The iPhone captured an audio and video recording of Townsend's half-time speech[1] and an audio recording of Townsend's post-game speech[2].

In March 2012, Long showed the recordings, which were on her computer at work, to her assistant principal.[3] Later that month, Long mailed the recordings to the other members of Argyle School Board, and the recordings were distributed to the Board on the night of the meeting to consider Townsend's probationary contract. A few days later, the Superintendent of the Argyle Independent School District turned over the recordings to the police. A detective with the Sanger Police Department eventually traced the recordings to Long and her daughter.

Long was charged in a two-count indictment with, *inter alia*, violating Sections 16.02(b)(1) and (b)(2) of the Texas Penal Code.[4] Section 16.02(b)(1) provides

---

[1] Townsend's half-time speech was nine minutes in length. However, the recording introduced into evidence at trial depicted only the last two minutes. It appears that Long's daughter accidentally erased the first seven minutes of Townsend's half-time speech when she attempted to email the recording after retrieving the iPhone from the locker. Dissatisfied with the recording of the half-time speech, her daughter went back into the locker room "to get the end of game speech."

[2] Because the iPhone fell inside the locker room sometime after Townsend's half-time speech but before his post-game speech, it was unable to capture an audio/visual recording of the post-game speech. Only the audio portion of the speech was recorded.

[3] Long was the principal of Wayside Middle School in Saginaw, Texas.

[4] Long was also charged with, and tried for, improper photography or visual recording under Section 21.15 of the Texas Penal Code. *See* TEX.PENAL CODE ANN. § 21.15(b)(West 2011). The jury, however, found her not guilty on that count.

that a person commits an offense if she: "intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication." TEX.PENAL CODE ANN. § 16.02(b)(1). Section 16.02(b)(2) makes it a crime to: "intentionally disclose[] or endeavor[] to disclose to another person the contents of a wire, oral, or electronic communication if the person knows or has reason to know the information was obtained through the interception of a wire, oral, or electronic communication in violating of . . . [Subsection (b)]." TEX. PENAL CODE ANN. § 16.02(b)(2).

The State alleged Long violated Section 16.02(b)(1) by procuring her daughter to record Townsend's speeches and Section 16.02(b)(2) by showing the recording to her assistant principal.

The jury agreed, finding Long guilty. In accordance with the parties' plea-bargain agreement, the trial court sentenced Long to five years' confinement, probated for three years, and assessed a $1,000.00 fine.

On appeal, Long raises four issues for our review. In her second issue, she challenges the sufficiency of the evidence to sustain her conviction. In her first, third, and fourth issues, respectively, she asserts that the trial court erred in overruling her motions for directed verdict, for judgment of acquittal, and for a new trial. Although Long enumerates four issues, all rest on the premise that she committed no crime because, as a matter of law, Townsend "had no justifiable expectation that only his students would acquire the contents of his communication."

REASONABLE EXPECTATION OF PRIVACY UNDER THE CIRCUMSTANCES

As mentioned in the preceding paragraph, Long moved for a directed verdict at trial and for a judgment of acquittal after trial. The basis for both motions was the argument that Townsend had no reasonable expectation of privacy, nor a justifiable expectation that his communication was not subject to interception, because his lecture to the team was public speech, which is subject to lawful recording regardless of where it occurs. In her appellate briefing, Long contends that the trial court erred in overruling her motions for directed verdict and for judgment of acquittal because, under the circumstances, Townsend had no reasonable expectation that his intercepted communication was private. We agree.

Standard of Review

Both parties acknowledge that a trial court's ruling on a motion for directed verdict or judgment of acquittal based on a question of law is subject to *de novo* review on appeal. *See Graham v. Atl. Richfield Co.*, 848 S.W.2d 747, 750 (Tex.App.—Corpus Christi 1993, writ denied)(*de novo* review is the proper standard to be employed by an appellate court in reviewing a trial court's directed verdict based on non-evidentiary grounds); *Johnson v. State*, 954 S.W.2d 770, 771 (Tex.Crim.App. 1997)(question of law are subject to *de novo* review). A directed verdict is proper when the law applied to the undisputed facts mandates a particular result. *Graham*, 848 S.W.2d at 750. Here, the question of law is whether Townsend had a reasonable expectation of privacy in his speeches. To answer that question, we turn to the concept of privacy espoused in federal law.

Applicable Law

It is beyond dispute that the Texas criminal wiretap statute, Section 16.02, is substantially similar to the federal one on which it is modeled, the Wiretap Act, codified as 18 U.S.C. §§ 2510-2521.[5] *See Alameda v. State*, 235 S.W.3d 218, 220, 222 (Tex.Crim.App.), *cert. denied*, 552 U.S. 1029, 128 S.Ct. 629, 169 L.Ed.2d 406 (2007)(recognizing similarity); *Meyer v. State*, 78 S.W.3d 505, 509 (Tex.App.—Austin 2002, pet. ref'd)(same). Indeed, the respective definitions of "oral communication" in both statutes are comparable. *Compare* 18 U.S.C. § 2510(2)(defining "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication."), *with* TEX. CODE CRIM.PROC.ANN. art. 18.20, § 1(2)(defining "oral communication" as "any oral communication uttered

[5] The Wiretap Act was enacted in 1968 as Title III of The Omnibus Crime Control and Safe Streets Act of 1968. Pub.L. 90-351. In 1986, it was amended by the Electronic Communications Privacy Act of 1986 (hereinafter, the "ECPA") to include electronic communication as well as oral and written communications. *See generally* Act of October 21, 1986, Pub.L. No. 99-508, 100 Stat. 1848. In turn, the ECPA was amended by the following statutes: (1) the Communications Assistance for Law Enforcement Act—*see generally* Act of October 25, 1994, Pub.L. 103-414, 108 Stat. 4279—(2) the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001—*see generally* Act of October 26, 2001, Pub.L. 107-56, 115 Stat. 272—(3) the USA PATRIOT Improvement and Reauthorization Act of 2005—*see generally* Act of March 9, 2006, Pub.L. 109-177, 120 Stat. 192—and (4) the FISA Amendments Act of 2008—*see generally* Act of July 10, 2008 Pub.L. 110-261, 122 Stat. 2436.

by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation. The term does not include any electronic communication."). It is also beyond dispute that, in interpreting Section 16.02, we may rely on decisions from other state courts and federal courts construing the Wiretap Act. *See Alameda*, 235 S.W.3d at 18; *Meyer*, 78 S.W.3d at 509.

The legislative history of the Wiretap Act reveals that Congress's intent was to protect persons engaged in oral communications under circumstances justifying an expectation of privacy. *United States v. McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978). Thus, to determine whether a person had a reasonable expectation of privacy in his speech, we employ a two-prong test: (1) did the person exhibit a subjective expectation of privacy; and (2), if so, is that subjective expectation one society is willing to recognize as reasonable. *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979); *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex.Crim.App. 1996). That determination is made on a case-by-case basis and is highly fact determinative. Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis. *O'Connor v. Ortega*, 480 U.S. 709, 718, 107 S. Ct. 1492, 1498, 94 L. Ed. 2d 714 (1987).

Discussion

Based on the application of existing authority to the evidence adduced at trial, we conclude that Townsend did not have a reasonable expectation of privacy in his half-time and post-game speeches to his players.

It is widely accepted that a public school teacher has no reasonable expectation of privacy in a classroom setting. *See Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107 (Tex.App.—Houston [1st Dist.] 1990, writ denied); *Plock v. Bd. of Educ. of Freeport Sch. Dist. No. 145*, 545 F. Supp. 2d 755 (N.D. Ill. 2007); *Evens v. Super. Ct. of L.A. County*, 77 Cal.App.4th 320, 91 Cal.Rptr.2d 497 (1999). In *Roberts*, the court held that a public school teacher had no legal complaint against a school district for audiotaping and videotaping her classroom performance because a teacher has no reasonable expectation of privacy while teaching in a public classroom. 788 S.W.2d at 111. There, the school district's assessment team videotaped a teacher's classroom performance, with the teacher's knowledge but over her objection. *Id.* at 108. After reviewing the videotape, the assessment team recommended that the school district terminate the teacher for incompetence and inefficiency. *Id.* The school district notified the teacher of her impending termination. *Id*. at 108-09. The teacher contested the proposed termination, and the school board held a hearing and considered evidence, including excerpts from the videotapes. *Id.* at 109. The teacher sued for invasion of privacy. *Id*. at 109. The court rejected her claim on the basis that she had not demonstrated "that she had a 'reasonable expectation of privacy' in her public classroom." *Id.* at 111. In reaching this conclusion, the court reasoned that "the activity of teaching in a public classroom does not fall within the expected zone of privacy" because "[t]here is no invasion of the right of privacy when one's movements are exposed to public views generally." *Id.* The court noted that the teacher "was videotaped in a public classroom, in full view of her students, faculty members, and administrators [and]

[a]t no point, did the school district attempt to record [the teacher's] private affairs." *Id*.

In *Plock*, the federal district court held that special education teachers could not enjoin the school district from installing audio/visual recording equipment in their classrooms because the teachers had no reasonable expectation of privacy in communications in their classrooms. *Id.* at 758. There, the teachers claimed that the proposed audio monitoring of their classrooms through audio/visual equipment would violate their Fourth Amendment right to be free unreasonable searches and seizure. *Plock*, 545 F.Supp.2d at 756. The court rejected the teachers' claim on the basis that any expectation of privacy in communications taking place in classrooms that are open to the public was inherently unreasonable because the classrooms were not solely reserved for the teachers' exclusive, private use. *Id*. at 758. In reaching this conclusion, the court reasoned that communications in a public classroom are not private because "[w]hat is said and done in a public classroom is not merely liable to being overheard and repeated, but is likely to be overheard and repeated." *Id*. The court did acknowledge, however, that "a teacher's personal office space," including his or her desk and locked file cabinets, "could conceivably be reserved for the teacher's exclusive use, giving rise to an expectation of privacy which society is willing to recognize as reasonable." *Id.* at 757.

In *Evens*, the court held that California's privacy laws do not prohibit school officials from using an illegal videotape recording of a teacher in disciplinary actions because the privacy laws did not expressly prohibit that type of use and because the recording in issue was not the type of "confidential communication" protected by the privacy laws. 77 Cal.App.4th at 323-

24, 91 Cal.Rptr.2d at 498-99. There, two students surreptitiously videotaped a public high school science teacher in her classroom and delivered it to the school board and district. *Id*. at 322, 91 Cal.Rptr.2d at 498. The teacher sought a judicial declaration that state statutes prohibited these entities from viewing the videotapes because evidence obtained as a result of unconsented recordings cannot be used in any administrative or judicial proceeding. *Id*. at 322-23, 91 Cal.Rptr.2d at 498-99. The court rejected the teacher's argument on the basis that the "videotape recording . . . was made in a public classroom" and was therefore not considered a "confidential communication" because the teacher's expectation that her communications and activities would be private and confined solely to the classroom was unreasonable. *Evens*, 77 Cal. App.4th at 323-24, 91 Cal.Rptr.2d at 498-99. In reaching this conclusion, the court reasoned that a teacher's communications and activities in a public classroom are not private because:

> [They] will virtually never be confined to the classroom. Students will, and usually do, discuss a teacher's communications and activities with their parents, other students, other teachers, and administrators. . . . A teacher must always expect 'public dissemination' of his or her classroom 'communications and activities.'

Id. at 324, 91 Cal.Rptr.2d at 499.

While not as widely accepted as the proposition that a public school teacher has no reasonable expectation of privacy in a classroom setting, a public high school coach—like a public high school teacher—is an educator, in the broadest sense of the word. The essence of an educator's role is to prepare students to

fulfill their role as responsible citizens in a free society. *Lowery v. Euverard*, 497 F.3d 584, 589 (6th Cir. 2007); *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001). "Educating students includes not only classroom teaching, but also supervising and educating students in all aspects of the educational process." *Ex parte Trottman*, 965 So.2d 780, 783 (Ala. 2007). Extracurricular activities are important to many students as part of a complete educational experience. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311, 120 S.Ct. 2266, 2280, 147 L.Ed.2d 295 (2000). To "educate" means "to train by formal instruction and supervised practice esp. in a skill, trade, or profession" or "to develop mentally, morally, or aesthetically esp. by instruction." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 396 (11th ed. 2009).

Although the duties of a coach are not comparable to that of the typical classroom teacher, no one could reasonably deny that some of the duties of a coach involve a type of teaching. *Theiler v. Ventura Cnty. Cmty. Coll. Dist.*, 198 Cal.App.4th 852, 859, 130 Cal. Rptr.3d 273, 277 (2011), *as modified* (Aug. 24, 2011). A public high school coach educates students-athletes in a myriad of ways. Principally, a coach provides instruction to help his players reach a certain performance standard in a chosen activity. *See Lowery*, 497 F.3d at 589 (recognizing that "the immediate goal of an athletic team is to win the game, and the coach determines how best to obtain that goal[]"); *Ex parte Nall,* 879 So.2d 541, 546 (Ala. 2003)(holding that student injured during baseball practice could not recover in negligence suit against public school coaches because they were state agents entitled to immunity for the exercise of judgment in *educating* students). Secondarily, a coach teaches his players to develop self-discipline, an admirable trait and one necessary

for success in most endeavors in life, including academics. *See Lowery*, 497 F.3d at 589 (recognizing that students participating in sports develop discipline, and that "[a]thletic programs may also produce long-term benefits by distilling positive character traits in the players[]"*); Ex parte Yancey*, 8 So.3d 299, 305-06 (Ala. 2008)(holding that student injured while cleaning field house following weight-lifting class taught by high school public coach could not recover in negligence suit against the coach because he was a state agent entitled to immunity for the exercise of judgment in teaching students *discipline* in his weight-lifting class by requiring then to clean field-house facilities).

From the preceding authority, we can extrapolate that society is not willing to recognize that a public school educator—whether a teacher or a coach—has a reasonable expectation of privacy in his or her instructional communications and activities, regardless of where they occur, because they are always subject to public dissemination and generally exposed to the public view. Here, there is no doubt that Townsend was an educator helping his pupils maximize performance and develop discipline. At trial, Townsend acknowledged his role as an educator:

> [DEFENSE COUNSEL]: Even though it has a – it can be a private dressing room during the times that you just described when the girls are changing clothes or going to the bathroom back in the bathroom part – or it can be used as a space for you to be an educator; is that correct?
>
> [TOWNSEND]: Yes, sir.
>
> [DEFENSE COUNSEL]: I mean, it's a – it's a – it's a convenient space for you, who

> are supposed to be an educator, to meet with your – the young ladies that are in a public school where you're a public teacher; is that right?
>
> [TOWNSEND]: That's correct.
>
> [DEFENSE COUNSEL]: It's a classroom basically; would you agree?
>
> [TOWNSEND]: Sometimes it is, yes.

Townsend also identified for the jury the lessons he strived to impart on his players:

> I expect my kids to work hard. I expect my kids to be disciplined. I want a disciplined team, which just means that I want the kids to play together, to do what the coaches ask them to do, to buy into what we're doing, and just play as hard as they can.
>
> And, you know – and I know winning is important. I've never been in a gym that there wasn't a scoreboard up there, so I know winning's – the score means something, but I – one of my – my style has always been this, is winning takes care of itself when you – when you develop kids who have discipline, who are determined, have determination, they dedicate theirselves, and they have a good character.
>
> So we always try to do things that develop character in the kids and a good work ethic and accountability. Those are the things that we look for on a team. And something that's always been my trademark in any of my teams is we're – we're able to accomplish that, those things, whether winning or not.

Just as important, Townsend was well aware that his communications to his players were subject to public dissemination. In the audio recording of his speech to the team following the loss to

Sanger, Townsend can be heard telling the players:

> And you know, I know the deal. You go home and you tell your parents, 'Well, uh that's what they told me to do; I . . . screwed up but that's what they told me to do.' And that's easy to do coming from you to them, you know, when there's not me there to say, 'I don't believe that is what I told you to do.' It's kinda easy to do that, you know. If that, if that's how you live, that's that's – go ahead and live like that.

Accordingly, we conclude that society is not willing to recognize as reasonable any expectation of privacy in half-time and post-game instructional communications uttered by a public high school basketball coach to his team in the visiting locker room of a public high school.

The State takes umbrage with the proposition "that a coach addressing his team during and after a sports contest is 'equivalent' to a teacher addressing a class." The State asserts a "coach is different from a teacher" in two important respects. The first is that "[a] coach's objective is not pedagogical in nature, but rather to achieve success in the sports arena." The second is that "the nature of a coach's behavior with his team on game day" in a closed locker room is private rather than public. In essence, the State is contending that the curtailed expectation of privacy society is willing to recognize for teachers "should not automatically be applied to coaches addressing their teams at halftime

or at the end of a sports contest" because a coach fulfills a different role in a different physical space. While we are not insensitive to the State's argument, we are not persuaded by it.

In support of its proposition that high school coaches are not akin to a high school teachers because high school coaches "do not contribute to a student's generalized knowledge base regarding educational requirements of a high school as do teachers of subjects such as science, math, or social studies[,]" the State cites *Dambrot v. Central Michigan Univ.*, 55 F.3d 1177 (6th Cir. 1995). The State's reliance on *Dambrot* is misplaced.

In *Dambrot*, the Sixth Circuit Court of Appeals held that the coach of a state university basketball team did not engage in protected speech when he used the word "nigger" during a locker-room peptalk. 55 F.3d at 1187. The court so held for a variety of reasons, including the rationale that the coach could not bring himself under the protection of academic freedom because he used the derogatory term to motivate rather than to educate. *Id.* at 1188-91. In making the point that the coach's speech was removed from any academic context, the court observed:

> Dambrot's use of the N-word is even further away from the marketplace of ideas and the concept of academic freedom because his position as coach is somewhat different from that of the average classroom teacher. Unlike the classroom teacher whose primary role is to guide students through the discussion and debate of various viewpoints in a particular discipline, Dambrot's role as a coach is to train his student athletes how to win on the court. The plays and strategies are seldom up

> for debate. Execution of the coach's will is paramount. Moreover, the coach controls who plays and for how long, placing a disincentive on any debate with the coach's ideas which might have taken place.

Id. at 1190.

But the court's observations in *Dambrot* are inapplicable in resolving this case. The issue here is whether Townsend had a reasonable expectation of privacy in his speeches. It is not, as it was in *Dambrot*, whether the contents of Townsend's speeches were protected under the First Amendment as matters of public concern. The two are distinct legal inquiries. Furthermore, the context in which sports and academics were distinguished in *Dambrot* is of no help here. The court merely illustrated the distinction between the two disciplines in relation to speech intended for a private rather than a public audience. Because the illustration does not explain why the distinction matters in any other context, it provides no guidance in answering the burning question: does a public high school coach have a reasonable expectation of privacy in half-time and post-game instructional communications to his team. *Dambrot* is thus inapposite.

In support of its proposition that coaches are not akin to teachers because "[,]in the context of a sports contest, a locker room is surely not a classroom, but a place for student athletes . . . to be reminded of the particular game plan and strategy for the game at hand, to consider how to improve performance at halftime of the game, and to hear an assessment of performance at the conclusion of the contest . . .[,]" the State cites *Borden v. Sch. Dist. of the Township of East Brunswick*, 523 F.3d 153 (3rd Cir. 2008), *cert denied*,

555 U.S. 1212, 129 S.Ct. 1524, 173 L.Ed.2d 656 (2009). The State's reliance on *Borden* is misplaced.

In *Borden*, the Third Circuit Court of Appeals held that a public school football coach's twenty-three-year practice of "engag[ing] in the silent act [ ] of bowing his head during his team's pre-meal grace and taking a knee with his team during a locker-room prayer" constituted an unconstitutional endorsement of religion. 523 F.3d at 158, 176-78. In reaching this holding, the court disposed of the coach's argument that his conduct was a "matter[] of public concern triggering protection of his rights, as a public employee, to freedom of speech" by highlighting the facts supporting its conclusion that the coach's speech was not public in nature:

> Borden's speech does not occur in any type of official proceeding, and even more importantly, Borden's speech does not extend into any type of public forum. In fact, Borden himself admits that the bowing of his head and taking of a knee occur in private settings, namely at an invitation-only dinner and *in a closed locker room*. Again, we find further support for this decision in the Sixth Circuit's opinion in *Dambrot*, where the court noted the private nature of the coach's message to his players because the coach's pep talk was given *in a locker room for the private consumption of his players*. 55 F.3d at 1188. Thus, we conclude that as in *Dambrot*, the bowing of Borden's head and taking a knee are meant for the *consumption of the football team only*. [Emphasis added].

523 F.3d at 171. The State directs our attention to the italicized portions of this passage.

But just as the court's observations in *Dambrot* are inapplicable in resolving this case, so too are the court's observations in *Borden*. This is because *Dambrot* and *Borden* are of the same ilk. Thus, for the reasons articulated above, *Borden* is inapposite. Furthermore, *Roberts*, *Plock*, and *Evans* make clear that an educator has no expectation of privacy in a space where he or she is providing instructional communications and activities to students. Here, Townsend was providing instructional communications to his players. That the instructional communications took place in a visiting locker room is inconsequential because the space was open to and occupied by student-athletes for the very purpose of receiving instruction.

Because society is not willing to recognize as reasonable any expectation of privacy in half-time and post-game instructional communications uttered by a public high school basketball coach to his players in the visiting locker room of a public high school, Townsend did not have justifiable expectation that only they would acquire the contents of his communications. Consequently, the recordings in dispute are not "oral communications" covered by Section 16.02 of the Texas Penal Code.

Long's first and third issues are sustained. Given our disposition of these issues, we need not address her remaining issues. *See* TEX.R.APP.P. 47.1 (providing that the court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal).

CONCLUSION

The trial court's judgment is reversed, and we render judgment acquitting Long of the charged offense.

June 30, 2015

YVONNE T. RODRIGUEZ, Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.
(Publish)

APPENDIX D

IN THE TEXAS COURT OF CRIMINAL APPEALS

PD-0984-15

WENDEE LONG

Respondent-Appellant

vs.

THE STATE OF TEXAS

Petitioner-Appellee

From the Eighth Court of Appeals
Cause No. 08-13-00334-CR
Appeal from the 367th District Court of Denton County, Texas, Cause No. F-2013-1478-E

RESPONDENT'S BRIEF ON DISCRETIONARY REVIEW

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Statement of the Case and Facts

Long's daughter placed an iPhone in a high school locker room immediately before halftime of a girls basketball game, and again when the game ended, in the hopes of obtaining evidence of the coach's verbal abuse. (RR4: 56-57, 62). She was successful, and Long sent the tapes to the school board. (SX10).

For this, Long was indicted on August 1, 2013, for the twin felonies of improper photography and unlawful interception of an oral communication. (CR: 6); *see* TEX. PEN. CODE § 21.15 & 16.02. A jury trial was held September 23 through September 25, 2013, at the conclusion of which Long moved for a directed verdict, arguing that, because "[n]othing is subject to privacy, not in a classroom setting," she could not possibly have invaded the complainant's privacy. (RR4: 241); *see* TEX. PEN. CODE § 21.15 & 16.02. The court nonetheless denied the motion, and the jury then found Long not guilty of the photography charge but guilty of the interception charge. (RR1: 4-7; CR: 88). Long then filed a motion for a judgment of acquittal, again arguing that the complainant had no expectation of privacy and that therefore she committed no crime, but the trial court again denied the motion. (CR: 79-84; RR6: 5-6). Long then agreed to a plea bargain offered by the State in which she would be sentenced to five years' confinement, probated for three years, and fined $1,268. (RR6: 7). Long did not waive her right to appeal, and filed notice of as much on October 10, 2013. (RR6: 8; CR: 85). Finally, on October 29, 2013, she filed a motion for new trial, again unsuccessfully arguing that she could not be guilty of the offense because the complainant had no reasonable expectation of privacy. (CR: 98-103).

In Long's opening brief on appeal, she urged the court of appeals that, to be guilty of unlawfully intercepting or disclosing an oral communication, the State was required to prove that the complainant justifiably expected his harangue to be private. (Ap. Br. at 7) (citing TEX. PEN. CODE § 16.02 and TEX. CODE CRIM. PROC. art. 18.20). And, as multiple Texas, state, and federal courts of appeals have recognized, a person is justified in that expectation only if it is reasonable, and an individual has a reasonable expectation of privacy when he has both: (1) an actual subjective expectation of privacy in the speech; and (2) that subjective expectation is one that society is willing to recognize as reasonable. (Ap. Br. at 8) (citing *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996); *Smith v. Maryland*, 442 U.S. 735, 740 (1979)). In this case, the State's evidence shows the complainant had neither. Accordingly, because the complainant had no justifiable expectation of privacy in the intercepted communication, Long committed no crime and the trial court thus erred in overruling her motions for a directed verdict, a judgment of a acquittal, and a new trial. (Ap. Br. at 13-23, 25-28). Additionally, the evidence is legally insufficient to support the verdict. (Ap. Br. at 23-25).

In an opinion released on June 30, 2015, the court of appeals agreed. *Long v. State*, 469 S.W.3d 304 (Tex. App.—El Paso 2015). The State's petition then followed.

Issue Presented

> Whether, in determining whether a speaker has a justifiable expectation that his oral communication will not be intercepted, *see* TEX. CODE CRIM. PROC. art. 18.20 §(1), Texas courts should follow nearly every other court

across the country that has considered the issue and apply *Katz v. United States*'s reasonable-expectation-of-privacy test.

Summary of the Argument

Modeled on the federal Wiretap Act, section 16.02 of the Texas Penal Code criminalizes the unlawful interception of an "oral communication." The Code of Criminal Procedure, in turn, defines an "oral communication" as "an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation." Nearly every court across the country to have considered the meaning of "circumstances justifying that expectation"—both state and federal—has concluded that, to determine whether a speaker's expectation is justified, courts are to employ the reasonable-expectation-of-privacy test articulated by the Supreme Court in *Katz v. United States*. And the court of appeals in this case did just that in overruling Long's conviction for unlawful interception of an oral communication. But the State, before this Court, now contends that the court of appeals, and all those courts it followed, improperly brought in the *Katz* test to determine whether the complainant had a justifiable expectation his halftime diatribe would not be intercepted.

The State first argues that "circumstances justifying the expectation" that a "communication is not subject to interception" is unambiguous, and thus the court of appeals was wrong to evaluate that element by considering whether the complainant had "a reasonable expectation of privacy." In arguing that the meaning is clear, however, the State never explains what "circumstances justifying the expectation" means. Long urges this Court that the State's total inability

to define or explain that which it contends to be unambiguous is indicative of the merits of that contention. But, more importantly, Long urges this Court that the plain language of the statute is classically ambiguous. Ambiguity exists when reasonably well-informed persons may understand the statutory language in two or more different senses. And here, where the language in question—"under circumstances justifying that expectation"—prompts an individual evaluation, it necessarily may be understood in multiple different senses.

The State further argues that "circumstances justifying that expectation" *can't* mean what nearly every other court across the country has concluded. The State advances four main arguments for this proposition: (1) the plain language of the statute doesn't say "reasonable expectation of privacy"; (2) employing the "reasonable expectation of privacy standard" is "absurd"; (3) extratextual sources indicate the legislatures did not wish courts to evaluate "reasonable expectation of privacy"; and finally, (4) all those cases which hold otherwise are poorly reasoned. Each contention is meritless.

First, that the statute "does not mention anything about some broad 'right to privacy'" is exactly why the test is brought in: the statute does not mention *any* test for evaluating whether an expectation is justified. Second, only by a glaring misreading of the court of appeals's holding in this case does employing the reasonable-expectation-of-privacy standard render "absurd results." The State's argument that a non-existent holding is absurd, then, is irrelevant. Third, "[t]he legislative history of Title III shows that Congress intended [the] definition [of oral communication] to parallel the 'reasonable expectation of privacy test'

articulated by the Supreme Court in *Katz*." And the State's argument that "[p]olicy supports a plain reading of the statute" entirely ignores the "justifiable" element. Finally, of the mere three cases interpreting the statute that the State approves of—in contrast to the overwhelming majority the State acknowledges support the use of *Katz*'s test—none of those cases support the outright rejection of the reasonable-expectation-of-privacy test that is embraced by nearly every court to have considered the issue. None hold as the State asks this Court to hold now.

That each of the State's arguments against the common interpretation of the statute fails is understandable. For, again, far from foreclosing use of the reasonable-expectation test, "[t]he legislative history of [the Wiretap Act] shows that Congress *intended* [the] definition [of oral communication] to parallel the 'reasonable expectation of privacy test' articulated by the Supreme Court." And under that test, the State cannot prove, and now no longer even argues, that the high-school-coach complainant had a justifiable expectation that his halftime tirades in a teenage-girls' locker room would not be intercepted. Accordingly, Long respectfully requests this Court to affirm the court of appeals's opinion reversing her conviction for unlawful interception of an oral communication.

Argument

> In determining whether a speaker has a justifiable expectation that his oral communication will not be intercepted, Texas courts should follow nearly every other court across the country that has considered the issue and apply *Katz v. United States*'s reasonable-expectation-of-privacy test.

◆ ◆ ◆

Before the court of appeals, the State argued that the complainant—an adult male high-school coach—had a reasonable expectation of privacy in a populated teenage-girls' locker room. The court of appeals disagreed and reversed Long's conviction for unlawfully intercepting the complainant's verbal abuse of the girls. *See* TEX. PEN. CODE § 16.02 (criminalizing the unlawful interception of an "oral communication"); TEX. CODE CRIM. PROC. art. 18.20 § 1(2) ("'Oral communication' means an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation.").

Before this Court, the State has now abandoned that argument, instead contending that the court of appeals considered (and the State argued) the wrong issue. *Cf. Long v. State*, 469 S.W.3d 304, 306 (Tex. App.—El Paso 2015) ("The threshold question, as framed by the parties, is whether the coach had a reasonable expectation of privacy under the circumstances."). The State asserts Long's conviction hinges not on whether the complainant had a reasonable expectation of privacy in a teenage-girls' locker room, and the court of appeals was wrong to "rel[y] exclusively on a single Ninth Circuit decision" in determining otherwise. (Br. at 6, 8).

In so arguing, however, the State acknowledges such a holding would be contrary not just to the Ninth Circuit, but to the overwhelming majority of courts across Texas and the United States (and, indeed, to several courts and opinions not acknowledged by the State). (Br. at 8, 25-27); *see infra* at 20-23. The State asks this Court to flout all those opinions of the federal

and state courts of appeals, though, because it contends the plain language of the statute is actually *clearly* contrary to those courts' interpretation, and because those courts' interpretation of the statute is "absurd," contrary to legislative history, and feebly reasoned.

In fact the State does not know better than all those courts. The common interpretation is perfectly harmonious with the decidedly ambiguous statute and its legislative history. The opinions concluding as much are well-reasoned. The common interpretation leads to absurd results only where the State, as here, entirely mischaracterizes its application. And perhaps most tellingly, the State offers absolutely no alternative interpretation for the statute's language. Accordingly, Long respectfully requests this Court to follow nearly every other court to have interpreted the oral communication statute and affirm the court of appeals's opinion reversing her conviction.

I. The State argues the plain language of the statute is unambiguous by removing its crucial element

Modeled on the federal Wiretap Act ("Title III"), section 16.02 of the Texas Penal Code criminalizes the unlawful interception of an "oral communication." TEX. PEN. CODE § 16.02; *see Alameda v. State*, 235 S.W.3d 218, 220, 222 (Tex. Crim. App. 2007) (recognizing similarity between state and federal statutes). The Code of Criminal Procedure, in turn, defines an "oral communication" as "an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation." TEX. CODE CRIM. PROC. art. 18.20 § 1(2). At issue before this Court

is that final phrase: "circumstances justifying that expectation."

The State first contends the court of appeals, and all those courts across the country it followed, improperly brought in an outside test for whether the complainant had a justifiable expectation his halftime diatribe would not be intercepted: *Katz*'s reasonable-expectation-of-privacy test. (Br. at 11-13); *see State v. Granville*, 423 S.W.3d 399, 418 (Tex. Crim. App. 2014) ("Under the privacy-based model of the Fourth Amendment set forth by *Katz v. United States*, 389 U.S. 347 (1967) . . . . to prove that a legitimate expectation of privacy existed [the actor must demonstrate] that (1) by his conduct, he exhibited an actual intention to preserve something as private, and (2) this subjective expectation of privacy is one that society is prepared to recognize as reasonable."). And, to that end, Long generally agrees with the State's summary of the principles of statutory construction. When appellate courts interpret statutes, their constitutional duty is to determine and give effect to the apparent intent of the legislators who voted for it. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). Indeed, "the Legislature is constitutionally entitled to expect that the Judiciary will faithfully follow the specific text that was adopted." *Id*. "In determining this apparent legislative intent, [this Court must] focus [its] attention on the text of the statute and ask [itself], how would ordinary legislators have understood that text?" *Whitehead v. State*, 273 S.W.3d 285, 288 (Tex. Crim. App. 2008) (citing *Lanford v. Fourteenth Court of Appeals*, 847 S.W.2d 581, 586 (Tex. Crim. App. 1993)). Appellate courts must look to the statute's literal text and "'read words and phrases in context and construe them according to the rules of grammar and usage.'" *Harris*, 359 S.W.3d at 629 (quoting *Lopez v. State*, 253 S.W.3d

680, 685 (Tex. Crim. App. 2008)). Words and phrases are construed under the rules of grammar and common usage unless they have acquired technical or particular meaning. *Ex parte Ruthart*, 980 S.W.2d 469, 472 (Tex. Crim. App. 1998). Most important for this case, "[o]nly if the statutory language is ambiguous, or leads to absurd results that the Legislature could not have possibly intended, may [courts] consult extratextual sources." *Harris*, 359 S.W.3d at 629 (citing *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991)); *see also Whitehead v. State*, 273 S.W.3d 285, 288 (Tex. Crim. App. 2008) ("Given this ambiguity in the statute, we may legitimately consider, in arriving at a sensible interpretation, such extratextual factors as legislative history or the probable consequences of a particular interpretation.").

The State argues that "circumstances justifying the expectation" that a "communication is not subject to interception" is unambiguous. (Br. at 11-12). Thus, the argument goes, the court of appeals was wrong to evaluate that element by considering whether the complainant had "a reasonable expectation of privacy." In arguing that the meaning is clear, however, the State never explains what "circumstances justifying the expectation" means. This paragraph of the State's brief is particularly representative:

> Read as a whole, this statutory scheme concerns a specific type of invasion of privacy unrelated to whether someone present could repeat what she heard. Rather, it prohibits people who are not party to a conversation from recording that conversation without the knowledge or consent of the parties, provided the parties recorded exhibited a justified expectation that they would not be recorded.

> Put another way, under objectively justifiable circumstances, the law prohibits acquiring the contents of oral utterances without the consent, implied or express, of at least one of the parties.

(Br. at 12-13). This is ultimately followed by all of one, conclusory sentence on the matter:

> Townsend's words were uttered in an area of the school that was generally for athletes only, at the farthest point in this area from the rest of the people in attendance, behind two closed doors, in an area for his team and staff only that he considers their "refuge" and "a place we can call our own." This place also happened to be a girls' locker room where the girls changed clothes before and after the game. . . . *It is . . . unclear how anyone in that situation would not be justified in [the expectation that people excluded from his team's refuge would not sneak in and plant recording devices].*

(Br. at 34-35). The State simply ignores the justification element, and then announces the complainant's expectation simply *was* justified because he was in an isolated locker room.

Long first urges this Court that the State's total inability to define or explain that which it contends to be unambiguous is indicative of the merits of that contention. But, more importantly, Long urges this Court that the plain language of the statute is classically ambiguous. Ambiguity exists when reasonably well-informed persons may understand the statutory language in two or more different senses. *Bryant v. State*, 391 S.W.3d 86, 92 (Tex. Crim. App. 2012).

And here, where the language in question—"under circumstances justifying that expectation"—prompts an individual evaluation, it necessarily may be understood in multiple different senses. And, as the State recognizes in its brief—and in fact argues—a select few courts have understood the language slightly differently (though not nearly as differently as the State would have this Court hold). *See* (Br. at 25-33).

In *Keeter v. State*, 74 S.W.3d 31, 36 (Tex. Crim. App. 2002), this Court considered article 40.001 of the Code of Criminal Procedure, which provides: "A new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial." This Court held the statute to be ambiguous because "the standard of 'materiality' varies according to context." *Id.* Similarly, in *Brown v. State*, 98 S.W.3d 180, 183 (Tex. Crim. App. 2003), this Court held that "the legislatively undefined term 'voluntarily' in Penal Code section 20.04(d) is ambiguous primarily because it is susceptible to different meanings, some of which would support holding that appellant's release of the victim was voluntary and some of which would support a contrary decision." Long urges this Court to follow all those courts across the country and conclude that "under circumstances justifying that expectation" is every bit as ambiguous. *See* TEX. CODE CRIM. PROC. art. 18.20 §1(2).

II. The common interpretation of the statute is unproblematic

After arguing that "under circumstances justifying that expectation" is unambiguous, but not saying what it means, the State pivots to the main subject of its brief: arguing that it *can't* mean what nearly every other appellate court across the country has concluded. The State advances four main arguments for

this proposition: (1) the plain language of the statute doesn't say "reasonable expectation of privacy"; (2) employing the "reasonable expectation of privacy standard" is "absurd"; (3) the legislative history (both state and federal) indicates the legislatures did not wish courts to evaluate "reasonable expectation of privacy"; and finally, (4) all those cases which hold otherwise are poorly reasoned. Each contention is meritless.

a. The statute's plain language is not in conflict with the common interpretation

The State first urges this Court that the plain language of the statute forecloses use of the commonly accepted reasonable-expectation-of-privacy test. (Br. at 13). The statute "does not mention anything about some broad 'right to privacy,'" the State contends. (Br. at 13). But that's exactly why the test is brought in: the statute does not mention *any* test for evaluating whether an expectation is justified.

The State further argues the statute has "no requirement that the State prove the victim's subjective expectation, as is necessary in a traditional Fourth Amendment analysis." (Br. at 13). This is a preview of the State's later discussion of *Huff v. Spaw*, 749 F.3d 543 (6th Cir. 2015). *See* (Br. at 29). In that case, the court noted that while "[c]ourts generally refer to [the] reasonable-expectation test as having a subjective part," in the present context the statute mandates consideration only of whether the speaker *exhibited* an expectation, not whether he actually possessed one. *Huff*, 794 F.3d at 549. The court explicitly went on to use the reasonable-expectation test as modified, though, leaving the reasonable-expectation-of-privacy prong of the test unaltered. *Id.* In no way, then, does the subjective/objective distinction bar the reasonable-expectation-of-privacy test from use in determining

whether a speaker's expectation that his communication would not be intercepted was justified.

b. Only by a glaring misreading of the court of appeals's opinion does employing the reasonable-expectation-of-privacy standard render "absurd results"

The State's second argument against the common interpretation of the statute is contingent upon its mistaken belief that the court of appeals held that the complainant had no reasonable expectation of privacy because the girls were capable of repeating his rants. Indeed, throughout the State's brief it characterizes the court's opinion as holding as much. *See* (Br. at 7, 12, 14-15, 20) ("Can anything that can be repeated by a listener be recorded. . . . this statutory scheme concerns a specific type of invasion of privacy unrelated to whether someone present could repeat what she heard. . . . no one can reasonably expect that something shared will never be repeated by the listener(s). . . . If repetition were impossible, trust would be unnecessary. . . . [The statute is not about the expectation] that what you say will never be repeated to anyone by the other party"). To be sure, the United States Congress and Texas legislature did not wish to protect only those conversations that could never be repeated (if such conversations even exist). That *would* be absurd. But that's not what the court of appeals said. To the contrary, the court of appeals held that the complainant had no reasonable expectation of privacy in his diatribes because they were "*always* subject to public dissemination *and* generally exposed to the public view." *Long*, 469 S.W.3d at 311. This is a huge distinction. The State's argument that a non-existent holding is absurd, then, is irrelevant.

c. Extratextual sources do not conflict with the common interpretation

The State next contends that the legislative history of the statute "support[s] a framework that focuses on the narrow expectation of being free from electronic interception," not whether the speaker has a reasonable expectation of privacy. (Br. at 16). As to the state legislative history, the State acknowledges that the Texas statutes "generally follow[ ]" the federal statutes. (Br. at 16); *see also Long*, 469 S.W.3d at 307 ("It is beyond dispute that the Texas criminal wiretap statute, Section 16.02, is substantially similar to the federal one on which it is modeled, the Wiretap Act"). But because a state statute modeled after the federal version is permitted to be more protective of individual privacy, the State contends "it is not unreasonable" to assume that the identical Texas statute is more protective than its federal counterpart. (Br. at 16-17). Long urges this Court that that is in fact entirely unreasonable.

As to that federal legislative history, the statute is not, the State argues, "about a broad expectation of privacy or even the narrower expectation that what you say will never be repeated to anyone by the other party." (Br. at 20). The State asserts the definition of "oral communication" instead "hinges on the expectation that what you are saying is not being secretly recorded." (Br. at 20).

In so arguing, however, the State explicitly acknowledges the definition of "oral communication" was "'intended to reflect existing law[,]' citing *Katz* [*v. United States*, 389 U.S. 347 (1967)]." (Br. at 18-19) And in *Katz*, the Supreme Court articulated the reasonable-expectation-of-privacy test. *See, e.g., United States v. Jones*, 132 S. Ct. 945, 952, 181 L. Ed. 2d 911

(2012) ("the *Katz* reasonable-expectation-of-privacy test"); *Florida v. Jardines*, 133 S.Ct. 1409 (2013) (acknowledging the reasonable-expectation-of-privacy formulation for defining the parameters of a "search" for Fourth Amendment purposes, introduced in *Katz*). The State nonetheless contends "[i]t makes no sense to hold that Title III, or a statute that mirrors it, is concerned with broad issues of privacy or privilege rather than the narrow issue of wiretapping, electronic surveillance and the fruits of those specific violations." (Br. at 22). As best as Long understands this portion of the State's brief, the State essentially argues that because *Katz* "rejected any formulation of the issues based on. . . a 'general constitutional 'right to privacy,'" *Katz*'s reasonable-expectation-of-privacy test has no bearing in considering a possible oral communication. (Br. at 20-22) (citing *Katz*, 389 U.S. at 349-50).

In fact "[t]he legislative history of Title III shows that Congress intended [the] definition [of oral communication] to parallel the 'reasonable expectation of privacy test' articulated by the Supreme Court in *Katz*." *United States v. Turner*, 209 F.3d 1198, 1200-01 (10th Cir. 2000) (citing S.Rep. No. 90–1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2178; *United States v. Longoria*, 177 F.3d 1179, 1181 (10th Cir. 1999)). Even *Huff*, so trumpeted by the State, agrees. *See Huff*, 794 F.3d at 548 ("The statutory history of Title III also supports" the application of "*Katz*'s reasonable-expectation test to assess whether a communication is protected under Title III."). As the State acknowledged, Title III was "'intended to *reflect* existing law," and it cited *Katz*. (Br. at 19) (emphasis added). But even if, as the State nonetheless argues, Title III addressed only "the narrow issue of wiretapping, electronic surveillance and the fruits of those

specific violations," courts would still have to find a test for when an expectation that a communication would not be intercepted would be justified. (Br. at 22). Again, the State offers no explanation of how a justified expectation that one's communication will not be intercepted can be evaluated absent considering whether the speaker had a reasonable expectation of privacy.[1]

The State's argument that "[p]olicy supports a plain reading of the statute" exhibits the same flaw. (Br. at 22-25). Pointing to the Supreme Court's statement in *Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001), that "Title III's restrictions are intended to protect" the interest in "[p]rivacy of communication," the State argues that "whatever ambiguity exists in the definition of 'oral communication' should be resolved in favor of an interpretation that supports prohibition of the monitoring and dissemination of private speech by strangers to that communication." (Br. at 24-25). As the State acknowledges, *Bartnicki* concerned the wholly distinguishable question of "what degree of protection, if any, the First Amendment provides to speech that discloses the contents of an illegally intercepted communication." *Bartnicki*, 532 U.S. at 517. But the bigger problem is that, again, the State ignores the "justifiable" element. Perhaps any ambiguity *should* be resolved in favor of an interpretation that supports the prohibition of the monitoring and dissemination of private communication—if the speaker has a justifiable expectation that that communication will not be intercepted.

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[1] The State also again argues against the court of appeals's non-existent holding that the dispositive issue is whether a communication can ever be repeated. (Br. at 20); *see supra* at 14-15.

After considering all of this, the common interpretation in no way conflicts with the state or federal legislative history. There has to be some way to evaluate when such an expectation is justified, and there is: whether the speaker had a reasonable expectation of privacy. *See, e.g., United States v. Peoples*, 250 F.3d 630, 637 (8th Cir. Mo. 2001) (employing *Katz*'s reasonable-expectation-of-privacy test to determine whether speaker had justifiable expectation communication would not be intercepted); *United States v. Clark*, 22 F.3d 799, 801 (8th Cir. Iowa 1994) (same); *United States v. McKinnon*, 985 F.2d 525, 527 (11th Cir. Fla. 1993) (same); *In re John Doe Trader Number One*, 894 F.2d 240, 242-43 (7th Cir. Ill. 1990) (same); *United States v. Dunbar*, 553 F.3d 48, 57 (1st Cir. Mass. 2009) (same); *United States v. Turner*, 209 F.3d 1198, 1200-01 (10th Cir. 2000) (same); *United States v. Harrelson*, 754 F.2d 1153, 1169-71 (5th Cir. Tex. 1985) (same).

This leads to the State's next contention. In its brief, the State acknowledges all those federal courts to have employed the common interpretation (in fact, the previous string citation is lifted directly from the State's brief). *See also, e.g., Longoria*, 177 F.3d at 1181 (same). In addition, though not acknowledged by the State, multiple state courts of appeals in states with statutes modeled after Title III have done the same. *See, e.g., State v. Duchow*, 2008 WI 57, ¶ 2, 310 Wis. 2d 1, 7, 749 N.W.2d 913, 915 ("We conclude that the statements were not "oral communication" because Duchow had no reasonable expectation of privacy in the statements."); *Iowa Beta Chapter of Phi Delta Theta Fraternity v. State, Univ. of Iowa*, 763 N.W.2d 250 (Iowa 2009) ("In determining whether communication constitutes an "oral communication" pursuant to statute regarding interception of communications a court

applies an expectation of privacy test; first the court determines whether the individual, by his conduct, has exhibited an actual subjective expectation of privacy, and second, the court determines whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable."); *Brugmann v. State*, 117 So. 3d 39, 46 (Fla. Dist. Ct. App. 2013), on reh'g (June 12, 2013) ("Section 934.02(2), Florida Statutes (2004), defines the term 'oral communication' as '*any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation. . . .*' (emphasis added)."). Thus, by state statute, only oral communications uttered by persons exhibiting an expectation of privacy under circumstances justifying that expectation are protected under Chapter 934."); *State v. Ingram*, 2010-Ohio-3546, ¶ 14 ("The phrase 'oral communication' means 'an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation.' R.C. 2933.51(B). In other words, an oral communication only qualifies as a protected oral communication under R.C. 2933.52 if the person uttering it had a reasonable expectation of privacy. *Id*."). And at least three Texas court of appeals have as well. *See Cortez v. State*, 240 S.W.3d 372, 383 (Tex. App.—Austin 2007, no pet.) (employing reasonable-expectation-of-privacy test); *Hernandez v. State*, 03-03-00456-CR, 2005 WL 2043641 (Tex. App.—Austin 2005, no pet.) (same); *Casey v. State*, 14-04-01165-CR, 2006 WL 348164 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (same). But the State criticizes all those courts for taking the "easy" route and "avoid[ing] any deep statutory analysis." (Br. at 27). The State then points to three cases it approves of:

Boddie v. American Broadcasting Cos., 731 F.2d 333 (6th Cir. Ohio 1984); *Huff*, 794 F.3d 543; *Walker v. Darby*, 911 F.2d 1573 (11th Cir. Ala. 1990).

None of those cases, however, support the outright rejection of the reasonable-expectation-of-privacy test that is embraced by nearly every court to have considered the issue. In fact, *Huff* explicitly approves of, and utilizes, *Katz*'s reasonable-expectation-of-privacy test. *See Huff*, 794 F.3d 549-50. It tweaks the first part of the test—a speaker's *subjective* expectation of privacy is instead considered as whether he exhibits as much—but explicitly retains the analysis of whether the speaker had a reasonable expectation of privacy. *See id.* at 550; *supra* at 14. And *Boddie and Walker* simply note it's possible there might be some scenarios in which one may have a justified expectation that a communication would not be intercepted but not a reasonable expectation of "total privacy." *See Boddie*, 731 F.2d at 339 n. 5 ("Thus, there 'may be some circumstances where a person does not have an expectation of total privacy, but still would be protected by the statute because he was not aware of the specific nature of another's invasion of his privacy.'"); *Walker*, 911 F.2d at 1579 ("We agree that there is a difference between a public employee having a reasonable expectation of privacy in personal conversations taking place in the work-place and having a reasonable expectation that those conversations will not be intercepted by a device which allows them to be overheard inside an office in another area of the building."). *Boddie* did not hold, as the State contends, that Boddie had a justified expectation that her communication would not be intercepted despite having no reasonable expectation of privacy. *Compare Boddie*, 731 F.2d at 338-39 ("The record shows that Boddie was aware that she was speaking

with reporters from ABC. But it remains an issue of fact for the jury whether Boddie had an expectation that the interview was not being recorded and whether that expectation was justified under the circumstances. The trial court's premature dismissal of the claim prevents us from holding that, as the defendants contend, the evidence could not support such an expectation."), with (Br. at 28-29) ("So, while Boddie could not reasonably expect that the words she said to Geraldo would not be repeated, she was justified in expecting that her interview would not be recorded and broadcasted because she spoke on that condition."). In sum, none of those cases which the State identifies as taking "greater care. . . to apply the plain language of the statute" hold as the State asks this Court to hold now.

III. In fact the reasonable-expectation test is exactly what Congress and the Texas legislature intended courts to use, and under that test, it is clear Long's conviction cannot stand

That each of the State's arguments against the common interpretation of the statute fails is understandable. For, as noted above, far from foreclosing use of the reasonable-expectation test, "[t]he legislative history of [the Wiretap Act] shows that Congress *intended* [the] definition [of oral communication] to parallel the 'reasonable expectation of privacy test' articulated by the Supreme Court." *Turner*, 209 F.3d at 1200 (emphasis added) (citing S.Rep. No. 90–1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2178; *see also Longoria*, 177 F.3d at 1182; *Dunbar*, 553 F.3d at 57; *Huff*, 794 F.3d at 548. And under that test, the State cannot prove, and now no longer even argues, that the high-school-coach complainant had a justifi-

able expectation that his halftime tirades in a teenage-girls' locker room would not be intercepted.

Indeed, even if this Court were to find that the complainant's expectation of privacy was recognized by society as legitimate, review of the record reveals this is the rare case where the complainant did not even have an actual expectation of privacy. *See* 40 George E. Dix & John M. Schmolesky, *Texas Practice: Criminal Practice And Procedure* § 8:24 (3d ed. 2011) ("In practice, concern focuses almost exclusively upon the second of the two requirements distinguished by Justice Harlan – the objective requirement that a defendant's expectation of privacy have been reasonable."). The complainant conceded at trial that the locker room was only a private location when the girls were undressing and he was not present, and that at other times it was a classroom. (RR4: 159-160). The complainant further testified that it was "not uncommon" or "common" for people to hear him yelling at his students, and that "most of the time" he could overhear the opposing team's coach in the neighboring locker room, and that he "wasn't really caring" if an opposing team overheard him. (RR4: 166-167). Finally, the complainant admitted that he was "sure [it was] quite possible" someone could have recorded his halftime lectures before. (RR4: 146). The complainant's recognition, and indifference at the recognition, that his communications could have been intercepted at any time clearly reflects he had no actual expectation of privacy.

As to the latter prong of the reasonable-expectation-of-privacy test, though, it is clear that society recognizes no reasonable expectation of privacy by a teacher in the course of classroom instruction, and the coach-complainant's halftime speech was the equivalent of a

teacher's speech in a classroom. The court of appeals cited to three cases in concluding that the complainant had no reasonable expectation of privacy in his half-time speech: *Roberts v. Houston Indep. Sch. Dist*., 788 S.W.2d 107 (Tex. App.–Houston [1st Dist.] 1990, writ denied); *Plock v. Bd. of Educ. of Freeport Sch. Dist*. No. 145, 545 F.Supp.2d 755 (N.D.Ill.2007); and *Evens v. Super. Ct. of L.A. County*, 77 Cal.App.4th 320, 91 Cal.Rptr.2d 497 (1999). *See Long*, 469 S.W.3d at 308-09. Each held that a public school teacher has no reasonable expectation of privacy in a classroom setting. The State in its brief on discretionary review sought to dismiss each as irrelevant because it contended that was not the issue. But it is. And because the complainant had no actual or reasonable expectation of privacy, Long's conviction cannot stand.

IV. Conclusion

The El Paso Court of Appeals, employing the common test, determined that the high-school-coach complainant did not have a reasonable expectation of privacy in half-time and post-game locker room speeches, and thus recordings of those speeches were not "oral communications" covered by the criminal wiretap statute. *Long*, 469 S.W.3d 304. The State petitioned this Court arguing only that the common test was wrong. Because each of the State's arguments in support of that contention is meritless, and in fact the common test is quite clearly appropriate, Long respectfully requests this Court to affirm the court of appeals's opinion reversing her conviction for unlawful interception of an oral communication.

Prayer

Long prays this Court will affirm the court of appeals's opinion reversing her conviction for unlawful interception of an oral communication.

Respectfully submitted,

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Certificate of Service

I, the undersigned, hereby certify that a true and correct copy of the foregoing Respondent's Brief on Discretionary Review was served to the State Prosecuting Attorney and Denton County District Attorney's Office on February 10, 2016.

/s/ Bruce Anton
Bruce Anton

Certificate of Compliance

Pursuant to TEX. R. APP. P. 9.4(i)(3), undersigned counsel certifies that this brief complies with:

1. the type-volume limitation of TEX. R. APP. P. 9.4(i)(2)(C) because this brief contains 5,470 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

2. the typeface requirements of TEX. R. APP. P. 9.4(e) and the type style requirements of TEX. R. APP. P. 9.4(e) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2015 in 14-point Century Schoolbook.

/s/ Bruce Anton
Bruce Anton

APPENDIX E

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

[SEAL]

No. PD-0984-15

WENDEE LONG,

Appellant

v.

THE STATE OF TEXAS

ON STATES'S PETITION FOR DISCRETIONARY REVIEW FROM THE EIGHTH COURT OF APPEALS DENTON COUNTY

OPINION

NEWELL, J. delivered the opinion of the Court in which KELLER, P.J., KEASLER, HERVEY, YEARY, and KEEL, JJ. joined. RICHARDSON, J. filed a dissenting opinion in which ALCALA, and WALKER, JJ. joined.

Does the definition of "oral communication" in the state wiretap statute incorporate the expectation-of-privacy test? We hold that it does. Under this standard, does a high school basketball coach have an expectation of privacy in his team's locker room during halftime? We hold that under the circumstances presented in this case, he does. Consequently, we affirm Appellant's conviction for her role in the interception

of the coach's communication with his team in the team's locker room.[1]

I. The Conduct

There is relatively little disagreement on what happened. At the time of the offense, Wendee Long was the principal of Wayside Middle School in Saginaw, Texas and a member of the Argyle I.S.D. school board. Long's daughter, C.L., attended Argyle High School and traveled to Sanger High School to attend a girls' high-school basketball game between the two rivals. It was the last game of the season, and the Argyle team was one game behind the Sanger team in the standings.

Shortly before halftime, C.L. went to sit with a friend of hers, P.S., who also happened to be a student at Sanger High School. C.L. claimed to be a "team manager" for the Argyle girls' basketball team, and asked her friend for help getting into the visitor's locker room. P.S. knew that team managers for visiting teams would be allowed into the visitor's locker room, so she agreed to show C.L. where the visitor's locker room was located.

All teams that visit another school for an athletic event are assigned a visitor's locker room. In this case, the visitor's locker room was at the end of a hall of three locker rooms. One must pass through two sets of doors to enter the locker room. The first set of doors leads to a little "nothing" room and the second set opened into the locker room itself. The room consisted of a changing area in front of lockers and a separate area for showers and toilets.

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[1] *Long v. State*, 469 S.W.3d 304 (Tex. App. – El Paso 2015).

The girls' basketball coach, Lelon "Skip" Townsend, described the locker room as a private area to get away from the people that are at the ball game and allow the coaches and teammates to meet and discuss aspects of the game or do team activities such as pray. It was Coach Townsend's understanding that no one was supposed to be able to access the locker room except the Argyle team and the coaches. Team members could use the locker room to store their belongings and get dressed, though no male coaches were allowed in while the female players were dressing. Coach Townsend acknowledged that "sometimes" a locker room could be thought of as a sports classroom, but no one disputed that the access to the locker room was limited to Argyle team members and the coaches.

On the way to the locker room, C.L. informed her friend that she was going to set up her phone in the locker room to record Coach Townsend's halftime speech. After C.L. entered the locker room, she set her phone inside the door to one of the small lockers and taped the phone so it would not fall once the locker was shut. From that position, the phone made an audio and visual recording of the coach's halftime speech.

After halftime was over, C.L. and P.S. returned to the locker room to retrieve the phone. C.L. showed the recording to another friend of hers and asked that friend for help in cropping the video. Unfortunately, C.L. deleted some of the recording while trying to crop it, so she returned to the locker room to make another recording. She was able to obtain additional audio of the coach speaking to the basketball team after the game, but not additional video because the camera fell down after the locker was closed. The video portion of the first recording reveals that Coach Townsend gave his halftime speech in the changing area of the girls'

locker room. However, the girls were not changing clothes at the time.

A copy of both recordings spliced together was emailed to all the members of the school board in advance of the school board taking up the issue of whether to award Coach Townsend a term contract. Notably, some audio on the recording emailed to the school board members was edited in such a manner that particular statements made by Coach Townsend during his speeches were copied and then repeated at the end of the recording. None of the girls on the team were aware they were being recorded, and Coach Townsend did not give anyone permission to record his remarks to his team.

At some point, Long showed one of her assistant principals a part of the video. Long also told that assistant principal that her husband was angry because he believed Long was allowing C.L. "to take the fall" for the recording. The superintendent for the school district eventually delivered a copy of the recording to the police.

A detective with the Sanger Police Department requested the cell phones for Long's two daughters. Long's husband provided C.L.'s phone, but it was a brand new phone. When police requested the phone that C.L. had been using around the time of the taping, they discovered that the screen had been shattered. They were also unable to get access to the hard drive on Long's personal computer because it had been replaced.

However, the police did get access to Long's work computer. On that computer, they found a copy of the recording turned over to the police by the superintendent. Long's computer also contained an additional,

longer copy of the recording that had additional footage. This footage included a video recording of Long's daughter returning to the locker room to retrieve the phone after the halftime speech. The footage of Long's daughter was not included on the copy of the video that was distributed to the school board.

Long also provided to police an unsigned, typed statement attempting to explain the chain of events. According to Long, "the journey to this bad decision" started a year before the incident. The original girls' basketball coach was pulled from the "approval list" shortly before his contract was up for renewal, and Long was unsure as to why. When a special board meeting was called to hire both Coach Townsend and his wife, Long became concerned because she was unaware of any other position opening other than the coach position and she had done her own research into the contacts provided by the Townsends. Long was unable to attend the special board meeting and, according to Long, the Townsends were hired with just enough votes.

Long spent the bulk of her written statement detailing complaints against Coach Townsend. According to Long, numerous parents approached her to complain that Coach Townsend was too mean, and that neither the principal nor the school's athletic director would do anything to remedy the situation. Paradoxically, Long also explained that several of these parents were AISD employees who had come forward to complain to her that they were afraid to come forward generally due to fear that they might lose their jobs. Out of the five-page, single-spaced, typed statement, Long devoted only four paragraphs to details about the recording.

According to Long, the recording was her daughter's idea. Long related that her daughter had initially tried to get a recording of Coach Townsend during a game between Argyle and Gainesville because "someone has to let people see how he acts to them." However, C.L. informed Long that she was unable to get the recording because policemen were there. According to Long, C.L. called her after the Argyle-Sanger game to say that she had gotten the recording by taping the phone to a locker and placing it on airplane mode so that there were no interruptions.

Finally, Long added that in March, before the board meeting to discuss Coach Townsend's contract, she happened upon the video on her personal computer, claiming it had been downloaded by C.L. Upon seeing the recording, Long claimed to have wondered whether the school board would understand "a little of what is trying to be explained" if they were to see Coach Townsend in action. However, she denied that the video was ever made to catch the girls on the team dressing or undressing, stating that it was only made "in the hopes of the leadership of the district being able to see Coach Townsend's treatment of 15-18 year old girls." Long concedes that she sent the recordings to the school board.

II. The Charges

The State charged Long with the unlawful interception of oral communication, or electronic eavesdropping, alleging in two paragraphs that she had violated Section 16.02 of the Texas Penal Code. Section 16.02(b)(1) makes it a crime when a person "intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire,

oral, or electronic communication[.]"[2] Section 16.02(b)(2) provides that a person commits a crime when that person "intentionally discloses or endeavors to disclose to another person the contents of a wire, oral, or electronic communication if the person knows or has reason to know the information was obtained through the interception of a wire, oral, or electronic communication in violation of [subsection (b)]."[3]

Section 16.02 does not define many of the terms of the offense; rather, it specifically incorporates the definitions found in Article 18.20 of the Texas Code of Criminal Procedure.[4] Under Article 18.20, "oral communication" means "an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation."[5] "Intercept" means "the aural or other acquisition of the contents of a wire, oral, or electronic communication through the use of an electronic, mechanical, or other device."[6] "Contents" when used with respect to a wire, oral, or electronic communication, "includes any information concerning the substance, purport, or meaning of that communication."[7]

There are a number of affirmative defenses in Section 16.02 as well. Specifically, a party to the communication has an affirmative defense to the

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[2] TEX. PENAL CODE § 16.02(b)(1).

[3] TEX. PENAL CODE § 16.02(B)(2).

[4] TEX. PENAL CODE § 16.02(A).

[5] TEX. CODE CRIM. PROC. art. 18.20, § 1(2).

[6] TEX. CODE CRIM. PROC. art. 18.20, § 1(3).

[7] TEX. CODE CRIM. PROC. art. 18.20, § 1(6).

interception of the oral communication.[8] And, someone who intercepts an oral communication has an affirmative defense if one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing an unlawful act.[9] We have also held that a parent may vicariously consent on behalf of his or her child to a recording of the child's conversations so long as the parent has an objectively reasonable, good-faith basis for believing that recording the conversations is in the child's best interest.[10]

In one paragraph of the indictment in this case, the State alleged that Long violated Section 16.02 by encouraging C.L. to record Townsend's speeches. In the other paragraph, the State alleged that Long violated Section 16.02 when she showed C.L.'s illegal recording to Long's assistant principal.[11] The jury found Long guilty.[12]

III. The Appeal

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[8] TEX. PENAL CODE § 16.02(c)(4)(A).

[9] Tex. Penal Code § 16.02(c)(4)(B).

[10] *Alameda v. State*, 235 S.W.3d 218, 223 (Tex. Crim. App. 2007).

[11] The State chose to treat subsections (b)(1) and (b)(2) as different manner and means of one offense, resulting in a single conviction for electronic eavesdropping. We take no position on whether the State was correct in doing so.

[12] The State also charged Long with, and tried Long for, a violation of Section 21.15(b) of the Texas Penal Code, the improper photography or visual recording statute, in a separate count. TEX. PENAL CODE § 21.15(b). However, the jury found Long not guilty on that charge. This Court subsequently held that the improper photography or visual recording statute was facially unconstitutional. *Ex parte Thompson*, 442 S.W.3d 325, 351 (Tex. Crim. App. 2014).

At trial and on appeal, Long argued that, as a matter of law, she had committed no crime because Townsend had no reasonable expectation of privacy in his locker-room speeches to his team.[13] The court of appeals agreed. The court of appeals acknowledged that "[i]t is widely accepted that a public school teacher has no reasonable expectation of privacy in a classroom setting."[14] The court of appeals then detailed several cases holding that a teacher has no expectation of privacy in their public classroom.[15] The court of appeals then characterized a public high school coach as an "educator," noting that some of the duties of a coach involve a type of teaching.[16] From there, the court of appeals extrapolated that no public school educator, whether a teacher or a coach, has a reasonable expectation of privacy in his or her "institutional communications and activities, regardless of where they occur, because they are always subject to public dissemination and generally exposed to the public view."[17] Thus, the court of appeals held that Coach Townsend's speeches did not constitute "oral

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[13] Long challenged the sufficiency of the evidence at trial through a motion for directed verdict, a motion for judgment of acquittal, and a motion for new trial. On appeal, she challenged the trial court's denial of these motions as well as the sufficiency of the evidence. Long acknowledged, however, that each of these arguments were based upon the same legal theory that the complainant did not have a reasonable expectation of privacy in his locker-room speeches to his players.

[14] *Long v. State*, 469 S.W.3d 304, 308 (Tex. App.– El Paso 2015).

[15] *Id.* at 309.

[16] *Id.* at 310.

[17] *Id.* at 311.

communication" under the statute because he was "teaching" in the visitor's locker room.[18]

The State Prosecuting Attorney's Office argues on discretionary review that the plain language of Section 16.02 prohibits people who are not parties to a private conversation from surreptitiously recording that conversation and disseminating that recording. According to the SPA, the statutory definition of "oral communication" is plain and prohibits a person who is not a party to a conversation from recording that conversation without the knowledge and consent of the parties, provided the recorded parties exhibited a justified expectation that they would not be recorded. Finally, the SPA argues that the statute defines "oral communication" based on what is captured rather than what is communicated, and therefore it does not matter whether Coach Townsend was speaking as an educator when he spoke to his team. Based upon this understanding of the statute, the SPA argues that the court of appeals erred by determining as a matter of law that Long had not intercepted or disclosed "oral communications."

IV. Analysis

In reviewing the sufficiency of the evidence to support a conviction, we typically look to whether any rational finder of fact could have found the essential elements of the offense beyond a reasonable doubt.[19] We view the evidence in a light most favorable to the prosecution by resolving any factual disputes in favor of the verdict and deferring to the fact-finder regarding the weighing of evidence and the inferences

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[18] *Id.* at 313.

[19] *Liverman v. State*, 470 S.W.3d 831, 835-36 (Tex. Crim. App. 2015).

drawn from basic facts.[20] In some cases, however, a sufficiency-of-the-evidence issue turns upon the meaning of the statute under which the defendant is being prosecuted.[21] We ask if certain conduct actually constitutes an offense under the statute.[22] As with all statutory construction questions, this type of analysis answers a question of law.[23] We review questions of law *de novo*.[24]

Here, the parties ask us to determine whether Article 18.20 requires a determination that Coach Townsend had a "legitimate expectation of privacy."[25] Ordinarily, the determination of whether a legitimate expectation of privacy exists is litigated in the context of a motion to suppress rather than as an element of an offense. In the motion to suppress context, the issue of whether a legitimate expectation of privacy exists–whether a defendant has "standing" to contest a search–is determined by a trial court after consideration of the "totality of the circumstances surrounding the search."[26] When reviewing the trial court's ruling on a motion to suppress, we defer to the trial court's factual findings and view them in a light most favorable to the

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[20] *Id.* at 836; *see also Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015).

[21] *Liverman*, 470 S.W.3d at 836.

[22] *Id.*

[23] *Id.*

[24] *Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011).

[25] *See State v. Betts*, 397 S.W.3d 198, 203 (Tex. Crim. App. 2013) (explaining that demonstrating a "legitimate expectation of privacy" requires a showing of a subjective expectation of privacy that society is prepared to regard as objectively reasonable).

[26] *Ex parte Moore*, 395 S.W.3d 152, 159 (Tex. Crim. App. 2013).

prevailing party, but we review the legal issue of standing *de novo*.[27]

In the context of this case, if we are to make a legal determination of whether a legitimate expectation of privacy exists, we have to rely upon the jury's verdict. For determinations of historical fact, we apply the traditional standard of review for legal sufficiency to determine what the totality of the circumstances are, deferring to the jury's rational factual determinations and inferences.[28] Then, we evaluate *de novo* the purely legal question of whether a legitimate expectation of privacy exists.[29]

Viewing the evidence in the light most favorable to the jury's verdict, a rational jury could have concluded that Long wanted to affect the school board's renewal of Coach Townsend's contract so she encouraged her daughter to sneak into the girls' locker room and record Coach Townsend's communication to the team. The locker room itself was not open to the general public with access restricted to Argyle coaches and team members. It was designed with two sets of entry doors to provide a place for young girls to dress and keep personal items. C.L. had to pretend to be an Argyle team manager in order to gain access to the locker room.

C.L. snuck into the locker room immediately before halftime and taped her cell phone to the inside of the locker to make a video recording of Coach Townsend's halftime speech. Coach Townsend believed the girls'

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[27] *Kothe v. State*, 152 S.W.3d 54, 59 (Tex. Crim. App. 2004).

[28] *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)); *Moore*, 395 S.W.3d at 159.

[29] *Liverman*, 470 S.W.3d at 836; *Kothe*, 152 S.W.3d at 59.

locker room was private when he entered it and spoke to his team. The room itself had a changing area in front of the lockers with a separate bathroom area. Coach Townsend's speech took place in the changing area but none of the girls were changing at that time. C.L.'s phone made an audiovisual recording of Coach Townsend's halftime speech. While one of the three coaches present held the inner-door to the locker room partially open in preparation for the team to go back to the gym, nothing in the record indicates that the outer door was open. Neither Coach Townsend, nor the members of the basketball team gave consent to the recording. No one disputed that the locker room itself was closed to unauthorized personnel such as C.L.

Shortly after halftime was over, C.L. retrieved the phone from the locker. She later went back and placed the phone into a locker and recorded Coach Townsend's after-game speech. She provided copies of the recordings to her mother who then edited them to combine the two recordings, exclude any footage of her daughter, and repeat certain statements made by Coach Townsend. Long distributed the edited video anonymously to the members of the school board.

With these circumstances in mind, we turn to the two legal questions in this case. First, we consider whether the Article 18.20 definition of "oral communication" incorporates the "legitimate expectation of privacy" standard. That is, we ask if the State was required to prove that Coach Townsend had a subjective expectation of privacy that society is prepared to regard as objectively reasonable in order to convict Long of violating Section 16.02.[30] We conclude that the

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[30] *See, e.g., Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996) (setting out the "legitimate expectation of privacy"

State was. Second, we consider whether the State satisfied that standard. That is, we ask whether the State actually proved that Coach Townsend's speech was "oral communication." To answer that, we consider whether Coach Townsend harbored a subjective expectation of privacy that society is prepared to regard as objectively reasonable. We conclude that he did.

A. The Definition of "Oral Communication" in Article 18.20 Incorporates the Legitimate Expectation of Privacy Standard

When we interpret statutes, our constitutional duty is to determine and give effect to the collective intent or purpose of the legislators who enacted the legislation.[31] We necessarily focus our attention on the literal text of the statute in question and attempt to discern the fair, objective meaning of the text at the time of its enactment.[32] If the plain language is clear and unambiguous, our analysis ends because "'the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute.'"[33] If the statutory language is ambiguous or leads to absurd results, we can consider extra-textual sources.[34] Ambiguity exists when

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standard as requiring a showing of a subjective expectation of privacy that society regards as objectively reasonable).

[31] *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

[32] *State v. Cooper*, 420 S.W.3d 829, 831 (Tex. Crim. App. 2013).

[33] *Nguyen v. State*, 359 S.W.3d 636, 642 (Tex. Crim. App. 2012) (quoting *Boykin*, 818 S.W.2d at 785).

[34] *Ex parte Perry*, 483 S.W.3d 884, 903 (Tex. Crim. App. 2016).

reasonably well-informed persons may understand the statutory language in two or more different senses.[35]

The statutory language at issue is the definition of "oral communication" found in Article 18.20, sec. 1(2) of the Code of Criminal Procedure.

> (2) "Oral communication" means an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation. This term does not include an electronic communication.[36]

The court of appeals framed the legal issue in this case as "whether Townsend had a reasonable expectation of privacy in his speeches."[37] The State argues that, as a matter of statutory construction, the Texas Legislature did not incorporate the Fourth Amendment's "legitimate expectation of privacy" standard into the Texas criminal wiretap statute. According to the State, the definition of "oral communication" set out in Article 18.20 only includes communication that someone utters when he or she reasonably believes someone is not recording it. And while the State agrees that the phrase "circumstances justifying that expectation" necessarily incorporates a reasonableness standard, the State does not agree that the phrase "circumstances justifying that expectation" refers to an expectation of privacy. In essence, the State argues that the statute incorporates an expectation-of-non-interception standard rather than the expectation-of-privacy standard used by the court of appeals.

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[35] *Bryant v. State*, 391 S.W.3d 86, 92 (Tex. Crim. App. 2012).

[36] TEX. CODE CRIM. PROC. art. 18.20, § 1(1).

[37] *Long*, 469 S.W.3d at 307.

Appellant responds that the phrase "circumstances justifying that expectation" is ambiguous and does not make sense without reference to a reasonable expectation of privacy. Appellant points to cases where we have held that undefined terms such as "materiality" and "voluntarily" are ambiguous because they are susceptible to different meanings.[38] According to Appellant, the phrase "circumstances justifying that expectation" is so dependent upon context that it is ambiguous.

Notably, this Court seems to have recognized that the statute is at least reasonably susceptible to Appellant's interpretation. We applied the expectation-of-privacy standard when construing the wiretap statute in *State v. Scheineman*.[39] There, police placed two arrestees together in a room at a county law enforcement building while both were in custody, and unbeknownst to the arrestees, the police surreptitiously recorded the conversation between the two men.[40] When the State sought to use the recording against one of the parties to the conversation, the defendant filed a motion to suppress claiming the recording was obtained in violation of the state wiretap statute as well as his constitutional rights.[41]

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[38] *See, e.g., Keeter v. State*, 74 S.W.3d 31, 36 (Tex. Crim. App. 2002) (holding that the undefined term "material" in Article 40.001 of the Code of Criminal Procedure was ambiguous because the standard for "materiality" varies according to context); *Brown v. State*, 98 S.W.3d 180, 183 (Tex. Crim. App. 2003) (holding that the undefined term "voluntarily" in section 20.04(d) of the Penal Code is ambiguous because it is susceptible to different meanings).

[39] 77 S.W.3d 810 (Tex. Crim. App. 2002).

[40] *Id.* at 811.

[41] *Id.*

The trial court granted the motion to suppress, but we subsequently reversed.[42] We noted that the "dispositive issue" in the case was whether society would regard the defendant's expectation of privacy in a room in a law enforcement building as reasonable.[43] We held it would not.

> We do not believe that society is prepared to recognize a legitimate expectation of privacy in conversations between arrestees who are in custody in a county law enforcement building, even when only the arrestees are present and they subjectively believe that they are unobserved. Having found no legitimate expectation of privacy in such conversations, we hold that the excluded statements were admissible.[44]

Though the State never challenged the applicability of the expectation-of-privacy-standard in *Scheineman*, our reliance upon that standard in our analysis suggests that "reasonably well-informed" people could interpret the statute in this way.

Texas courts of appeals have also interpreted the state wiretap statute to incorporate an expectation-of-privacy analysis.[45] And the State acknowledges that

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[42] *Id.* at 813.

[43] *Id.*

[44] *Id.*

[45] *Meyer v. State*, 78 S.W.3d 505, 508-09 (Tex. App.–Austin 2002, pet. ref'd) (holding that the interception of a defendant's statements in the back of a patrol car did not violate federal or state wiretapping statutes because the defendant lacked a reasonable expectation of privacy); *Ex parte Graves*, 853 S.W.2d 701, 705 (Tex. App.–Houston [1st Dist.] 1993, pet. ref'd) (interpreting the definition of "oral communication" to include an

there are a number of cases interpreting the almost identical definition of "oral communication" in the Federal Wiretap Statute that support Appellant's position.[46]

Thus, there appear to be at least two possible interpretations for the phrase "circumstances justifying that expectation." On the one hand, the phrase could, as the State argues, merely require a showing of a reasonable expectation that the communication at issue was not being recorded. But on the other hand, the phrase could, as Appellant argues, include within it a requirement that there be a showing of an

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expectation of privacy); *see also Moseley v. State*, 223 S.W.3d 593, 599 (Tex. App.–Amarillo 2007) (holding that statements made during phone call while in custody were not "oral communication" because defendant had no expectation of privacy so statements were not made under circumstances that justified an expectation that the communication would not be intercepted), *aff'd*, 252 S.W.3d 398 (Tex. Crim. App. 2008).

[46] *United States v. Peoples*, 250 F.3d 630, 637 (8th Cir. 2001) ("Before the interception of a conversation can be found to constitute a search under the Fourth Amendment or an 'oral communication' under the federal wiretap law . . . the individuals involved must show that they had a reasonable expectation of privacy in that conversation."); *United States v. Clark*, 22 F.3d 799, 801 (8th Cir. 1994) ("Under either the fourth amendment or the Wiretap Act, the inquiry is 1) whether the defendant manifested a subjective expectation of privacy, and 2) if so, whether society is prepared to recognize that expectation as reasonable."); *United States v. McKinnon*, 985 F.2d 525, 527 (11th Cir. 1993) ("the statutory and constitutional test is whether a reasonable or justifiable expectation of privacy exists"); *In re John Doe Trader Number One*, 894 F.2d 240, 242 (7th Cir. 1990) ("Congress limited its protection of 'oral communications' under Title III to those statements made where 'first, a person [has] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."'").

expectation of privacy. Because reasonably well-informed people may understand the statute in two or more different ways, we agree with Appellant that the statute is at least ambiguous in this regard.[47] Consequently, we resort to extra-textual sources to attempt to give effect to the legislature's intent.

Resort to extra-textual sources supports Appellant's argument that the legislature intended the definition of "oral communications" to incorporate the expectation-of-privacy standard.[48] Article 18.20 of the Code of Criminal Procedure was passed in 1981 by the 67th Texas Legislature as part of House Bill 360. According to the Bill Analysis from the House Criminal Jurisprudence Committee, the Texas Legislature passed Article 18.20 of the Code of Criminal Procedure (and Section 16.02 of the Penal Code) in response to the passage of Title III of the Omnibus Crime Control and Safe Streets Act by the U.S. Congress.[49]

The Bill Analysis does recite that Congress, when enacting the federal wiretap statute, "intended to permit state electronic surveillance laws to be more

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[47] *See, e.g., Ex parte White*, 400 S.W.3d 92, 93-94 (Tex. Crim. App. 2013) (setting out two possible interpretations of the term "arrest" as used in section 508.253 of the Texas Government Code before determining the statute to be ambiguous).

[48] *See, e.g., State v. Schunior*, 506 S.W.3d 29, 34-35 (Tex. Crim. App. 2016) (noting that a statute is ambiguous when it may be understood by reasonably well-informed persons in two or more different senses).

[49] House Comm. on Crim. Juris., Bill Analysis, Tex. H.B. 360, 67th Leg. R.S. (1981); *see also Castillo v. State*, 810 S.W.2d 180, 182-83 (Tex. Crim. App. 1990) ("Title III regulates the electronic and mechanical interception of wire, oral, and electronic communications by government officials and private citizens.").

restrictive than the Federal Act, and therefore more protective of individual privacy, but state enactments cannot be less restrictive."[50] Our State legislature did not take the federal government up on that invitation when it came to the definition of "oral communication." According to the Bill Analysis, "The bill generally follows the provisions of Title III except for provisions which limit the use of electronic surveillance to narcotics cases, provisions for the designation of a judge from each administrative judicial district to rule on applications, provisions relating to applying authorities and provisions defining the role of the Texas Department of Public Safety as the only agency in implementing any electronic surveillance."[51] Our legislature adopted essentially the same definition of "oral communication" used in the federal wiretap statute despite acknowledging the authority and ability to draft a more restrictive definition.[52] This supports the conclusion that our legislature intended the definition of "oral communication" be read consistently with the almost identical definition of "oral communication" in the federal wiretap statute.[53]

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[50] *Id.* at 1.

[51] *Id.*

[52] *Compare* 18 U.S.C. § 2510(2)(West 2016) ("Oral communication" means "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such an expectation, but such term does not include any electronic communication.") *with* TEX. CODE CRIM. PROC. art. 18.20 § 1(2) ("Oral communication" means "an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation. This term does not include an electronic communication.").

[53] *See also Castillo*, 810 S.W.2d at 183 (noting that the Court should consider the statutory construction of the federal wiretap

The legislative history behind the federal wiretap statute reveals that Congress' intent was to protect people engaged in oral communications under circumstances justifying their expectation of privacy.[54] As both the State and Appellant observe, the purpose of Title III was creating legislation to meet the constitutional standard set out by the United States Supreme Court in *Berger v. New York* and *Katz v. United States.*[55] This supports the conclusion that the definition of "oral communication" was meant to incorporate the expectation-of-privacy standard.

Moreover, the State relies upon cases that actually apply the expectation-of-privacy standard when analyzing the definition of "oral communication" in the federal wiretap statute. *Boddie v. American Broadcasting Companies, Inc*., for example, held that a woman who voluntarily spoke with reporters may have retained an expectation of privacy in that conversation when the reporters surreptitiously recorded a portion of it without the woman's consent.[56] *Huff v. Spaw* held that a woman had an expectation of privacy in a conversation with her husband even though, unbeknownst to her, her husband's cell phone had pocket-dialed a third person.[57] While these cases do note the interplay between an expectation of privacy and the terms of the

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statute by other courts because the definition of "intercept" in Article 18.20 was borrowed from the federal wiretap statute).

[54] S. Rep. No. 90-1097 at ___ (1968), as reprinted in 1968 U.S.C.C.A.N. 2112, 2178; *see also Ex parte Graves*, 853 S.W.2d at 705 (citing *United States v. McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978)).

[55] State's Br. 18; Appellant's Br. 25-26; *see also* 1968 U.S.C.C.A.N. 2112, 2113.

[56] 731 F.2d 333, 338-39 (6th Cir. 1984).

[57] 794 F.3d 543, 554 (6th Cir. 2015).

federal wiretap statue, the results are nonetheless couched in terms of an expectation of privacy. These cases certainly do not reject an expectation-of-privacy analysis; they simply address nuances contained within that standard.

We have found two cases that interpreted the federal wiretap statute consistent with an expectation-of-non-interception standard.[58] But the federal circuit courts that decided those cases have more recently eschewed that standard in favor of a traditional expectation-of-privacy analysis.[59] There no longer appear to be any courts incorporating an expectation-of-non-interception standard into the federal definition of "oral communication." Though a person's reasonable expectation that his statements will not be intercepted will necessarily inform an expectation-of-privacy analysis and vice versa, interpreting the state wiretap statute to incorporate the expectation-of-privacy test is consistent with the legislative intent behind the promulgation of the state and federal wiretap statutes.

We agree with the court of appeals that our legislature intended that the definition of "oral communication" in Article 18.20 be read to incorporate the Fourth Amendment's legitimate-expectation-of-privacy standard. To that end, when determining whether a person exhibited "an expectation that the communication is not subject to interception" under Article 18.20, we ask whether the person speaking displayed through his conduct a subjective expectation

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[58] *See, e.g., Angel v. Williams*, 12 F.3d 786, 789-90 (8th Cir. 1993); *Walker v. Darby*, 911 F.2d 1573, 1579 (11th Cir. 1990).

[59] *See, e.g., United States v. Peoples*, 250 F.3d 630, 636-37 (8th Cir. 2001); *United States v. McKinnon*, 985 F.2d 525, 526 (11th Cir. 1993).

of privacy in his conversation. When we consider whether there were "circumstances justifying that expectation" under Article 18.20, we must determine whether society is prepared to recognize a person's subjective expectation of privacy as objectively reasonable. We turn now to the question of whether Coach Townsend's locker-room speech constituted "oral communication" under the statute.

B. Coach Townsend's Speech Was "Oral Communication"

There does not appear to be serious dispute that Coach Townsend harbored "an expectation that his communication was not subject to interception."[60] He testified that he believed that the locker room was private. As noted above no one was allowed to access the locker room except the Argyle team and the coaches. Upon learning that his communication with his team had been recorded, Coach Townsend felt that his privacy had been violated. We hold that a rational jury could have found that Coach Townsend harbored a subjective expectation of privacy.[61] The remaining question then is whether Coach Townsend's subjective

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[60] Long does argue that Coach Townsend did not actually exhibit a subjective expectation of privacy because there was evidence that he was not allowed in the locker room while the girls were dressing and that on some occasions (not necessarily this one) he could be overheard from outside the locker room. At most, this evidence presented a conflict the jury was free to resolve against Long. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014) ("[W]hen the record supports conflicting inferences, we presume that the jury resolved conflicts in favor of the verdict, and we defer to that determination.").

[61] *Betts*, 397 S.W.3d at 204 (holding defendant had expectation of privacy in his aunt's backyard based upon permission from his aunt to keep his dogs in the back yard and enter the premises to water and feed them).

expectation of privacy was one that society is prepared to regard as objectively reasonable. We hold that it is.

1. *Berger v. New York* and *Katz v. United States*

Eavesdropping is an ancient practice which at common law was condemned as a nuisance.[62] At one time the eavesdropper listened by naked ear under the eaves of a house or at its windows or beyond its walls seeking out private discourse.[63] In 1967, when the United States Supreme Court decided *Berger*, the Court recognized that technological advances had yielded sophisticated electronic devices capable of eavesdropping under almost any condition by remote control.[64] At that time, the Court was concerned with devices suitable to an Ian Fleming novel such as miniature microphones (no bigger than a postage stamp) and "electric rays" beamed at walls or glass windows to record voice vibrations.[65] Doubtless the Court could not even imagine the eavesdropping potential in the modern cell phone.[66]

Berger was the go-between for the principal co-conspirators in a conspiracy to bribe the Chairman of the New York State Liquor Authority.[67] Police obtained two different ex parte orders under the New York "eavesdropping" statute to plant listening

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[62] *Berger v. New York*, 388 U.S. 41, 45 (1967).

[63] *Id.*

[64] *Id.* at 47.

[65] *Id.*

[66] *See, e.g., Riley v. California*, 134 S.Ct. 2473, 2489-90 (2014) (describing in detail the multitude of features of modern cell phones as well as noting their pervasiveness in modern society).

[67] *Berger*, 388 U.S. at 44-45.

devices in the offices of the attorneys for Berger and his co-conspirators.[68] After some two weeks of eavesdropping, evidence of the conspiracy was uncovered, and New York charged Berger based solely upon his conversations with the attorneys in their respective offices.[69]

The Supreme Court struck down the New York statute because it effectively authorized a "general warrant" for the collection of evidence after a trespassory invasion of a home or office.[70] Though the statute required police to obtain an order from a neutral and detached magistrate before placing the listening device, it did not explicitly require a showing of probable cause, only a showing of a "reasonable ground."[71] And, even assuming that a showing of "reasonable ground" equaled a showing of probable cause, it also failed to require a showing of particularity as to the crime under investigation, the place to be searched, or the person or things to be seized.[72] This need for particularity was especially great in the context of eavesdropping because of its intrusion upon privacy.[73] According to the Court, the New York Statute authorized "indiscriminate use" of an electronic listening device.[74]

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[68] *Id.*

[69] *Id.*

[70] *Id.* at 45.

[71] *Id.* at 59.

[72] *Id.* at 55.

[73] *Id.* at 56.

[74] *Id.* at 58.

Several months later, the Court decided *Katz v. United States*.[75] The United States charged Katz with taking bets in a public telephone booth in Los Angeles from gamblers in Miami and Boston.[76] FBI agents obtained key evidence in the case by attaching an electronic listening and recording device to the outside of the booth and recording Katz's end of the conversation.[77] At trial, the prosecution introduced these recordings, over objection, based upon the theory that the recording did not violate the Fourth Amendment because the agents had not physically intruded into the public telephone booth occupied by Katz.[78]

The Court reversed, holding that the recording of Katz's side of the conversation, even overheard from outside a public telephone booth, violated the Fourth Amendment.[79] At the outset, the Court rejected the contention that the telephone booth at issue was less deserving of Fourth Amendment protection simply because Katz was still visible to the public while inside it.

> But what he sought to exclude when he entered the booth was not the intruding eye– it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the

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[75] 389 U.S. 347 (1967).

[76] *Id.* at 348.

[77] *Id.*

[78] *Id.* at 348-49.

[79] *Id.* at 359.

> protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.[80]

Consequently, the Court held that the FBI agents had violated Katz's privacy even without a physical intrusion into the public phone booth to record his conversation.[81]

In contrast to *Berger*, the Court agreed that the surveillance at issue in *Katz* was narrowly circumscribed.[82] The Government argued that the surveillance was limited in scope and duration to the specific purpose of establishing the contents of Katz's unlawful telephonic communications.[83] Moreover, the agents confined the surveillance to brief periods during which Katz used the phone booth, and they took great care to only record Katz's side of the conversation.[84] According to the Court, "[A] duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place."[85] Nevertheless, the Court held that the

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[80] *Id*. at 352 (internal citations omitted).

[81] *Id.* at 352-53.

[82] *Id.* at 354.

[83] *Id.*

[84] *Id*.

[85] *Id*.

Government was still required to get a warrant, and because it did not, the recording violated Katz's privacy.[86]

Notably, the "reasonable expectation of privacy" test was first articulated in Justice Harlan's concurring opinion in *Katz*. Justice Harlan recognized, as did the majority, that the Fourth Amendment protects "people, not places," but he further noted that explaining what protection it affords those people still required reference to a "place."[87]

> My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.[88]

In his view, "[t]he point is not that the booth is 'accessible to the public' at other times . . . but that it is a temporarily private place whose momentary

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[86] *Id*. at 359.

[87] *Id*. at 361 (Harlan, J., concurring).

[88] *Id*.

occupants' expectations of freedom from intrusion are recognized as reasonable."[89]

Neither *Berger* nor *Katz* turned upon the risk that the parties to the conversation might repeat the conversation to someone else. Indeed, Berger, as a go-between, was expected to divulge the information gleaned in one conversation with the other member of the conspiracy and vice versa. Nevertheless, the conversations were still private and the placement of an electronic eavesdropping device in a private office that Berger visited violated Berger's expectation of privacy.

Additionally, the content of the communications itself played no roll in the Court's analysis. The focus was on whether law enforcement had invaded a privacy interest in order to surreptitiously record the conversations at issue. The FBI's efforts to limit its electronic eavesdropping to only the illegal betting did not lessen the intrusion into Katz's privacy.

But most significantly, the expectation-of-privacy standard announced in *Katz* necessarily evaluates the place in which the conversation occurred in order to determine whether a person has an expectation of privacy in his or her conversation.[90] Long frames the

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[89] *Id*.

[90] *Id*. at 361 (Harlan, J., concurring). We reached the same conclusion in *Crosby v. State*, 750 S.W.2d 768, 779 (Tex. Crim. App. 1987) ("To a large degree the determination of whether an individual has a reasonable expectation of privacy depends upon the location or situs of that individual at the time of the questioned search."); *See also Liebman v. State*, 652 S.W.2d 942, 945 (Tex. Crim. App. 1983) ("While the design of the 'place' in which appellants were observed by the officers is important . . . its relevance is in reflecting the inherent opportunity the

issue as whether Coach Townsend has an expectation of privacy in his speech, and so did the court of appeals. *Katz* makes clear that the legal question is answered by considering the circumstances in which Coach Townsend gave his speech, not what Coach Townsend said or whether he had, in the past, been overheard.[91]

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individual had for privacy in the "place" and the steps he actually took to avail himself of that opportunity.").

[91] In *Katz,* the defendant had an expectation of privacy in the public telephone booth even though his communication was actually intercepted by being overheard outside of the telephone booth. 389 U.S. at 348, 359. This is also consistent with the United States Supreme Court's more recent move to consider whether property rights have been violated when determining the applicability of the Fourth Amendment. *See United States v. Jones*, 565 U.S. 400 (2012) (holding that commission of trespass by placing a GPS tracking device on the undercarriage of the defendant's Jeep violated the Fourth Amendment). In *Florida v. Jardines*, for example, the drug-dog's "interception" of the smell of marijuana outside the home violated the Fourth Amendment because the officer had to intrude upon the homeowner's property rights for the dog to be able to intercept the scent. 133 S. Ct. 1409, 1417 (2013). In this way the *Katz* reasonable-expectations standard "has been *added to*, not *substituted for*," the traditional property-based understanding of the Fourth Amendment. *Jones*, 565 U.S. at 409. We do not need to evaluate whether a defendant's property interest gives rise to a socially-recognized privacy interest because we can simply conclude that it does by resort to determinations based on property law. *See O'Connor v. Ortega*, 480 U.S. 709, 730 (1987) (Scalia, J., concurring) ("A man enjoys Fourth Amendment protection in his home, for example, even though his wife and children have the run of the place–and indeed, even though his landlord has the right to conduct unannounced inspections at any time.").

2. Factors Supporting An Expectation of Privacy

The United States Supreme Court clarified in *Smith v. Maryland* that Justice Harlan's formulation of the expectation-of-privacy test was implicit in the majority holding in *Katz*.[92]

> This inquiry, as Mr. Justice Harlan aptly noted in his *Katz* concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy,"–whether, in the words of the *Katz* majority, the individual has shown that "he seeks to preserve [something] as private." The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'"–whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is "justifiable" under the circumstances.[93]

As mentioned above, this standard is applied when determining whether a person has "standing" to challenge a search by law enforcement.[94] Notably, the Supreme Court recognized that a person can have standing to complain about a search of a workspace even though he shares it with several other people.[95] Even though an employee might share his office with

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[92] 442 U.S. at 740.

[93] *Id*. (internal citations omitted).

[94] *See, e.g., State v. Granville*, 423 S.W.3d 399, 405 (Tex. Crim. App. 2014).

[95] *Mancusi v. DeForte*, 392 U.S. 364, 368-69 (1968).

other people who have equal access to the office, the employee can still reasonably expect that he will not be disturbed except by personal or business invitees.[96] Sharing an otherwise private area with others–and the corresponding risk that those others might divulge something subjectively considered private–does not defeat the reasonableness of an employee's expectation of privacy.[97] As the late Justice Scalia noted, "It is privacy that is protected by the Fourth Amendment, not solitude."[98] We have explained that courts look to a variety of factors when deciding whether a person has a reasonable expectation of privacy in a place or object searched, factors such as whether:

> (1) the person had a proprietary or possessory interest in the place searched;
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> (2) the person's presence in or on the place searched was legitimate;
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> (3) the person had a right to exclude others from the place;
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> (4) the person took normal precautions, prior to the search, which are customarily taken to protect privacy in the place;
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> (5) the place searched was put to a private use; and
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> (6) the person's claim of privacy is consistent with historical notion of privacy.[99]

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[96] *Id.* at 369.

[97] *Id*.

[98] *O'Connor*, 480 U.S. at 730 (Scalia, J., concurring).

[99] *Granados v. State*, 85 S.W.3d 217, 223 (Tex. Crim. App. 2002).

This list of factors is not exhaustive, however, and none is dispositive of a particular assertion of privacy; rather we examine the circumstances in their totality.[100] As the United States Supreme Court observed in *Rakas v. Illinois*, "One of the main rights attaching to property is the right to exclude others, . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude."[101]

Consideration of whether a legitimate expectation of privacy existed in this case is also affected by its unique posture. When reviewing courts conduct a standing analysis in the context of a motion to suppress, oftentimes several overlapping concepts are combined. Most often, a reviewing court will consider whether a particular defendant had a "legitimate" expectation of privacy–a subjective and objectively reasonable expectation of privacy–in an area searched.[102] But sometimes, reviewing courts answer the question of standing by determining whether there has been an intrusion upon an expectation of privacy, i.e., whether a search has occurred.[103] And other times, reviewing courts might discuss an expectation of privacy but uphold a search as reasonable under the Fourth

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[100] *Id.*

[101] 439 U.S. 128, 143 n. 12 (1978).

[102] *State v. Betts*, 397 S.W.3d 198, 203 (Tex. Crim. App. 2013) (applying expectation of privacy test to determine standing).

[103] *State v. Hardy*, 963 S.W.2d 516, 523 (Tex. Crim. App. 1997) ("There is no question that the drawing of blood from a person's body infringes an expectation of privacy recognized by society as reasonable.") (citing *Skinner v. Railway Labor Exec. Assn.*, 489 U.S. 602, 616 (1989)).

Amendment because the expectation of privacy is low and the corresponding intrusion minimal.

This case is not a review of a motion to suppress. Instead, we are tasked with determining whether the evidence adduced in this case satisfies the definition of "oral communication" as a matter of law. We are not concerned with the reasonableness of C.L.'s "search" so we do not need to consider how heightened or diminished Coach Townsend's expectation of privacy was. But, as discussed above, a determination of whether a legitimate expectation of privacy has been violated requires examination both of the privacy interest and the intrusion. Given the legislative intent behind the statute at issue, we read the statute consistent with the standard set out in *Berger* and *Katz*. Under those cases, the intrusion at issue was either the placement of an electronic listening device within a private area or the placement of the listening device on the outside of a private area in order to seize the information inside a private area. In this case, the intrusion at issue is similar to the one present in *Berger*, the placement of an electronic listening device within an otherwise private area, the girls' locker room.

The bulk of the factors we traditionally consider when determining whether an expectation of privacy is objectively reasonable weigh in favor of finding that Coach Townsend's expectation of privacy in the team's locker room was legitimate. The locker room was being put to a private use and Coach Townsend was legitimately present in that locker room. While he did not own the property, he had a greater proprietary or possessory interest in the locker room than C.L. in the same way that Katz had a greater proprietary or possessory interest in the public phone booth than the

FBI agents. And, Coach Townsend's position as coach authorized him to exclude people from the locker room; his understanding that the room was only for the coaches and the team members was unchallenged. C.L. passing herself off as a "team manager" to gain access to the locker room further supports a finding that the locker room was at least temporarily private. Though Townsend himself did not take additional precautions to protect his privacy in the room, there was evidence that the police had prevented one attempt by C.L. from entering the locker room at another game at another school. And, the two sets of doors at the entry to the locker room showed a design establishing an additional layer of privacy protection to those inside the room. Historical notions of privacy, however, appear to be harder to weigh.

3. A Locker Room Is Not a Classroom

Of course, part of the difficulty in determining what historical notions of privacy apply under these circumstances flows from the difficulty in characterizing the "place" in which Coach Townsend's communication was recorded. To a large degree the determination as to whether an individual has a reasonable expectation of privacy depends upon the location or situs of that individual at the time of the questioned search.[104] While the design of the "place" in which a person is observed is important, its relevance is in reflecting the inherent opportunity the individual had for privacy in the "place" and the steps he actually took to avail himself of that opportunity.[105] Though the "place" at issue in this case was designed to be a locker room, albeit one that could be put to multiple uses, the court

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[104] *Crosby*, 750 S.W.2d at 779.

[105] *Liebman*, 652 S.W.2d at 945.

of appeals characterized it as a "classroom setting." An examination of the cases the court of appeals relied upon leads us to the conclusion that this is not an accurate characterization.

Understandably, the court of appeals relied upon *Roberts v. Houston Independent School Dist.*, the only case in Texas that addresses the expectation of privacy held by a teacher in her classroom.[106] But there, the recording undisputedly took place in an otherwise "public" classroom.[107] That is, in *Roberts*, the record showed that the teacher at issue "was videotaped in a public classroom, in full view of her students, faculty members, and administrators."[108] There was nothing to indicate that there were any restrictions upon entry into the classroom. Moreover, the teacher in that case was even told that she would be videotaped before she was actually videotaped.[109] There was simply no room for privacy at all. This stands in marked contrast to the environment in which Coach Townsend spoke to his basketball team.

Problematically, the strength in the court of appeals analogy to *Roberts* lay in the content of the communication collected rather than the circumstances surrounding it. The key to the court of appeals' analysis comes from its reliance upon the observation in

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[106] 788 S.W.2d 107, 111 (Tex. App.–Houston [1st Dist.] 1990, writ. denied).

[107] *Id*.

[108] *Id.*

[109] *Id.* at 110-11 ("Under this point, appellant argues that she had an expectation of privacy in her classroom to be free from intrusion by videotaping, and that by videotaping her performance, over her objection, the school district violated her right of privacy as well as its own policy.").

Roberts that "the activity of teaching in a public classroom does not fall within the expected zone of privacy."[110] The court of appeals appears to have taken this statement to mean that any time the communication between a teacher and a student amounts to "teaching" the teacher lacks any expectation of privacy in the conversation.

But as discussed above, neither *Berger* nor *Katz* turned upon the determination that the content of the communication was less deserving of privacy. Berger's communication in furtherance of the conspiracy did not render the environment in which he made statements less private. Neither did Katz's illicit wagering render the phone booth he was speaking in more public. And in *Roberts* it was the openness of the classroom that made the teacher's expectation of privacy unreasonable, not the lesson she was teaching. The statutory definition of "oral communication" does not exempt certain subjects of communication from protection, and the court of appeals erred in determining that the content of the communication in this case changed the character of the environment in which Coach Townsend spoke.[111] In this we agree with the

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[110] *Id*. at 111; *see also Long*, 469 S.W.3d at 309 ("In reaching this conclusion, the court reasoned that 'the activity of teaching in a public classroom does not fall within the expected zone of privacy' because '[t]here is no invasion of the right of privacy when one's movements are exposed to public views generally.'").

[111] Even if we were to regard "teaching" as conduct rather than speech, the mere fact that an individual defendant can use a particular environment for a different purpose than it was designed for does not alter societal expectations of that environment. The ability to use a public bathroom stall for oral sex, for example, does not convert that bathroom into a bedroom though both areas are indisputably private areas. *Buchanan v. State*, 471 S.W.2d 401, 404 (Tex. Crim. App. 1971) (recognizing privacy

State; Section 16.02, and by extension Article 18.20, concern themselves with the capture, not the content, of the communication.

Even more problematic is the court of appeals' reliance upon *Evans v. Super. Ct. of L.A. County*. There, the issue was not whether the surreptitious recording of a teacher violated a reasonable expectation of privacy.[112] Instead, the plaintiff, a public school teacher, claimed that a student's surreptitious videotape of her classroom lecture could not be admitted into evidence because it violated California statutes, specifically Section 51512 of the California Education Code and Section 632 of the California Penal Code.[113] The plaintiff in *Evans* based her

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interest in public bathroom stall even though defendant was not using bathroom stall to go to the bathroom). And regardless of whether "teaching" amounts to speech or expressive conduct, we have a duty to construe the statute in a content-neutral fashion to avoid constitutional violations. *Long v. State*, 931 S.W.2d 285, 295 (Tex. Crim. App. 1996) (recognizing our general duty to interpret statutes in order to avoid constitutional violations).

[112] *Evans v. Super. Ct. Of L.A. County*, 77 Cal. App. 4th 320 (Cal. Ct. App. 1999).

[113] *Id.* at 322. *See also* CAL. EDUC. CODE § 51512 ("The Legislature finds that the use by any person, including a pupil, of any electronic listening or recording device in any classroom of the elementary and secondary schools without the prior consent of the teacher and the principal of the school given to promote an educational purpose disrupts and impairs the teaching process and discipline in the secondary schools, and such use is prohibited. Any person, other than a pupil, who willfully violates this section shall be guilty of a misdemeanor."); CAL. PENAL CODE § 632(a) ("A person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by

arguments in that case upon her interpretation of these California statutes, not the Fourth Amendment. More simply put, the *Evans* court faced an issue of statutory privilege rather than one of constitutional privacy.

Finally, the court of appeals also relied upon *Plock v. Bd. of Educ. of Freeport Sch. Dist. No. 145*. But the circumstances at issue in *Plock* mirror those in *Roberts*; the teachers there complained that open and notorious videotaping of their otherwise public classroom violated their expectation of privacy.[114] Specifically, the court's decision in *Plock* turned upon the fact that "classrooms are open to students, other faculty, administrators, substitute teachers, custodians, and on occasion, parents."[115] And, the court relied upon *Evans* to inform its expectation-of-privacy analysis even though *Evans* did not determine whether the teacher filing suit had a reasonable expectation of privacy in her classroom.[116] In effect, *Plock* combines both *Roberts* and *Evans*, but because neither case is an apt analogy to the circumstances present in this case,

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means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500) per violation, or imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.").

[114] *Plock v. Bd. of Educ. of Freeport Sch. Dist. 145*, 545 F. Supp. 2d. 755, 756 (N.D. Ill. 2007).

[115] *Id.* at 758.

[116] *Id.* ("Any expectations of privacy concerning communications taking place in special education classrooms such as those subject to the proposed audio monitoring in this case are inherently unreasonable and beyond the protection of the Fourth Amendment.").

combining them does not make *Plock* fit this case any better than *Roberts* or *Evans*.

The environments at issue in *Roberts*, *Evans*, and *Plock* were public with no stated restrictions upon access at the time of the communications in question. But the circumstances surrounding the communication in this case are more restrictive with undisputed limits upon access to the area where the communication took place. Further, none of these cases stand for the proposition that the content of communication determines whether a teacher has an expectation of privacy in his or her communication with students; an otherwise private environment does not become public simply because the teacher is "teaching." The court of appeals erroneously relied upon these cases to simply equate a girls' locker room with a "classroom setting."[117]

4. Historical Notions of Privacy In Locker Rooms

Of course, we have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable.[118] Instead we give weight to such factors as the intention of the uses to which the individual has put a location and our societal understanding that certain areas deserve the

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[117] Ultimately, identifying what constitutes a "classroom" for a particular type of teacher presupposes a *per se* rule that teacher-student communications are exempt from the wiretap statute. Had that been the legislature's intent, it would have included an affirmative defense in that regard within the statute. *See, e.g., United States Giordano*, 416 U.S. 505, 514 (1974) (noting that the purpose of the federal wiretap statute was to prohibit all interceptions of oral and wire communications except those specifically provided for in the Act).

[118] *O'Connor*, 480 U.S. at 715.

most scrupulous protection from government invasion.[119] As the United States Supreme Court stated in *Rakas v. Illinois*, "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."[120]

While we often note that we determine whether a person has a legitimate expectation of privacy by looking to "historical notions of privacy," we typically resort to other cases examining privacy in similar settings unless the setting itself provides an obvious answer. For example, we held that historical notions of privacy cut against any expectation of privacy in a jail cell in *Oles v. State* because the conclusion was obvious.[121] However, in *Matthews v. State*, we determined that the defendant had a reasonable expectation of privacy in a borrowed car by, as one might expect, looking at cases analyzing searches of borrowed cars and the like.[122] So, to determine whether Coach Townsend's subjective expectation of privacy is consistent with historical notions of privacy we must examine cases involving locker rooms and similar environments.

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[119] *Oliver v. United States*, 466 U.S. 170, 178 (1987).

[120] 439 U.S. 128, 143 n.12 (1978).

[121] *Oles v. State*, 993 S.W.2d 103, 109 (Tex. Crim. App. 1999) ("No situation imaginable is as alien to the notion of privacy than an arrestee sitting in a jail cell, completely separated from his effects that are lawfully controlled and inventoried by the very police that are investigating him.").

[122] *Matthews v. State*, 431 S.W.3d 596, 607 (Tex. Crim. App. 2014).

On the one hand, the United States Supreme Court has noted that public school locker rooms are not necessarily notable for the privacy they afford the students because no individual dressing rooms are provided, showers are generally communal, and some toilet stalls do not have doors.[123] In that case, *Vernonia School Dist. 47J v. Acton*, the Court considered the reasonableness of a school district's random urinalysis program for student athletes.[124] While the Court noted that the individual students had an expectation of privacy in their "excretory function," it upheld the policy as a reasonable intrusion upon the student's expectation of privacy because the intrusion into that expectation was negligible.[125] Nevertheless, the Court did not hold that the students in the bathroom had no expectation of privacy at all, only that the intrusion was reasonable because the expectation of privacy was not great and the intrusion was minimal.[126]

Indeed, when it comes to the issue of covert surveillance in a public school locker room, at least one court has been quick to note that the students still maintain some expectation of privacy.[127] In *Brannum*

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[123] *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).

[124] *Id.* at 651-52.

[125] *Id.* at 658 (noting that students providing a sample did so in conditions nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily).

[126] *Id.* at 664-65 ("Taking into account all the factors we have considered above–the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search–we conclude Vernonia's Policy is reasonable and hence constitutional.").

[127] *Brannum v. Overton County School Board*, 516 F.3d 489, 496 (6th Cir. 2008).

v. Overton County School Board, the Sixth Circuit considered a legal challenge by students to a school's installation of surveillance cameras in student locker rooms that recorded them changing clothes.[128] There, a girls' basketball team visited another school for a game and noticed a camera in the girls' locker room.[129] After they complained, it was discovered that the camera had recorded a number of children changing clothes over a period of months.[130] In holding that the school district's use of surveillance cameras infringed upon the student's reasonable expectation of privacy, the Sixth Circuit acknowledged a public school student's diminished expectation of privacy, but nevertheless rejected the suggestion that the expectation of privacy was non-existent.[131] According to the Sixth Circuit, it is reasonable for students using a school locker room to expect that no one, especially school administrators, would videotape them, without their knowledge.[132]

However, the Court did not focus solely upon the privacy interest attendant to a school locker room; it also focused upon the students' significant privacy interest in their unclothed bodies.[133] To that extent, the case appears somewhat distinguishable from the facts presented here. After all, one could suggest that we should only focus on the complainant's expectation of privacy in this case, not the expectation of privacy of the members of his team.

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[128] *Id.* at 491-92.

[129] *Id.* at 492.

[130] *Id.* at 492-93.

[131] *Id.* at 496.

[132] *Id*.

[133] *Id.*

Yet, it must be remembered we are considering the scope of a definition in a statute rather than engaging in the traditional expectation-of-privacy analysis attendant to a specific search.[134] The terms of Section 16.02 making the interception of oral communication a crime protects all parties to a conversation.[135] By providing an affirmative defense to the crime for a party to the communication, Section 16.02 necessarily limits the application of the statute to interception of oral communication by uninvited third parties.[136] When interpreting the scope of this statute, the privacy interest of the other parties to the communication, the students, should be considered when assessing societal expectations regarding the locker room.[137]

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[134] *Moore v. State*, 371 S.W.3d 221, 227 (Tex. Crim. App. 2012) (noting that appellate construction of a statute may be necessary to resolve an evidence-sufficiency complaint when alternative statutory interpretations would yield dissimilar outcomes).

[135] TEX. PENAL CODE § 16.02(b); TEX. PENAL CODE § 16.02(c)(4)(a).

[136] TEX. PENAL CODE § 16.02(c)(4)(a). Of course, as discussed above, when dealing with a conversation with a child, parents of the child are essentially deemed invited to any conversation someone has with their child because they have the authority to vicariously consent to the recording of their child's conversation. *Alameda*, 235 S.W.3d at 223 (holding that parent may vicariously consent to the recording of conversations with their child provided the parent has a reasonable, good faith belief that consent is in the child's best interest). In this case, Long had not vicariously consented to a recording of a communication with one of her own children; she orchestrated the recording of communication with the children of other parents.

[137] In *State v. Hardy*, we observed that "[i]n determining whether an expectation of privacy is viewed as reasonable by 'society,' the proper focus under the Fourth Amendment is upon

When it comes to surreptitious electronic surveillance of locker rooms generally, courts in other jurisdictions have reached mixed conclusions. In *Jones v. Houston Community College System*, the United States District Court for the Southern District of Houston recognized that it is objectively reasonable to expect privacy in a locker room where access was restricted to those who used it.[138] Similarly, the United States District Court for the Central District of California held that police officers had a reasonable expectation of privacy in a work locker room that was not open to the public even though it lacked total privacy.[139]

Even when courts do not recognize an expectation of privacy in a locker room, they nevertheless recognize an expectation of privacy in not being recorded. In *DeVittorio v. Hall*, the United States District Court for the Southern District of New York held that police officers lacked a reasonable expectation of privacy in their locker room because it was accessible by everyone in the department, included mailboxes, bulletin boards, and a separate shower and bathroom area with its own door.[140] However, the court noted that the officers did have an expectation of privacy from covert

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American society as a whole, rather than a particular state or other geographic subdivision." 963 S.W.2d at 523.

[138] *Jones v. Houston Community College System*, 816 F. Supp. 2d 418, 434 (S.D. Tex. 2011).

[139] *Trujillo v. City of Ontario*, 428 F. Supp. 2d 1094, 1104-05 (C.D. Cal. 2006); *see also Carter v. County of Los Angeles*, 770 F. Supp. 2d 1042, 1049 (C.D. Cal. 2011) (noting expectation of privacy in secure dispatch room not open to the public because room was also used for resting, eating, and napping).

[140] *DeVittorio v. Hall*, 589 F. Supp. 2d 247, 256-57 (S.D.N.Y. 2008).

video surveillance while in the locker room because the room is used for private functions, such as changing clothes.[141] And the United States District Court for the District of Puerto Rico, in an unpublished opinion, seemed to recognize that federal police officers had an expectation of privacy in a locker room-break area, but only to the extent that those officers could not be videotaped.[142] Indeed, many courts have recognized the intrusiveness of covert video surveillance.[143]

While we have never had the occasion to consider the question of whether a locker room is private, we have considered the privacy interests attendant to a dressing room. In *Crosby v. State*, a "well-known nightclub and recording entertainer" named David Crosby[144] had contracted with a Dallas nightclub to perform at the club.[145] As part of the contract, the owner had furnished Crosby with exclusive use of a private dressing room.[146] The entrance to the dressing room was demarcated by an opaque curtain, which,

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[141] *Id.* at 257.

[142] *Avila v. Valentin-Maldonado*, No. 06-1285 (RLA), 2008 WL 747076, at *13 (D. Puerto Rico March 19, 2008) (not designated for publication).

[143] *See, e.g., United States v. Taketa*, 923 F.2d 665, 678 (9th Cir. 1991) (holding that one employee had an expectation of privacy from covert video surveillance by the government in another employee's office); *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) ("[I]ndiscriminate video surveillance raises the specter of the Orwellian state."); *United States v. Torres*, 751 F.2d 875, 882 (7th Cir. 1984) ("We think it . . . unarguable that television surveillance is exceedingly intrusive.").

[144] Yes, *that* David Crosby. *See e.g.* THE BYRDS, *Eight Miles High*, on FIFTH DIMENSION (Columbia Records 1966).

[145] *Crosby*, 750 S.W.2d at 770.

[146] *Id.*

when drawn, completely shielded anyone from viewing inside the room.[147] Crosby also placed a private sentry in front of the drawn curtain, whose obvious duties entailed excluding unwanted intruders.[148] We held that Crosby's subjective expectation of privacy in his dressing room was objectively reasonable because a dressing room reflects an inherent opportunity for privacy and Crosby had taken steps to maintain that privacy.[149]

In contrast, we have recognized there is no legitimate expectation of privacy in a Foley's dressing room, but only because in that case there was a sign informing the patron that the dressing room was under surveillance.[150] In *Gillett v. State*, the defendant went into the dressing room at Foley's in order to steal a sweater.[151] A female security guard entered an adjoining room and looked into the defendant's stall to view the defendant putting the sweater into her purse.[152] We held that defendant lacked an expectation of privacy because the posted sign "was notice that one could not expect privacy."[153] No such sign was posted in the girls' locker room in this case.[154]

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[147] *Id.* at 773.

[148] *Id.*

[149] *Id.* at 779-80.

[150] *Gillett*, 588 S.W.2d at 363.

[151] *Id*. at 362.

[152] *Id*.

[153] *Id.* at 363.

[154] Notably, both *Roberts* and *Plock*, cases relied upon by Appellant, dealt with situations where the teachers complaining about being recorded were told beforehand that they were being recorded. *See Roberts*, 788 S.W.2d at 110-11; *Plock*, 545 F. Supp. 2d. at 757.

At a minimum, every court that has considered the issue of covert video surveillance within a locker room has recognized that those within the locker room have a reasonable expectation of privacy to be free from such surveillance. Many recognize an expectation of privacy in locker rooms generally. And while we have never before considered whether a school locker room reflects an inherent opportunity for privacy, similar to a bathroom stall or a public telephone booth, we have made that determination in the context of a dressing room. A person in a locker room does not expect someone to sneak into that locker room and record them; courts considering the issue have recognized that this expectation is reasonable.

5. "Always Subject to Dissemination"

Despite all this, Long argues that the court of appeals correctly determined that Coach Townsend's speech to his team was not "private" because anything he says to students is always subject to dissemination by those students.[155] As discussed above, this theory originates with *Evans v. Superior Court of L.A. County* as a matter of California state law rather than under the expectation-of-privacy standard set out in *Katz*.[156] At most, *Evans* holds that the lack of a teacher-student privilege informed the determination that a student's surreptitious recording of her teacher in a public classroom did not violate California statutes.[157]

We have held that the absence of a privilege may be some evidence of societal expectations when

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[155] The court of appeals even noted that Coach Townsend stated in his halftime speech that he expected his students to talk to their parents about what he said. *Long*, 469 S.W.3d at 311.

[156] *Evans*, 77 Cal.App.4th at 324.

[157] *Id.*

evaluating whether a person has an expectation of privacy in his or her medical records.[158] As discussed above, in *State v. Hardy*, we recognized that the drawing of blood and analysis of its contents infringes upon a person's legitimate expectation of privacy, but the seizure of those medical records by law enforcement does not.[159] In reaching that conclusion we were careful to distinguish between privacy and privilege.

> [T]he absence or inapplicability of a privilege does not foreclose the existence of a societally recognized expectation of privacy. A privilege stands as an absolute bar to the disclosure of evidence (absent an exception) while the Fourth Amendment merely imposes certain reasonableness requirements as a condition for obtaining the evidence. That medical records have not been given the absolute protection of a privilege does not mean they might not possess the qualified protections embodied by the Fourth Amendment.[160]

Notably, we were not concerned, in *Hardy*, with dissemination of the test results at issue; we addressed the seizure of the results themselves. If we were to draw any analogy between this case and *Hardy* it would be to note that the intrusion in this case is more akin to the taking of the defendant's blood rather than the subpoena of his medical records.[161] And, as discussed above, *Katz* and *Berger* were concerned with the recording of the communication in those cases, not the information contained within the

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[158] *Hardy*, 963 S.W.2d at 525.

[159] *Id.* at 523, 527.

[160] *Id.* at 524.

[161] *Id.* at 523-24.

conversations. Though it is true that a teacher should expect that students will relay information about their lesson to others including parents, that fact did not equate to a sign in the locker room alerting Coach Townsend to the fact that he was under surveillance.

This is not to say that a school district, when faced with parental complaints regarding a particular teacher or coach, lacks the authority to intercept communications between school employees and students. As discussed above, we are not called upon to address the reasonableness of a particular search under the Fourth Amendment. Given a school district's interest in providing a safe and effective educational environment for students, a school district could certainly fashion surveillance protocols tailored to further an interest in monitoring communications between adults and students with only minimal intrusion upon existing privacy interests. And providing some form of notice to those under surveillance that such communications in otherwise restricted areas are subject to electronic interception would render any subjective expectation of privacy objectively unreasonable under the electronic eavesdropping statute.[162] But those are not the circumstances presented in this case.

V. Conclusion

We conclude that the definition of "oral communication" found in Article 18.20 of the Code of Criminal Procedure incorporates the reasonable expectation of privacy test as set out in *Katz* and *Berger*. Having reached that conclusion, we further hold that under the circumstances presented in this case, there was sufficient evidence for the jury to find that C.L. intercepted an "oral communication" because Coach

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[162] *See, e.g., Roberts*, 788 S.W.2d at 111.

Townsend had a subjective expectation of privacy that society is prepared to regard as objectively reasonable when he uttered that communication within the girls' locker room. Consequently, there was sufficient evidence supporting the jury's verdict that Appellant had violated Section 16.02 of the Texas Penal Code for her part in encouraging the interception of that oral communication and sharing copies of it with the school board. We reverse the court of appeals and affirm Appellant's conviction.

Filed: June 28, 2017

Publish

APPENDIX F

IN THE COURT OF
CRIMINAL APPEALS
OF TEXAS

[SEAL]

No. PD-0984-15

WENDEE LONG,

Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY
REVIEW FROM THE EIGHTH COURT OF
APPEALS DENTON COUNTY

DISSENTING OPINION

RICHARDSON, J., filed a dissenting opinion in which ALCALA and WALKER, JJ. joined.

Wendee Long instructed her daughter to record Coach Townsend speaking to his high school girls' basketball team. She later disclosed that recording to members of the school board. The majority holds that the recorded locker-room speeches were "oral communications" because Coach Townsend had a reasonable expectation of privacy in those speeches. Based on that conclusion, the majority reverses the Eighth Court of Appeals and reinstates Long's conviction under

Section 16.02, a second degree felony. Respectfully, I disagree with that decision.[1]

A person violates the Texas wiretap statute, committing a felony offense under Section 16.02 of the Texas Penal Code, if she intentionally "procures another person" to intercept an oral communication.[2] An "oral communication" is defined by statute as a communication "uttered by a person exhibiting an expectation that the communication is not subject to interception *under circumstances justifying that expectation*."[3] The Texas wiretap statute is substantially similar to its federal counterpart under 18 U.S.C. §§ 2510-2521.[4] Moreover, when we compare the federal statutory definition of "oral communication," it is almost identical to the Texas statutory definition.[5]

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[1] The issue before us is one of first impression—that is, with all other factors being equal, does a coach have a greater expectation of privacy than a teacher in a classroom setting simply because he is speaking to students in a locker room? More precisely, if a coach's locker room "half-time pep talk" is recorded without the permission or knowledge of anyone in the locker room, is it a violation of Section 16.02? The Court of Appeals unanimously said no, and I agree.

[2] TEX. PENAL CODE § 16.02(b)(1).

[3] TEX. CODE CRIM. PROC. art. 18.20, § 1(2) (emphasis added).

[4] *Alameda v. State*, 235 S.W.3d 218, 220, 222 (Tex. Crim. App. 2007) (noting that "the federal wiretap statute is substantively the same as the Texas statute").

[5] 18 U.S.C. § 2510(2) defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication." Texas Code of Criminal Procedure art. 18.20 § 1(2) defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under

This definition of "oral communication" incorporates the Fourth Amendment's legitimate-expectation-of-privacy standard.[6] But, even if a person has a subjective expectation of privacy in the words they utter to another, if the circumstances surrounding the uttering of that communication do not *justify* that subjective expectation (i.e., society is not willing to recognize that subjective expectation of privacy as objectively reasonable), then the communication is *not* protected from "interception" by Section 16.02.[7]

I disagree with the majority because I do not believe that Coach Townsend's locker-room speeches to his basketball team were "oral communications" as that term is used in Section 16.02(b)(1). The circumstances under which Coach Townsend uttered the locker room speeches did not justify his subjective expectation of privacy.[8] Therefore, I would affirm the court of appeals, which held that Coach Townsend did not have a reasonable expectation of privacy under these circumstances, the recordings were not "oral

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circumstances justifying that expectation. The term does not include any electronic communication."

[6] *Katz v. United States*, 389 U.S. 347, 353 (1967) ("[W]e have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording or oral statements overheard.").

[7] *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

[8] The fact that Wendee Long was not the principal of the school employing Coach Townsend, he was not at her school at the time of the alleged offense, and the fact that her daughter was not on any team coached by Coach Townsend, do not affect my opinion that he still did not have a legitimate expectation of privacy in the communications at issue.

communications" within the meaning of Section 16.02, and thus Long did not violate Section 16.02(b)(1).[9]

The determination of whether a person has a reasonable expectation of privacy in his communications "is made on a case-by-case basis and is highly fact determinative."[10] It is therefore necessary to look at the "circumstances" under which Coach Townsend uttered the words that were recorded. To look at the "circumstances," we should consider all of the details surrounding the words that were uttered. No one factor or detail should be viewed in isolation or removed from consideration.

However, the majority places great weight on the fact that Coach Townsend gave his speech to the players in a locker room, emphasizing that locker rooms are private, that Coach Townsend was "legitimately present" in the locker room, and that access to the locker room was restricted. So, reasons the majority, society would therefore regard Coach Townsend's expectation of privacy in the speeches he gave in the locker room as objectively reasonable. But, the half-time speech video clearly reflects that Coach Townsend had no expectation of privacy in what he was saying to the team. When Coach Townsend was giving his half-time speech, the video shows that the door was left wide open,[11] and there appears to have

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[9] *Long v. State*, 469 S.W.3d 304, 306 (Tex. App.—El Paso 2015).

[10] *Id*. at 308 (citing *O'Connor v. Ortega*, 480 U.S. 709, 718 (1987), which notes that, given the great variety of work environments in the public sector, whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis).

[11] *Cf Katz*, 389 U.S. at 361 ("The critical fact in this case is that '(o)ne who occupies it, (a telephone booth) shuts the door behind him, and pays the toll that permits him to place a call is

been three other coaches in the room. Coach Townsend was speaking in a loud voice, and he exhibited no body language or vocal inflections that demonstrated any intention to keep the communication private *because* it was being given in a locker room. Yet, the majority was unpersuaded by the appellate court's characterization of the locker room as a "classroom setting."[12] Historical notions of locker-room privacy provided a basis for the majority to distinguish the cases relied on by the court of appeals.

But, the court of appeals's analysis equating the locker room to a classroom under these facts rings true. A high school girls' basketball coach is an Educator with great power to influence and impress upon student athletes the values of teamwork, commitment, integrity, fairness, loyalty, responsibility, accountability, patience, self-discipline, and sportsmanship. This was clearly Coach Townsend's intent when he gave the

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surely entitled to assume' that his conversation is not being intercepted.").

[12] *See Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107, 111 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (a public school teacher has no reasonable expectation of privacy while teaching in a public classroom); *Plock v. Bd. of Educ. of Freeport Sch. Dist. No. 145*, 545 F. Supp.2d 755, 758 (N.D. Ill. 2007) (special education teachers had no reasonable expectation of privacy in communications in their classrooms). In *Evens v. Super. Ct. of L.A. County*, 77 Cal. App. 4th 320 (1999), the court's assessment that a teacher's communications in a classroom are not private was based at least in part on the fact that a teacher should expect "public dissemination" of his or her communications and activities since students usually discuss teacher's communications and activities with their parents, other students, other teachers, and administrators. Thus, realistically, said *Evens*, a teacher's expectation that their communications with students would remain private was unrealistic and thus unreasonable. *Id.* at 324.

locker-room speeches. This case does not involve the invasion of Coach Townsend's "innermost secrets."[13] He did not "utter words into the mouthpiece" of a telephone.[14] Rather, at the time that Coach Townsend was uttering the words that were recorded, he was *on the job*. Coach Townsend was providing what he clearly believed to be instructional communications to his players during and immediately after a game. Since a coach does not have a traditional classroom within which to educate his student athletes, anywhere that a coach addresses his or her team should be considered their "classroom."

Thus, while the location is an important consideration, it is not the sole consideration.[15] Nevertheless, to the same extent the majority factored in the location of the communication, it devalued the content of the communication. I would hold, however, that the content of the video and audio recordings is the best evidence that Coach Townsend did not have an expectation of privacy. The content of his communication is a very significant part of the "circumstances" surrounding the communication. When Coach Townsend gave his post-game speech, a female coach also spoke to the team. Both coaches's speeches focused solely on the general performance of the players. Nothing about what was said or how it was said gave any indication that Coach Townsend intended the communication to

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[13] *Berger v. State of New York*, 388 U.S. 41, 63 (1967).

[14] *Katz*, 389 U.S. at 352.

[15] *See Katz*, 389 U.S. 347, 351 (noting that the Fourth Amendment protects people not places).

be private. No game strategy was discussed; no team secrets were revealed.[16]

If we are to determine whether Coach Townsend's subjective expectation of privacy in his locker-room communications to the girls' basketball team is one that society is willing to recognize as reasonable, we must look at the totality of the circumstances, and that includes what was said and how it was said. A communication is only an "oral communication" under Section 16.02 if it is uttered by a person "under circumstances" that objectively justify that person's subjective expectation of privacy. Only then is the person's expectation of privacy considered objectively reasonable as well as subjectively reasonable.[17] No single factor should be determinative.[18]

As noted above, the content of Coach Townsend's speeches was 100% focused on what he believed was the necessary coaching of his players. Putting it mildly, the gist of his speeches was directed to the players's performance at the game, and emphasis was placed on their commitment to the team and their

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[16] I understand that game secrets are game secrets, but even if this were a situation where a rival had eavesdropped on Coach Townsend's strategy session, that form of reprehensible cheating would likely result in a forfeit of the game or some other similar form of punishment.

[17] *See Brugmann v. State*, 117 So.3d 39, 48-49 (Fla. App. 3rd Dist. 2013); *see also State v. Inciarrano*, 473 So.2d 1272 (Fla. 1985) (noting that factors to consider may include (1) the location where the communication took place; (2) the manner in which the communication was made; (3) the nature of the communication; (4) the intent of the speaker asserting protection at the time the communication was made; (5) the purpose of the communication; (6) the conduct of the speaker; (7) the number of people present; (8) the contents of the communication).

[18] *State v. Duchow*, 749 N.W.2d 913, 920 (Wis. 2008).

need for improvement. To the extent that Coach Townsend even had a subjective expectation of privacy, nothing about what he said would support a finding that he was justified in having such an expectation of privacy.

Therefore, considering the totality of the circumstances in this case, I disagree with the majority's conclusion that Coach Townsend's speeches he gave to the girls' basketball team were made under circumstances that justified his subjective expectation of privacy. Because I do not believe that Coach Townsend had a legitimate expectation of privacy in such communications, respectfully, I dissent. Instead, I would affirm the decision of the Eighth Court of Appeals.

FILED: June 28, 2017

PUBLISH

APPENDIX G

IN THE TEXAS
COURT OF CRIMINAL APPEALS

[Filed 7/7/2017]

PD-0984-15

WENDEE LONG

v.

THE STATE OF TEXAS

MOTION FOR REHEARING

The State of Texas raised, and this Court granted, two issues for review in this case: (1) whether the reasonable-expectation-of-privacy test was the appropriate one; and, (2) if it was *not*, whether the judgment of the court of appeals should be reversed. The State never asked this Court to hold that, if the reasonable-expectation-of-privacy test was appropriate, the judgment of the court of appeals should be reversed. As such, neither party briefed that question.

In an "acutely unfair" move, this Court nonetheless reversed the court of appeals's judgment on that basis. *See McWilliams v. Dunn*, 137 S. Ct. 1790, 1807 (2017) (Alito, J., dissenting) (describing as "acutely unfair" the Court's disposition based on an issue on which review was not granted). "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*,

714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring). Deciding only questions presented "give[s] the parties notice of the question to be decided and ensure that [the Court] receive[s] adversarial briefing, which in turns helps the Court reach sound decisions." *McWilliams*, 137 S. Ct. at 1807 (Alito, J., dissenting) (citing *Yee v. City of Escondido, Cal.,* 503 U.S. 519, 536 (1992)).

This Court has repeatedly recognized as much. *See, e.g., Lucio v. State*, 351 S.W.3d 878, 896 (Tex. Crim. App. 2011) ("We decide that this point of error is inadequately briefed and presents nothing for review as this Court is under no obligation to make appellant's arguments for her."); *Busby v. State*, 253 S.W.3d 661, 673 (Tex. Crim. App. 2008) (affirming that this Court has no obligation "to construct and compose" a party's "issues, facts, and arguments with appropriate citations to authorities and to the record" (internal quotes omitted)). In fact, the same day that this Court reversed the judgment of the court of appeals in this case, it affirmed a judgment of the 14th Court of Appeals on the basis that "requir[ing] an intermediate appellate court to resolve aspects of legal sufficiency neither explicitly raised nor even mentioned in the appealing party's brief 'creates an unworkable burden on the lower courts to act as de facto defense counsel for every defendant who raises the issue of legal insufficiency.'" *Burks v. State*, PD-0992-15 (Tex. Crim. App. 2017) (opinion on reh'g). For Wendee Long, though, this Court saw fit to act as de facto counsel for the State, accepting an argument the State never made.

This Court has the power to order supplemental briefing if it determines, either before or after submission, that the case has not been properly presented in the briefs. Tex. R. App. P. 38.9(b); *see also* Tex. R. App. P. 38.7 ("Amendment or Supplementation. A brief may be amended or supplemented whenever justice requires, on whatever reasonable terms the court may prescribe."). That's what this Court should do in this case. This Court should reconsider its decision otherwise.

Respectfully submitted,

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Certificate of Service

I, the undersigned, hereby certify that, upon filing of this motion, a true and correct copy is being electronically served to the Denton County District Attorney's Office.

/s/ Bruce Anton
Bruce Anton

APPENDIX H

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS

P.O. BOX 12308,
CAPITOL STATION,
AUSTIN, TEXAS 78711

[SEAL]

9/13/2017

LONG, WENDEE
Tr. Ct. No. F-2013-1478-E PD-0984-15

On this day, the Appellant's motion for rehearing has been denied.

JUDGE ALCALA WOULD GRANT

Deana Williamson, Clerk

DISTRICT CLERK DENTON COUNTY
SHERI ADELSTEIN
P.O. BOX 2146
DENTON, TX 76202
* DELIVERED VIA E-MAIL *

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CAPITOL STATION,
AUSTIN, TEXAS 78711

[SEAL]

9/13/2017

LONG, WENDEE
Tr. Ct. No. F-2013-1478-E PD-0984-15

On this day, the Appellant's motion for rehearing has been denied.

JUDGE ALCALA WOULD GRANT

Deana Williamson, Clerk

JOHN R. MESSINGER
ASSISTANT STATE PROSECUTING ATTORNEY
BOX 13046
AUSTIN, TX 78711
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OFFICIAL NOTICE FROM COURT OF
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CAPITOL STATION,
AUSTIN, TEXAS 78711

[SEAL]

9/13/2017

LONG, WENDEE
Tr. Ct. No. F-2013-1478-E PD-0984-15

On this day, the Appellant's motion for rehearing has been denied.

JUDGE ALCALA WOULD GRANT

Deana Williamson, Clerk

PRESIDING JUDGE 367TH DISTRICT COURT
1450 E MCKINNEY ST, STE 3426
DENTON, TX 76209

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS

P.O. BOX 12308,
CAPITOL STATION,
AUSTIN, TEXAS 78711

[SEAL]

9/13/2017

LONG, WENDEE
Tr. Ct. No. F-2013-1478-E PD-0984-15

On this day, the Appellant's motion for rehearing has been denied.

JUDGE ALCALA WOULD GRANT

Deana Williamson, Clerk

DISTRICT ATTORNEY DENTON COUNTY
PAUL JOHNSON
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OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS

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AUSTIN, TEXAS 78711

[SEAL]

9/13/2017

LONG, WENDEE
Tr. Ct. No. F-2013-1478-E PD-0984-15

On this day, the Appellant's motion for rehearing has been denied.

JUDGE ALCALA WOULD GRANT

Deana Williamson, Clerk

BRUCE ANTON
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OFFICIAL NOTICE FROM COURT OF
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P.O. BOX 12308,
CAPITOL STATION,
AUSTIN, TEXAS 78711

[SEAL]

9/13/2017

LONG, WENDEE
Tr. Ct. No. F-2013-1478-E PD-0984-15

On this day, the Appellant's motion for rehearing has been denied.

JUDGE ALCALA WOULD GRANT

Deana Williamson, Clerk

8TH COURT OF APPEALS CLERK
DENISE PACHECO
500 SAN ANTONIO, #1203
EL PASO, TX 79901-2421
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