No. 48053-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jerome Medina,

Appellant.

Kitsap County Superior Court Cause No. 15-1-00586-1

The Honorable Judge Jeanette Dalton

Appellant's Opening Brief

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2. No rational jury could have found that Mr. Medina contacted Mattox in a manner prohibited by the no-contact order.

> **ISSUE 1:** The no-contact order permitted Mr. Medina to contact Mattox via email. Did the state fail to prove that Medina's messages were not permissible email-to-text messages?

3. The no-contact order violated Mr. Medina's Fourteenth Amendment right to due process.

4. The no-contact order is unconstitutionally vague.

> **ISSUE 2:** A court order is unconstitutionally vague when it fails to define proscribed conduct with sufficient definiteness and allows for arbitrary enforcement. Is the order prohibiting contact but allowing "email" unconstitutionally vague, where Mr. Medina was arrested and convicted for communicating via electronic messages?

5. The court violated Mr. Medina's Sixth and Fourteenth Amendment right to be free from double jeopardy.

6. The court violated Mr. Medina's Wash. Const. art. I, § 9 right to be free from double jeopardy.

7. The court erred by entering separate convictions for counts II, III, V, VI, VII, VIII, and IX.

8. Counts II, III, V, VI, VII, VIII, and IX comprised a single unit of prosecution for violation of a no-contact order.

> **ISSUE 3:** Double jeopardy prohibits a court from entering multiple convictions for a single violation of a criminal statute. Did the court violate double jeopardy by entering seven

convictions for violation of a no-contact order based on electronic messages sent on a single day, some within minutes of each another?

9. The court erred by ordering Mr. Medina to pay $100 into an expert witness fund.

ISSUE 4: A court exceeds its authority by ordering payment of legal financial obligations beyond what is permitted by statute. Did the court exceed its authority by ordering Mr. Medina to pay a $100 "expert witness fund" contribution which is not authorized by statute?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jerome Medina and Heather Mattox have a child together. RP 97. A no-contact order (NCO) prohibits Mr. Medina from contacting Mattox, except in writing by "US Post Officer or email." Ex 16, p. 1.

In April 2014, a sheriff's deputy showed up at Mattox's door looking for Mr. Medina to verify his address. RP 53, 100. Mattox showed the deputy electronic communications that she had received as text messages on her cell phone. RP 107.

Mattox said that she believed the messages were from Mr. Medina because the originating phone number was similar to one belonging to Mr. Medina's friend. RP 122. The phone number was not assigned a name or saved as Mr. Medina's contact number in Mattox's phone. Ex. 1-5.

The deputy did not take any steps to verify that the messages had come from a phone associated with Mr. Medina. Despite this, the state charged Mr. Medina with nine counts of violation of a no-contact order (VNCO). CP 1-10.

At trial, the prosecution introduced "screen shots" of the messages. Ex 1-5. The state did not offer Mattox's phone or the phone from which the messages were sent. Nor did the state offer any phone company records associating the phone number with Mr. Medina or anyone else.

The state did not offer any evidence of the manner in which the messages were sent. *See* RP *generally*. Nor did the state provide testimony outlining the entirety of Mattox's electronic communications with the originating phone number.

The first message – a picture of Mr. Medina[1] – did not have a date on it. Ex. 1. Mattox said that she received the photo a month or two before the officer arrived. RP 111. All but one of the remaining messages had been received on April 28th, some within a few minutes of each other.[2] Ex 2-6. One final message was received at 7:15am on April 29th. Ex 5.

A defense investigator had telephoned the number from which Mattox received the messages. RP 165. A woman named Luella answered the phone. RP 165. She said that she had had the phone number since January 2014. RP 165. She said that she had never loaned her phone to anyone. RP 165.

The jury could not agree on a verdict for Count IV, but found Mr. Medina guilty of the eight remaining counts. RP 216-217. The court sentenced Mr. Medina to 60 months confinement. CP 109. In addition to mandatory legal financial obligations, the court ordered Mr. Medina to pay a $100 contribution to a "Kitsap County Expert Witness Fund." CP 113.

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[1] Mr. Medina is holding what appears to be a gun in the photo. Ex. 1.

This timely appeal follows. CP 53.

ARGUMENT

I. NO RATIONAL JURY COULD HAVE FOUND THAT MR. MEDINA CONTACTED MATTOX IN A MANNER PROHIBITED BY THE COURT ORDER.

The no-contact order in Mr. Medina's case permitted him to contact Mattox via email. Ex. 16, p. 1.

Mattox received the communications as text messages on her cell phone. RP 107. But "email-to-text" allows wireless customers to receive communications as text messages even when they are sent as emails.[3]

The state did not present any evidence of how the messages were *sent*. The prosecution did not offer the device on which the messages were composed, or any evidence that they were transmitted as text messages (as opposed to emails). No rational jury could have found beyond a reasonable doubt that Mr. Medina contacted Mattox in a manner that was prohibited by the court order.

In order to convict Mr. Medina for violation of a no contact order, the state was required to prove that he violated "…restraint provisions [of

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[2] The April 28th messages arrived at 7:29am, 8:58am, 9:37am, 10:51pm, 10:53pm, 10:55pm, 10:58pm and 11:01pm. Ex 2-6

[3] *See, e.g.*, Daniel L. Hadjinian, *Reach Out and Text Someone: How Text Message Spam May Be A Call Under the TCPA*, 4 Shidler J. L. Com. & Tech. 3, 1 (2007).

the order] prohibiting contact with a protected party." RCW 26.50.110(1)(a)(i).

Due process requires the state to prove beyond a reasonable doubt all facts necessary to constitute the crime charged. *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014); U.S. Const. Amend. XIV. In challenging sufficiency,[4] the appellant admits the truth of the state's evidence and all reasonable inferences that can be drawn from it. *State v. Homan,* 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Evidence is insufficient if no rational fact-finder could have found each element proved beyond a reasonable doubt. *Id.* at 105.

However, the existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). To prove even a *prima facie* case, the state's evidence must be consistent with guilt and inconsistent with a hypothesis of innocence. *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006) (addressing *prima facie* evidence in the *corpus delicti* context).

Here, no rational jury could have found that Mr. Medina violated the court order at issue. *W.R., Jr.*, 181 Wn.2d at 762.

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[4] A challenge to the sufficiency of the evidence may always be raised for the first time on review. *State v. Kirwin,* 166 Wn. App. 659, 670 n. 3, 271 P.3d 310 (2012); RAP 2.5(a)(2) and (3).

The order permitted Mr. Medina to contact Mattox by email. Ex. 16, p. 1. Messages that are sent via email can be delivered as text messages to a recipient's wireless phone. *See* Hadjinian, 4 Shidler J. L. Com. & Tech. at 1 (*discussing Joffe v. Acacia Mortgage Corp.*, 211 Ariz. 325, 121 P.3d 831 (Arizona Ct. App. 2005)). Indeed, some emails are automatically converted to text messages by the recipient's wireless service provider. *Id.*

Accordingly, Mr. Medina could have sent the messages to Mattox via email, even if she received them as text messages. *Id.* But the state did not offer the phone from which Mr. Medina allegedly sent the messages or any other evidence regarding how the communications were sent. No rational jury could have found beyond a reasonable doubt that Mr. Medina violated the court order, which permitted him to email Mattox. *Homan,* 181 Wn.2d at 105.

The state's evidence was consistent with a hypothesis of innocence. *Brockob*, 159 Wn.2d at 329. Thus the state did not even present a prima facie case. *Id.*

The state presented insufficient evidence to prove that Mr. Medina contacted Mattox in a manner that violated the restraint provisions of the no contact order. *Homan,* 181 Wn.2d at 105. Mr. Medina's convictions must be reversed. *Id.*

II. THE COURT ORDER PROHIBITING CONTACT EXCEPT BY "EMAIL" IS UNCONSTITUTIONALLY VAGUE.

The order prohibiting contact at issue in Mr. Medina's case permits contact via "email" but does not define that term. Ex. 16. The dictionary definition of "email" encompasses all electronic communication.[5] Because of innovations such as email-to-text and Facebook messaging, this definition is broad enough to embrace numerous kinds of messaging.

Still, Mr. Medina was convicted for violating the order based on allegations that he sent Mattox electronic messages. The order is unconstitutionally vague.

Due process requires that the state provide citizens with fair warning of proscribed conduct. *State v. Valencia*, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010); U.S. Const. Amend. XIV; Wash. Const. art. I, § 3. A court order is unconstitutionally vague if it (1) fails to define the proscribed conduct with "sufficient definiteness" that an ordinary person can understand what is prohibited or (2) fails to provide "ascertainable standards" to protect against arbitrary enforcement. *State v. Bahl*, 164 Wn.2d 739, 752-753, 193 P.3d 678 (2008).

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[5] *See* Merriam-Webster Dictionary of the English Language, http://www.merriam-webster.com/dictionary/email (accessed 2/18/2016).

Failure to satisfy either requirement renders an order void for vagueness. *Id.* Furthermore, unlike a statute or ordinance, the court does not begin with the presumption that a court order is constitutional. *Valencia*, 169 Wn.2d at 793. An unconstitutionally vague order cannot form the basis for a deprivation of liberty. *Id.* at 795.

In *Valencia*, for example, the court found that a sentencing condition prohibiting possession of "paraphernalia that can be used for ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances" was unconstitutionally vague. *Id.* The court declined to read the word "paraphernalia" to mean only "drug paraphernalia," because the sentencing condition did not include such limiting language. *Id.*

The court also found that the *Valencia* condition violated the second alternative of the vagueness test:

> ...an inventive probation officer could envision any common place item as possible for use as drug paraphernalia, such as sandwich bags or paper. Another probation officer might not arrest for the same "violation," i.e. possession of a sandwich bag. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague.

Valencia, 169 Wn.2d at 794-95.

The provision of the order permitting Mr. Medina to contact Mattox by "email" is unconstitutionally vague under both prongs of the

test. First, the order fails to define the prohibited conduct with sufficient definiteness. *Bahl*, 164 Wn.2d at 752-53.

When a term in an order is undefined, the appellate court may consider its ordinary meaning as provided by a standard dictionary. *Bahl*, 164 Wn.2d at 754. The dictionary defines the term "email" as: "1: a means or system for transmitting messages electronically (as between computers on a network)".[6]

An ordinary person would not know whether the order in Mr. Medina's case prohibited contact via an email that could be converted to a text message by a wireless carrier, a normal text message, or electronic communications sent via Facebook or other social networking platforms. Indeed, each of those communication media fall within the dictionary definition of email as "transmitting messages electronically."

Second, the order also fails to provide "ascertainable standards" to protect against arbitrary enforcement. *Id.* As demonstrated by Mr. Medina's case, the order can be read as permitting arrest and conviction for a message received as a text message regardless of how it was actually *sent*. Indeed, a person could send a message by email and still be found in violation of the order if the protected party received it in some other manner. This is true despite the language allowing email communication,

and despite the fact that the dictionary definition of "email" can be read to include text messages.

The order permitting Mr. Medina to contact Mattox via email but not by other means is unconstitutionally vague. *Id.* Mr. Medina's convictions for violating that order must be reversed. *Id.*

III. THE COURT VIOLATED THE CONSTITUTIONAL PROHIBITION ON DOUBLE JEOPARDY BY ENTERING MULTIPLE CONVICTIONS FOR MESSAGES SENT WITHIN MINUTES OF ONE ANOTHER.

Eight of the nine counts against Mr. Medina were based on communications sent and received on a single day. *See* RP 187-188. Indeed, the conduct underlying Counts VI through IX all occurred within an eight-minute span. RP 188; Ex 3-5.

The single conversation that took place over the course of the day should have been counted as a single unit of prosecution. The court violated Mr. Medina's right to be free from double jeopardy by entering seven[7] different convictions based on a single violation of the statute.

The constitutional prohibition against double jeopardy precludes multiple convictions for a single offense. *State v. Morales*, 174 Wn. App.

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[6] http://www.merriam-webster.com/dictionary/email (last accessed 2/18/2016).

[7] The jury could not agree on a verdict for Count IV. RP 217.

370, 384-85, 298 P.3d 791 (2013); U.S. Const. Amends. V, XIV; art. I, § 9.[8]

When addressing multiple counts of the same charge, the double jeopardy analysis turns on the unit of prosecution. *Id.* To establish the unit of prosecution, the question is "what act or course of conduct the legislature has defined as the punishable act." *Id.* (*quoting State v. Varnell*, 162 Wn.2d 165, 168, 170 P.3d 24 (2007)).

The unit of prosecution analysis looks first to the statute in question, then to the statutory history, and finally to the facts of a particular case. *Id.* If the statute is ambiguous regarding the unit of prosecution, the rule of lenity requires the ambiguity to be "resolved against turning a single transaction into multiple offenses." *Id.* at 385.

No published opinion has determined that communications occurring on a single day constitute more than one unit of prosecution for violation of a no contact order.[9] The rule of lenity requires that Mr. Medina be liable, at most, for one count of violation of a no contact order

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[8] Double jeopardy violations can be raised for the first time on appeal because they constitute manifest error affecting a constitutional right. *State v. Allen*, 150 Wn. App. 300, 312, 207 P.3d 483 (2009); RAP 2.5(a)(3).

[9] By contrast, violations occurring on separate days each comprise a unit of prosecution. *See State v. Brown*, 159 Wn. App. 1, 12, 248 P.3d 518 (2010); *Allen*, 150 Wn. App. at 314. In both *Brown* and *Allen* the prosecutor filed no more than one charge per day, even though there were hundreds of phone calls (and several personal contacts) in *Brown* and four separate emails in *Allen*. *Brown*, 159 Wn. App. at 6-7; *Allen*, 150 Wn. App. at 314.

for the single electronic "conversation" which took place over the course of April 28. *Morales*, 174 Wn. App. at 385.

Indeed, a contrary approach would incentivize in-person contact in violation of a court order over less-intrusive electronic communication. A single occurrence of showing up at a protected party's home or workplace would only constitute a single violation, regardless of the number of statements made. If each individual electronic message (even if sent within minutes of each other) constituted a separate unit of prosecution, someone who avoided direct contact while having a conversation with the protected party would be sentenced more harshly than an offender who did not.

Mr. Medina's electronic conversation with Mattox over the course of a single day should constitute at most a single unit of prosecution. *Id.* The court violated the prohibition on double jeopardy by entering convictions for seven different counts based on the single act. *Morales*, 174 Wn. App. at 384-85. Six of Mr. Medina's convictions must be vacated. *Id.*

IV. THE COURT EXCEEDED ITS AUTHORITY BY ORDERING MR. MEDINA TO PAY $100 INTO AN "EXPERT WITNESS FUND."

The court may order an offender to pay "expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2).

The court may not order an offender to pay legal financial obligations (LFOs) that are not authorized by statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied,* 172 Wn.2d 1021, 268 P.3d 224 (2011). Nor may the court order payment of "expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law." RCW 10.01.160.

The court exceeded its authority by ordering Mr. Medina to pay $100 into a Kitsap County expert witness fund. CP 113.

First, no statute authorizes imposition of general costs for expert witnesses (or for the sheriff's department). Second, the sheriff's deputy was the only witness at Mr. Medina's trial who could be conceivably considered an expert. The costs of the sheriff's department was not "specially incurred by the state in prosecuting" Mr. Medina. RCW 10.01.160(2).

For these reasons, the assessment for the expert witness fund must be vacated, and Mr. Medina's case remanded for correction of the judgment and sentence. *Hathaway*, 161 Wn. App. at 651-653.

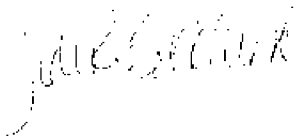
CONCLUSION

No rational jury could have found beyond a reasonable doubt that Mr. Medina violated the court order, which permitted email contact. The court order is unconstitutionally vague. Mr. Medina's multiple convictions for a single electronic conversation on April 28th violated the constitutional prohibition on double jeopardy. Mr. Medina's convictions must be vacated.

In the alternative, the court exceeded its authority by ordering Mr. Medina to make a $100 contribution to the Kitsap County expert witness fund. That order must be stricken.

Respectfully submitted on February 23, 2016,

BACKLUND AND MISTRY



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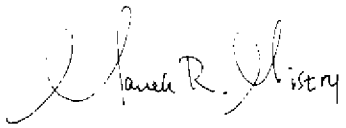

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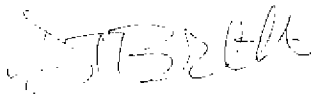

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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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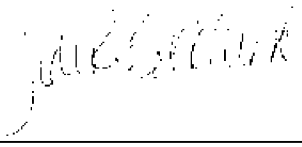

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