NOT DESIGNATED FOR PUBLICATION

No. 125,290

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
*Appellee*,

v.

AARON RAY BYERS,
*Appellant*.

MEMORANDUM OPINION

Appeal from Shawnee District Court; JESSICA L. HEINEN, judge. Opinion filed September 29, 2023. Affirmed.

*Patrick R. Barnes*, of Barnes Law Offices, of Topeka, for appellant.

*Michael R. Serra*, deputy district attorney, *Michael F. Kagay*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., GREEN and HILL, JJ.

PER CURIAM: Aaron Ray Byers was found guilty of violating a protective order. On appeal, he argues that his conviction is supported by insufficient evidence, that the protective order, as applied by the district court, violated his rights to free speech and association, and that the protective order is unconstitutionally vague. But because his insufficient evidence claim and his constitutional claims are all fatally flawed, we affirm.

## FACTS

In September 2020, the Shawnee County District Court issued an order of protection from abuse barring Byers from having any contact with S.G. for one year. The protective order also barred Byers from contacting S.G.'s three children, B.B., J.B., and A.G. Byers is the father to two of these children, B.B. and J.B.

The protective order prohibited Byers from engaging in the following conduct:

- assaulting, threatening, abusing, harassing, following, stalking, or interfering with the privacy or rights of the protected persons wherever they may be;
- using, attempting to use, or threatening to use physical force that would reasonably be expected to cause bodily injury against the protected persons, or engaging in other conduct that would place the protected persons in reasonable fear of bodily injury;
- threatening a member of the protected persons' family or household;
- entering or coming on or around the premises, residence, property, school, or place of employment of the protected persons or other family or household members of the protected persons;
- contacting the protected persons, either directly or indirectly, in any manner;
- contacting, in any manner, the protected persons' employer, employees, fellow workers, or others with whom the communication would be likely to cause annoyance or alarm to the protected persons; and
- directing or requesting another to contact the protected persons, either directly or indirectly, in any manner.

The only exceptions to these limitations were for Byer's supervised parenting time with B.B. and J.B.

In September 2021, the State charged Byers with violating the protective order.

At Byers' trial before the district court, the court first heard testimony from S.G. S.G. testified that, on July 7, 2021, she was attending J.B.'s final softball game of the season, along with B.B. and A.G. She stated that they sat at the top of the bleachers to watch the game and that, after a while, the children's grandmother—Byers' mother—showed up and sat with them. S.G. stated that she sat directly in front of the children, who were seated alongside Byers' mother on the top row of the bleachers.

S.G. testified that shortly after arriving at the ballpark, she noticed Byers' mother looking around the parking lot. She then noticed Byers and a young boy walking from the parking lot towards them. She stated that Byers walked up to where they were seated, placed his hands on the back rail of the top row of the bleachers, and began talking to his mother. Specifically, she stated that Byers said, "'Hey grandma, it's nice to see everyone here, isn't it?'" S.G. testified that after talking with his mother, Byers then backed up roughly 5 or 10 feet from the bleachers and began playing catch with the young boy, who was his girlfriend's son. According to S.G., Byers also talked to the boy while playing catch, telling him, "'Good job buddy. You're doing a good job[,]" at which point B.B. and A.G. started crying.

S.G. testified that after B.B. and A.G. started crying, they moved to a lower part of the bleachers and tried to ignore Byers. Nevertheless, Byers grew louder and began chanting and whistling. Eventually, S.G. decided to pull J.B. from the ball game and take the children and leave the ball park. S.G. stated that Byers' presence scared her and upset her daughters.

S.G. testified that Byers was there to attend his girlfriend's son's ball game, but that his girlfriend's son's game was on a separate field roughly 100 feet away and was not scheduled to start until two or two-and-a-half hours after J.B.'s game.

At the close of the State's evidence, Byers moved for dismissal based on insufficient evidence. In support, he argued that the State's evidence did not establish a knowing violation of the order, as the testimony showed that he did not directly contact S.G. or the children and immediately distanced himself from them after talking to his mother. As for his other conduct, he argued that he was merely trying to warm up his girlfriend's son for his game and otherwise was acting as one normally would at a ballgame. The district court denied his motion.

The district court also received testimony from Byers' mother. She testified that she had told Byers earlier in the day on July 7 that she would not be at the game. She stated that when Byers walked up to her at the bleachers, he told her he did not think she was coming and asked if she would be attending his girlfriend's son's game. She said that after she responded yes, he left and began playing catch. She also testified that when he was speaking, Byers did not grab the back rail of the bleachers but instead was standing roughly 10 feet away. And she testified that Byers was "far away" from the bleachers while playing catch, that A.G. moved to a separate portion of the bleachers because her mother made her, not because she was upset at Byer's presence, and that the children did not cry.

Finally, Byers also testified. He stated that he went up to speak with his mother because he did not expect her to be at the ballpark and that he limited the conversation to asking her if she was coming to his girlfriend's son's game because he saw she was sitting with A.G. and B.B. Byers stated that he then went and played catch with his girlfriend's son about 40 yards away. Byers denied cheering or otherwise paying attention to his daughter's game and testified that he was solely focused on warming up his girlfriend's son for his game.

In closing, Byers argued that he did not violate the protective order, as he had not contacted any protected persons within the meaning of the order, and even if he had

violated the order, he had not done so knowingly. In support, he argued that he did not know S.G. and the children were going to be there, that once he realized they were, he attempted to distance himself from them, and that he otherwise was engaging in the same behavior as everyone else at the ballpark and with no intent of affecting S.G. or the children.

The district court found Byers guilty of violating the protective order. In support of its decision, the district court noted that Byers testified that he noticed his children were sitting with his mother as he walked up to her, yet still decided to engage her in conversation. He then remained close by playing catch. Finally, the district court noted, there was testimony that after he walked up, his daughters began to cry, moved seats, and eventually left the game. Based on this, the district court found that Byers knowingly violated the protective order by interfering with S.G.'s and the children's privacy rights.

The district court sentenced Byers to 12 months' unsupervised probation with an underlying sentence of 1 month in the county jail.

Byers timely appeals.

## ANALYSIS

On appeal, Byers advances three claims: (1) His conviction was supported by insufficient evidence; (2) the protective order, as applied by the district court, constitutes an unconstitutional prior restraint on his rights to free speech and association; and (3) the protective order is unconstitutionally vague.

I. *Is Byers' conviction supported by sufficient evidence?*

Byers first argues that the district court erred in denying his motion to dismiss based on sufficiency of the evidence and in interpreting and applying the order. In other words, Byers challenges the sufficiency of the evidence supporting his conviction.

The State counters that it produced sufficient evidence to find that Byers knowingly violated the protective order.

*Standard of Review*

There is disagreement between the parties as to the applicable standard of review.

Byers argues that we should exercise an unlimited standard of review on this issue because it involves the interpretation of statutes and the text of the protective order. In support, he claims that the evidence taken as stated failed to demonstrate a knowing violation of the protective order or that the order was violated at all.

Byers argues that in assessing whether his motion to dismiss should have been granted, the question is whether the evidence taken as stated failed to demonstrate a knowing violation of the protective order or that the order was violated at all. He thus argues that it involves statutory interpretation, to which this court applies an unlimited standard of review. Similarly, Byers argues that because this case involves a mistake of law as to the sufficiency of the evidence, the appropriate standard of review is likewise unlimited.

The State argues that the usual standard of review applicable to challenges to the sufficiency of the evidence supporting a conviction should apply here.

When sufficiency of the evidence is challenged on appeal, the standard of review is whether, after review of all evidence presented, viewed in a light most favorable to the prosecution, a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. *State v. Gutierrez*, 285 Kan. 332, 336, 172 P.3d 18 (2007). A reviewing court does not reweigh evidence, resolve evidentiary conflicts, or make credibility determinations of witnesses. *State v. Chandler*, 307 Kan. 657, 668, 414 P.3d 713 (2018). Interpretations of questions of law are subject to unlimited review. *State v. Sartin*, 310 Kan. 367, 369, 446 P.3d 1068 (2019).

Despite arguing that we should apply a de novo standard of review, Byers argues that the evidence "taken as stated" fails to demonstrate a knowing violation—seemingly acknowledging that the usual standard of review for sufficiency of evidence is applicable here. Also, in addressing Byers' motion to dismiss, the trial judge applied a sufficiency of the evidence burden on the State in determining whether it had produced enough evidence to move forward with its action against Byers:

> "Defense Counsel has moved for dismissal based on the fact that evidence wasn't per—presented that he knowingly violated the—the PFA.
>
> "At this time, based on both of the State's witnesses, I do think that there is sufficient evidence to move forward. . . .
>
> "So I'm going to deny the Motion to Dismiss at this point."

Despite Byers' arguments to the contrary, his claims require us to review the evidence and determine whether it was sufficient to establish a knowing violation of the terms of the protective order. This entails a review of the sufficiency of the evidence.

So, we will apply the sufficiency of the evidence standard of review for this issue.

*Discussion*

Under K.S.A. 2022 Supp. 21-5924(a)(1), a defendant may be held criminally liable for "knowingly violating: . . . A protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106 or 60-3107."

The term "knowingly," in turn, is defined by statute:

> "A person acts 'knowingly,' or 'with knowledge,' with respect to the nature of such person's conduct or to circumstances surrounding such person's conduct when such person is aware of the nature of such person's conduct or that the circumstances exist. A person acts 'knowingly,' or 'with knowledge,' with respect to a result of such person's conduct when such person is aware that such person's conduct is reasonably certain to cause the result. All crimes defined in this code in which the mental culpability requirement is expressed as 'knowingly,' 'known,' or 'with knowledge' are general intent crimes." K.S.A. 2022 Supp. 21-5202(i).

In proving a defendant's guilt, the State may utilize both direct and circumstantial evidence, along with logical inferences properly drawn from said evidence. *Chandler*, 307 Kan. at 669.

While Byers' arguments are not exactly clear, his essential contention seems to be that he did not knowingly violate the protective order and that the district court's findings were based on the victim's subjective interpretation of his actions, rather than his actual intent.

Byers argues that he was engaging in normal conduct for a person at a ballpark and that a knowing violation of the protective order cannot be established based on acts that were commonly occurring among the inhabitants of a public gathering. He argues that his conduct was not directed at the protected persons and that the protected persons

simply assumed that it was directed at them despite hundreds of other people at the public gathering engaging in the same sort of conduct. Byers argues that merely standing nearby the protected persons and being loud, without talking directly to them, is not conduct prohibited by the terms of the protective order. If it is, he argues that the protective order touches such a breadth of undefined conduct as to be unreasonably vague.

Byers further argues that the list of prohibited acts in the protective order—such as assault, harassment, and threats—indicates that conduct must be personal, adverse, and pointedly direct to violate the order. He argues that, applying the statutory canon that the inclusion of one thing implies the exclusion of another to the language of the protective order, his conduct here does not fall within the penumbral envelope of the conduct prohibited under the order. He argues that the acts prohibited under the order all imply active, affirmative, direct effort. Even an indirect contact, he claims, must at least still be aimed in a conscious way at the subject as opposed to the contact happening incidentally or inadvertently.

Although Byers argues that the Latin maxim of *expressio unius est exclusio alterius* as a statutory canon should apply "with equal consideration to an order such as the one here in issue," we disagree. Even if we were interpreting a statute, which we are not, his reasoning is out of step with this statutory canon. This rule of statutory construction is used only when legislative intent is not otherwise clear. Thus, this maxim does not apply when the legislative intent is clearly expressed. The limitations of this rule were best described in *Johnson v. General Motors Corporation*, 199 Kan. 720, 722, 433 P.2d 585 (1967). Also, Byers' argument affords no basis to contend that we should use this Latin maxim statutory canon—which serves to help interpret the meaning of an absence of particular words from a statute—to apply to the order in this case. Surely not: the terms of the protective order in this case are clearly expressed and understandable.

Indeed, the order was sufficiently clear as to what Byers could not do:

> "• Defendant shall not assault, threaten, abuse, harass, follow, stalk, or interfere with the privacy or rights of the Protected Person(s) wherever they may be. . . .
>
> . . . .
>
> "• Defendant shall not contact the Protected Person(s), either directly or indirectly, in any manner, except as authorized by the court in Paragraph 8(b) of this Final Order."

The requirements of the order are not arbitrary and provide a person of ordinary intelligence fair notice of what is prohibited.

In line with his previous argument, Byers argues that he did not directly or indirectly "contact" S.G. or the children, as that term is normally understood, since he made no attempt to interact with them. In support, he cites to dictionary definitions for the term and several cases from other states in arguing that "contact" requires a person to initiate communication. See *Cooper v. Cooper*, 144 P.3d 451, 457-58 (Alaska 2006) (relying on Webster's Third New International Dictionary to define "'contact'" as physically touching or communicating and finding that nonphysical contact thus must involve some element of direct or indirect communication and does not merely mean coming within view); *People v. Serra*, 361 P.3d 1122, 1131 (Colo. App. 2015) (defendant's conduct must involve physical touching or some element of direct or indirect communication, or attempted communication, with the victim; incidental contact that occurs unintentionally and is unavoidable is insufficient); *C.W.W. v. State*, 688 N.E.2d 224, 226 (Ind. Ct. App. 1997) (relying on Webster's Dictionary [10th ed.1993] to define contact as "'establishing of communication with someone' or 'to get in communication with'"); *Lisa T. v. K.T.*, 14 N.Y.S.3d 883, 891 (N.Y. Fam. Ct. 2015) (no violation of protective order barring contact with mother where mother and child were at the same church event as defendant and defendant briefly interacted with child outside of mother's presence).

Similarly, Byers argues that his conduct cannot be viewed as an interference with the victims' privacy rights, as there is minimal to no reasonable expectation of privacy for a person sitting at a baseball game amongst a crowd of people who are cheering, conversing, playing catch, and yelling back and forth.

In support, he cites to *State v. Hayes*, 57 Kan. App. 2d 895, 900-01, 462 P.3d 1195 (2020) (evaluating statute criminalizing concealed filming of another person under circumstances in which the other person has a reasonable expectation of privacy and looking to person's actual subjective expectation as well as the objective reasonability of this expectation in determining whether reasonable expectation of privacy existed). He argues that a person can only reasonably expect to have very limited privacy rights in a public ballpark.

Byers also argues, as a matter of policy, that a finding of guilt based on this conduct would open the courts to frivolous claims and undermine the public integrity of the system of protection by enabling individuals to utilize the courts for personal retribution rather than real need.

Finally, Byers cites two cases on page 20 of his brief: *Paida v. Leach*, 260 Kan. 292, 917 P.2d 1342 (1996), and *J.B.B. v. J.L.B.*, 60 Kan. App. 2d 310, 495 P.3d 1036 (2021). But these cases will not bear nearly the weight of reliance which he places on them. Byers maintains that these two cases involve conduct that was more physical and violent than the conduct at issue in this case. And he further contends that these cases did not result in the granting of a protective order by the court. He advances these cases as support for the argument that his conduct did not violate the protective order here. Nevertheless, these cases, as Byers admits in his brief, did not involve the question of whether the defendant had violated a protective order, but whether a protective order should have been granted in the first place. Given this obvious distinction, and Byers'

general lack of explanation as to these cases' significance, we determine that his reliance on these cases is misplaced.

The State argues that although the district court stated its reasoning in finding Byers guilty, it was not required to do so, and this reasoning is not dispositive of the appeal. See *State v. Kendall*, 300 Kan. 515, 529, 331 P.3d 763 (2014) (noting in review of sufficiency of evidence supporting conviction that regardless of district court's stated reasoning in support of finding of guilt, a district court is not required to explain its decision and may render the equivalent of a general verdict of guilty or not guilty). The State argues that the only issue on appeal is whether the evidence presented, when viewed in the light most favorable to the prosecution, was sufficient for a rational fact-finder to find Byers guilty beyond a reasonable doubt.

The State maintains that the evidence here was sufficient to support a conviction based on violating S.G.'s and the children's privacy rights, harassment, coming to the premises of a protected person, or having direct or indirect contact with a protected person. In support, the State notes that (1) Byers arrived early for his girlfriend's son's game with knowledge that J.B. was playing; (2) Byers admitted to seeing B.B. and A.G. sitting with his mother; (3) S.G. testified that Byers came within feet of B.B. and A.G. while talking to his mother; (4) Byers said to his mother, "'Hey grandma, it's nice to see everyone here, isn't it?'"; (5) Byers then engaged in a noisy game of catch 5 to 10 feet away, causing the children to move seats; and (6) Byers' loud and animated behavior eventually caused S.G. to feel she needed to remove J.B. from her ball game and leave.

The State argues that the general right to privacy can be basically defined as the "right to be let alone by other people." *Katz v. United States*, 389 U.S. 347, 350, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). And the State notes that a previous panel of this court has defined contact in the context of a no-contact order as synonymous with communication

or close physical proximity, but not mere observation alone. See *State v. Smith*, No. 107,629, 2013 WL 3791615, at *3-4 (Kan. App. 2013) (unpublished opinion).

The State argues that Byers' loud and disruptive behavior, when viewed in the light most favorable to the State, supports a conclusion that Byers was aware that his words and presence would be perceived by the victims here and that his conduct was reasonably certain to have the effect of upsetting them.

Furthermore, the State argues that Byers' behavior interfered with S.G., A.G., B.B., and J.B.'s general right to be left alone and went beyond merely observing them in a public place, straying into both direct and indirect contact.

As noted earlier, the question here is whether the evidence, taken in the light most favorable to the prosecution, was sufficient for a rational fact-finder to have found Byers guilty beyond a reasonable doubt. In other words, the evidence must be capable of sustaining a finding that Byers knowingly engaged in at least one type of prohibited conduct under the protective order.

Viewing the evidence presented in the light most favorable to the prosecution, it is sufficient to establish that Byers contacted a protected person. The parties both agree that "contact" in this context means communication or close physical proximity, but not mere observation alone. Given the circumstances here, a rational fact-finder could conclude beyond a reasonable doubt that Byers knowingly contacted a protected person. Crediting S.G.'s testimony regarding Byers' words, actions, and proximity to where she and the children were sitting, a rational juror could conclude that Byers was directing communications towards them through his conduct. He saw the children, walked directly up to them, and made a statement to his mother, who was sitting with B.B. and A.G., as follows: "'Hey grandma, it's nice to see everyone here, isn't it?'" Byers' use of the word "grandma" while the children were sitting with her and his use of the word "everyone" in

his statement would indicate the following: that he was referring to both his mother, as the grandmother of the children, and the children, as grandchildren of the grandmother. If not so, why when referring to his mother in his statement would he use the term "grandma" if he was not also referring to his mother's grandchildren? Thus, Byers' statement shows a contact (direct or indirect) directed toward the children in violation of the protective order.

After this contact, Byers proceeded to stand mere feet away and loudly played catch with his girlfriend's son, engaging in parenting activities he was seemingly not allowed to engage in with his own children. He made his presence further known by whistling and cheering. And he persisted in this conduct even after his children became visibly upset and moved, until they were forced to leave the game to escape his presence. A reasonable juror could conclude that Byers either intended to communicate with the protected persons or was reasonably certain that his words and actions would have that effect—that is, that the protected persons would perceive his words and actions as directed towards them and would be affected by them.

Thus, we find that Byers' conviction is supported by sufficient evidence.

II. *Does the protective order as applied violate Byers' First Amendment rights?*

Byers next argues that the district court's interpretation of the order, as applied, constitutes a violation of his rights to free speech and association under the First Amendment to the United States Constitution and section 11 of the Kansas Constitution Bill of Rights.

The State argues that this argument is unpreserved, and in any case, neither the protective order nor the district court's interpretation of the order rendered an unconstitutional restraint on Byers' free speech or assembly rights.

*Standard of Review*

Both statutory and constitutional interpretation are subject to unlimited review on appeal. *In re Miller*, 289 Kan. 218, 230, 210 P.3d 625 (2009).

*Preservation*

As the State points out, Byers did not raise this argument before the district court. Generally, issues not raised before the district court, including constitutional grounds, cannot be raised for the first time on direct appeal. *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018).

A defendant may raise an issue for the first time on appeal if one of the following exceptions applies: (1) The newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) the consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) the district court was right for the wrong reason. *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019).

Nevertheless, if seeking to raise an argument for the first time on direct appeal, Kansas Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36) requires the proponent to explain why the issue was not raised below and what exception applies permitting said issue to be addressed for the first time on appeal. *Daniel*, 307 Kan. at 430.

The State thus argues that this issue should not be addressed because it is being raised for the first time on appeal and does not involve a pure question of law that is finally determinative of the case, and consideration of the claim is not necessary to serve the ends of justice or prevent the denial of fundamental rights.

Byers argues that he was not required to raise this issue below because there was no indication that the district court would apply the order in an unconstitutional manner until after the fact. Furthermore, Byers argues that two exceptions apply here as this issue involves a pure question of law that is finally determinative of the case and consideration of his claim is necessary to serve the ends of justice or prevent the denial of fundamental rights.

As an initial matter, Byers' argument that he could not have anticipated how the district court would apply the order rings hollow. The district court's application of the order to the facts mirrored the theory advanced by the State and was not novel or unexpected in its reasoning. Byers gives no explanation why he could not predict that the district court might find him guilty of violating the protective order based on his alleged conduct. Nonetheless, however, Byers is correct that an exception allowing consideration of his claim applies here, as freedom of speech is a fundamental right. *State v. Jones*, 313 Kan. 917, 933, 492 P.3d 433 (2021).

So, we have discretion as to whether to consider his unpreserved claim on this issue. We will exercise our discretion and consider this issue.

*Discussion*

As a general rule, the government lacks the power to restrict expression because of its message, its ideas, its subject matter, or its content. As a result, content-based restrictions on speech are presumed invalid and the government bears the burden of showing their constitutionality. *United States v. Alvarez*, 567 U.S. 709, 716-17, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012).

Restrictions on free speech are valid only where narrowly tailored to serve compelling public interests and where no less restrictive alternatives are available. *Reed*

*v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015); *U.S.D. No. 503 v. McKinney*, 236 Kan. 224, 227-28, 689 P.2d 860 (1984).

Nevertheless, many crimes can consist solely of spoken words, and the state may penalize threats, even those consisting of pure speech, provided the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection. The goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is "'communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs.'" *State v. Whitesell*, 270 Kan. 259, 271, 13 P.3d 887 (2000). Thus, a statute that is otherwise valid and is not aimed at protected expression does not conflict with the First Amendment simply because the statute can be violated by spoken words or other expressive activity. 270 Kan. at 271-72.

A balance must be struck between the constitutional right to free speech and the personal right to be left alone. Despite the First Amendment, a person is not free to harm others under the guise of free speech. "'As speech strays further from the values of persuasion, dialogue, and free exchange of ideas, and moves toward willful threats to perform illegal acts, the State has greater latitude to regulate expression.'" *Smith v. Martens*, 279 Kan. 242, 253, 106 P.3d 28 (2005) (quoting *Whitesell*, 270 Kan. 259, Syl. ¶ 7).

The First Amendment also accords special protection to two different forms of association: "'intimate association'" and "'expressive association.'" See *City of Dallas v. Stanglin*, 490 U.S. 19, 23-25, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989); *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). The right to "intimate association" deals with the institution of marriage and familial relationships. See 468 U.S. at 619.

Byers claims that the district court's interpretation of the protective order restricted his right to speak, be present, and participate (i.e., cheer and encourage others) in a public event and penalized him for associating with and speaking to his mother.

Byers cites to *State v. Smith*, 57 Kan. App. 2d 312, 452 P.3d 382 (2019), in support. There, a panel of this court found that a provision in a protection from stalking order prohibiting a defendant from making direct or indirect disparaging statements in public regarding her neighbor being a child molester was a content-based restraint on speech because it forbids a specific speaker from specific expression. 57 Kan. App. 2d at 321-22.

Byers argues that, like *Smith*, "there is nothing to show what occurred here is excluded from First Amendment protection." He claims that the district court's interpretation of the order is an improper prior restraint on his speech and association, as it prohibited non-threatening speech that did not subject the hearer to a reasonable fear or threat of physical harm and was not narrowly tailored to serve any compelling state interest.

The State argues that Byers' conduct here was integral to criminal conduct as well as constituting a true threat and served no purpose other than to harass, intimidate, and interfere with the privacy rights of S.G., A.G., B.B., and J.B. The State argues that Byers' conduct was thus not entitled to First Amendment protection, citing to *Whitesell*, 270 Kan. 259, in support. Furthermore, the State argues that the protective order does not constitute a content-based speech restriction, as it did not limit what Byers could say but merely prohibited him from having contact with specific persons. Finally, even if the protective order, as applied, infringed on Byers' First Amendment rights, the State argues it was narrowly tailored to protect a compelling and legitimate government interest of protecting victims of domestic violence from conduct that subjects them to a reasonable fear of harm.

The State also argues that the protective order, as applied, did not violate Byers' right of assembly, since the order did not prohibit him from attending baseball games, only from contacting, harassing, or interfering with the privacy rights of the protected persons.

Byers' arguments on this issue are flawed. First, the protective order as applied did not constitute a content-based restriction on his speech. Unlike *Smith*, the order here did not prohibit Byers from making specific sorts of statements about the protected persons in public, but merely restricted him from engaging in specific sorts of threatening and harassing conduct towards the protected persons. Second, Byers' brief argument regarding his right of association is nonsensical. Neither the protective order nor the district court's interpretation of it restricted Byers from attending or participating in baseball games. It restricted him from engaging in a specific range of conduct towards the protected persons. And the district court punishing him for conduct that involved him talking to his mother does not transform the protective order into a categorical restriction on his ability to associate with his mother.

Thus, we find that the protective order, as applied, did not violate Byers' rights to free speech and association.

III. *Is the protective order unconstitutionally vague?*

Finally, Byers argues that the terms of the protective order are so vague as to be violative of due process.

The State argues that this issue is unpreserved, and that Byers' argument is meritless, as the terms of the order are sufficiently clear as to what sort of conduct is prohibited.

*Standard of Review*

This issue, like the previous one, calls on us to interpret a written order and engage in constitutional analysis. As stated, these questions are both subject to unlimited appellate review. *Miller*, 289 Kan. at 230.

*Preservation*

To begin, the State argues that we should refuse to consider this issue because Byers raises it for the first time on appeal.

Byers acknowledges that he did not raise this issue before the district court and incorporates his arguments as to preservation under Issue II (whether the protective order violated First Amendment rights). That is, he argues that he could not have anticipated the existence of this argument below and that two exceptions apply here justifying its consideration for the first time on appeal.

Like Issue II, we have the discretion to consider Byers' claim on this issue. See *State v. Jenkins*, 311 Kan. 39, 52, 455 P.3d 779 (2020) (court could review unpreserved vagueness challenge on basis that consideration of the theory was necessary to serve the ends of justice or to prevent the denial of fundamental rights). We will exercise our discretion and consider this issue.

*Discussion*

A statute is void for vagueness based on due process grounds if it does not convey a "sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice." *State v. Dunn*, 233 Kan. 411, 418, 662 P.2d 1286 (1983).

A statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process. 233 Kan. at 418. "At its heart the test for vagueness is a commonsense determination of fundamental fairness." *State v. Kirby*, 222 Kan. 1, 4, 563 P.2d 408 (1977).

In line with his claims as to the sufficiency of the evidence presented, Byers argues that his actions did not fall within the bounds of the conduct prohibited by the protective order, and if they did, that the order was so vague as to leave one guessing as to what was prohibited. Essentially, Byers argues that if the protective order prohibited him from engaging in the conduct here—incidentally encountering and being in the proximity of the protected persons while engaging in otherwise normal activity not directed at them—it should have said so specifically, instead of leaving it up to him to guess as to the breadth of its coverage. In support, he analogizes the text of the protective order to the stalking statute invalidated in *State v. Bryan*, 259 Kan. 143, 149-51, 910 P.2d 212 (1996), arguing that, like the statute there, the protective order subjected him to criminal liability based on the particular sensibilities of the victim. Thus, he argues it required him to guess as to what is prohibited based on the unpredictable subjective reactions of third persons.

The State responds that neither the statute forbidding knowing violations of protection from abuse orders, nor the protective order itself, are so overly broad or vague as to be unconstitutional. The State argues that the concepts of a "right to privacy" or "direct or indirect contact" are not complicated or vague and are readily understood by the average person. In support, the State points to the definition of these terms provided under Issue I (sufficiency of the evidence).

Byers' arguments on this issue are likewise flawed. He offers no specific arguments as to vagueness, other than repackaging his arguments that the evidence was

not sufficient to establish a violation of the order. But as explained in Issue I, the evidence here was indeed sufficient to find that his conduct constituted contact or a violation of the protected persons' rights to privacy, or both, based on the common understanding of those terms.

So, we find that the terms of the protective order were not unconstitutionally vague because they gave sufficiently definite warning of the conduct proscribed when measured by common understanding and practice.

Affirmed.