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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1930, A11-1931**

State of Minnesota,
Respondent,

vs.

Steven Robert Latham,
Appellant.

**Filed September 4, 2012
Affirmed
Hudson, Judge**

Dakota County District Court
File No. 19-AV-CR-11-10412

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael E. Molenda, Christine J. Cassellius, Jessica L. Sanborn, Ryan J. Bies,
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respondent)

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appellant)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

In these consolidated appeals, appellant challenges his misdemeanor convictions
of violating a harassment restraining order and disorderly conduct. Appellant argues that

the no-contact language in Minn. Stat. § 609.748 (2010) is unconstitutionally vague and overbroad; the temporary restraining order he was convicted of violating denied him due process; the district court abused its discretion by declining to admit his divorce decree and declining to instruct the jury on the exceptions to stalking; and the district court committed reversible error by joking with the jury. We conclude that Minn. Stat. § 609.748 is neither unconstitutionally vague nor overbroad; that appellant was not denied due process; that the district court did not abuse its discretion by not admitting appellant's divorce decree and by not providing appellant's requested instruction; and that the district court did not commit reversible error in its interactions with the jury. We affirm.

FACTS

On February 22, 2011, J.L., the former wife of appellant Steven Latham, obtained a temporary harassment restraining order (TRO). The order stated that appellant "shall have no contact" with J.L. The TRO also stated that

[t]he following conduct is a violation of this order if an Order for Relief is granted: Any contact with the protected person(s), direct or indirect, any visits to or phone calls to the protected person(s), threats or assaultive behavior to the protected person(s), damaging or stealing property belonging to the protected person(s), breaking into and entering the Petitioner's or minor child's residence, taking pictures of a protected person without permission of the Petitioner, and

Appellant was served with the TRO on February 23, 2011. On April 8, 2011, appellant was charged with violating the TRO, in violation of Minn. Stat. § 609.748, subd. 6(b). A harassment restraining order (HRO) hearing took place on April 18, 2011. The district

court issued a HRO, which was filed April 19, 2011.¹ The HRO stated that appellant “shall have no contact with” J.L. On June 7, 2011, appellant was charged with misdemeanor violation of the HRO, in violation of Minn. Stat. § 609.748, subd. 6(b). Appellant moved to dismiss both charges alleging, in part, that Minn. Stat. § 609.748 was “unconstitutional as written and applied.” The district court denied the motion.

On April 7, 2011, J.L. received two emails from appellant. The first contained a sporting goods coupon and the second contained a Bible verse. Later that day, appellant arrived in the parking lot of a middle school in Apple Valley, where one of appellant’s and J.L.’s daughters attended school, to attend a book fair. J.L. had already arrived and was sitting in her vehicle. When appellant exited his vehicle, he walked to J.L.’s car and stood within six inches of her door and yelled, “Look, I got to park right next to a liar.” He then ran toward the school. When appellant exited the school, police officers were waiting. Appellant admitted to one of the officers what he had said to J.L.

A jury trial on the misdemeanor charge arising from appellant’s conduct on April 7 was held. From the beginning of jury selection, the district court joked with court staff and the jurors. When a juror stated that she knew the defense attorney because the two had shared a room on a school choir trip for their daughters, the judge responded, “Shared a room? . . . I don’t want to hear about that. Oh, it was a choir trip.” A few

¹ Appellant appealed the issuance of the TRO and HRO, and this court affirmed the district court’s issuance of the HRO. *Latham v. Latham*, A11-1085, 2012 WL 686117 (Minn. App. Mar. 5, 2012), *review denied* (Minn. May 30, 2012). This court did not address the issuance of the TRO because it was not reviewable; nor did we address the constitutional arguments raised by appellant because they were not properly raised. *Id.* at *7.

moments later, when a deputy entered the courtroom, the judge stated, “He wants to make sure we’re safe. I don’t know; we have a couple women sleeping together but besides that everything else is okay.” To a juror who stated she had been a victim of a crime after stating she had been a defendant in a civil lawsuit, the judge stated, “Interesting life, Jean.” At one point during voir dire, the judge asked the jurors, “Do you guys have lives?” When told by one of the jurors that he managed a Domino’s pizza restaurant, the judge asked “Do they still taste like cardboard?” When the same juror said he was unmarried and the judge asked if he had children, the judge stated, “You would be surprised how many times I get yes to that.” When one of the jurors stated she was a homemaker, the judge responded, “Homemaker. I haven’t heard that for a long time.” To another juror who stated she had a 42-year-old child the judge stated, “You don’t look like you would have a 42 year old. You don’t look much older than 42 yourself. Wow . . . Wow. Very good.” When told one of the jurors worked at a commercial bakery, the judge asked if the juror would bring in baked goods the next morning. “Treats are accepted. You guys have to keep Patrick on here, okay?” After one juror stated he had worked in the Northwest Airlines stockroom, the judge asked, “Is that where they steal all our bags and put them in there?” When told of the consecutive ages of a juror’s four children, the judge stated “Well, you weren’t shooting blanks. We know that much.”

Before jury instructions, the judge stated to the jury:

I’ll give you the instructions. You’ll go into your deliberations. And all be done because—I won’t lie to you. I’ve had a half day vacation for some time to play in a golf tournament tomorrow afternoon. So, I will be out of here by noon come hell or high water.

After jury instructions, the judge stated to the jury:

Now, the only thing that is not in here that I should tell you is that deliberations are now in your hands, which means that you are in control of your destiny. You can stay here, hypothetically, as long as you want. And if you want to stay through dinner, we'll buy you dinner.

During the trial, appellant offered the couple's divorce decree to demonstrate the parenting-time requirements in effect at the time J.L. obtained the TRO and when appellant attended his daughter's book fair at the middle school. The state objected on relevance grounds, and the district court sustained the objection, stating that the decree was not relevant because the allegations against appellant pertained only to whether appellant sent emails to J.L. and whether he spoke to her in the school parking lot. The jury deliberated for 11 minutes and returned a guilty verdict. The next day, appellant's complaint in the second misdemeanor charge of violating an HRO was amended to include disorderly conduct, in violation of Minn. Stat. § 609.72, subd. 1 (2010). The state dismissed the HRO-violation charge and appellant entered a guilty plea to the disorderly conduct charge.

Appellant moved for a new trial and reconsideration of his motion to dismiss based on his claim that Minn. Stat. § 609.748 is unconstitutional. The district court denied the motions.

This appeal follows.

DECISION

An ex parte TRO may be obtained if the petitioner alleges “an immediate and present danger of harassment” and the district court finds reasonable grounds to believe respondent has engaged in harassment. Minn. Stat. § 609.748, subd. 4(a). The ex parte order remains in effect until a hearing is held on the issuance of a HRO. *Id.*, subd. 4(b). A person who violates a restraining order is subject to criminal penalties. *Id.*, subd. 6.

I

Appellant argues that Minn. Stat. § 609.748 is unconstitutionally vague on its face. “The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *State v. Bussmann*, 741 N.W.2d 79, 83 (Minn. 2007) (quotation omitted). In other words, if a person must guess at a statute’s meaning, it is void for vagueness. *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 171 (Minn. App. 2001). “Vague penal states are prohibited as a violation of due process.” *Dunham v. Roer*, 708 N.W.2d 552, 567 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006). The constitutionality of an ordinance is a question of law, which is reviewed de novo. *State v. Stallman*, 519 N.W.2d 903, 906 (Minn. App. 1994).

Furthermore, “[a] greater degree of specificity is required when the law in question is a criminal statute capable of reaching protected expression.” *State v. Krawsky*, 426 N.W.2d 875, 878 (Minn. 1988) (quotation omitted). And, “[e]ven if such a law is not impermissibly vague in all of its possible applications, the law may still be

considered vague on its face if it encourages arbitrary enforcement by failing to describe with sufficient particularity what the statute prohibits or requires.” *Id.* (quotation omitted). We have determined that the harassment statute is quasi-criminal; therefore, the heightened definiteness requirement applies to this vagueness challenge. *Dunham*, 708 N.W.2d at 568.

Minn. Stat. § 609.748, subd. 4(a), provides:

The court may issue a temporary restraining order ordering the respondent to cease or avoid the harassment of another person or to have *no contact* with that person if the petitioner files a petition in compliance with subdivision 3 and if the court finds reasonable grounds to believe that the respondent has engaged in harassment.

(Emphasis added.)

Appellant asserts that the statute does not define or limit “contact,” and could include any number of lawful contacts, from interactions at a school event to sending an email, rendering it impermissibly void for vagueness. Appellant also asserts that the vagueness of the no-contact requirement results in arbitrary enforcement, which he argues occurred here because he had numerous other “contacts” with J.L. that J.L. did not report. The state argues that “contact” is not vague because a reasonable person would understand contact to mean touching, interaction, or communication, which would encompass calling, emailing, texting, or talking.

Before addressing appellant’s facial-vagueness challenge, we must first determine if the statute implicates the First Amendment. If it does not, appellant must show that the law is vague in all of its applications. *See Dunham*, 708 N.W.2d at 568 (stating appellant

must demonstrate law is vague in all applications where “statute proscribes only words and conduct unprotected by the First Amendment”). The state argues that the no-contact provision in Minn. Stat. § 609.748 does not implicate the First Amendment because the provision is content neutral, regulates fighting words, and the provision does not suppress the expression of ideas or public discourse because it regulates matters of private, not public, concern.

The state’s argument is persuasive. To obtain a TRO, the requesting party must demonstrate “that the respondent has engaged in harassment.” Minn. Stat. § 609.748, subd. 3(a)(3). We have determined that harassment, as defined in Minn. Stat. § 609.748, is intended “to prohibit repeated and unwanted acts, words, or gestures that have or are intended to have a substantial adverse effect on the safety, security, or privacy of another.” *Dunham*, 708 N.W.2d at 566. Furthermore, in analyzing whether the definition of harassment was unconstitutionally vague, *Dunham* held that Minn. Stat. § 609.748 “proscribes only words and conduct unprotected by the First Amendment.” *Id.* at 568. Similarly, because a party seeking a TRO under the statute must first allege facts sufficient to demonstrate that harassing conduct has occurred, we conclude that the no-contact provision of Minn. Stat. § 609.748 also regulates conduct invasive of the privacy of another and therefore does not regulate First Amendment speech.

Because appellant has failed to show that the statute implicates the First Amendment, he must demonstrate that the law is vague in all of its applications. *Id.* The requirement that a criminal statute be definite does not mean statutory language must be written with “mathematical certainty.” *State, City of Minneapolis v. Reha*, 483 N.W.2d

688, 690–91 (Minn. 1992) (quotation omitted). Therefore, appellant must demonstrate that a person of reasonable understanding would not be able to discern the meaning of “contact.” *Dunham*, 708 N.W.2d at 568. We conclude that “contact” is commonly understood to mean communication with another and that a person of reasonable understanding would know, for example, that emailing and speaking to a person constitutes contact within the meaning of the statute. *See State v. Pettengill*, 635 A.2d 1309, 1310 (Me. 1994) (“The word ‘contact’ is not a word of art, but one of common usage and commonly understood.”). The district court did not err in concluding that the statute is not unconstitutionally vague.

II

Appellant also raises a facial overbreadth challenge to Minn. Stat. § 609.748, asserting that the statute violates the right to free speech by prohibiting “contact,” which the statute does not define. “A statute is overbroad on its face if it prohibits constitutionally protected activity, in addition to activity that may be prohibited without offending constitutional rights.” *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998). Given the potential for voiding an entire statute, the overbreadth doctrine “should be applied only as a last resort.” *Id.* (quotation omitted). Additionally, application of the overbreadth doctrine requires that the overbreadth be substantial and that the statute is not subject to a limiting construction. *Id.*

As previously noted, appellant argues that his conduct was protected by the First Amendment. But because we have determined that the no-contact provision in the statute does not implicate the First Amendment, appellant’s overbreadth challenge fails. *Id.*

(stating that when facial-overbreadth challenge does not implicate First Amendment, no constitutional question raised). Therefore, the district court did not err in determining that Minn. Stat. § 609.748 was not unconstitutional.

III

We next address appellant's argument that the TRO denied him due process because he was subject to a warrantless arrest and deprived of his right to parent.

Warrantless arrest

Respondent argues that appellant waived the argument that his due-process rights were violated by a warrantless arrest because he did not raise it below. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). The record reflects that appellant did not challenge his warrantless arrest below; he has therefore waived this argument.

Right to parent

The right to parent is a fundamental right that may not be infringed on without due process of law. *Soohoo v. Johnson*, 731 N.W.2d 815, 820 (Minn. 2007). Appellant asserts that the no-contact order deprived him of his right to parent because he could not contact his children when they were with J.L. But appellant does not assert how this lack of contact interfered with his right to parent and also does not demonstrate that he was actually deprived of contacting his children. For instance, the record reflects that at least one of his children has a cell phone and appellant could presumably contact that child, if not all of his children, via the child's phone. A bare, unsupported assertion renders a party's argument waived. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519–20, 187 N.W.2d 133, 135 (1971) (stating that “assignment of error based

on mere assertion and not supported by any argument or authorities in appellant's brief is waived," unless prejudicial error is obvious). Because appellant makes only a bare, unsupported assertion regarding his right-to-parent challenge, this argument is waived.

IV

Evidentiary rulings fall within the discretion of the district court and are reviewed for a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). It is appellant's burden to establish that the district court abused its discretion and any resulting prejudice. *Id.*

The district court rejected appellant's attempt to introduce the couple's divorce decree into evidence, stating that it was not relevant to the allegations against appellant. Appellant provides a cursory argument on this issue, stating only that, "[t]he Court committed fundamental error by not allowing any defense, including the divorce decree which demonstrated [appellant's] legal rights." Because appellant provides no authority or analysis of this argument and no prejudicial error is obvious, it is waived. *Schoepke*, 290 Minn. at 519–20, 187 N.W.2d at 135.

Appellant additionally argues that the district court abused its discretion by refusing to give his requested jury instruction regarding the exceptions to stalking under Minn. Stat. § 609.749 (2010). "A [district] court is given considerable latitude in selecting the language of jury instructions, but instructions may not materially misstate the law." *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). Refusal to give a requested jury instruction is reviewed for an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996).

At issue here was a violation of the harassment statute, Minn. Stat. § 609.748, not a violation of Minn. Stat. § 609.749. Therefore, the district court did not abuse its discretion by refusing to instruct the jury regarding the stalking exceptions under Minn. Stat. § 609.749.

V

Appellant argues that the district court committed reversible error by extensively joking with the jury throughout jury selection and by indicating to the jury that it must conclude deliberations in time for the judge's golf outing. Appellant did not object to the judge's conduct during trial. We therefore review appellant's assertion for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under the plain-error test, appellant must show (1) an error, (2) that is plain, and (3) that affects substantial rights. *Id.* If the three prongs are satisfied, the error is addressed only if it seriously affects the fairness and integrity of judicial proceedings. *Id.*

Appellant relies on *State v. Mims* to argue prejudicial error. In *Mims*, the district court judge entered jury-room deliberations uninvited, in the absence of the defendant, and asked about the prospects of arriving at a verdict. 306 Minn. 159, 160, 235 N.W.2d 381, 383 (1975). In concluding that the judge committed reversible error, the supreme court stated that "our concern is with the influence this particular type of intrusive communication has upon the integrity of the proceedings and the independent role and function of a jury during its deliberations." *Id.* at 163, 235 N.W.2d at 384. The circumstances here are distinguishable. Here, the district court judge joked with the jury in the presence of counsel and defendant. Unlike in *Mims*, the judge did not enter the

jury room during deliberations. And although several of the comments made by the judge to jurors during jury selection were inappropriate, appellant has not demonstrated how he was prejudiced or that his substantial rights were affected.

In passing, appellant argues that the judge's jokes relating to sex, age, and marital status were in poor taste and demeaning and demonstrated a bias against appellant in violation of rule 2.2 of the Minnesota Code of Judicial Conduct. But appellant does not argue that the judge should have been disqualified on that basis, and appellant has presented nothing beyond his mere allegation of bias. On this record, appellant has not demonstrated error.

And finally, as to the judge's comments regarding his future golf outing, appellant neglects to mention that, after the judge told the jury that he wanted deliberations concluded so that he could golf, he also stated to the jury:

Now, the only thing that is not in here that I should tell you is that deliberations are now in your hands, which means that you are in control of your destiny. You can stay here, hypothetically, as long as you want. And if you want to stay through dinner, we'll buy you dinner.

The judge's statement mitigated any suggestion that the jury needed to end its deliberations prematurely and, therefore, the judge's comment regarding his golf outing did not constitute reversible error.

VI

Respondent asserts that appellant's constitutional challenge to Minn. Stat. § 609.748 has no effect on his conviction for disorderly conduct under Minn. Stat.

§ 609.72 (2010), and therefore his disorderly conduct conviction should be affirmed. We agree.

In the case from which appeal A11-1930 originates, the state originally charged appellant with violation of the harassment restraining order statute, Minn. Stat. § 609.748, but later amended the charge to disorderly conduct under Minn. Stat. § 609.72, subd. 1.² Appellant pleaded guilty to disorderly conduct and has made no request to withdraw his plea. Appellant's plea to disorderly conduct under Minn. Stat. § 609.72—a statute he does not challenge—is unaffected by his challenges to the constitutionality of the harassment restraining order statute in Minn. Stat. § 609.748.

Finally, appellant briefly raises a prosecutorial misconduct argument. Prosecutorial misconduct not objected to at trial is analyzed under a plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). Appellant's brief lists actions taken by the state before and during trial but does not assert how any of the actions constitute error. Therefore, this argument lacks merit. *See id.* (stating that unobjected-to prosecutorial misconduct claim requires that appellant demonstrate plain error).

Affirmed.

² The case from which appeal A11-1931 originates is the charge of misdemeanor violation of the TRO for which appellant was found guilty.