IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28326-7-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
MARTIN DALE JONES,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — This appeal follows a successful prosecution for violation of a no-contact order. The defendant challenges the convictions on two constitutional grounds. First, he says that the word "contact" is vague as applied here. Next, he says that the statute he was convicted of violating (RCW 26.50.110**)** sweeps in, or has the potential to sweep in, protected speech and therefore is facially invalid. We conclude that neither assignment of error rises to the level of "manifest" and therefore we need not review these challenges for the first time on appeal. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). But we further conclude that the statutory scheme here is not constitutionally infirm facially or as applied to this defendant. We therefore affirm the

conviction for violation of a no-contact order.

FACTS

Martin Jones and Tanya Selke had a relationship that ended badly. Mr. Jones is the uncle of Ms. Selke's 15-year-old son Antony Jones. Following the breakup, Mr. Jones and an accomplice broke the windows of Ms. Selke's car and made threatening phone calls to her home. Mr. Jones was charged with malicious mischief and witness tampering. The case proceeded to trial but Mr. Jones ultimately pleaded guilty. Ms. Selke testified against him.

The court sentenced Mr. Jones and also ordered that he not come near or have "any contact whatsoever, in person or through others, by phone, mail or any means directly or indirectly, except for mailing or service of process of court documents by a third party or contact by defendant's lawyers, with [Ms. Selke]." 2 Report of Proceedings (RP) at 87; Ex. 1. The court also instructed Mr. Jones to avoid any contact with the victim or anyone else who might relay messages to her. The court did this because of reports of contact between Mr. Jones's family members and Ms. Selke. Mr. Jones understood that the order restricted contact with Ms. Selke through any other person, including family members.

Mr. Jones sent a letter to his nephew, Antony, at Ms. Selke's home. He wrote on

the back of the letter, "'This letter was written to my nephew. It was not intended in any part for Tanya R. Selke.'" 2 RP at 97. The letter had two "Attention" notices written on the back flap to the effect that the letter was not intended for Ms. Selke. Antony immediately showed his mother the letter. The letter talked about Mr. Jones's desire to retrieve his possessions and his resentment over Ms. Selke testifying against him. The letter refers to Ms. Selke directly and indirectly. Ms. Selke notified the police and gave them the letter.

The State charged Mr. Jones with felony violation of a no-contact order. RCW 26.50.110(5). Ms. Selke testified, without objection, that she read every piece of mail sent to her home, even if addressed to her minor children, and that Mr. Jones knew this. She testified, again without objection, that she believed Mr. Jones intended the letter for her even though it was addressed to her 15-year-old son.

A jury found Mr. Jones guilty of felony violation of a no-contact order.

DISCUSSION

Constitutional Challenges

Mr. Jones raises two constitutionally based challenges to the statute under which he was prosecuted (RCW 26.50.110). He does so for the first time on appeal. His first is an "as applied" challenge (the word "contact" is too vague here) and the second is a

"facial" challenge (the statute has the potential to sweep in protected speech). We address an issue raised for the first time on appeal if it amounts to manifest error that affects a constitutional right. RAP 2.5(a)(3); *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Manifest error requires a showing of actual prejudice. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). An error is "manifest" if it had "practical and identifiable consequences in the trial of the case." *Lynn*, 67 Wn. App. at 345. And "[i]n normal usage, 'manifest' means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed." *Id.* Mr. Jones must then show how, in the context of the trial, any error actually affected his rights. *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

Certainly, there are practical and identifiable consequences if this statute or the statutory scheme Mr. Jones complains of is constitutionally infirm. *Lynn*, 67 Wn. App. at 345. But, that said, there is nothing here that strikes us as unmistakable, evident, indisputable, or even clear about any of the constitutional improprieties Mr. Jones claims. *Id.* Indeed facially, the statute only prohibits conduct and incidentally might implicate speech. And, as applied to Mr. Jones, it only prohibits him from contacting Ms. Selke directly or indirectly. This record does not suggest that the 12-person jury that passed on Mr. Jones's guilt or innocence had any trouble understanding what was prohibited.

We, nonetheless, take the time to pass on Mr. Jones's specific assignments of error to further assure him. We review a statute's constitutionality de novo. *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 978, 216 P.3d 374 (2009).

"Contact" Void for Vagueness

Mr. Jones's claim here was that he was denied due process of law because he did not have adequate notice of the prohibited conduct. *City of Pasco v. Shaw*, 127 Wn. App. 417, 426, 110 P.3d 1200 (2005), *aff'd*, 161 Wn.2d 450, 166 P.3d 1157 (2007). Mr. Jones argues that the word "contact" in RCW 26.50.110 is void for vagueness. We begin with the presumption that the statute is constitutional. *City of Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). And we review a challenge that the statute is void for vagueness based on how the law was actually applied to Mr. Jones. *City of Spokane v. Douglass*, 115 Wn.2d 171, 182, 795 P.2d 693 (1990).

The law "does not demand impossible standards of specificity or absolute agreement." *Id.* at 179. The fact that some terms in the statute are undefined does not render the statute unconstitutionally vague. *Id.* at 180. To determine whether a statute gives fair warning, the statute must be considered as a whole, giving the statutory language "a sensible, meaningful, and practical interpretation." *Id.*

A statute is "'void for vagueness if it is framed in terms so vague that persons of

common intelligence must necessarily guess at its meaning and differ as to its application.'" *Eze*, 111 Wn.2d at 26 (quoting *O'Day v. King County*, 109 Wn.2d 796, 810, 749 P.2d 142 (1988)). The statute must provide (1) adequate notice of the proscribed conduct and (2) adequate standards to prevent arbitrary enforcement. *Id.*

The statute allows the court to prohibit "contact with a protected party." RCW 26.50.110(1)(a)(i). The sentencing court was then privileged to "[r]estrain the respondent from having any contact with the victim of domestic violence or the victim's children or members of the victim's household." RCW 26.50.060(1)(h). And it did so by prohibiting Mr. Jones from

> "[c]oming near and from having any contact whatsoever, in person or through others, by phone, mail or any means directly or indirectly, except for mailing or service of process of court documents by a third party or contact by defendant's lawyers, with [Ms. Selke]."

2 RP at 87; Ex. 1.

Mr. Jones argues, nonetheless, that it did not adequately notify him of what specific conduct was prohibited. This record suggests that Mr. Jones both understood and agreed that the restriction included indirect contact with Ms. Selke through family members:

> THE COURT: . . . .
> Again, I'm troubled by the fact that there's been a report of contact between a family member of yours and the victim in this case. There's not to be any further contact between you and the victim nor anyone else that

> you might talk to about that. Okay? Do you understand?
>
> [Mr. Jones]: I understand, your Honor. But, at the same time, my mother and her have been having contact. And she calls periodically to there, my sisters. I have no control of that.
>
> THE COURT: No, I understand that. But, I think, in terms of your best interests and tranquility among your family members, it would go a long ways toward promoting that if you'd make that known to everybody that might feel inclined to talk to Ms. Selke. Okay?

RP (Feb. 4, 2009) at 7; Ex. 6.

He, nonetheless, wrote to Ms. Selke's son at her address and specifically complained about Ms. Selke. The suggestion that he did not expect this to result in contact with her was an assertion that was rejected by the jury; and we believe reasonably so.

Mr. Jones sent the letter to the prohibited address; that conduct reasonably falls within the prohibition against direct or indirect contact with Ms. Selke. Persons of ordinary intelligence could understand the meaning of the term and specifically comprehend that sending mail to the address was prohibited by the no-contact order. And that is so whether or not the letter is addressed to the specific individual noted in the order. To require further definition would invoke a standard of specificity not contemplated under the due process analysis. *Eze*, 111 Wn.2d at 27-28.

We do not have any trouble articulating what the word "contact" means and we conclude that a person of ordinary intelligence would not have any difficulty understanding what conduct was prohibited.

Id. The word "contact" as applied here is not then vague.

Protected Speech

Mr. Jones next contends that RCW 26.50.110 is unconstitutionally overbroad because the term "contact" in the statute prohibits, or has the potential to prohibit, constitutionally protected speech. Br. of Appellant at 9.

Again, any error, even assuming constitutional error, does not fall under the rubric of "manifest." *Lynn*, 67 Wn. App. at 345.

First, what is prohibited here is contact. And certainly contact can include speech. *State v. Noah*, 103 Wn. App. 29, 41-42, 9 P.3d 858 (2000). But the statute and the challenged order here regulate conduct and therefore only obliquely touch upon speech. *State v. Dyson,* 74 Wn. App. 237, 243, 872 P.2d 1115 (1994).

We have already concluded that the word contact is not vague and would easily be understood by a person of average intelligence. The prohibited conduct here may well include speech but it is not protected speech. *Id.* at 245. The State did not have to countenance contact, even if it restricted speech, once the sentencing judge concluded that Mr. Jones represented a threat to Ms. Selke's physical and emotional security. *Spence v. Kaminski*, 103 Wn. App. 325, 331, 12 P.3d 1030 (2000). Before the court imposed this no-contact order, it found that Mr. Jones broke the windows of Ms. Selke's

car and made threatening phone calls to her home.

A statute is only overbroad on its face if it criminalizes a substantial amount of constitutionally protected speech. *Eze*, 111 Wn.2d at 31. A statute that regulates conduct rather than speech is not overbroad unless the overbreadth is both real and substantial when compared to the statute's plainly legitimate sweep. *Id.*

By its terms, RCW 26.50.110 regulates conduct and not true speech. To the extent that the statute touches on "speech," it does not do so in violation of the First Amendment. *See State v. Talley*, 122 Wn.2d 192, 858 P.2d 217 (1993) (addressing the malicious harassment statute, RCW 9A.36.080). Mr. Jones is simply not free to contact (a touching or meeting; establishing communication with someone[1]) Ms. Selke. And he was prohibited from contacting her for a very good reason—a sentencing judge found that he was a threat to her after Mr. Jones was convicted of malicious mischief and tampering with a witness (Ms. Selke). This is certainly not protected speech, if it is speech at all.

In *Talley*, our Supreme Court rejected an overbreadth challenge to a harassment statute, finding that the statute's impact on speech was not substantial. *Id.* at 212. The defendants argued that the statute was a content-based speech regulation and thus an unconstitutional restriction of First Amendment rights. *Id.* at 210. The court in *Talley*

[1] Websters Third New Int'l Dictionary 490 (1993).

concluded that the statute prohibited criminal conduct and only incidentally affected speech. *Id.* at 210-11. The court declared that "[t]he nexus between criminal conduct and any speech implicated ensures that [the statute] does not deter a substantial amount of protected expression." *Id.* at 211.

RCW 26.50.110 is similar. It does not deter a substantial amount of speech. It regulates conduct and only implicates speech when the speaker knowingly violates the "restraint provisions prohibiting contact with [the] protected party." The incidental impact on speech does not render RCW 26.50.110 unconstitutionally overbroad.

Statement of Additional Grounds (SAG)

Mr. Jones makes a number of assignments of error other than those raised by his lawyer. He argues that it is unreasonable to conclude that his letter was intended for Ms. Selke. He does so by surveying 20 people and soliciting their opinions on whether the letter could be construed as directed toward Ms. Selke. The problem with that approach is that it ignores the fact that a properly instructed jury concluded that contact with Ms. Selke is precisely what he intended.

Mr. Jones pleaded guilty to witness tampering and malicious mischief. The no-contact order was issued pursuant to the charges, and Mr. Jones had a duty to obey it. He cannot now make a collateral challenge to a final judgment in another matter. *E.g.*,

Bullock v. Bullock, 131 Wash. 339, 342-43, 230 P. 130 (1924).

Mr. Jones also claims that his lawyer was ineffective because he did not call certain witnesses or properly conduct the defense. We are very deferential to the decisions defense lawyers make during the course of a trial. *McFarland*, 127 Wn.2d at 335. Here there is not the necessary showing that mistakes were made. And Mr. Jones concedes as much, "I don't want it to seem like I am putting the blame of the guilty verdict on my attorney I just want you to know the facts, that I feel he could have done much better." SAG at 3-4. Nor does Mr. Jones identify any prejudice. His claim is insufficient to satisfy either prong of the *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

We affirm the convictions.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Kulik, C.J.

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Brown, J.