NO. 44594-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Appellant,

v.

ANTHONY LEO KOZEY

Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Jeanette Dalton, Judge

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court correctly ruled that to prove a domestic violence violation subject to enhanced sentencing under RCW 9.94A.525(21), the state was required to plead and prove the elements of RCW 10.99.010(r)(5), and RCW 26.50.010(1) as stated in RCW 9.94A.030(20).

Issues Presented on Appeal

Did the trial court correctly rule that the state failed to prove that Mr. Kozey committed a domestic violence crime under RCW 9.94A.030(20).

B. STATEMENT OF THE CASE

Mr. Kozey adopts the facts entered pursuant to the stipulated trial. CP 170-188.

C. ARGUMENT

THE TRIAL COURT CORRECTLY INTERPRETED RCW 9.94A.030(20) TO REQUIRE THE STATE TO PROVE EACH OF THE DEFINITIONS FOUND IN RCW 26.50.010(1) AND RCW 10.99.020(5)(r) TO HOLD THAT DOMESTIC VIOLENCE AS DEFINED IN RCW 9.94A.030(20) HAD BEEN SUCCESSFULLY PLEAD AND PROVED.

Mr. Kozey admitted that on November 13, 2011 and on February 9, 2012, he violated a no-contact order contrary to RCW 26.50.010(1). 170-188. The sole legal controversy in this case requires this Court to determine if the

trial court correctly ruled that under RCW 9.94A.030(20), the state was required to prove that Mr. Kozey committed a domestic violence crime as defined under both RCW 10.99.020(5)(r) and RCW 26.50.010(1) so that the State could seek the enhanced sentencing provisions available in RCW 9.94A.525(21). The trial court agreed that the state failed to prove domestic violence as it is defined in RCW 9.94A.030(20). The trial court concluded that RCW 10.99 contains a non-exclusive list of criminal conduct; RCW 26.50 defies domestic violence and "the different purposes of the statutes work in unison, not as separate and independent entities". Findings Re 9.94A.030(20); CP170-188.

RCW 9.94A.030(20)in relevant part, defines "domestic violence" as having "**the same meaning** as defined in RCW 10.99.020 **and** 26.50.010." (Emphasis added). RCW 9.94A.030(20) must be read in the conjunctive not only because the plain language used by the legislature demands it but also because only through such a conjunctive reading can the court ensure giving effect to the stated intent of the legislature which was to "**identify** violent perpetrators ... and **hold them accountable**." (Emphasis added). A disjunctive reading of the statute renders the legislature's explicit reference to RCW 26.50.010 superfluous because the definition contains elements not

present in RCW 10.99.020(5)(r).

Since the enactment and effective date of RCW 9.94A.525(21) and RCW 9.94A.030(20) on August 1, 2011, the question of whether the legislature intended the plain meaning of "and" to mean "and" in the conjunctive is a question of first impression for Washington's appellate Courts.

On April 1, 2010, the state House and Senate, unanimously passed Engrossed Substitute House Bill 2777, Chapter 274, with the exception of one section not relevant in this case. ESHB 2777, Chapter 274, Laws of Washington (2010). During this session, the legislature enacted RCW 9.94A.030(20) and RCW 9.94A.525(21), the provisions at issue in this case. Id. at 23, 43-41. RCW 9.94A.525(21) relates to the calculation of a defendant's offender score for felony sentencing purposes. It states in relevant part:

> "If the present conviction is for a felony domestic violence offense *where domestic violence as defined in RCW 9.94A.030 was plead and proven*, count priors as in subsections (7) through (20) of this section; however, count points as follows:..."

RCW 9.94A.525(21) (emphasis added). The statute creates a multiplier of 2 for certain prior convictions where "...domestic violence as defined in RCW

9.94A.030 was plead and proved after August 1, 2011..." RCW 9.94A.525(21)(a).

In this case, to impose an enhanced offender score under RCW 9.94A.525(21), the state was required to prove that Mr. Kozey was: (1) charged with a felony domestic violence offense as defined in RCW 9.94A.030; **and** (2) and that Mr. Kozey was convicted of a felony domestic violence offense as defined in RCW 9.94A.030 after August 1, 2011.

RCW chapter 10.99, which governs the issuance of domestic violence no-contact orders, broadly defines domestic violence in relevant part as follows:

> ""Domestic violence" **includes but is not limited to** any of the following crimes when committed by one family or household member against another:
>
> ....
>
> (a) Assault in the first degree (RCW 9A.36.011);
>
> ....
>
> (l) Malicious mischief in the first degree (RCW 9A.48.070);
>
> (m) Malicious mischief in the second degree (RCW 9A.48.080);
>
> (n) Malicious mischief in the third degree (RCW 9A.48.090);
>
> ....

> (r) **Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location (RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.44.063, 26.44.150, 26.50.060, 26.50.070, 26.50.130, 26.52.070, or 74.34.145);**
>
> ...
>
> (w) Interference with the reporting of domestic violence (RCW 9A.36.150)."

RCW 10.99.020(5)(emphasis added).

The definition of domestic violence in RCW 10.99.020 is provided through a non-exclusive list of exemplar crimes, while the term "domestic violence" is more narrowly defined in chapter 26.50 as follows:

> ""Domestic violence" means (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member."

RCW 26.50.010(1). The definition for domestic violence in RCW 26.50.010 specifically requires physical harm, bodily injury, assault, or the fear of the same, or stalking, or sexual assault. Without these elements, the state cannot prove domestic violence under RCW 26.50.010. Similarly, as the trial court

correctly held in this case, without these elements the state could not prove RCW 9.94A.030.

While many of the crimes specifically listed RCW 10.99.020(5) are usually accompanied by elements that are defined as domestic violence in RCW 26.50.010(1), there are several rimes, such as in the instant case under subsection (r) that does not require harm, injury or threat of either, unlike in RCW 26.50.010. For example, when the crime charged is criminal trespass or violating a no-contact or protection order (the instant case) and the victim is a family or household member, but without violence, there is no crime under RCW 26.50.010(1) or RCW 9.94A.030.

This issue of divergent definitions of "domestic violence" did not exist prior to the enactment 9.94A.030(20), or was irrelevant to practitioners and defendants alike due to the absence of a disparate sentencing scheme under RCW 9.94A.525. Currently with the inclusion by the legislature of both definitions of domestic violence in RCW 9.94A.030(20), and that statute's direct effect on the potential length of prison sentence, this definitional divergence along with the legislature's use of the conjunctive "and" instead of the disjunctive "or" is critical.

In a bench trial, the trial judge is the finder of fact and determines the

sufficiency of the evidence and must also determine the presence of a fact, other than the fact of a previous conviction that increases the penalty for a crime. *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *State v. Gower*, 172 Wn.App. 31, 41, 288 P.3d 665 (2012). In this case, the trial court correctly determined that the crimes charged were not successfully plead or proven to be domestic violence offenses under RCW 9.94A.030(20).

"Penal statutes are strictly construed so that only conduct which is clearly within the statutory terms is subject to punitive sanctions." *State v. Johnson*, 119 Wn.2d 167, 172, 829 P.2d 1082, 1085 (1992). RCW 9.94A.030(20) is a penal statute because it directly governs the potential length of incarceration for a crime. Id.

"Strict construction" does not mean "that a forced, narrow, or over-strict construction should be applied to defeat the obvious intent of the legislature." *State v. Rinkes*, 49 Wn.2d 664, 667, 306 P.2d 205, 207 (1957), accord, *Jongeward v. BNSF R. Co.*, 174 Wn2d 586, 600, 278 P.3d 157 (2012). Rather, a court's objective in construing any statute is "to determine the legislature's intent." *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281, 283 (2005). Courts should interpret statutes to avoid absurd or strained results to

avoid rendering any language superfluous. *Wright v. Engum*, 124 Wn.2d 343, 351-52, 878 P.2d 1198 (1994); *see also State v. Johnson*, 66 Wn.App. 297, 301, 831 P.2d 1137 (1992).

Each provision of a statute must be viewed in relation to other provisions and harmonized if at all possible. *Addleman v. Board of Prison Terms,* 107 Wn.2d 503, 509, 730 P.2d 1327 (1986); *Avlonitis v. Seattle District Court*, 97 Wn.2d 131, 138, 641 P.2d 169, 646 P.2d 128 (1982). It is an elementary rule of statutory construction that effect must be given, if possible, to every word, clause, and sentence of a statute. *State v. Farmer*, 100 Wn.2d 334, 341, 669 P.2d 1240 (1983). Thus, the term "and" in RCW 9.94A.030 must be given its plain meaning as a conjunctive.

"If a statute's meaning is plain on its face, [] [this Court] must 'give effect to that plain meaning as an expression of legislative intent." *Jongeward,* 174 Wn.2d at 594, *quoting*, *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 9, 10, 43 P.3d 4 (2002). "'The plain meaning of a statute may be discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.'" *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487, 490-91 (2010) (internal citations and quotations omitted).

If the provision is subject to more than one reasonable interpretation after examining the plain language in context, "[a]n examination of related statutes aids our plain meaning analysis " 'because legislators enact legislation in light of existing statutes.' " *Jongeward,* 174 Wn.2d at 594, *quoting* 2A Norman J. Singer, Statutes and Statutory Construction § 48A:16, at 809–10 (6th ed. 2000).

If a statute is ambiguous, the rule of lenity requires the court to "interpret the statute in favor of the defendant absent legislative intent to the contrary." *Bunker*, 169 Wn.2d at 601. "Legislative history, principles of statutory construction, and relevant case law may provide guidance in construing the meaning of an ambiguous statute." *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196, 199 (2005).

RCW 9.94A.030(20) is plain on its face; it defines domestic violence by referring to two different statutes: RCW 26.50.010 "and" RCW 10.99.020 in the conjunctive. Each definition within these two statutes is also equally plain and clear, which requires this Court to give effect to that plain meaning as an expression of legislative intent. *Jongeward,* 174 Wn.2d at 594. RCW 9.94A.030 requires the state to plead and prove **both** RCW 26.50.010 "**and"** RCW 10.99.020.

The definition of domestic violence located in RCW 26.50.010 is narrower than the broader definition in RCW 10.99.020, thus there are crimes that may constitute domestic violence under RCW 10.99.020 but not under RCW 26.50.010. A domestic violence under 26.50.010 but not under 10.99.020 does not satisfy the elements of RCW 9.94A.030.

The legislature chose to use the conjunctive "and" between the referenced statutes. Under a plain language reading, the definition in 9.94A.030(20) of "and" must be read as a conjunctive meaning (i.e. "both") rather than a disjunctive meaning (i.e. "either") because the plain dictionary definition of "and" is used to connect words, phrases, or clauses together and means "along or together with" or "as well as". http://dictionaryreference.com/browse/and?s=t Each of these most common definitions for "and" is a conjunctive.

Substituting in RCW 9.94A.030, "and" with any of these other terms demonstrates that for a crime to be considered "domestic violence" under RCW 9.94A.030(20) the state must plead and prove **both** definitions. For example, using the listed definitions of the word "and" in place of "and" in the statute, affords the following plain language readings of RCW 9.94A.030(20):

> "Domestic violence" has the same meaning as defined in RCW 10.99.020 **along with** 26.50.010.
> "Domestic violence" has the same meaning as defined in RCW

> 10.99.020 **together with** 26.50.010.
> "Domestic violence" has the same meaning as defined in RCW 10.99.020 **as well as** 26.50.010.

Under the plain language meaning of RCW 9.94A.030, "and" unambiguously, requires that **both** definitions listed in RCW 10.99.020 and 26.50.010 must be satisfied before an act may be considered "domestic violence" under RCW 9.94A.030(20) and the enhanced offender scoring consequences of RCW 9.94A.525(21). While it is not impossible to find a dictionary definition for "and" that could theoretically offer a different definition of "and", such a definition would render the statute ambiguous given the plain meaning of "and", thus requiring any such construction to employ the rule of lenity.

A conjunctive reading of RCW 9.94A.030(20) not only comports with the plain language requirement that all words are given their plain meaning and no word or phrase be rendered superfluous, but also satisfies the time-honored method of construction known as *in pari materia*. The Washington Supreme Court has explained this rule of construction as follows:

> "Statutes *in pari materia* are those which relate to the same person or thing, or the same class of persons or things; and in construing a statute, or statutes, all acts relating to the same subject matter or having the same purpose, should be read in connection therewith as together constituting one law. The object of this rule is to ascertain and carry into effect the intent of the legislature and it proceeds upon the supposition that the several statutes having to do with related subject matters were governed by one spirit or policy, and were intended to be consistent and harmonious in their several parts and

provisions."

State v. Houck, 32 Wn.2d 681, 684-85, 203 P.2d 693 (1949). Applying *in pari materia* to RCW 9.94A.030(20) requires that 10.99.020(5) and 26.50.010(1) be read in conjunction with each other; i.e., a crime is domestic violence for felony sentencing purposes under RCW 9.94A.525(21) when it includes an element of physical harm, bodily injury, assault, fear of any of the same, or of sexual assault or stalking, as required by 26.50.010(1). This construction is consistent with the legislature's conjunctive choice of the word "and", the requirement for an *in pari materia* method of statutory harmonization, and this construction recognizes the historically close relation between chapters 10.99 and 26.50: their shared definitions and often contemporaneous amendments under new domestic violence legislation.

Statutes amended at the same time "should be harmonized to give force and effect to each." *State v. Chapman*, 140 Wn.2d 436, 451-52, 998 P.2d 282 (2000). "This rule applies with particular force to statutes passed in the same legislative session." Id. RCW 9.94A.525 and RCW 9.94A.030 were amended during the same legislative session. ESHB 2777

The legislature's statement of intent in passing. ESHB 2777 expressly indicates the purpose for including RCW 26.50.010(0) in RCW

9.94A.030(20):

> "The legislature intends to give law enforcement and the courts better tools to *identify* **violent** perpetrators of domestic violence and *hold them accountable*."

ESHB 2777, Laws of Washington, Chapter 274, section 101(2010) (emphasis added). The intent of the legislature is to ***identify*** **violent** perpetrators of domestic violence in order to hold them accountable. The only plausible identification mechanism for locating **violent** perpetrators is the definition in RCW 9.94A.030(20) which requires both (conjunctive) RCW 26.50.010(1) with 10.99.020(5). By requiring both definitions the legislature reaches the violent domestic violence perpetrator to ensure the sentence enhancement applies. To construe RCW 9.94A.030(20) in the disjunctive eliminates the purpose of including RCW 26.50.010 in the statute; and renders the reference nonsensical, gratuitous and superfluous.

"'[W]here the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.'" *Jacobs*, 154 Wn.2d at 603 (citing *State v. Roberts*, 117 Wn.2d 576, 586, 817 P.2d 855 (1991), (quoting *In re Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990)). A legislative body is also presumed not to use nonessential words. *State v. Beaver*, 148 Wn.2d 338, 343, 64 Wn2d 1226 (2002). Each

word is to be accorded meaning and the legislature is presumed not to use superfluous words. *Roggenkamp*, 153 Wn.2d at 624 (citations omitted).

The legislature has ample experience drafting domestic violence legislation and many definitions of domestic violence do not include reference to the RCW 26.50.010. See e.g., RCW 9.94A.535(3)(h); 70.123.020(2); 35.20.255; 3.50.330; 3.66.068; 9.94A.729(3)(c)(ii)(D); 10.99.080(4). The legislature's specific inclusion of RCW 26.50.010 as a requirement for imposition of an enhanced offender scoring for certain convictions is significant, because it differs from other definitions of domestic violence located in other sections of the RCW.

The state proposes that this Court disregard the rules of statutory construction and legal precedent in favor of an absurd construction giving the "and" in RCW 9.94A.030(20) the definition of "or. To comply with the state's interpretation of the term "and" in RCW 9.94A.030 requires this Court to disregard the specific, intentional, use of statutory language and render its inclusion entirely superfluous despite such inclusion being clear proof of the legislative intent to define domestic violence for purposes of enhanced offender scores, more specifically than under RCW 10.99.020(5).

The Washington Supreme Court has explained the general rule that

normally governs when the Court finds the word "and" in a statute as follows:

> "The statute contains an 'and', not an 'or'. We thus read the "and" as simply being an "and". **The Legislature would have used the word "or" if it had intended to convey a disjunctive meaning**."

Ski Acres, Inc., v. Kittitas County, 118 Wn.2d 852, 856, 827 Wn.2d 100 (1992), citing cases (emphasis added). The Supreme Court, in a parenthetical, cited *Childers v. Childers*, 89 Wn. 2d 592, 596, 575 P.2d 201 (1978) for the proposition that "**the word 'and' does not mean 'or.'**" *Id.* (emphasis added). The Court in *Childers* held that "[w]hen the term 'or' is used it is presumed to be used in the disjunctive sense, unless the legislative intent is clearly contrary." *Childers*, 89 Wn.2d at 595-96 (internal citations omitted), *see also State v. Carr*, 97 Wn.2d 436, 439, 645 P2d 1098 (1982)(finding the word "and" is obviously conjunctive and should not be read as disjunctive). In 2010, the Court of Appeals likewise declined to read "or" into a statute that was written with "and" explaining as follows:

> " 'And' conveys a conjunctive meaning, otherwise the legislature would have used 'or' if it meant to convey a disjunctive meaning. To achieve the meaning urged by Ahten requires us to rewrite this provision by replacing the word "and" with the word "or" ... We decline to read 'or' into this provision."

Ahten v. Barnes, 158 Wn.App. 343, 352-353, n.5, 242 P.3 35 (2010) (internal citations omitted).

The Supreme Court of Washington explained the first rule of construction in 1906 as follows:

> "The first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one, and in their popular meaning if they have not, and that the phrases and sentences are to be construed according to the rules of grammar; and **from this presumption it is not allowable to depart, unless adequate grounds are found**, either in the context or in the consequences which would result from the literal interpretation, for concluding that that interpretation does not give the real intention of the legislature"

State v. Tiffany, 44 Wash. 602, 603-04, 87 P.932 (1906), (citing Endlich, *Interpretation of Statutes*, s.2 (emphasis added). The Court in *Tiffany* observed that on occasion, with a caveat, there exists an exception to the general rules of construction where "*or* is sometimes construed to mean *and*, and *vice versa*, in statutes, wills and contracts when there is cogent proof of legislative error. Id., at 604(emphasis in original).

> "But the plain language of a statute can **only** be disregarded, and this **exceptional** rule of construction can **only** be resorted to, where the act itself furnishes **cogent proof** of the **legislative error**."

Id. (emphasis added). The Court in *Tiffany* examined the criminal statute, attempting to destroy a dam under Ballinger's Ann.Codes & St. § 7154 which contained the language, "willfully or maliciously". The Court determined that without proof of legislative error, the legislature did not intend the term "or" to

be read as "willfully and maliciously". Id. at 603-05.

> "We are satisfied that the act under consideration contains no such **evidence of error or mistake** as would warrant in disregarding its plain language."

Id. at 604. The most recent cases known to counsel, discussed below, that have found legislative error to determine that "and" really means "or," or vice versa, all reference "legislative error" principle discussed in *Tiffany*.

In 1997, the Court of Appeals cited *Tiffany* for the proposition that "[t]he disjunctive 'or' and conjunctive 'and' may be interpreted as substitutes." *Mount Spokane Skiing Corporation v. Spokane County*, 86 Wn.App. 165, 174, 936 P.2d 1148 (1997). The Court did not cite other authority or discuss when such a substitution was appropriate, but did cite the obvious legislative error as the sole exception for considering "and" to mean "or". *Mount Spokane Skiing Corporation,*, 86 Wn.App. at 174.

In 2005, this Court stated:

> "**In certain circumstances**, the conjunctive "and" and the disjunctive "or" may be substituted for each other **if it is clear from the plain language of the statute that it is appropriate to do so**."

Bullseye Distributing, L.L.C. v. State Gambling Commission, 127 Wn.App. 231, 239, 110 P.3d 1162 (2005), (citing *Mt.Spokane Skiing Corp, citing Tiffany*). The Court in *Bullseye*, like the Court in *Tiffany*, applied the

legislative error principle based on the plain language and intent of the legislature. *Bullseye*, 127 Wn.App. at 239-40.

Similarly, the Washington Supreme Court briefly mentioned this line of cases in 1997 when it held that a conjunctively written statute needed to be read as disjunctive in order to avoid the "meritless" argument that a PDA must perform all 3 functions contemplated by the legislature when it authorized the purposes for which a city may create a public corporation. *CLEAN v. City of Spokane*, 133 Wn.2d 455, 473-74, 947 P.2 1169 (1997) (citing *Mount Spokane Skiing Corp*). The opinion in *CLEAN* disregarded as meritless the absurd construction proposed in favor of the clear and obvious intent of the legislature. Id.

Absent obvious legislative error coupled with a contrary and clear legislative intent, our state Supreme Court has consistently held that "and" means "and" in the conjunctive. *Tiffany,* 44 Wash. at 604. In this case, the trial court recognized these principles and the general principles of statutory construction when it rejected the state's argument that "and" means "or" .

Here under RCW 9.94.030, the legislature intended the word "and" to be used in accordance with its ordinary meaning, and it intended a result whereby RCW 26.50.010(1) would provide enhanced offender scoring

consequences under RCW 9.94A.525(21) when both definitions of "domestic violence were met. Any other construction of RCW 9.94A.030(20) renders the inclusion of 26.50.010 superfluous and disregards legislative intent in enacting RCW 9.94A.030(20) and RCW 9.94A.525(21) to deal more harshly with violent offenders.

The legislature's express inclusion of RCW 26.50.010 "and" RCW 10.99.010 in RCW 9.94A.030(20) requires this Court to give effect to both referenced definitions.

CONCLUSION

Mr. Kozey respectfully requests this Court uphold the trial court's correct ruling that absent any evidence of legislative error, the statutes presented are clear and unambiguous and must be giver their plain meaning, i.e., "and" means "and". Mr. Kozey admitted to violating RCW 10.99.020(5)(r). As such he was correctly subjected to post-conviction no-contact orders at sentencing. The trial court was correct that the state did not plead and prove the necessary elements under RCW 9.94A.030(20) thus Mr. Kozey could not and cannot be subjected to an enhanced sentence under RCW 9.94A.525(21).

DATED this 21st day of August 2013.

Respectfully submitted,

_____

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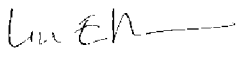
I, Lise Ellner, a person over the age of 18 years of age, served the– kcpa@co.kitsap.wa.us Kitsap County prosecutor's office and **Anthony Kozey 1526 Callow Ave. N Bremerton, WA 98312** Chehalis WA 98532 a true copy of the document to which this certificate is affixed, on August 21, 2013. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.



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