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DIVISION II

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NO. 37105-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

EZELL JACKSON,

Appellant.

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

The Honorable Frank E. Cuthbertson, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

BECAUSE JACKSON'S CONTACT WITH HIS WIFE DID NOT CONSTITUTE A CRIME, HIS CONVICTION MUST BE REVERSED AND THE CHARGE DISMISSED.

Appellant Ezell Jackson was charged with felony violation of a court order under Former RCW 26.50.110. In State v. Hogan, this Court held that the plain language of former RCW 26.50.110(1) criminalizes only contact "for which an arrest is required under RCW 10.31.100(2) (a) or (b)." State v. Hogan, 145 Wn. App. 210, 218, 192 P.3d 915 (2008). Because an arrest is required only if a person violates the terms of a protection order by acts or threats of violence or intrusion into a prohibited location, unless the violation involves such conduct, no crime had been committed. Id. at 218-19. While the evidence in this case would support an inference that Jackson had prohibited contact with his wife, there was no evidence that he committed any act or threat of violence or that he entered or remained in any specific location prohibited by the no contact order. His conduct therefore did not constitute a crime.

Where no crime has been committed, the felony classification provision in RCW 26.50.110(5) ¹ does not apply. The state contends,

¹ Former RCW 16.50.110(5) provides as follows:

A violation of a court order issued under this chapter, chapter 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

however, that subsection (5) of the statute is independent of the other provisions of that statute for charging purposes because it lists all the elements necessary to prove a class C felony and does not reference any other section. Br. of Resp. at 7. The state is mistaken. Subsection (5) does not include the element of knowledge, referring only in shorthand fashion to a “violation.” Subsection (1), on the other hand, sets forth all the elements necessary for a conviction:

Whenever an order is granted under this chapter, chapter 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 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).

The state also relies on State v. Chapman, 140 Wn.2d 436, 998 P.2d 282, cert. denied, 531 U.S. 984 (2000). In Chapman, the Supreme Court analyzed the 1996 version of the statute which was amended in 2000, prior to the incident in question here, holding that “RCW

convictions for violating the provisions of an order issued under this chapter, chapter 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.

26.50.110(5) applies to a third violation without reference to whether that violation, standing alone, would subject the offender to criminal prosecution.” Chapman, 140 Wn.2d at 448. As this Court stated in Hogan, these statutory amendments supercede the decision in Chapman, and that case is no longer binding precedent. Hogan, 145 Wn. App. at 215.

Nonetheless, the state argues that the Chapman Court’s interpretation of subsection (5) should stand because that subsection has not changed materially. Br. of Resp. at 8. The state’s argument ignores the fact that the Chapman interpretation of subsection (5) was inextricably tied to the language of subsection (1). The Court explained, “Under rules of statutory construction each provision of a statute should be read together (in para material) with other provisions in order to determine the legislative intent underlying the entire statutory scheme.” Chapman, 140 Wn.2d at 448. The Court arrived at its interpretation of subsection (5) by reading it together with subsection (1). Id. Thus, as this Court recognized, the decision in Chapman has been superceded by statutory amendment, and the state’s reliance on that case is misplaced.

This Court’s decision in Hogan is directly on point. The state does not distinguish Hogan. Instead, it invites this Court to ignore that controlling precedent and reverse itself. This Court should reject the

state's invitation, apply its well-reasoned decision in Hogan, and dismiss the charge against Jackson.

B. CONCLUSION

For the reasons set forth above and in the Brief of Appellant, this Court should reverse Jackson's conviction and dismiss the charge.

DATED this 2nd day of December, 2008.

Respectfully submitted,



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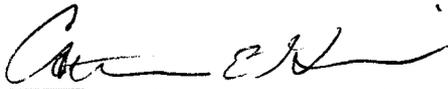
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Reply Brief of Appellant in *State v. Ezell Jackson*, Cause No. 37105-7-II, directed to:

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



Catherine E. Glinski
Done in Port Orchard, WA
December 2, 2008

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