NO. 48053-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JEROME PATRICK MEDINA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00586-1

BRIEF OF RESPONDENT

TINA R. ROBINSON
Prosecuting Attorney

JOHN L. CROSS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

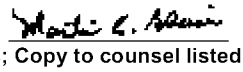
SERVICE		
	Jodi R. Backlund Po Box 6490 Olympia, Wa 98507-6490 Email: backlundmistry@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 20, 2016, Port Orchard, WA  **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY AUTHORITIES

RULES AND REGULATIONS

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether sufficient evidence supports the convictions?

2. Whether the "email" provision of the no-contact order is vague?

3. Whether the unit of prosecution is any violation of the restraint provisions of a no-contact order?

4. Whether imposition of an expert witness fund fee was error and was preserved for review?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Jerome Patrick Medina was charged by first amended information filed in Kitsap County Superior Court with nine counts of felony violation of a court order. CP 1. Medina stipulated to the predicate charges that elevated the present violations to felonies. CP 37.

Trial commenced on July 20, 2015. 1RP 4. The jury rendered guilty verdicts as to counts I, II, II, V, VI, VII, VIII, and IX, finding on each that the crimes were domestic violence. CP 87-97. The jury reached no verdict as to count IV. CP 87-88. That count was dismissed. CP 98.

The parties argued issues of same criminal conduct and unit of prosecution at sentencing. CP 100-106 (briefing). The trial court ruled

that counts v. through IX do constitute same criminal conduct and sentenced accordingly. CP 107; (commensurate reduction in points reflected at CP 108). Medina was sentenced under the standard range to 60 months. CP 109. The present appeal was timely filed. CP 118.

B. FACTS

Deputy Sheriff Sonya Mathews testified that this case began when she contacted victim Heather Mattox at her residence while see was looking for Medina. 1RP 52-53. Deputy Mathews was aware of a no-contact order between Medina and Heather Mattox. 1RP 53. Heather Mattox told deputy Mathews that she had been receiving text messages from Medina. Id. Heather Mattox showed the deputy a picture and word messages from Medina on her phone. Id. The deputy identified state's exhibits 1 through 5 as pictures of the text messages and the texted picture that Heather Mattox showed her. 1RP 54. Heather Mattox sent screen shots of these items to Deputy Mathew's work e-mail address. 1RP 55.

Ms. Mattox had known Medina for a couple of years and had been in a relationship with him for a little over a year. 2RP 96. The two have a child in common. 2RP 97. Ms. Mattox had not seen Medina for some time due to the no contact order. Id. Ms. Mattox identified state's

exhibit 1 as a picture of Medina holding a shotgun and exhibits 2-4 as text messages "he sent to my phone." 2RP 99. She recognized these messages from the phone number and "how he is speaking in them." Id.

Ms. Mattox told of her meeting with Deputy Mathews. 2RP 100. She said she had shown the messages to the deputy. Id. She testified that the no contact order had been modified to allow e-mails only. Id. She recognized the texted picture as being of Medina holding a shotgun. 2RP 101. She knew who had sent the picture by the phone number on the message. Id. She associated that number with Medina because "it's one that he messaged me from for a while, for a good period of time." 2RP 102. The texted picture was captioned "I'm ready." Id. Ms. Mattox recognized this statement as having context from something related to Medina. Id.

Ms. Mattox continued to identify each message in turn. She knew that a reference to Curt in the first text message referred to Medina's cousin. 2RP 102. She explained the interaction between Medina and his cousin that was behind the language of the text message. 2RP 103. She explained that the message about sending the "pic of me and my gage" as Medina being upset because he thought there was something going on between Ms. Mattox and the cousin. Id. She knew of this dispute independently from the messages. Id. She identified a list of names in item 3 of 4 as the cousin, her ex-husband and other mutual friends. 2RP

104. She identified the phrase "keep on playing with my daughter" as Medina wanting to see his daughter. Id.

Next, Ms. Mattox identified the text saying "I should have ran up on your bitch ass at Aaron's. Watch your back. I told you don't F with me LOL BAP." 2RP 105. The two had run into each other at Aaron's while Ms. Mattox was there to pay a bill. Id. Further, she recognized the word "BAP" as being associated with Medina. Id. She provided context to the message saying "I just saved you from two people" as Medina talking about two girls that he had sent after her. 2RP 106. Finally, she identified "LOL. Yeah, I am, because you're going to call the cops anyways. Girl, I just saved your ass SMH LOL" as referencing their daughter and referencing things that were occurring in Ms. Mattox's life. Id.

Defense investigator Chris Mace testified that he called the phone number listed on the text messages. 2RP 172. Mace said he reached someone that sounded like a female. Id. Information that the answering person was one Luella who had had the number for some time and had not loaned her phone was not admitted as it was hearsay. (See Brief of Appellant at 4).

III. ARGUMENT

A. THE EVIDENCE AT TRIAL WAS SUFFICIENT TO SUPPORT CONVICTION AND MEDINA'S NEW THEORY OF DEFENSE DOES NOT CHANGE THAT FACT.

Medina argues that there is insufficient evidence to support the guilty findings. This claim is without merit because the evidence adduced at trial was sufficient and because the evidence actually adduced at trial did not include appellate counsel's new theory of defense.

The rules regarding sufficiency of the evidence are well settled. Thus

> Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.

State v. Cordero, 170 Wn.App. 351, 361, 284 P.3d 773 (2012). Circumstantial evidence is as probative as direct evidence. *State v. Garbaccio*, 151 Wn.App. 716, 214 P.3d 168 (2009). Here, Medina makes two claims of insufficiency. First, he claims that the evidence was insufficient because there was no evidence as to how the offending text messages were sent. Brief at 5. Second, he argues a new theory of defense on appeal that was not considered or litigated below. Brief at 7.

1. Viewed in a light most favorable to the state, the evidence actually adduced at trial was sufficient to support conviction.

An amended domestic violence no-contact order underlies this case. State's exhibit 16. Medina was prohibited from assaulting, sexually assaulting, harassing, stalking, or surveilling Ms. Mattox. He was prohibited from contact except "written contact by US Post Office or email permitted ONLY." Further, Medina was prohibited from obtaining, owning, possessing or controlling a firearm. The record reflects that Medina violated that order by repeatedly sending harassing text messages to Ms. Mattox.[1] No issue of notice obtains because Medina's signature appears on the order.

The evidence shows that Ms. Mattox received certain messages. These messages were seen on her phone by Deputy Mathews. Each message contained a heading indicating the phone number from which the messages were sent. Ms. Mattox recognized the phone number as belonging to Medina because she had received messages from him from that number in the past. That sender heading did not include an email address. Moreover, Ms. Mattox was able to establish that each of the messages related to incidents or circumstances that were occurring or had occurred in their lives.

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[1] It should be noted that Medina may have clearly violated the firearm prohibition as shown by the texted picture in which he is holding a shotgun. The state must concede that it cannot be shown when that picture was taken.

In *State v. Bradford*, 175 Wn.App. 912, 308 P.3d 736 (2013), *rev denied*, 179 Wn.2d 1010 (2014), a stalking case, the appellant challenged the authentication of text messages that were admitted at trial. Id. at 927. Bradford argued, as Medina does here, that "the State did not prove that he was the individual responsible for sending these text messages." Id. at 928. Although Bradford's stalking behavior included physical contacts around the time of the text messages, the *Bradford* Court found significant that the victim was able to provide context to the communications: "the content of the text messages themselves indicated that Bradford was the individual who sent them." Id. at 929. And, finally, it was significant to the Court of Appeals that "Smith and Vilayphone [the victim] testified to their belief that the text messages were from Bradford." Id. at 930.

In the present case, Ms. Mattox provided knowledge of Medina's phone number, the context of the messages, including the instances of her life to which the messages applied, and a belief that Medina sent the messages. There is an absence of direct evidence. But the circumstantial evidence provided by Ms. Mattox and the reasonable inferences therefrom are sufficient to allow a rational finding that the provenance of the messages lies with Medina. Moreover, it is likely that many such prosecutions will of needs have to rely on similar circumstantial evidence. If Medina is correct that direct evidence of the sending of such electronic

communications is required, each defendant who similarly violates a no-contact order may veto prosecution by the simple expedient of destroying or disabling the cell phone after sending the messages.

The circumstantial evidence in the case provided more than adequate support for a rational finding of guilt. Medina's sufficiency argument, at least the part based on the actual evidence at trial, fails.

1. Appellate counsel's new defense theory does not undermine the sufficiency of the evidence actually adduced at trial.

Medina asserts that no rational trier of fact could have found proof beyond a reasonable doubt because of a possibility that an email may be converted to a text message in the process of delivery of the communication. But no evidence or argument of this new theory of defense can be found in the record. Medina presented no evidence of and did not argue that he had attempted communication with Ms. Maddox by email that was changed to text message by a behind-the-keyboard technological flourish. Thus the logic of this argument is fundamentally flawed; in fact, this jury could not have been rationally swayed one way or another by this defense because the jury did not know of the defense.

"Arguments not raised in the trial court generally will not be considered on appeal." State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). Further, "although RAP 2.5(a) permits a party to raise for the first

time on appeal a "manifest error affecting a constitutional right", RAP 2.5(a) does not mandate appellate review of a newly-raised argument where the facts necessary for its adjudication are not in the record and therefore where the error is not "manifest."" Id. In raising sufficiency of the evidence, Medina runs around RAP 2.5, arriving at a theory of defense for which there is no record at all let alone sufficient facts necessary for adjudication.

The article upon which Medina relies for his "email to text message" theory deals with the application of the federal Telephone Consumer Protection Act of 1991(TCPA). That act "and its corresponding regulations prohibit the use of automatic dialing systems or prerecorded voices to make any call to telephone numbers assigned to cellular phones."[2] At 2. The Arizona Court of Appeals in the *Joffe* case "found that an unsolicited advertisement originating as an email, converted to text message, and delivered to a wireless phone, is a "call" within the meaning of the TCPA." At 3. That court noted that the email-to-text feature was a service offered by the recipient's phone carrier and that the advertiser was "co-opting" that service in sending an email advertisement that was destined to be received as a text. At 6.

This situation undercuts Medina's assertion of a new defense.

[2] The article has no page numbers. But each paragraph is numbered. The citation herein refers to the paragraph numbers.

There is no doubt in the record that Ms. Maddox received Medina's messages on her phone as text messages. Thus, in order to lay a foundation for this new defense, the jury would have had to have received evidence that Ms. Maddox's phone carrier was providing her with such a conversion service. But the defense herein may be shy of doing so because in so doing it would be raising an inference that Medina knew of the service. Thus, even if Medina had thought of this argument, it may have backfired in proving that he knew Ms. Mattox would receive the communication as a text message in violation of the order.

Moreover, the author observes "[i]n the case of email to text message where the recipient's email address is composed of only numbers, or contains a wireless domain name, the sender is put on notice that the message may be sent to a cell phone and therefore place demand and cost burdens on the recipient." At 19. A rebuttal to this un-argued defense, then, would have been to solicit testimony from Ms. Maddox of her phone number as distinguished from her email address. If we follow this defense, then, through the twists and turns of technology, we find that even if Medina had used email, a fact which no evidence in the case supports, and sent that email to Ms. Mattox's phone number, he was on notice that it would be received as a text message in violation of the order.

In fact, the record is silent as to whether or not either Medina or Mattox had email addresses. The case proceeded on the actual testimony

that the messages were received as texts on Mattox's phone and displayed the sender as a phone number associated with Medina. Medina made no claim that he used email or that email was converted by Ms. Mattox's carrier to text. The state may have rebutted those arguments had they been made. At bottom, this new defense argument may well have been unavailing even if asserted by Medina. But the issue was simply not preserved below.

Even a fundamental constitutional right may be waived if not asserted below. "No procedural principle is more familiar than that a constitutional right, or a right of any other sort, may be forfeited in criminal cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *State v. Lazcano,* 188 Wn.App. 338, 355-56, 354 P.3d 233(2015)(citation omitted), *rev denied,* 185 Wn.2d 1008 (2016). The policies behind this rule include that

> There is great potential for abuse when a party does not raise an issue below because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal. State v. Weber, 159 Wash.2d 252, 271–72, 149 P.3d 646 (2006); State v. Emery, 174 Wash.2d 741, 762, 278 P.3d 653 (2012). The theory of preservation by timely objection also addresses several other concerns. The rule serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address. State v. Strine, 176 Wash.2d at

749–50, 293 P.3d 1177; State v. Scott, 110 Wash.2d 682, 688, 757 P.2d 492 (1988).

Id. at 356. Of course the present issue is not concerned with objections and argument as to purely legal issues. Rather, this issue involves an omitted factual argument. The trial court was not asked to rule on the effect of this unseen defense on the sufficiency of the evidence when the state rested. The rule and its policies apply: one like Medina could sit back on this new theory and argue insufficient evidence after conviction; the evidence is nonexistent as to Medina's email to text argument and , therefore, there is no record for appellate review; and, adversarial unfairness is manifest where the prosecution as the prevailing party had no opportunity to address an argument not made.

On this record, whether the preparation of and presentation of this email to text argument would have swayed the jury cannot be said. It is a new argument on appeal. It should not be reviewed and certainly has no effect on the sufficiency of the evidence actually adduced at trial.

B. CONSIDERATION OF THE DIFFERENT DEFINITIONS OF "EMAIL" AND "TEXT MESSAGE" SHOWS THAT THE TWO TERM ARE NOT SYNONOMOUS AND NO VAGUENESS ATTENDS THE USE OF THE WORD "EMAIL."

Medina next claims that the no-contact order is unconstitutionally

vague in its use of the word "email." This claim is without merit because the unique definition of "email" is distinct from the definition of "text message." Given those varying definitions, a person of ordinary intelligence would clearly know what is prohibited.

Reasoning from case law that considers vagueness of sentencing conditions, the Supreme Court has held that the standard of review on such conditions is abuse of discretion. *State v. Valencia,* 169 Wn.2d 782, 792, 239 P.3d 1059 (2010)(in later cases referred to as "*Sanchez Valencia*"). This is so because the presumption of constitutionality accorded legislative enactments by deference to separation of powers does not apply to sentencing conditions. Id. at 792, *citing State v. Bahl,* 164 Wn.2d 739, 193 P.3d 678 (2008). Although the no-contact order provision here in issue is not a sentencing condition as such, it also is not a legislative enactment. Thus it does appear that abuse of discretion is the correct standard of review. Moreover, under that standard, there is in fact no presumption of constitutionality which Medina has to overcome.

However, Medina makes no claim that the no-contact order provision in issue—the meaning of the word "email"—implicate protected First Amendment considerations. Medina is not entitled to the "stricter standard of definiteness appl[ied] if material protected by the First Amendment falls within the prohibition." *Bahl* at 753. Nonetheless, it is

an abuse of discretion to impose an unconstitutional condition of sentence. Id.

But the present case has a standard of review wrinkle to it. Here, Medina challenges a condition that was imposed by the District Court in proceedings on an unrelated case. And the underlying validity of a no-contact order is not an element of the crime of violating the order. *See State v. Miller*, 156 Wn.2d 23, 31, 123 P.3d 827 (2005); *accord State v. Snapp*, 119 Wn.App. 614, 625, 82 P.3d 252 (2004), *rev denied*, 152 Wn.2d 1028 (2004). Thus, if there was abuse of discretion in imposing the condition, that abuse belongs to the District Court, not the Superior Court. Herein, the Superior Court was not asked to rule on the vagueness *vel non* of the District Court's order. Arguably, the Superior Court was not vested with the procedural power to correct the District Court's order there being no RALJ appeal from the District Court's order in this record.

Meanwhile, the Superior Court did enter judgment and sentence based upon jury verdicts from a violation of that provision. Medina thus has standing for the present challenge. Such challenges are sustained if either the offending provision "(1) ... does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) ... does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *Bahl, supra*, at 752-53.

Further, "[i]n deciding whether a term is unconstitutionally vague, the terms are not considered in a "vacuum," rather, they are considered in the context in which they are used." Id. (citation omitted). And, "[w]hen a statute does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary." Id. at 754 (citation omitted). In all, "[i]f persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement, the [law] is sufficiently definite." Id. (bracketed term "[law]" in original). Finally, "a community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." *Sanchez Valencia*, 169 Wn.2d at 793, 239 P.3d 1059.

Medina claims that the dictionary definition of "email" supports his position. Brief at 10. The definition he finds is that the term refers to "a means or system for transmitting messages electronically (as between computers on a network)." Id. He cites the Merriam-Webster on-line dictionary for this definition. But the state went to Merriam-Webster web site and found "email" given a "simple" definition of "a system for sending messages *from one computer to another computer*" or "messages that are sent electronically from *one computer to another.*" Merriam-Webster.com (emphasis added). In a second box at the site is found

Medina's permutation of the definition. The two "simple" definitions above provide context to the third formulation by its inclusion of the parenthetical "(as between computers on a network)." Further, in a box entitled "e-mail defined for kids" we once again find the "simple" definitions above are restated. It seems that the task of looking for a plain meaning from a dictionary definition is not as easy as Medina would have it.

The upshot of the definitional enterprise is that in every permutation, including the one Medina prefers, the definition of email refers to communication by computer, not texting to a phone. Therein is the primary distinction. Looking in the same dictionary, we find the term "text message" defined, both "simple" and "full" definitions, as "a short message that is sent electronically to a cell phone or other device." Merriam-Webster.com. The distinction comes into focus when both definitions are considered. While both email and text message are forms of electronic communication, one concerns communication by or between computers while the other, text message, is defined in terms of a message sent to a cell phone. Medina clearly engaged in the latter, not the former. That is, there is no evidence in the record that the offending electronic communications were computer to computer and, to the contrary, there is substantial evidence that the electronic communications were sent to a cell

phone with a phone number identifying the sender.

In *Valentia, supra,* the issue was whether the term "paraphernalia" standing alone was vague in a case involving conditions of sentence for a drug offender. Clearly, the word was meant to prohibit possession or use of *drug* paraphernalia. But the word "drug" was not included. Resort to the dictionary led to the conclusion that the word "paraphernalia," unqualified by the word "drug," applied to many things having no connection to drugs. 169 Wn.2d at 794. Thus, "there is nothing in the condition as written that limits petitioners to refrain from contact with drug paraphernalia." Id. The condition failed to provide fair notice of the conduct proscribed. Id. And, the definitional deficit allowed for arbitrary enforcement. Id. at 794-95.

The *Valencia* defendants could have accessed the dictionary and been left with the same vagueness the Supreme Court found between the definition of "paraphernalia" and the intention of the condition of sentence that omitted the word "drug.". What was prohibited was vague. The same is not true for Medina. Resort to the dictionary shows unique definitions for the two types of electronic communication being discussed. The law relies on plain language and Medina is presumed to know the law, which in this instance includes the plain language of the no-contact order.

Thus, it is doubtful that a person of ordinary intelligence would be

unable to understand that his behavior in communicating with a protected person is limited to email to the exclusion of a different form of communication, text message. One enforcing the order is in the same position. There simply is no ambiguity that would allow arbitrary enforcement. Deputy Mathews was not confronted by a linguistic or legal ambiguity when she investigated these crimes. She was shown text messages on Ms. Mattox's phone and, again, those messages indicated that they were sent from a phone number. Nothing the officer saw would raise any implication that email was involved, just as no evidence or argument in the trial of this case raised that implication. If email addresses or computer (rather than phone) use had been involved, it is entirely safe to assume that Deputy Mathews, and the state, would not have proceeded against Medina after reading the qualification in the order. There is, then, no evidence of arbitrary enforcement.

The challenged provision has a unique definition clearly distinguishable from the conduct of Medina. Arbitrary enforcement is highly unlikely because of these unique definitions. Medina's vagueness challenge fails.

C. THE UNIT OF PROSECUTION FOR VIOLATIONJ OF A DONESTIC VIOLENCE NO-CONTACT ORDER IS ANY VIOLATION OF THE RESTRAINT PROVISIONS OF THE ORDER.

Medina next claims that the convictions violate double jeopardy by charging multiple counts based upon each text message received regardless of the time that they were sent. This claim is without merit because the cases provide that any violation is a crime regardless of the time at which the violations occurred.

For this argument, Medina relies on *State v. Morales*, 174 Wn.App. 370, 298 P.3d 791 (2913). There, the unit of prosecution for the crime of felony harassment was considered. Morales had threatened to kill his estranged girlfriend and mother of his three children. Id. at 374. The initial threat was communicated to the victim's brother-in-law. Id. Next day, Morales communicated the threat to kill directly to the victim. Id. at 375. These two occasions were charged as two separate counts of harassment. Id. Morales argued that the two threats constituted a single course of conduct and therefore the two counts violated double jeopardy. Id. at 384.

The *Morales* Court announced the applicable rules

> A defendant may face multiple charges arising from the same conduct but the principle of double jeopardy precludes multiple punishments for the same offense. The determination of whether or

> not a defendant faces multiple convictions for the same crime depends on the unit of prosecution. The unit of prosecution for a crime may be an act or a course of conduct. The proper question is to determine what act or course of conduct the legislature has defined as the punishable act.

174 Wn.App. at 384-85 (citation and quotation omitted). The analytical process involves

> [T]he first step is to analyze the statute in question. Next, we review the statute's history. Finally, we perform a factual analysis as to the unit of prosecution because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one "unit of prosecution" is present.

Id., *citing State v. Varnell,* 162 Wn.2d 165, 168, 298 P.3d 791 (2007). It is this analytical process that indicates that *Morales* lends little to analysis of the present case.

The *Morales* Court commenced upon a thorough review of the harassment statute. Id. at 385. But that review of the harassment statute clearly has no application to the present prosecution. That court's analysis of the unit of prosecution issue, and its holding that there was in fact but one offense on that record, is completely controlled by the language of the harassment statute. Id. at 388. Thus Medina cannot rely on the *Morales* analysis in arguing the unit of prosecution for felony violation of a no-contact order.

Nor need this Court rely on *Morales.* Three published cases resolve unit of prosecution issue under RCW 26.50.110. First, in *State v.*

Allen, 150 Wn.App. 300, 207 P.3d 483 (2009), *rev denied*, 170 Wn.2d 1014 (2010), two emails had been sent on different days to the victim by the restrained person. Id. at 305. But the victim had viewed the two emails at the same time. Id. Allen argued that the statute was unclear as to whether the viewing of the two emails at the same time constituted two violations and that lenity should, then, apply in his favor. Id. at 313. The state retorted that it is the actions of the defendant that matters, not the victim. Id. The Court of Appeals agreed with the state. Id.

The *Allen* Court discussed analogous cases wherein the focus of the inquiry was the defendant's actions, not the victim's actions. The Court cited a case in which three letters had been sent to the protected person giving rise to three charges of violating a no-contact order. Id. at 313, *citing State v. Parmelee*, 108 Wn.App. 702, 32 P.3d 1029 (2001). But "[w]hen the victim received or read the letters was not at issue; the facts showed that she did not even open some of them." Id. The *Allen* Court decided

> Here, Allen sent Foley different e-mail messages on different days. The no-contact order prohibited him from contacting her in this manner, and his punishment for those violations should not depend on when Foley happened to read her e-mail. Allen's two convictions for violating a domestic violence no-contact order did not violate double jeopardy.

Id. at 314. Similarly, Medina sent separate text messages albeit on the same day. But it is clear that the *Allen* Court's holding is not so fragile

that it would not apply to two separate emails sent on the same day.

Multiple no-contact order violations on consecutive days gave rise to the same issue in *State v. Brown*, 159 Wn.App. 1, 248 P.3d 518 (2010) *rev denied* 171 Wn.2d 1015 (2011). Brown argued that the multiple violations on consecutive days constituted continuing conduct and thus the five counts charged violated double jeopardy. Id. at 9. The state countered that the legislature intended that each violation was a chargeable offense. Id. The Court agreed with the state. Id. The statute as written referred to punishment for "a violation" of a no-contact order. Id. at 10-11. And, "[t]he Supreme Court "has consistently interpreted the legislature's use of the word 'a' in a criminal statute as authorizing punishment for each individual instance of criminal conduct, even if multiple instances of such conduct occurred simultaneously." Id. at 11 (citation omitted). Further, the *Brown* Court cited the holding in *Allen*, *supra*, that each act of sending an email constituted a violation. Id. Thus there was no double jeopardy problem with Brown's five charges.

Brown also relied on the Supreme Court's precedent in *State v. Bunker*, 169 Wn.2d 571, 238 P.3d 487 (2010). The precise question there was whether the statute requires that the defendant's behavior must warrant arrest under the phrase 'for which an arrest is required under RCW 10.31.100(2)(a)" in order for the behavior to be a crime. Id. at 577.

The Supreme Court held that

> It is clear from examining the statute in context that *any no-contact order violation is a crime*, and the arrest provision does not modify the phrase "a violation of the restraint provisions." The mandatory arrest requirements are thus not elements of the crime of violating a no-contact order under former RCW 26.50.110(1).

Id. (emphasis added). In rejecting the last antecedent rule, which if applied would require all the antecedents in the statute to require arrest in order to be a crime, the Court found that "applying the arrest provision to all antecedents would lead to absurd results that conflict with legislative intent." Id. at 579. Thus, "*all violations* of no-contact order restraint provisions are misdemeanors or felonies under former RCW 26.50.110." Id. (emphasis added). Moreover, in 2007 the legislature amended the statute and removed the arrest provision, providing for mandatory arrest in a separate subsection, and "make clear that *any violation of a no-contact order restraint provision is a crime.*" Id. at 581 (emphasis added).

The amended RCW 26.50.110 was the authority for the prosecutions herein. CP 1. And the excision of the contentious arrest provision in no way changed the Supreme Court's holding that the statute applies to "a violation" and that in its application this refers to all violations. That reasoning applies to the present case. Medina's several text messages, although contemporaneous with each other, were each a discreet communication with the protected person in violation of the

restraining provisions of the order. *Allen*, *Brown*, and *Bunker* taken together clearly require that the unit of prosecution is each violation. Medina's argument fails.

D. THE TRIAL COURT HAD LEGISLATIVE AUTHORITY FOR IMPOSING THE CONTRIBUTION OT THE EXPERT WITNESS FUND FEE AND MEDINA DI NOT OBJECT BELOW TO THAT FEE.

Medina next claims that the trial court erred in imposing an expert witness fund fee. This claim is without merit because the trial court had authority to so impose pursuant to the Kitsap County Code and because this issue was not preserved below.

Medina claims that the trial court was without authority to impose an expert witness fee, particularly when no expert was called as a witness in the case. Brief at 14. But, he did not object below and this certainly does not appear to be a manifest constitutional error. Thus, the failure to object should preclude his argument here. RAP 2.5. In any event, this was not a mandatory cost. The state concedes that RCW 10.01.160(2) does not provide such authority. Nor does the SRA authorize this particular cost. However, the state disagrees with Medina because the

assessment is authorized by Kitsap County Code (KCC) chapter 4.84.

That ordinance establishes a "fund" and is not for the purpose of reimbursing the county for the use of any particular expert in any particular case. This can be seen in section 4.84.040, which provides for "reasonable compensation to any expert witness who has provided or *will provide* services to the prosecuting attorney." (emphasis added) Clearly, then, the purpose is not solely for compensation of a particular expert in a particular case but to have a fund in place for any expert services that will arise.

Medina's reading is unworkable. He assumes that this assessment must be in recompense for an expert used in his particular case. The upshot is that on this reading any expert used should await this recompense before she is paid. To the contrary, this ordinance allows the prosecution to retain necessary experts before conviction with the money (presumably paid by other defendants) already in the fund. Moreover, the ordinance contemplates that such money be accrued by court order. KCC 4.84.030. The ordinance thus provides the required statutory authority for the imposition of this cost by the trial court. If Medina may assert this issue for the first time on appeal, it fails none-

theless.

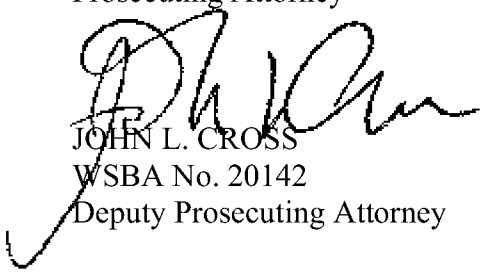
IV. CONCLUSION

For the foregoing reasons, Medina's conviction and sentence should be affirmed.

DATED April 20, 2016.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney



JOHN L. CROSS
WSBA No. 20142
Deputy Prosecuting Attorney

Office ID #91103
kcpa@co.kitsap.wa.us

KITSAP COUNTY PROSECUTOR

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