IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34458-4-III

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STATE OF WASHINGTON, Respondent,

v.

ALEX S. NOVIKOFF, Appellant.

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# APPELLANT'S REPLY BRIEF

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## TABLE OF CONTENTS

**AUTHORITIES CITED**.....ii

**I. ARGUMENT**.....1

**II. CONCLUSION**.....6

**CERTIFICATE OF SERVICE**.....7

## AUTHORITIES CITED

### State Cases

*In re Matter of Sietz*, 124 Wn.2d 645, 880 P.2d 34 (1994).....2

*State v. Leming*, 133 Wn. App. 875, 138 P.3d 1095 (2006).....1, 4, 5

*State v. Moreno*, 132 Wn. App. 663, 132 P.3d 1137 (2006).....1, 2, 3

*State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).....5

### Statutes

RCW 26.50.110(1)(a).....2

RCW 26.50.210.....2

### Legislative Materials

2007 Wash. Legis. Serv. Ch. 173, § 1 (S.H.B. 1642) (WEST).....2

## I. ARGUMENT

The State relies upon *State v. Moreno*, 132 Wn. App. 663, 132 P.3d 1137 (2006) and *State v. Leming*, 133 Wn. App. 875, 138 P.3d 1095 (2006) for the proposition that the Legislature intended to separately punish a protective order violation that is elevated to a felony by virtue of an assault, and the assault that elevates the violation. To the extent those cases hold that such intent exists, they are wrongly decided and this court should not follow them.

In *Moreno*, Division One of the Court of Appeals considered convictions for felony violation of a protective order and third degree assault, which arise from the same incident and were presumptively the same in fact and law. 132 Wn. App. at 668. However, the *Moreno* Court noted that the crimes could still be found separate when there is "clear evidence of contrary legislative intent." *Id.* at 669. In reaching the conclusion that the legislature intended to impose different punishments, the *Moreno* Court considered the location of the crimes in two separate chapters of the Revised Code of Washington, as well as different enactment purposes. *Id.* at 669-71.

But subsequent to *Moreno*, the Legislature amended the Domestic Violence Protection Act. In the first such amendment, it expressly stated

its intent that "This act is not intended to broaden the scope of law enforcement power or effectuate any substantive change to any criminal provision in the Revised Code of Washington." 2007 Wash. Legis. Serv. Ch. 173, § 1 (S.H.B. 1642) (WEST). This statement of intent conflicts with the *Moreno* Court's interpretation of the Legislature's intent to expand existing criminal penalties by adopting RCW 26.50.210. At a minimum, this express statement of the Legislature's intent not to expand criminal penalties renders its intent in separately punishing assaults and assaultive protective order violations ambiguous. When the Legislature's intent is ambiguous, the rule of lenity applies to resolve the ambiguity in favor of the criminal defendant. *In re Matter of Sietz*, 124 Wn.2d 645, 652, 880 P.2d 34 (1994).

The statutory structure further undermines the *Moreno* Court's conclusion. In *Moreno*, the court gave considerable weight to the fact that the Legislature adopted criminal penalties for protection order violations in Title 26 RCW, whereas the criminal assault prohibitions are contained in Title 9A RCW. 132 Wn. App. at 669. But the Title 26 provisions specifically interact with and incorporate the assault provisions of Title 9A, indicating that the Legislature intended the provisions to be read and understood together. First, RCW 26.50.110(1)(a) establishes that

knowingly violating a protective order is a gross misdemeanor, except as provided in subsections (4) and (5). Subsection (4) states:

> Any assault that is a violation of an order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

This language expressly references the criminal assault statutes in providing that simple assaults that violate a restraining order are elevated to class C felonies. As such, structurally, the statutory language does not suggest an intention to create separate and independent penalties; rather, it incorporates the criminal statutes and provides that existing criminal penalties for fourth and third degree assault can be elevated to class C felonies when the assault violates a restraining order.

Lastly, the *Moreno* Court's reliance upon different legislative purposes for criminalizing protective order violations and assaults does not hold when the legislative purpose to prevent domestic violence and maximize protection to abuse victims is carried out by increasing the criminal penalty for a simple assault when the assault is in violation of a protection order. 132 Wn. App. at 670-71. It is safe to presume that any

new legislation has a new and different purpose than pre-existing legislation; but this fact alone does not override the Legislature's reconciliation of those purposes by using the newer legislation to build upon the earlier law – precisely what it did in this case. Here, the Legislature plainly and simply sought to achieve its purpose to prevent domestic violence by making simple assaults more serious offenses than they would be in the absence of a protective order.

*Leming*, on the other hand, is distinguishable on its facts as it addressed whether convictions for second degree assault and assault in violation of a protective order violated double jeopardy. Those crimes fail the *Blockburger* test because they rely upon different evidence and elements. 133 Wn. App. at 884-85. First, to prove the felony violation of the protective order, the State had to show that the defendant assaulted the victim other than in the second degree, which it did by way of a separate conviction for a separate assault in the fourth degree.[1] 133 Wn. App. at 879-80, 885. Second, to prove the second degree assault, the State had to prove intent to commit the crime of felony harassment, which was unnecessary to establish the felony assault in violation of a protective

[1] It does not appear that Leming argued on appeal that the fourth degree assault and the felony assault in violation of a protection order violated double jeopardy, so this question was not before the court in that case. *Leming*, 133 Wn. App. at 881 (stating arguments presented on appeal).

order. *Id.* at 885. Thus, *Leming* correctly establishes under the *Blockburger* test that second degree assault and felony assault in violation of a protection order are not the same offense. But this conclusion does not hold in the case of a fourth degree assault and a felony assault in violation of a protection order, which are more equivalent to degrees of a crime in which the greater offense requires proof of the lesser offense, plus some additional fact.

Lastly, the State attempts to evade the necessary conclusion that the fourth degree assault is functionally a lesser-included offense to felony assault in violation of a protective order by suggesting that different incidents could have comprised the factual basis for both charges. *Respondent's Brief*, at 21-22. But the State did not request a unanimity instruction under *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), presumably because it considered the various acts part of a continuous course of conduct occurring over several days, rather than separate and discrete criminal acts. A unanimity instruction would have been required if the State wished to allege that the discrete acts constituted separate criminal offenses. Moreover, the State's argument that felony violation of a protective order can be committed in other ways than by committing an assault is beside the point, because the State did not charge Novikoff or

attempt to prove that he committed the felony violation under one of the statutory alternatives. *Respondent's Brief*, at 21.

For these reasons, convictions for fourth degree assault and felony assault in violation of a protection order arising from the same conduct violate double-jeopardy. This court should decline to follow *Moreno*, which is poorly reasoned and fails to apply the rule of lenity to resolve ambiguity in the legislative intent.

## II. CONCLUSION

For the foregoing reasons, Novikoff respectfully requests that the court VACATE the conviction for fourth degree assault and REMAND the case for resentencing.

RESPECTFULLY SUBMITTED this 7 day of June, 2017.

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## DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 7 day of June, 2017 in Walla Walla, Washington.

Breanna Eng

**BURKHART & BURKHART, PLLC**

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