

NO. 36444-1-II

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

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 APR -4 PM 3:49

STATE OF WASHINGTON,

Respondent,

v.

DONALD WOFFORD,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
08 APR -8 PM 1:09
STATE OF WASHINGTON
BY *[Signature]*
DEFINITION

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

The Honorable Susan K. Serko, Judge

REPLY BRIEF OF APPELLANT

JONATHAN M. PALMER
DANA M. LIND
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
THE STATUTE UNDER WHICH WOFFORD WAS CHARGED, RCW 26.50.110, IS UNAMBIGUOUS; WOFFORD'S ALLEGED CONDUCT DOES NOT CONSTITUTE A CRIME DEFINED BY THAT STATUTE.	1
B. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

City of Spokane v. County of Spokane,
158 Wn.2d 661, 146 P.3d 893 (2006) 1

Jacques v. Sharp,
83 Wn. App. 532, 922 P.2d 145 (1996) 5, 6

State v. Azpitarte,
140 Wn.2d 138, 995 P.2d 31 (2000) 6, 7

State v. Chapman,
140 Wn.2d 436, 998 P.2d 282 (2000) 2, 4, 6

RULES, STATUTES AND OTHERS

Chapter 10.99 RCW 1, 3

Former RCW 26.50.110 7

Former RCW 26.50.110(1) 2, 3, 6, 7

RCW 10.31.100(2) 7

RCW 10.31.100(2)(a) 1-5, 7

RCW 10.31.100(2)(b) 1-3, 7

RCW 26.44.063 2

RCW 26.50.110 1-3, 5, 6

RCW 26.50.110(5) 4

A. ARGUMENT IN REPLY

THE STATUTE UNDER WHICH WOFFORD WAS CHARGED, RCW 26.50.110, IS UNAMBIGUOUS; WOFFORD'S ALLEGED CONDUCT DOES NOT CONSTITUTE A CRIME DEFINED BY THAT STATUTE.

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).

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). Had the legislature intended the interpretation urged by the state, it could have

clearly manifested such intent by merely omitting the comma. It did not. The interpretation urged by the state is, therefore, a strained reading of the statutory language.

RCW 10.31.100(2)(a), in relevant part, requires an 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). None of these conditions apply to Wofford.

The state's reliance on State v. Chapman, 140 Wn.2d 436, 998 P.2d 282 (2000), is misplaced. Although that case held that Chapman's violation of a previous version of RCW 26.50.110(1) subjected him to both criminal prosecution and contempt sanctions, the earlier version of RCW 26.50.110(1) applicable to Chapman differs materially from the subsequent version of the statute applicable to Wofford. Furthermore, the analysis and result in Chapman do not contravene the proposition that a violation of the version of RCW 26.50.110 applicable to Wofford is only a crime when the violation constitutes an action "for which an arrest is required under RCW 10.31.100(2)(a) or (b)."

The state incorrectly asserts that the 1998 version of RCW 26.50.110 applicable to Chapman is "significantly similar" to the 2000 version applicable to Wofford. Brief of Respondent at 9. In fact, the statute at issue in this case differs substantially and materially from that applicable to Chapman. The statute applicable to Wofford provides, in relevant part:

(1) 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, workplace, 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.

Former RCW 26.50.110(1) (2000 version). The statute applicable to Chapman expressly provides:

(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, workplace, school, or day care *is a gross misdemeanor*. . .

Former RCW 26.50.110(1) (1998 version). Unlike the version of the statute applicable to Wofford, the version of the statute applicable to Chapman does not define the conduct constituting a crime as a violation "for which an arrest is required." The arrest requirement in the definition

of criminal conduct in the statute applicable to Wofford distinguishes this case from Chapman.

The factual scenario in Chapman likewise distinguishes that case from Wofford's case. The restraining order at issue in Chapman purported to forbid Chapman "from entering or coming within one mile (distance) of petitioner's residence." 140 Wn.2d at 439. The Chapman court upheld Chapman's conviction for violating the order after he allegedly entered within 50-75 feet of the protected party's residence. Chapman, 140 Wn.2d at 452-53.

Had Chapman been decided under the statutory provisions applicable to Wofford, Chapman's actions would still constitute a crime, while Wofford's would not. Chapman was convicted for violating an order of protection that prohibited him from coming within a specified distance of the residence of the protected parties. The version of RCW 10.31.100(2)(a) applicable to Wofford plainly requires an arrest for such conduct. RCW 10.31.100(2)(a) requires arrest if a person "has violated the terms of an order . . . prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location." Since, under the 2000 version of RCW 26.50.110(5), Chapman's actions constituted a violation of a "provision prohibiting a person from knowingly

coming within, or knowingly remaining within, a specified distance of a location," an action "for which an arrest is required under RCW 10.31.100(2)(a)," his actions constituted "a gross misdemeanor" under that statute.

By contrast, the version of RCW 10.31.100(2)(a) applicable to Wofford does not define Wofford's alleged conduct, being in the presence of a protected party, as conduct for which an arrest is required. Since Wofford's actions, unlike Chapman's, do not constitute "a crime, for which an arrest is required under RCW 10.31.100(2)(a)," Wofford's actions are not a crime under RCW 26.50.110.

The state's reliance on Jacques v. Sharp, 83 Wn. App. 532, 922 P.2d 145 (1996), is also misplaced. Jacques argued that the police lacked probable cause to arrest him for violating the conditions of a protective order because the legislature intended only certain violations to be criminal. Under the statute in effect at the time of Jacques' arrest, the appellate court concluded that violations of only three categories of protective orders were criminal -- violations of orders that either: (1) Restrain a party from committing acts of domestic violence; (2) exclude the respondent from the dwelling which the parties share or from the residence of the petitioner; or (3) restrain any party from having any contact with the victim of

domestic violence or the victim's children or members of the victim's household. Jacques, 83 Wn. App. at 542-43.

At first blush, the holding in Jacques would appear to support the state's position. However, like the Chapman court, the Jacques court was interpreting a version of RCW 26.50.110, which does not contain the language "for which an arrest is required" that exists in the version of the statute applicable to Wofford. Thus, while Jacques may have been correctly decided given the statutory language at issue in that case, its holding is inapposite to the statute at issue in the instant case.

If Jacques has any bearing on the instant case, it supports Wofford's position that the Legislature did not intend all violations of protective orders to be crimes.

The version of RCW 26.50.110(1) applicable to Wofford is not ambiguous. When the plain language of a statute is clear, the court assumes the Legislature meant exactly what it said. State v. Azpitarte, 140 Wn.2d 138, 141, 995 P.2d 31 (2000). Absent ambiguity, a statute's meaning is derived from its language alone. Azpitarte, 140 Wn.2d at 142. "An ambiguity exists if the language at issue is susceptible to more than one reasonable interpretation." Azpitarte, 140 Wn.2d at 141.

Like the statutory language at issue in Azpitarte, there is no ambiguity here. Former RCW 26.50.110 clearly states violation of a no-contact order is criminal only if the violation requires an arrest under RCW 10.31.100(2)(a) or (b). The language referring to RCW 10.31.100(2)(a) and (b) is not susceptible to two or more interpretations. Either an arrest is required under that statute or it is not.

The order here is not a foreign order. Wofford's violation of the order thus was not criminal unless it involved (1) acts or threats of violence or (2) entering or remaining in a prohibited location. RCW 10.31.100(2)-(a). Wofford's alleged violation did not meet either criterion. To the contrary, the conduct underlying the alleged violation consisted of Wofford and the protected party allegedly voluntarily riding together in a car. Wofford did not engage in acts or threats of violence toward the protected party, and was not in a location he is prohibited from entering. An arrest was not required under RCW 10.31.100(2), and the violation was, therefore, not a crime under the definition in RCW 26.50.110(1).

The state has failed to establish an ambiguity in the statute. The statute unambiguously defines the crime in a manner that does not include Wofford's alleged conduct. Furthermore, even if the state has established

that the statute is ambiguous, the ambiguity must be construed in Wofford's favor. Accordingly, this Court should reverse his conviction.

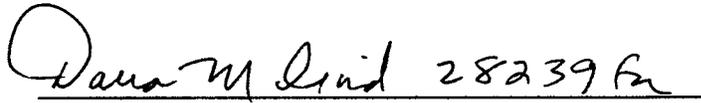
B. CONCLUSION

For the reasons stated in Wofford's opening brief and this reply, this Court should reverse his conviction.

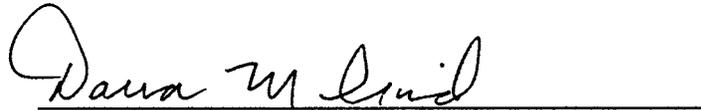
DATED this 4th day of April, 2008.

Respectfully submitted,

NIELSEN BROMAN & KOCH, PLLC

A handwritten signature in cursive script, appearing to read "Jonathan M. Palmer", written over a horizontal line.

JONATHAN M. PALMER
WSBA No. 35324

A handwritten signature in cursive script, appearing to read "Dana M. Lind", written over a horizontal line.

DANA M. LIND
WSBA No. 28239
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON)
)
 Respondent,)
)
 vs.) COA NO. 36444-1-II
)
 DONAL WOFFORD,)
)
 Appellant.)

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 4TH DAY OF APRIL 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTING ATTORNEY
930 TACOMA AVENUE SOUTH
ROOM 946
TACOMA, WA 98402
- [X] DONALD WOFFORD
DOC NO. 995848
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2079
AIRWAY HEIGHTS, WA 99001

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 APR -4 PM 3:49

FILED
COURT OF APPEALS
DIVISION II
03 APR -8 PM 1:09
STATE OF WASHINGTON
BY _____
DEPUTY

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF APRIL 2008.

x Patrick Mayovsky