

NO. 36444-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DONALD WOFFORD,

Appellant.

FILED
STATE OF WASHINGTON
BY [Signature]
11/21/07

COURT OF APPEALS
STATE OF WASHINGTON

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

The Honorable Susan K. Serko, Judge

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STATE OF WASHINGTON
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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was convicted of violating a protective order based on his actions of driving a car with the protected party as a passenger, conduct that does not constitute a crime under applicable law.

2. The state presented insufficient evidence of appellant's two prior convictions for violation of no contact orders to support his conviction of violating RCW 26.50.110(1) and (5).

Issues Pertaining to Assignments of Error

1. Whether the evidence was insufficient to convict appellant of violating a no contact order where the purported violation involved neither a threat of physical violence nor entry into a prohibited area?

2. Whether a police officer's testimony that appellant stated that he had he had previously been convicted of a similar crime constituted insufficient independent evidence that appellant was the individual named in documents purporting to prove the existence of appellant's two previous convictions for violating a no contact order?

B. STATEMENT OF THE CASE

Donald Wofford was charged with violating a protection order entered on behalf of Tara Mozer, under Pierce County Superior Court

Cause No. 05-1-02544-3. CP 1-5; Trial Exhibit 8; RCW 26.50.110(5).

The order stated, in relevant part:

IT IS HEREBY ORDERED pursuant to RCW 10.99 and 26.50 that the defendant shall have no contact, directly or indirectly, in person, in writing, by telephone, or electronically, either personally or through any other person, with: TARA MOZER. . .

Trial Exhibit 8.

On the date of the alleged "crime," Wofford was stopped by Pierce County Sheriff Deputy Jeffrey Reigle for a traffic infraction. CP 4-5. A woman who was seen exiting the car Wofford drove was contacted near the location where Wofford stopped the car. CP 4-5. She identified herself as Mozer to Department of Corrections Officer Torrey McDonough, who was accompanying Deputy Reigle. CP 4-5.

Wofford was charged with violating RCW 26.50.110(1) and (5), and was tried by jury in the Pierce County Superior Court.¹

At trial, to prove that Wofford had been convicted for two previous violations of no-contact orders, the state offered the criminal complaints and municipal court docket entries pertaining to the convictions. RP 6-7; Trial Exhibits 2, 3, 5, and 6.

¹ Wofford was also simultaneously tried and convicted for reckless driving, based on the manner in which he drove at the time he allegedly violated the no contact order. That conviction is not at issue in the instant appeal.

The trial court found, during a 3.5 hearing commenced after the trial had begun, that several statements Wofford made to deputy Reigle were admissible. RP 140-142. Of significance here, Deputy Reigle testified that while Wofford was being transported to jail, he mentioned "that at some previous point he had been convicted of a similar crime." RP 197.

After the state rested its case, Wofford's trial counsel moved to dismiss the charge for violating RCW 26.50.110(5), asserting that the state had failed to offer evidence to demonstrate that Wofford was "actually the individual who has those prior convictions that these documents relate to." RP 220. Wofford's trial counsel also noted that "there hasn't been any evidence about comparison of signatures of Mr. Wofford, anybody actually having seen him sign any court record that he was actually present and that was the same individual." RP 221. Wofford's counsel cited to State v. Brezillac, 19 Wn. App. 11, 12, 573 P.2d 1343 (1978), and argued:

[T]he certified copy of the judgment and the conviction is not enough by itself to prove the prior conviction. There has to be more. There has to be some other form of evidence that proves that this is actually the person that has the conviction. The document itself can't speak for itself.

. . .

In this case, there is nothing more than just the blank record of conviction. And, perhaps in anticipation, I guess I would point out that on two of the documents that were presented, the record of the conviction itself, the court order which are

Exhibits 2 and 5, there isn't any identifying information concerning Mr. Wofford. There is no birth date, there is no identifying data, height, weight, race, those kinds of things.

And in any event, there hasn't been any testimony concerning Mr. Wofford's height, weight, race. He's obviously present in court but without some kind of testimony that isn't in front of the jury, their observations of people in court aren't part of the evidentiary record of the case. So I point out that in Exhibits 3 and 6 which are the criminal complain, there are, his race is described as black, it gives a height of six feet, a sex of male, a date of birth and those kinds of things. But again, there hasn't been any testimony, any evidence presented in court that that's actually Mr. Wofford or that it even corresponds to Mr. Wofford. So there hasn't been presented any evidence before this court that these actually match the individual who's been in court.

. . .

there hasn't been any testimony about that that's actually Mr. Wofford's signature on the document, whether it be by comparison to a known signature, a court record that he was there, testimony from somebody who was there and so I don't believe the State has actually proved the identity of Mr. Wofford as to those documents.

RP 221-23.

The trial court denied the motion, ruling as follows:

All right. This is a very -- I'm not going to allow any further argument. This is a very interesting issue . . . and I think it's a pretty close call quite frankly.

I'm going to deny the defense motion and this is why. I think there is an inference that can be drawn from the other evidence which [the prosecutor] alluded to, the

identification by the police officer in open court of Mr. Wofford, the remarks made by Mr. Wofford about his knowledge about what had happened in the past. And, again, those are direct I have been convicted of such and such events; however, I think that that implication and inference is there. If it were on these documents alone, I might agree . . . but I think with the testimony of the officer, there are sufficient connections that can be drawn through all of the evidence and on that basis I'm going to deny it

RP 229-30.

Following trial, Wofford was convicted of violating the protection order based on the allegation that Mozer was with him in the car. CP 29-31. By special verdict, the jury found that Wofford had twice been previously convicted for violating the provisions of a no contact or protection order. CP 31. Wofford was sentenced to 51 months of imprisonment. CP 37-50.

C. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT OF VIOLATING A NO CONTACT ORDER WHERE THE PURPORTED VIOLATION INVOLVED NEITHER A THREAT OF PHYSICAL VIOLENCE NOR ENTRY INTO A PROHIBITED AREA.

In this case, Wofford drove a car with the protected party as a passenger. He neither threatened violence nor entered a prohibited area. While his conduct may have violated the order, subjecting him to contempt, he did not commit a "crime."

In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, when viewing the evidence in a light most favorable to the state, could have found the elements of the crime charged beyond a reasonable doubt. State v. Hundley, 126 Wn.2d 418, 421-22, 894 P.2d 403 (1995); State v. Wade, 98 Wn. App. 328, 338, 989 P.2d 576 (1999).

Wofford was charged with violating a no contact order under RCW 26.50.110, which provides:

Whenever an order is granted under . . . chapter 10.99 . . . and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, work place, school, or day care, or of a provision prohibiting a person from knowingly coming within or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2)(a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section.

RCW 26.50.110 (emphasis added).

As indicated above, the statute defining the crime of violation of a no-contact order incorporates RCW 10.31.100 to define the types of violations that are criminally punishable.² A violation is only a gross misdemeanor (that may be elevated to a felony) if it is "of the kind for which an arrest is required under RCW 10.31.100(2)(a) or (b)." RCW 26.50.110. Other conduct in violation of the order, for which arrest is not required, may be contempt of court but is not a crime. RCW 26.50.110.

It is, therefore, necessary to turn to RCW 10.31.100 to determine whether a crime was committed in the current case. Subsection (2)(b) of that statute applies only to foreign protection orders and does not apply here. RCW 10.31.100(2)(b). Subsection (2)(a) requires arrest only if a person

has violated the terms of the order restraining the person from acts or threats of violence, 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 or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person. . . .

RCW 10.31.100(2)(a). The last part of subsection (2)(a), referring only to orders issued under RCW 26.44.063, does not apply here. CP 1-5.

² The full texts of RCW 26.50.110 and RCW 10.31.100 are attached as appendices C and D, respectively.

Therefore, arrest is not required, and violation of the order is not a crime, unless the violation involves: 1) acts or threats of violence; or 2) entering or remaining in a prohibited location. Id. Other conduct such as driving a car with the protected party as a passenger, though it may violate the order and subject the actor to sanctions for contempt, is not a crime under RCW 26.50.110.

This conclusion is clear from the plain language of the statute, and no statutory construction or legislative intent analysis is necessary. See, e.g., State v. Azpitarte, 140 Wn.2d 138, 141, 995 P.2d 31 (2000); Duke v. Boyd, 133 Wn.2d 80, 87-88, 942 P.2d 351 (1997); In re Welfare of A.T., 109 Wn. App. 709, 714, 34 P.3d 1246 (2001). The purpose of statutory construction is to give effect to the intent of the Legislature. But when the plain language of a statute is clear, the court assumes the Legislature meant exactly what it said. Id. However, assuming, arguendo, that further analysis is necessary, the above interpretation comports with the last antecedent rule, the rule of lenity, and the Legislature's clear intent.

Under the last antecedent rule, the phrase "for which an arrest is required under RCW 10.31.100(2)(a) or (b)" in RCW 26.50.110 modifies the entire sentence, not merely the last phrase, because the qualifying phrase is preceded by a comma. The presence of a comma before the qualifying

phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one. City of Spokane v. County of Spokane, 158 Wn.2d 661, 673, 146 P.3d 893 (2006); All Seasons Living Ctrs. v. State (In re Seahome Park Care Ctr.), 127 Wn.2d 774, 781-82, 903 P.2d 443 (1995).

Moreover, if the Court finds the statute ambiguous, it must be construed in favor of criminal defendants under the rule of lenity. State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). "A penal statute which may be construed to render an act either criminal or innocent will be strictly construed against the state in favor of innocence." State v. Anderson, 61 Wash. 674, 112 P. 931 (1911) (invoking the last antecedent rule and the rule of lenity to reverse the defendant's conviction); State v. Hertz Driv-Ur-Self Stations, Inc., 149 Wash. 479, 271 P. 331 (1928).

The history of the 2000 amendments to RCW 26.50.110 also shows that the Legislature intended this interpretation. The original Senate bill did not include the "for which arrest is required" language. SB 6400, 56th Leg., Reg. Sess. (Wash. 2000). That language was added by the House of Representatives. E2SSB 6400, 56th Leg., Reg. Sess. (Wash. 2000). The House Bill Report explains, "[L]anguage was added to protect people accused of violating court orders by defining that a violation is a violation

if and only if someone knowingly comes within or knowingly remains a specified distance from a prohibited place or person." H.B. Rep. on E2SSB 6400, 56th Leg., Reg. Sess. (Wash. 2000). Moreover, the testimony against the bill states the concern that this bill would criminalize every violation, but then notes that that concern was addressed by the House striker to the senate bill. Id. This history demonstrates the Legislature's intent that not all violations of a no-contact order would be criminal.

Because not all violations are criminal, the definition of which violations are crimes is an essential element of the charge. An "essential element is one whose specification is necessary to establish the very illegality of the behavior" charged. State v. Tinker, 155 Wn.2d 219, 118 P.3d 885 (2005); State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing United States v. Cina, 699 F.2d 853, 859 (7th Cir. 1983)). Violations of a no-contact order are not criminal unless the violation involves acts or threats of violence or entering or remaining in a prohibited area. See RCW 26.50.110; RCW 10.31.200(a). Contact such as driving a car with the protected party as a passenger, without more, may violate the terms of the order, but does not constitute a crime. See RCW 26.50.110; RCW 10.31.200(a).

The law was misconstrued in the instant case, resulting in Wofford being subjected to criminal penalties for a non-existent crime. In addition, the state failed to prove all the elements of the offense, which requires proof of a threat of violence or proof that Wofford was in a proscribed area.

2. THE STATE PROVIDED INSUFFICIENT INDEPENDENT EVIDENCE THAT APPELLANT WAS THE INDIVIDUAL NAMED IN DOCUMENTS PURPORTING TO PROVE THE EXISTENCE OF APPELLANT'S TWO PREVIOUS CONVICTIONS FOR VIOLATING A NO CONTACT ORDER.

Although at trial the state admitted documents pertaining to the previous convictions of an individual with the same name as appellant, the state failed to demonstrate that the individual named in those documents was the same individual who was on trial. Accordingly, the state failed to prove that that Wofford violated RCW 26.50.110(5). At most, the record supports a conviction for a violation of RCW 26.50.110(1)(a), a gross misdemeanor. The trial court erred by denying Wofford's motion to dismiss.

Due process requires the state to prove every element of the charged offense beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. at 358; State v. Crediford, 130 Wn.2d at 749.

The state, therefore, has the burden of proving the identity of a criminal defendant through relevant evidence. State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). To sustain this burden when criminal liability depends on the accused being the person to whom a document pertains, the state must do more than authenticate and admit the document; it also must show beyond a reasonable doubt that the person named therein is the same person on trial. State v. Huber, 129 Wn. App. 499, 502, 119 P.3d 388 (2005) (citing State v. Kelly, 52 Wn.2d 676, 678, 328 P.2d 362 (1958), and State v. Brezillac, 19 Wn. App. 11, 12, 573 P.2d 1343 (1978)). As the court stated in Huber:

[T]he state cannot do this by showing "identity of names alone." Rather, it must show, "by evidence independent of the record," that the person named therein is the defendant in the present action.

The state can meet this burden in a variety of specific ways. Depending on the circumstances, these may include otherwise-admissible booking photographs, booking fingerprints, eyewitness identification, or, arguably, distinctive personal information. But the state does not meet its burden merely because the defense opts not to present evidence; if the state presents insufficient evidence, the defendant's election not to rebut it does not suddenly cause it to become sufficient.

129 Wn. App. at 502 (internal citations omitted).

Here, as was the case in Huber, the state produced documents in the name of the appellant, but no evidence to show that the person named

in each document pertaining to the previous convictions was "the same person on trial." 129 Wn. App. at 502.

The trial court in this case concluded that the evidence independent of the documentary record that the defendant at trial was the individual named in the documents consisted of: (1) "the identification by the police officer in open court of Mr. Wofford"; and (2) the remarks made by Mr. Wofford about his knowledge about what had happened in the past." RP 229, 30. However, neither of these considerations, taken separately or together, provide sufficient evidence that the individual on trial was the same individual named in the documents.

First, the officer's in-court identification of Wofford bore no relation to the documents pertaining to the previous convictions--it merely demonstrated that the individual on trial was the same individual whom the officer contacted at the time of the arrest. The in-court identification of Wofford at trial was not relevant to the issue of whether the individual named in the documents was the individual on trial.

Second, the testimony of Deputy Reigle only indicated that when Wofford was being transported to jail, he mentioned "that at some previous point he had been convicted of a similar crime," and "that he believed his conduct in this incident would constitute a crime." RP 197. Neither of

these statements taken separately or together provide an evidentiary basis for a jury to conclude that the individual on trial was the same individual named in documents pertaining to both of the previous convictions. Even if this statement provided the jury with a basis to infer that one of the prior convictions pertained to the individual on trial, it did not support the inference that both did.

Third, the prosecution did not call any witnesses to discuss the documents at issue, and did not even mention the documents until closing argument. Accordingly, the state's discussion of these documents at trial did not comprise evidence and did not add any evidence to the record concerning the issue of whether the individual named therein was the individual on trial. The argument of counsel at trial is not evidence and, therefore, the prosecutor's statements during closing argument do not add anything to the consideration of this issue. Huber, 129 Wn. App. at 502, citing State v. Rice, 120 Wn.2d 549, 573, 844 P.2d 416 (1993).

The state failed to present evidence to establish that the individual on trial was the same individual referenced in the documents pertaining to two previous convictions. Such proof was a necessary element of the crime with which Wofford was charged. The state's failure to meet its burden requires reversal.

As this Court concluded in Huber, this Court should similarly conclude in this case "that the evidence is insufficient to support a finding that the person on trial is the person named in the State's exhibits," and should reverse the conviction for violation of RCW 26.50.110(5). 129 Wn. App at 502.

D. CONCLUSION

Because Wofford was arrested and charged for an offense that is not a crime, and because the state failed to establish an essential element of the offense for which Wofford was ultimately convicted, this court should reverse Wofford's conviction.

DATED this 21st day of November, 2007.

Respectfully submitted,

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APPENDIX A¹

¹ The brief incorrectly refers to the appendices as “C” and “D” instead of “A” and “B.”

West's RCWA 26.50.110



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West's Revised Code of Washington Annotated Currentness
 Title 26. Domestic Relations (Refs & Annos)
 Chapter 26.50. Domestic Violence Prevention (Refs & Annos)

→26.50.110. Violation of order—Penalties

(1)(a) Whenever an order is granted under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:

(i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party;

(ii) A provision excluding the person from a residence, workplace, school, or day care;

(iii) A provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location; or

(iv) A provision of a foreign protection order specifically indicating that a violation will be a crime.

(b) Upon conviction, and in addition to any other penalties provided by law, the court may require that the respondent submit to electronic monitoring. The court shall specify who shall provide the electronic monitoring services, and the terms under which the monitoring shall be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the convicted person to pay for electronic monitoring.

(2) A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020, that restrains the person or excludes the person from a residence, workplace, school, or day care, or prohibits the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, if the person restrained knows of the order. Presence of the order in the law enforcement computer-based criminal intelligence information system is not the only means of establishing knowledge of the order.

(3) A violation of an order issued under this chapter, chapter 7.90, 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, shall also constitute contempt of court, and is subject to the penalties prescribed by law.

(4) Any assault that is a violation of an order issued under this chapter, chapter 7.90, 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

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West's RCWA 26.50.110

another person is a class C felony.

(5) A violation of a court order issued under this chapter, chapter 7.90, 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, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

(6) Upon the filing of an affidavit by the petitioner or any peace officer alleging that the respondent has violated an order granted under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020, the court may issue an order to the respondent, requiring the respondent to appear and show cause within fourteen days why the respondent should not be found in contempt of court and punished accordingly. The hearing may be held in the court of any county or municipality in which the petitioner or respondent temporarily or permanently resides at the time of the alleged violation.

CREDIT(S)

[2007 c 173 § 2, eff. July 22, 2007; 2006 c 138 § 25, eff. June 7, 2006; 2000 c 119 § 24; 1996 c 248 § 16; 1995 c 246 § 14; 1992 c 86 § 5; 1991 c 301 § 6; 1984 c 263 § 12.]

HISTORICAL AND STATUTORY NOTES

Finding—Intent—2007 c 173: "The legislature finds this act necessary to restore and make clear its intent that a willful violation of a no-contact provision of a court order is a criminal offense and shall be enforced accordingly to preserve the integrity and intent of the domestic violence act. 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 c 173 § 1.]

Short title—2006 c 138: See RCW 7.90.900.

Application—2000 c 119: See note following RCW 26.50.021.

Severability—1995 c 246: See note following RCW 26.50.010.

Finding—1991 c 301: See note following RCW 10.99.020.

Laws 1991, ch. 301, § 6, inserted subsec. (4); and renumbered former subsec. (4) as (5).

Laws 1992, ch. 86, § 5, in subsec. (1), added the second to fifth sentences, which relate to electronic monitoring.

Laws 1995, ch. 246, § 14, in subsecs. (1) and (2), in the first sentences, following "from a residence" inserted ", workplace, school, or daycare"; and, in subsec. (2), added the second sentence.

Laws 1996, ch. 248, § 16, at the end of the first sentence in subsec. (1), inserted "except as provided in subsections (4) and (5) of this section"; inserted a new subsec. (5); and redesignated former subsec. (5) as subsec. (6).

Laws 2000, ch. 119, § 24, rewrote the section, which previously read:

"(1) Whenever an order for protection is granted under this chapter and the respondent or person to be restrained knows of the order, a violation of the restraint provisions or of a provision excluding the person from a residence,

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APPENDIX B

West's RCWA 10.31.100

C

West's Revised Code of Washington Annotated Currentness

Title 10. Criminal Procedure (Refs & Annos)

Chapter 10.31. Warrants and Arrests (Refs & Annos)

→ 10.31.100. Arrest without warrant

A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant. A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section.

(1) Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving physical harm or threats of harm to any person or property or the unlawful taking of property or involving the use or possession of cannabis, or involving the acquisition, possession, or consumption of alcohol by a person under the age of twenty-one years under RCW 66.44.270, or involving criminal trespass under RCW 9A.52.070 or 9A.52.080, shall have the authority to arrest the person.

(2) A police officer shall arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that:

(a) An order has been issued of which the person has knowledge under RCW 26.44.063, or chapter 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW restraining the person and the person has violated the terms of the order restraining the person from acts or threats of violence, 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 or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person; or

(b) A foreign protection order, as defined in RCW 26.52.010, has been issued of which the person under restraint has knowledge and the person under restraint has violated a provision of the foreign protection order prohibiting the person under restraint from contacting or communicating with another person, or excluding the person under restraint from 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, or a violation of any provision for which the foreign protection order specifically indicates that a violation will be a crime; or

(c) The person is sixteen years or older and within the preceding four hours has assaulted a family or household member as defined in RCW 10.99.020 and the officer believes: (i) A felonious assault has occurred; (ii) an assault has occurred which has resulted in bodily injury to the victim, whether the injury is observable by the responding officer or not; or (iii) that any physical action has occurred which was intended to cause another person reasonably to fear imminent serious bodily injury or death. Bodily injury means physical pain, illness, or an impairment of physical condition. When the officer has probable cause to believe that family or household members have assaulted each other, the officer is not required to arrest both persons. The officer shall arrest the person whom the officer believes to be the primary physical aggressor. In making this determination, the officer shall make every reasonable effort to consider: (i) The intent to protect victims of domestic violence under RCW 10.99.010; (ii) the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (iii) the history of domestic violence between the persons involved.

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(3) Any police officer having probable cause to believe that a person has committed or is committing a violation of any of the following traffic laws shall have the authority to arrest the person:

- (a) RCW 46.52.010, relating to duty on striking an unattended car or other property;
- (b) RCW 46.52.020, relating to duty in case of injury to or death of a person or damage to an attended vehicle;
- (c) RCW 46.61.500 or 46.61.530, relating to reckless driving or racing of vehicles;
- (d) RCW 46.61.502 or 46.61.504, relating to persons under the influence of intoxicating liquor or drugs;
- (e) RCW 46.20.342, relating to driving a motor vehicle while operator's license is suspended or revoked;
- (f) RCW 46.61.5249, relating to operating a motor vehicle in a negligent manner.

(4) A law enforcement officer investigating at the scene of a motor vehicle accident may arrest the driver of a motor vehicle involved in the accident if the officer has probable cause to believe that the driver has committed in connection with the accident a violation of any traffic law or regulation.

(5) Any police officer having probable cause to believe that a person has committed or is committing a violation of RCW 79A.60.040 shall have the authority to arrest the person.

(6) An officer may act upon the request of a law enforcement officer in whose presence a traffic infraction was committed, to stop, detain, arrest, or issue a notice of traffic infraction to the driver who is believed to have committed the infraction. The request by the witnessing officer shall give an officer the authority to take appropriate action under the laws of the state of Washington.

(7) Any police officer having probable cause to believe that a person has committed or is committing any act of indecent exposure, as defined in RCW 9A.88.010, may arrest the person.

(8) A police officer may arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that an order has been issued of which the person has knowledge under chapter 10.14 RCW and the person has violated the terms of that order.

(9) Any police officer having probable cause to believe that a person has, within twenty-four hours of the alleged violation, committed a violation of RCW 9A.50.020 may arrest such person.

(10) A police officer having probable cause to believe that a person illegally possesses or illegally has possessed a firearm or other dangerous weapon on private or public elementary or secondary school premises shall have the authority to arrest the person.

For purposes of this subsection, the term "firearm" has the meaning defined in RCW 9.41.010 and the term "dangerous weapon" has the meaning defined in RCW 9.41.250 and 9.41.280(1) (c) through (e).

(11) Except as specifically provided in subsections (2), (3), (4), and (6) of this section, nothing in this section extends or otherwise affects the powers of arrest prescribed in Title 46 RCW.

(12) No police officer may be held criminally or civilly liable for making an arrest pursuant to RCW 10.31.100 (2) or (8) if the police officer acts in good faith and without malice.

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[2006 c 138 § 23, eff. June 7, 2006; 2000 c 119 § 4; 1999 c 184 § 14; 1997 c 66 § 10; 1996 c 248 § 4. Prior: 1995 c 246 § 20; 1995 c 184 § 1; 1995 c 93 § 1; prior: 1993 c 209 § 1; 1993 c 128 § 5; 1988 c 190 § 1; prior: 1987 c 280 § 20; 1987 c 277 § 2; 1987 c 154 § 1; 1987 c 66 § 1; prior: 1985 c 303 § 9; 1985 c 267 § 3; 1984 c 263 § 19; 1981 c 106 § 1; 1980 c 148 § 8; 1979 ex.s. c 28 § 1; 1969 ex.s. c 198 § 1.]

HISTORICAL AND STATUTORY NOTES

Short title—2006 c 138: See RCW 7.90.900.

Application—2000 c 119: See note following RCW 26.50.021.

Short title—Severability—1999 c 184: See RCW 26.52.900 and 26.52.902.

Severability—1995 c 246: See note following RCW 26.50.010.

Effective date—1995 c 184: "This act shall take effect January 1, 1996. Prior to that date, law enforcement agencies, prosecuting authorities, and local governments are encouraged to develop and adopt arrest and charging guidelines regarding criminal trespass." [1995 c 184 § 2.]

Severability—Effective date—1993 c 128: See RCW 9A.50.901 and 9A.50.902.

Severability—1987 c 280: See RCW 10.14.900.

Effective date—Severability—1984 c 263: See RCW 26.50.901, 26.50.902.

Laws 1979, Ex.Sess., ch. 28, § 1, rewrote the section, which previously read:

"Any police officer having information to support a reasonable belief that a person has committed or is committing a misdemeanor or gross misdemeanor, involving physical harm or threats of harm to any person or property or the unlawful taking of property or involving the use or possession of cannabis shall have the authority to arrest said persons: *Provided*, That nothing herein shall extend or otherwise affect the powers of arrest prescribed in chapter 46 RCW."

Laws 1980, ch. 148, § 8, in subsec. (2)(d), substituted "46.61.502 or 46.61.504" for "46.61.506".

Laws 1981, ch. 106, § 1, inserted a subd. (2)(e) [now (3)(e)]; and relettered a former subd. (2)(e) as (2)(f) [now (3)(f)].

Laws 1984, ch. 263, § 19, in the introductory paragraph, in the second sentence, substituted "(4)" for "(3)"; inserted new subsec. (2); and redesignated former subsecs. (2) and (3) as (3) and (4).

Laws 1985, ch. 267, § 3, inserted subsec. (5), and renumbered former subsecs. (5) and (6) as (6) and (7).

Laws 1985, ch. 303, § 9, in subsec. (2)(b), inserted "is eighteen years or older and", substituted "a person eighteen years or older" for "other person" and added language following "or has formerly resided".

Laws 1987, ch. 66, § 1, in the introductory paragraph, near the end of the second sentence, substituted the reference to subsec. (8) for a reference to subsec. (5); in subsec. (5), substituted the reference to RCW 88.02.095 for a reference to 88.02.025; inserted a subsec. (6), relating to traffic infractions; renumbered former subsecs. (6) and (7) as (7) and (8); then, in subsec. (7) [now subsec. (9)], inserted the reference to subsec. (6).

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON)
)
 Respondent,)
)
 vs.)
)
 DONAL WOFFORD,)
)
 Appellant.)

COA NO. 36444-1-II

FILED
COURT OF APPEALS DIV. II
STATE OF WASHINGTON
2007 NOV 21 PM 3:05

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF NOVEMBER 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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BY _____
DEPUTY
STATE OF WASHINGTON
07 NOV 21 11 54 AM

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF NOVEMBER 2007.

x Patrick Mayovsky