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No. 64473-4-I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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**STATE OF WASHINGTON, Respondent,**

**v.**

**ERIC O'GRADY, Appellant.**

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**BRIEF OF RESPONDENT  
AND MOTION TO STRIKE**

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**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether the case should be remanded for correction of the judgment and sentence where the community custody imposed is contrary to statute and where the judgment and sentence does not reflect that the total term of incarceration and community custody cannot exceed the statutory maximum.
2. Whether there was substantial evidence to support the trial court's finding that the defendant had the ability or likely future ability to pay where the defendant has his lifetime to pay the \$1050 in legal financial obligations and the record reflects that the defendant had previously been employed, received SSI benefits, although he was indigent at sentencing.

**C. FACTS**

Appellant Eric O'Grady was charged on August 3, 2006 with Rape in the Second Degree, in violation of RCW 9A.44.050, a class A felony, for his actions on July 26, 2006. CP 158-59. Prior to trial the charges were amended in part to allege violation of a protection order, in violation of RCW 26.50.110(1). CP 153-55. He was found guilty at a jury trial in June 2007. CP 132. He appealed and his conviction on the rape count was overturned based on ineffective assistance of counsel and the matter remanded for a new trial. App. A.

The State then filed an amended information alleging an additional rape count. CP 119-21. On October 21, 2009 the State amended the information again, to allege two counts of the assault in the second degree, one count of rape in the third degree, as well as the violation of protection order that O'Grady was convicted of at the first jury trial, which conviction was upheld on appeal. CP 53-55; App. A. O'Grady entered an *Alford* plea of guilty to the two assault charges and the rape charge, but did not enter a plea to the protection order violation count because he had already been found guilty in the previous jury trial. RP 3-7, 48.<sup>1</sup>

At sentencing the parties presented an agreed recommendation for the top of the range, 29 months, on the assault counts and the bottom of the range 41 months, on the rape count. RP 3-5, 24, 31. Regarding the legal financial obligations, defense counsel requested that all non-mandatory costs be waived, informing the court that O'Grady was indigent and had not been the one to pay for his retained services. RP 31. He noted that O'Grady did not have significant work history and opined that it would be more difficult for him to obtain employment in the future given his convictions. *Id.*

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<sup>1</sup> RP refers to the verbatim report of proceedings for Oct. 29, 2009.

The judge imposed 54 months, the top of the standard range, on the rape count, but otherwise followed the agreed recommendation. RP 42.

With regard to the legal financial obligations, the court imposed all standard terms and costs, but waived the attorneys fees of \$3000 given that O'Grady had retained counsel after the matter was remanded back to the trial court. RP 44. The court imposed 18 to 36 months of community custody on the assault counts and 36 to 48 months on the rape count. CP 29.

#### **D. ARGUMENT**

- 1. The judgment and sentence should be corrected to reflect that the total of time, including community custody, served cannot exceed the statutory maximum and the community custody on the assault convictions should be corrected to state 18 months.**

O'Grady asserts that the trial court exceeded its authority in imposing the term of community custody on the Rape in the Third Degree conviction because the total term of incarceration plus community custody time exceeds the statutory maximum. He also claims that the wrong term of community custody was imposed on the Assault in the Second Degree convictions. The State concedes that the judgment and sentence needs to reflect that the community custody time and the incarceration time together cannot exceed the statutory maximum of 60 months on the rape

conviction and that the community custody term on the assaults should be corrected to reflect a determinate term of 18 months. The State would also note that in correcting the community custody term on the rape count, the judgment and sentence should reflect the imposition of a determinate term of 36 months, rather than 36 to 48 months. The State, however, asserts that the matter need not be remanded for resentencing, but merely for correction of the judgment and sentence.

O'Grady contends the court erroneously imposed 18-36 months of community custody at sentencing on the assault convictions. Assault in the Second Degree is a violent offense. RCW 9.94A.030(53). The community custody terms are set forth in RCW 9.94A.701(2). When O'Grady was sentenced again, in October 2009, the statute in effect set forth a determinate term of 18 months community custody for violent offenses. RCW 9.94A.701(2). As noted by O'Grady, RCW 9.94A.701(2) was amended in May 2009 and the amendment was effective as of August 2009.<sup>2</sup> *See*, Laws of 2009, Ch.375, §5. The judgment and sentence should be corrected to state a determinate term of 18 months for the assault convictions.

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<sup>2</sup> The legislation also provided that the amendments were to be applied retroactively. Laws of 2009, Ch. 375 §20.

The State would also note that the community custody term imposed for the rape conviction appears to be in error as well. Under RCW 9.94A.701 the term to be imposed for sexual offenses not listed in RCW 9.94A.507 is three years, 36 months, not a range. RCW 9.94A.701(1)(a). Rape in the third degree is not one of the listed offenses under RCW 9.94A.507. RCW 9.94A.507(1). Therefore the community custody term for the rape count should have been 36 months.

The State also concedes that the judgment and sentence must be clarified so that it is clear that the total period of incarceration combined with the term of community custody cannot exceed the statutory maximum. “[W]hen a defendant is sentenced to a term of confinement and community custody that has the potential to exceed the statutory maximum for the crime, the appropriate remedy is to remand to the trial court to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum.” In re Brooks, 166 Wn. 2d 664, 675, 211 P.3d 1023 (2009). The statutory maximum for rape in the third degree, a class C felony, is 5 years or 60 months. RCW 9A.20.021(1)(c). The court imposed 54 months incarceration and 36 to 48 months of community custody. The judgment and sentence should be amended to state that the total term of

incarceration and community custody cannot exceed the statutory maximum.

2. **There is substantial evidence in the record to support the court's finding that the defendant has the likely future ability to pay legal financial obligations and the court did not err in imposing the costs it did.**

O'Grady alleges that the trial court erred in finding that he has the ability either in the present or future to pay the legal financial obligations it imposed. He further asserts that the court erred in imposing specifically the jury demand fee, the criminal filing fee and the crime lab fee. While O'Grady raised the issue of his inability to pay costs, there is nothing in the record to show that O'Grady will not have the ability to pay the costs imposed, \$1050, given the length of the time he has to satisfy the judgment. The costs that O'Grady otherwise disputes are set forth by statute and thus the court did not err in imposing them.

O'Grady asserts that there was insufficient evidence in the record for the court to make a finding that he has the ability to pay the legal financial obligations imposed. A court need only consider a defendant's ability to pay and does not have to make a specific finding regarding a defendant's ability to pay. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). The judgment and sentence reflects that the court made a

finding that the O'Grady "has the ability or likely future ability to pay the legal financial obligations imposed." CP 26.

The court has jurisdiction over O'Grady's judgment and sentence for collection of the legal financial obligations until the judgment is satisfied. RCW 9.94A.760(4). While defense counsel noted O'Grady's limited job history and predicted that given his convictions it would be difficult for O'Grady to find work in the future, the presentence investigation indicated that he has received SSI benefits and at various times been employed in landscaping, as a dishwasher, a shipping clerk and an inventory clerk. CP 77. Noting the potential for O'Grady to be able to pay the costs at some point in the future, the court declined defense's invitation not to impose the costs. RP 44. The court decided not to impose the attorney fees costs of over \$3000 when defense counsel mentioned that although O'Grady had been represented by a public defender in the first trial, O'Grady's parents had retained him to represent O'Grady on appeal and remand. It is difficult to imagine that O'Grady, given his age, will not be able to pay the \$1050 over the course of even just the next ten years. The court's finding of O'Grady's current or future ability to pay was not error.

At sentencing retained counsel requested that all the non-mandatory the legal financial obligations be waived because of O'Grady's current indigency.<sup>3</sup> As noted in Curry:

[Defendants] argue additionally that the orders of indigency entered for purposes of appeal are sufficient to show that they cannot, in fact, pay the financial obligations imposed. We disagree. The costs involved here are on a different scale that the costs involved in obtaining counsel and mounting an appeal. Moreover, in both cases, recoupment of attorney fees was waived. *It is certainly within the trial court's purview to find that the defendants could not presently afford counsel but would be able to pay the minimal court costs at some future date.*

Curry, 118 Wn.2d at 915 n.2 (emphasis added in italics). A defendant's indigent status at the time of sentencing does not preclude the imposition of court costs, and a defendant's inability to pay is best addressed at the time the State attempts to enforce collection. State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008); *see also*, State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009) (the time to address the defendant's ability to pay is at the time the State seeks to enforce collection as court's determination at sentencing is speculative). The court sufficiently

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<sup>3</sup> O'Grady also references the order of indigency on appeal as evidence that the court was aware of his inability to pay. O'Grady did not file the motion for the order of indigency he references until a week after sentencing, therefore that information was not before the trial court at the time it imposed LFOs and is not appropriately considered by the Court on appeal.

considered O'Grady's ability to pay, particularly given the speculative nature of such a determination at sentencing.

O'Grady further contests specifically the imposition of the jury demand fee, the criminal filing fee and the crime lab fee. O'Grady asserts that there is nothing in the record to show that the \$200 criminal filing fee was specially incurred. The criminal filing fee, however, is set by statute. Under RCW 36.18.020 the fee, to be paid upon conviction, is \$200. RCW 36.18.020(h). O'Grady asserts the crime lab fee should have been waived because the court has the discretion to suspend all or part of the fee if the defendant is indigent. RCW 43.43.690. Under RCW 43.43.690 the defendant must file a verified petition regarding their ability to pay before the crime lab fee may be suspended or deferred. RCW 43.43.690(1). O'Grady did not and has not filed such a petition.

O'Grady asserts that the trial court erred in imposing the jury demand fee because he pleaded guilty on remand to the assault and rape counts. However, O'Grady ignores the fact that he was found guilty of the violation of a protection order count by a jury. Under RCW 10.46.190, "[e]very person convicted of a crime ... shall be liable to all the costs of the proceedings against him or her, including, when tried by a jury in the superior court ..., a jury fee as provided for in civil actions for which

judgment shall be rendered and collected.” RCW 10.46.190. Under RCW 36.18.016 the amount is \$250. RCW 36.18.016(b). The fee is to be paid even if the conviction is for only a misdemeanor. State v. Twitchell, 61 Wn.2d 403, 410, 378 P.2d 444 (1963). If there is a retrial, the costs of the first trial can be assessed against the defendant. *See, State v. Birch*, 183 Wash. 670, 680-81, 49 P.2d 921 (1935) (defendant who was originally charged with two counts, acquitted of one and convicted of the other and then retried after appeal on the other and convicted again, was required to pay the costs of both trials where the costs of the first trial would have been the same even if the defendant had only been charged originally with one count). While O’Grady entered a guilty plea to the amended counts on remand, he was originally tried by a jury on the violation of a protection order count, which count was upheld in his first appeal. The court had the authority to impose the fee because one of the convictions he is convicted of was tried to a jury.

O’Grady also asserts that under RCW 10.01.160(1) the jury fee must have been an expense specially incurred before it could be imposed. However, under subsection two, that statute specifically allows for the imposition of the jury fee costs under RCW 10.46.190. RCW

10.01.160(2) (“Expenses incurred for ... jury fees under RCW 10.46.190 may be included in costs the court may require a defendant to pay.”).

The trial court had the authority to impose the fees it did and did not err in finding that O’Grady had the likely future ability to pay the legal financial obligations it imposed. A defendant’s ability to pay is best addressed at the point in which the State seeks to enforce collection.

**3. The State moves to strike references in the appellate brief to a study regarding the effect of legal financial obligations on defendants.**

O’Grady references a study regarding the legal financial obligations and the effect on defendants and the rate of recidivism. Appellate Brief at 12-14. The State moves to strike this reference from the appellate brief as this information was never presented to the trial court, and does not provide a basis for the trial court not to impose the statutory fees. Argument as to the wisdom of requiring defendants to pay for the costs their unlawful conduct imposes upon the judicial system and society as a whole is one better left for the legislature.

**E. CONCLUSION**

For the reasons set forth above, the State respectfully requests that this Court remand this matter for correction of the judgment and sentence with respect to the terms of community custody, and not for resentencing.

The State further requests that this Court affirm the legal financial obligations imposed in the judgment and sentence.

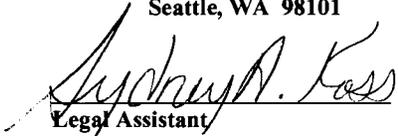
Respectfully submitted this 20<sup>th</sup> day of October, 2010.

  
HILARY A. THOMAS, WSBA #22007  
Appellate Deputy Prosecutor  
Attorney for Respondent

**CERTIFICATE**

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

NANCY P. COLLINS  
Washington Appellate Project  
1511 Third Avenue, Suite 701  
Seattle, WA 98101

  
Legal Assistant

10/21/2010  
Date

# **APPENDIX A**

DEC 9 2008

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	NO. 60796-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
ERIC JAMES O'GRADY,	)	UNPUBLISHED OPINION
aka ERIK JAMES O'GRADY,	)	
	)	
Appellant.	)	
_____	)	FILED: December 8, 2008

LEACH, J. — Eric O'Grady appeals his convictions of second degree rape and violation of a no-contact order. O'Grady claims that he was denied effective assistance of counsel when his lawyer failed to inform him of a defense to the charge of second degree rape before he decided not to testify and failed to request an instruction for the defense. O'Grady also argues that RCW 26.50.110(1), which criminalizes the violation of a no-contact order, is unconstitutionally overbroad since it implicates protected speech. Because counsel's deficient performance prejudiced O'Grady, we reverse his rape conviction and remand for a new trial.<sup>1</sup> However, we hold that that RCW

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<sup>1</sup> For this reason, we do not address the remaining assignments of error relating to O'Grady's rape conviction.

26.50.110(1) is not unconstitutionally overbroad and affirm O'Grady's conviction of violation of a no-contact order.

#### Background

On July 25, 2006, Rachel Abrahams planned to go to several bars to celebrate her 21st birthday with her roommates Jacqueline Sizer and Jennifer Veliz, and their friend Krystal Romano. Outside the first bar, O'Grady recognized Romano, who introduced O'Grady to Abrahams. Over the course of the evening, the women consumed alcohol at different bars and became intoxicated; O'Grady did not drink because he did not have any identification with him. O'Grady and Abrahams spent about 45 minutes talking exclusively with each other at one bar, and they made plans to see each other again. Towards the end of the evening, the group returned to the women's apartment, along with Sizer's friend, Jamison Rogayan.

At the apartment, O'Grady invited over two friends, Andrew Geckland and Ben Brune. After about an hour, Geckland and Brune left, and Abrahams and O'Grady went to her bedroom, where they talked and kissed. O'Grady touched Abrahams' breasts and crotch. Abrahams testified that when O'Grady touched her crotch and attempted to either remove too much of her clothes or his own, she told him that she did not want to have sex with him. Each time, O'Grady told her not to worry and stopped pressuring her. Eventually, Abrahams put on a pair of jeans and a sweatshirt, and they talked about getting food. However, Abrahams changed her mind because she felt nauseated from drinking, and fell asleep with her jeans on. When she awoke, she was naked, and O'Grady was

penetrating her. Crying and hyperventilating, Abrahams ran to Sizer's bedroom, climbed into the bed, and pulled the blankets over her head. O'Grady came into the room several times to tell Abrahams that nothing had happened, but she refused to talk to him. O'Grady explained to Rogayan that he and Abrahams were having sex until she "freaked out." Abrahams asked Sizer to remove O'Grady from the house. After doing this, Sizer and Veliz took Abrahams to the hospital for a rape exam. The results of this exam later identified that the semen inside her belonged to O'Grady.

O'Grady was charged with second degree rape. Abrahams later obtained a protection order prohibiting O'Grady from having any contact with her. At a pretrial motion hearing on February 13, 2007, O'Grady waved a Bible at Abrahams and shouted at her to "tell the truth." One count of violation of a no-contact order under RCW 26.50.110(1) was added to O'Grady's rape charge.

At trial, Abrahams testified about the alleged rape incident; O'Grady did not testify. On June 13, 2007, the jury found O'Grady guilty of both second degree rape and violation of a no-contact order. The jury returned a special verdict, which stated that the jurors unanimously believed that sexual intercourse had occurred when Abrahams was incapable of consent by reason of being physically helpless. With new counsel, O'Grady filed a motion for a new trial, which the court denied.

Discussion

A. Ineffective Assistance of Counsel

Rape in the second degree occurs when a person engages in sexual intercourse with another person who is incapable of consent by reason of being mentally incapacitated or physically helpless.<sup>2</sup> A defense to a charge of this crime exists if the defendant reasonably believed that the victim was not mentally incapacitated or physically helpless.<sup>3</sup> The defendant has the burden of proving this defense by a preponderance of the evidence.<sup>4</sup> O'Grady argues that he was denied effective assistance of counsel because his attorney failed to (1) inform him of this defense before he decided not to testify and (2) request a "reasonable belief" instruction. Because the failure of O'Grady's counsel to request a reasonable belief instruction amounts to ineffective assistance of counsel, we need not decide whether counsel's failure also denied O'Grady's constitutional right to testify.

When reviewing a claim of ineffective assistance, we start with the strong presumption that counsel's representation was effective.<sup>5</sup> To overcome this presumption, the defendant must show both deficient performance and resulting prejudice.<sup>6</sup> The defendant establishes deficient performance if there are no

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<sup>2</sup> RCW 9A.44.050(1)(b).

<sup>3</sup> RCW 9A.44.030(1).

<sup>4</sup> RCW 9A.44.030(1).

<sup>5</sup> State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

<sup>6</sup> In re Pers. Restraint of Hubert, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

“legitimate strategic or tactical reasons supporting the challenged conduct.”<sup>7</sup> The defendant demonstrates prejudice if there is “a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.”<sup>8</sup>

O'Grady relies on In re Personal Restraint of Hubert<sup>9</sup> to show both deficient performance and prejudice. In Hubert, this court found that counsel's failure to request a reasonable belief instruction in defending Hubert against a charge of second degree rape demonstrated both deficient performance and prejudice.<sup>10</sup> The evidence in that case supported the defense that Hubert reasonably believed that the victim was not physically helpless.<sup>11</sup> Hubert testified that there was consensual sexual activity and that he believed that the victim was awake during the entire incident.<sup>12</sup>

Yet, Hubert's counsel failed to argue the reasonable belief defense or request an appropriate instruction because he was unaware of the statutory defense.<sup>13</sup> The court stated this “failure to investigate the relevant statutes under which [a] client is charged cannot be characterized as a legitimate tactic.”<sup>14</sup> As a result, the court held that counsel's failure to “discover and advance the defense was plainly deficient performance.”<sup>15</sup> The court also found resulting prejudice

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<sup>7</sup> McFarland, 127 Wn.2d at 336.

<sup>8</sup> Hubert, 138 Wn. App. at 928 (citing State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)).

<sup>9</sup> 138 Wn. App. 924, 158 P.3d 1282 (2007).

<sup>10</sup> Hubert, 138 Wn. App. at 932.

<sup>11</sup> Hubert, 138 Wn. App. at 929.

<sup>12</sup> Hubert, 138 Wn. App. at 926-27, 929.

<sup>13</sup> Hubert, 138 Wn. App. at 929.

<sup>14</sup> Hubert, 138 Wn. App. at 929-30.

<sup>15</sup> Hubert, 138 Wn. App. at 930.

because, without the reasonable belief instruction, the jury had “no way to understand the legal significance of the evidence supporting the reasonableness of [the defendant’s] belief that [the victim] was . . . capable of consenting to his advances.”<sup>16</sup> The court concluded that Hubert’s counsel was ineffective: “Where defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial.”<sup>17</sup>

Here, as in Hubert, O’Grady’s counsel admitted that he failed to argue the reasonable belief defense or request an instruction for it because he was unaware of this statutory defense. His failure to investigate the relevant statutes under which O’Grady was charged cannot be a legitimate tactic and shows deficient performance. Further, as in Hubert, some evidence supports the defense that O’Grady reasonably believed that the victim was not physically helpless. Abrahams testified that she consented to certain sexual activity. Rogayan also testified that O’Grady told him he and Abrahams were having consensual sex until Abrahams “freaked out.” Without the reasonable belief instruction, the jury could not recognize the legal significance of this evidence and, therefore, prejudice resulted.

Thus, under Hubert, O’Grady has shown both deficient performance and prejudice. Accordingly, we reverse and remand for a new trial.

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<sup>16</sup> Hubert, 138 Wn. App. at 932.

<sup>17</sup> Hubert, 138 Wn. App. at 932.

B. Violation of No-Contact Order

O'Grady challenges his conviction for violating a no-contact order under RCW 26.50.110(1), which criminalizes the violation of such an order. He claims that this statute is unconstitutionally overbroad because it implicates speech protected under the First Amendment.

However, O'Grady fails to recognize that RCW 26.50.110(1) primarily regulates conduct and not speech.<sup>18</sup> We will find such a statute overbroad “only if it reaches a substantial amount of protected speech and there exists no way of severing the statute's unconstitutional applications.”<sup>19</sup> We further note that the overbreadth doctrine should be applied sparingly and “only as a last resort.”<sup>20</sup>

In State v. Talley,<sup>21</sup> our Supreme Court rejected an overbreadth challenge to a harassment statute on grounds that the statute's impact on speech was not substantial.<sup>22</sup> In Talley, the respondents argued that the harassment statute was unconstitutionally overbroad because the statute permitted the State to use the respondents' speech as circumstantial evidence.<sup>23</sup> Our Supreme Court disagreed.<sup>24</sup> After finding that the statute primarily regulated conduct, the court determined that its effect on speech was minimal: “The nexus between criminal

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<sup>18</sup> See State v. Talley, 122 Wn.2d 192, 210-11, 858 P.2d 217 (1993).

<sup>19</sup> Talley, 122 Wn.2d at 210.

<sup>20</sup> Talley, 122 Wn.2d at 210 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)).

<sup>21</sup> 122 Wn.2d 192, 858 P.2d 217 (1993).

<sup>22</sup> Talley, 122 Wn.2d at 212. The statute at issue in Talley was RCW 9A.36.080(1), which prohibits malicious harassment based on the victim's perceived membership in a protected category.

<sup>23</sup> Talley, 122 Wn.2d at 210.

<sup>24</sup> Talley, 122 Wn.2d at 210-11.

conduct and any speech implicated ensures that [the statute] does not deter a substantial amount of protected expression.”<sup>25</sup>

RCW 26.50.110(1), like the statute in Talley, does not deter a substantial amount of speech. RCW 26.50.110(1) primarily regulates conduct and only implicates speech when the speaker knowingly violates the “restraint provisions prohibiting contact with [the] protected party.” Given his awareness of the no-contact order, O’Grady’s conduct and speech—waving a Bible at Abrahams and shouting at her to “tell the truth”—amounts to contact in violation of the no-contact order. We conclude that this incidental impact on speech does not render RCW 26.50.110(1) unconstitutionally overbroad.

Conclusion

We reverse O’Grady’s conviction of second degree rape and remand for retrial because O’Grady received ineffective assistance when his counsel failed to request the reasonable belief instruction. However, O’Grady’s overbreadth challenge to RCW 26.50.110(1) lacks merit, so we affirm his conviction of violation of a no-contact order.

Reversed in part and affirmed in part.

WE CONCUR:

Cox, J.

Leach, J.

Grosse, J.

<sup>25</sup> Talley, 122 Wn.2d at 211.