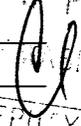


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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

EZELL JACKSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson, Judge

No. 06-1-04916-2

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Under RCW 26.50.110(5), did defendant commit a felony violation of a no-contact order when he violated the court order on the day in question and when he had had two prior convictions for violating a no-contact order? (Appellant's Assignment of Error 1).

2. Did the State have to prove that the contact between the defendant and the protected party involved an act or threat of violence when under RCW 26.50.110 the nature of a contact is not an element of the crime? (Appellant's Assignment of Error 1).

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant, Ezell Jackson, with a felony violation of a domestic violence no-contact order pursuant to RCW 26.50.110(5). CP 1-2. The case proceeded to trial.

At trial, the State admitted into evidence a copy of a no-contact order that was in effect on the day of the incident. RP3A 76 (Exhibit 1). The State also admitted into evidence certified copies of court records that showed defendant's two prior convictions for violating a no-contact order. RP3B 22, 34 (Exhibits 2-5).

Defense moved to dismiss the case against defendant arguing that RCW 26.50.110(1) criminalized only violations of a no-contact order, for which an arrest is required under RCW 10.31.100(2)(a) and (b). RP3B 24-25. Defense argued that RCW 26.50.110(1) did not criminalize behavior at issue in this case. RP3B 26. The court denied the motion holding that “a reasonable jury can find, based on the evidence, that it was a no-contact order under existence and it’s been violated on two occasions. And, more importantly, the Court is not inclined to read the statute the way that it’s suggested by the defense...” RP3B 27.

After the parties rested, defendant moved to include a duress instruction in the jury instructions packet. RP4 110-112. The court granted defendant’s motion. RP4 116; CP 37-54 (Instruction 12).

The jury found defendant guilty of the crime of violation of domestic violence court order. RP4 152; CP 35. In a special verdict, the jury also found that defendant had been convicted twice previously for violating the provisions of a no-contact order. RP4 153; CP 36. The prior violations made defendant’s third no-contact violation a class C felony. CP 1-2; RCW 26.50.110(5).

At sentencing, defendant stipulated to his prior convictions. CP 88-92. Defendant had an offender score of at least nine. RP (Sentencing) 4; CP 88-92. The court sentenced defendant to the mandatory range of 60 months, with credit for time served. RP (Sentencing) 4, 11. Defendant filed a timely notice of appeal. CP 93.

2. Facts

On August 15, 2006, Tyson Sagiao, a federally commissioned law enforcement officer for the U.S. Department of Homeland Security, was in the parking lot of the Social Security Administration office in Tacoma doing routine patrol. RP3A 71-72, 73. During his patrol, he ran a license plate of a van that had entered the parking lot. RP3A 74. The license plate check showed that the registered owner of the van was a respondent in a no-contact order and that Patricia Jackson was the protected person. RP3A 75. According to Sagiao, the physical description of the two parties to the court order matched the two occupants of the van. RP3A 75-76.

While Sagiao was completing the records check, a man had parked the van, got out, and walked into a building accompanied by his female passenger. RP3A 76. At trial, Sagiao identified defendant Ezell Jackson as the man who he had observed in the parking lot and Patricia Jackson¹, the protected party, as the woman who accompanied defendant. RP3A 73-74, 86-87. Sagiao testified that after completing the check, he walked inside the building and saw defendant and Jackson inside the Social Security Administration lobby. RP3A 78. They sat “right next to each other” and appeared to be filling out paperwork. RP3A 78.

¹ To avoid confusion, Patricia Jackson will be referred to as Jackson in the brief, and Ezell Jackson will be referred to as defendant.

Moments later, defendant and Jackson walked out together. RP3A 79. Sagiao approached the couple and asked for their names and birth dates, and they both provided the names and dates identical to the information listed in the no-contact order. RP3A 79, 80. 80. Sagiao asked the couple if they knew they were not allowed to be together, and defendant replied that he knew but that they were not really together. RP3A 81. Sagiao then handcuffed defendant and read him his *Miranda* rights. RP3A 81.

According to Sagiao, when he asked defendant if he was willing to speak to him about the incident, defendant responded, "Well, sure. I mean I don't know what else there is to talk about. You saw us together." RP3A 84. Defendant then informed Sagiao that Jackson had called him earlier and asked him to take her to the Social Security Office. RP3A 85. However, defendant admitted to Sagiao that there was no real need for the two of them to be together that day. RP3A 85. According to Sagiao, defendant also stated that he had been twice previously convicted of violating a no-contact order. RP3A 86.

Before defendant was transported to the Pierce County jail, he asked Sagiao to remove a few things from his wallet, including Jackson's identification card, and give them to her. RP3A 88; RP3B 14.

Sagiao testified that Jackson was “standoffish” and unwilling to speak to him. RP3A 85-86. However, she did not appear emotionally distraught or upset. RP3A 85, 86.

Although Jackson admitted at trial that she was with defendant on August 15, 2006, her version of events differed from defendant’s in important respects. RP3B 35-54. Jackson claimed that she jumped into defendant’s van without his invitation, when she saw it stop at a traffic light. RP3B 36. Defendant allegedly told her to get out, but she did not leave. RP3B 37. When the light changed to green, defendant took the first left and entered the Social Security Parking lot. RP3B 37.

In the parking lot, according to Jackson, defendant asked her to leave again, and she threatened to hurt herself with a razor blade if he did not speak to her. RP3B 37. She testified that she had attempted to commit suicide before and defendant knew about it. RP3B 37.

According Ms. Jackson, she followed defendant into the Social Security office, where defendant filled out some paperwork but did not talk to her. RP3B 38-39, 42. She admitted that they were in the building for about 20 minutes. RP3B 39, 43. She also admitted that she had been previously convicted of residential burglary, possession of stolen property, and theft. RP3B 38.

Defendant did not testify at trial. RP3B 54.

C. ARGUMENT

1. DEFENDANT COMMITTED A FELONY VIOLATION OF A NO-CONTACT ORDER WHEN HE VIOLATED THE ORDER ON THE DAY IN QUESTION AND WHEN HE HAD TWO PRIOR CONVICTIONS FOR VIOLATING A NO-CONTACT ORDER

The applicable language of RCW 26.50.110, in force at the time defendant violated the no-contact order for the third time was as follows:

(1) Whenever an order is granted ... 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...

...

(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 ...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... The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated² (emphasis added).

² The full text of RCW 26.50.110 and RCW 10.31.100(2)(a) and (b) in effect on 08/15/2006 is attached as Appendix A.

This Court looks at the construction of a statute de novo as a question of law. *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 515, 910 P.2d 462 (1996).

First, the plain language of RCW 26.50.110(5) indicates that it is an independent subsection for the charging purposes. RCW 26.50.110(5) is an independent subsection because it lists all the elements necessary to prove a class C felony and does not reference any other section, including RCW 26.50.110(1).

Second, defendant was properly charged under RCW 26.50.110(5). Defendant was charged with a felony violation as opposed to committing a crime of violating a no-contact order. CP 1-2. According to Information, defendant “unlawfully and feloniously” violated the terms of a court order and had two previous convictions for violating court orders, “contrary to RCW 26.50.110 and 26.50.110(5).” CP 1-2. RCW 26.50.110(1), upon which defendant is heavily relying on appeal, does not appear anywhere in the Information. *See* Appellant’s Brief; CP 1-2.

Third, the plain language of the subsection unequivocally states that a third violation of a no-contact order is always elevated to a class C felony regardless of whether it was a crime or a contempt of court. RCW 26.50.110(5). While the “two previous convictions” language indicates that the two *prior* violations must be crimes, the language “a violation of a court order” describing the current violation indicates that it is immaterial whether the third violation is a crime or a contempt of court. RCW

26.50.110(5). This is also obvious from the fact that the legislature did not use language like “a third conviction” or a reference to subsection 1.

Furthermore, a decision by the Supreme Court of Washington confirmed that any third violation of a no-contact domestic violence court order was punishable as a felony. *State v. Chapman*, 140 Wn.2d 436, 445, 449, 998 P.2d 282 (2000) (superseded on other grounds). Although *Chapman* has possibly been superseded in its interpretation of RCW 26.50.110(1) by the subsequent 2000 amendments to the subsection, *Chapman*'s interpretation of RCW 26.50.110(5) should stand because that subsection has not changed materially.³ 140 Wn.2d 436.

Chapman argued that he could not be convicted of a class C felony under RCW 26.50.110(5) because, while he was in violation of a court order, it was not a type of violation prohibited by RCW 26.50.110(1). *Chapman*, 140 Wn.2d at 441, 445. He argued that his violation subjected him to a contempt citation only and not to criminal prosecution. *Chapman*, 140 Wn.2d at 445. The Supreme Court disagreed with Chapman holding that:

Where a person who has been convicted of two previous violations of a no-contact or domestic violence protection order comes before the court on a third violation of a no-contact or domestic violence protection order, the person is subject to a class C felony charge under RCW 26.50.110(5). *RCW 26.50.110(5) applies to a third violation without*

³ The two versions of RCW 26.50.110(5) in effect when defendant committed the violation and when Chapman committed the violation are attached as Appendix B.

reference to whether that violation, standing alone, would subject the offender to criminal prosecution.

Id. at 449 (emphasis added, original emphasis removed).

This case is controlled by the analysis in **Chapman**. Like Chapman, defendant in this case never denied that he violated the no-contact order. *See* RP3A 81; Appellant's Brief 3, 7. Like Chapman, defendant argues that he could not be convicted of a class C felony because his third violation of the court order was not a crime. *See* Appellant's Brief 6. The Supreme Court, however, already found such argument unconvincing. *See supra*.

Finally, the State proved beyond a reasonable doubt all the elements required to establish a felony violation under RCW 26.50.110(5). The State proved and the jury found in a special verdict that defendant had had two prior convictions for violating a no-contact order. CP 36; *see* Exhibits 1-5. Further, the State showed that defendant contacted the protected party on August 15, 2006, contrary to a no-contact court order in effect at the time. RP3A 73-81; Exhibit 1. Defendant knew he violated the court order and does not deny it on appeal. RP3A 81; Appellant's Brief 3, 7. This was defendant's third violation that triggered RCW 26.50.110(5). Under the plain language of RCW 26.50.110(5) and **Chapman's** interpretation of the subsection, it is immaterial whether

defendant's third violation of the no-contact order was a crime or a contempt of court. *Id.* at 449.

Therefore, defendant's argument on appeal that stems from the reading of RCW 26.50.110(1) is irrelevant and must fail. The Court should affirm defendant's conviction.

2. UNDER RCW 26.50.110(1), THE NATURE OF A CONTACT BETWEEN THE RESTRAINT PARTY AND THE PROTECTED PARTY IS NOT AN ELEMENT OF THE CRIME OF THE VIOLATION OF A NO-CONTACT ORDER

Even if this Court considers defendant's argument, it should, nevertheless, affirm his conviction because defendant's conduct of contacting the protected party constituted the crime of violation of a no-contact order under RCW 26.50.110(1).

The applicable language of RCW 26.50.110(1) in force at the time defendant violated the no-contact court order was as follows:

Whenever an order is granted ... 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...

RCW 26.50.110(1) is ambiguous on its face because it is unclear which preceding clause(s) are modified by the clause “for which an arrest is required.” The ambiguity creates disparate readings of the statute where either all of the listed violations are gross misdemeanors or only those violations that are arrestable under RCW 10.31.100(2)(a) and (b). However, the statute’s legislative history as well as the applicable canons of statutory construction and case law demonstrate that the legislature intended to criminalize all the violations of a no-contact domestic violence order.

This Court looks at the construction of a statute de novo as a question of law. *Rettkowski v. Dep’t of Ecology*, 128 Wn.2d 508, 515, 910 P.2d 462 (1996).

a. RCW 26.50.110(1) is ambiguous on its face.

While a statute is not ambiguous simply because a variety of alternatives is imaginable, a statute is ambiguous if it can be reasonably interpreted in more than one way. *State v. McGary*, 122 Wn. App. 308, 313, 93 P.3d 941 (2004). RCW 26.50.110(1) is ambiguous because it lends itself to at least three reasonable interpretations: (1) that the clause “for which an arrest is required” modifies all the preceding clauses; (2) that it modifies two of the preceding clauses; and (3) that it only modifies the immediately preceding “foreign protection order” clause.

These alternative interpretations are not imaginable – they are reasonable and existent. Thus, this Division recently held that the clause “for which an arrest is required” modified all of the preceding clauses. *State v. Hogan*, 145 Wn. App. 210, 218 __ P.3d __ (2008); *State v. Madrid*, 145 Wn. App. 106, 115, __ P.3d __ (2008). In contrast, Division I, in *State v. Bunker*, concluded that the clause “for which an arrest is required” modified only two of the preceding clauses. 144 Wn. App. 407, 419, 183 P.3d 1086 (2008).⁴ Additionally, it is reasonable to assume that the clause “for which as arrest is required” modifies only the “foreign protection order” clause because that is the immediately preceding clause.

Even the judges of Division II were not unanimous in interpreting RCW 26.50.110(1) thereby providing additional evidence of the statute’s ambiguity. In *Hogan*, Judge Quinn-Brintnall dissented, stating that she agreed with “Division One’s interpretation of former RCW 26.50.110(1) as set out in *Bunker*.” 145 Wn. App. at 223. The disagreement within Division II and among the divisions on the reading of RCW 26.50.110(1) demonstrates the statute’s ambiguity.

⁴ The two divisions are also in disagreement on whether the statute is ambiguous: Division I held that it is, and Division II held that it is not. *Hogan*, 145 Wn. App. 210, 218; *Madrid*, 145 Wn. App. 106, 115; *Bunker*, 144 Wn. App. 407, 415.

Further, although the *Hogan* and *Madrid* courts concluded that RCW 26.50.110 was unambiguous, the reasoning the courts used to arrive at this conclusion actually supports a conclusion that the statute *is* ambiguous. The proper order of statutory analysis is for the court first to look at the plain language of the statute alone and make a “value judgment” on whether it is amenable to one or several reasonable interpretation. See *In re Sehome Park Care Ctr.*, 127 Wn.2d 774, 778, 903 P.2d 443 (1995); Philip A. Talmadge, *A New Approach to Statutory Interpretation in Washington*, 25 Seattle U. L. Rev. 179, 192 (2001). The inquiry ends if the court finds the statute unambiguous on its face because “where the meaning of the statute is clear from the language of the statute alone, there is no room for judicial interpretation.” *Kadoranian v. Bellingham Police Dep't*, 119 Wn.2d 178, 185, 829 P.2d 1061 (1992).

If the court finds that a statute is amenable to more than one reasonable interpretation, the statute is ambiguous. See *McGary*, 122 Wn. App. 308, 313 (internal citations omitted). Then the court can “resort to principles of statutory construction, legislative history, and relevant case law to assist in interpreting it.” *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

While the case law dictates that a court does not get to principles of statutory construction until it deems a statute *ambiguous*, the *Hogan* and *Madrid* courts used an exception to the last antecedent rule to arrive at a conclusion that RCW 26.50.110 was *unambiguous*. 145 Wn. App. at 217, 218; 145 Wn. App. at 115. By resorting to a rule of statutory construction, the courts constructively admitted that they could not make a value judgment based on the plain language of the statute alone. The courts had to move to the second step of statutory analysis that looks to legislative intent by, among other things, applying the canons of statutory construction.⁵ Thus, despite the courts' ultimate holding that the statute was *unambiguous*, the courts' analyses spoke to the contrary and signaled that the statute was in fact *ambiguous*.

Finally, defendant's reading of RCW 26.50.110(1) begs a simple syntax question: why did the legislature write such a long and cumbersome subsection to say that a violation of a court order is a gross

⁵ While rules of grammar and syntax can be freely applied during the first step of statutory analysis, the last antecedent rule, contrary to a popular belief, is not a rule of grammar, but a canon of statutory construction. See, e.g., *Berrocal v. Fernandez*, 155 Wn.2d 585, 592, 121 P.3d 82 (2005); *Stepnowski v. Comm'r*, 456 F.3d 320, 324, n.7 (2006) (distinguishing the last antecedent rule from the rules of grammar); see also *In re Reeves*, 221 B.R. 756, 759 (1998); *In re Mattson*, 210 B.R. 157, 160 (1997); *The Chicago Manual of Style*, 240-275, 881-956 (15th Ed., 2003).

misdemeanor only if it is an arrestable violation under RCW 10.31.100(2)(a) and (b)? The answer is because the legislature did not intend to say it.

In sum, RCW 26.50.110(1) is ambiguous on its face. Therefore, it is necessary to ascertain what reading the legislature intended by looking at the applicable legislative history, canons of statutory construction and case law. *Cockle*, 142 Wn.2d 801, 808.

- b. The extrinsic sources prove that the legislature intended to criminalize all the violations listed in RCW 26.50.110(1)

“The fundamental object of judicial construction or statutory interpretation is to ascertain, if possible, and to give effect to, the intention of the legislature in enacting a particular statute . . .” *Lynch v. Dept. of Labor & Indus.*, 19 Wn.2d 802, 806, 145 P.2d 265 (1944).

The legislative history clearly demonstrates the legislature’s desire to strengthen domestic violence laws and make offenders accountable for their actions. Thus, prior to the legislature’s enactment of the 2000 amendments to RCW 26.50.110(1), which created the ambiguity, a

violation of a no-contact restraint provision constituted a crime. *Jacques v. Sharp*, 83 Wn. App. 532, 542; 922 P.2d 145 (1996).⁶ However, at the time, penalties for violations of domestic violence court orders varied depending on whether the underlying case was criminal, civil, dissolution, custody or paternity. *See* Final B. R. 6400, Reg. Sess., at 1 (Wash. 2000).

The 2000 amendments were enacted, in part, as a “collaborative effort that will strengthen domestic violence laws.” H. B. Rep. 6400, Reg. Sess., at 7 (Wash. 2000). The proponents of the bill believed that “penalties for violating the restraint provisions of various types of orders should flow from the conduct violating the order rather than the type of order.” Final B. Rep. 6400, Reg. Sess., at 1 (Wash. 2000).

The Senate was concerned over a Division II decision holding that a batterer was only punished with contempt of court, when he violated a court order prohibition against his coming within a specified distance of a victim’s house or other location, because the prohibition was not a “restraint provision” within the meaning of RCW 26.50.110. S. B. Rep. 6400, Reg. Sess., at 2 (Wash. 2000).

⁶ The 2000 amendments support a conclusion that the clause “for which an arrest is required” modifies two of the preceding clauses because all three clauses were enacted at the same time. *See* Laws of 2000, ch. 119, §24.

These concerns led the legislature to align the punishments for violations of no-contact orders, foreign protection orders, and restraining orders with the punishment for domestic violence protection order violations, making them all a gross misdemeanor unless the respondent has two prior convictions for violating an order, in which case the violation was a class C felony. H. B. Rep. 6400, Reg. Sess., at 4 (Wash. 2000). The proponents of the bill emphasized that that “[s]ince 1990, 247 women have been murdered by their intimate partner...[the bill] holds offenders accountable for their actions.” S. B. Rep. 6400, Reg. Sess., at 3 (Wash. 2000). All of these statements demonstrate that the legislature intended to criminalize all no-contact domestic violence violations in RCW 26.50.110(1).

In contrast, if we accept defendant’s reading of the statute and presume that the legislature intended to relax the punishments for violations of no-contact domestic violence court orders, one would expect to find that important fact in the bill reports. *See Sehome Park*, 127 Wn.2d 774, 781. The reports, however, reflect no legislative intent to relax the punishments.

More importantly, the legislature dissipated any doubts as to the proper reading of RCW 26.50.110(1) with its subsequent clarification in

2007 amendments, which are in force at this time. Presently, the relevant language of the statute is as follows:

Whenever an order is granted ... 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.

RCW 26.50.110(1)(a)⁷

The legislature's intent statement, accompanying the 2007 amendments, explained that the legislature wanted 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 ... effectuate any substantive change* to any criminal provision in the Revised Code of Washington." Laws of 2007, ch. 173, §1 (emphasis added).

This court should retroactively apply the 2007 amendments to the former RCW 26.50.110(1) to cure the ambiguity. While the 2007

amendments were enacted after defendant committed the violation in question, “to help clarify the original intent of a statute, the court may also turn to the statute’s subsequent history.” *State v. McKinley*, 84 Wn. App. 677, 681, 929 P.2d 1145 (1997) (internal citations omitted).

“When a statute is adopted to clarify an internal inconsistency to help it conform to its original intent, it may properly be retroactive as curative.” *State v. MacKenzie*, 114 Wn. App. 687, 699, 60 P.3d 607 (2002) (internal citation omitted). Similarly, “when an amendment clarifies existing law and where that amendment does not contravene previous constructions of the law, the amendment may be deemed curative, remedial and retroactive. This is particularly so when the amendment is enacted during a controversy regarding the meaning of the law.” *Tomlinson v. Clarke*, 118 Wn.2d 498, 510-511, 825 P.2d 706 (1992) (internal citation omitted).

The 2007 amendments do not contravene previous constructions of the law. *Madrid* and *Hogan*, which interpret the former version of RCW 26.50.110(1), were published in 2008, *after* the 2007 amendments. 145 Wn. App. 210; 145 Wn. App. 106. Thus, nothing precludes this court from applying the 2007 amendments retroactively.

⁷ The full text of current RCW 26.50.110 is attached as Appendix C.

Even if this Court declines to accept the applicability of the current RCW 26.50.110(1), the canons of statutory construction also demonstrate that the legislature intended to criminalize all the violations listed in the subsection. Thus, one of the traditional canons dictates that the Court should avoid a statutory reading that would result in “unlikely, absurd or strained” consequences. *Berrocal*, 155 Wn.2d 585, 590 (internal citation omitted). Here, the practical consequences of defendant’s interpretation is that a personal contact with the protected party is punished less severely (it would not even be a crime) than coming within a mile of the protected party or coming to a protected party’s work place even if the protected party is not there. Such results are at the very least strained and run counter to the clearly expressed legislative intent of strengthening the domestic violence laws. H.B. Rep. 6400, Reg. Sess., at 7 (Wash. 2000).

Additionally, defendant’s interpretation of the statute would mean that the legislature criminalized direct contact with a protected party before 2000; then in 2000, while meaning to strengthen domestic violence laws, it decriminalized nonviolent personal contact with the protected party; and finally, in 2007, the legislature reverted back to any personal contact being a crime, regardless of its nature. Such reading of the legislative history is strained.

Further, another canon of statutory construction requires that all parts of a statute or an act “be construed as a whole, considering all provisions in relations to one another and harmonizing all rather than rendering any superfluous.” *State v. George*, 160 Wn.2d 727, 738, 158 P.3d 1169 (2007). Defendant’s reading of RCW 26.50.110(1) makes RCW 26.50.110(3) largely superfluous. RCW 26.50.110(3) states that “a violation of an order...shall also constitute contempt of court...”

Under defendant’s reading of RCW 26.50.110(1), any and all non violent contacts with the protected party that occurs anywhere other than in the area specifically listed as prohibited to the restraint party would not be a crime, but a contempt of court. Defendant’s reading makes RCW 26.50.110(3) largely superfluous because RCW 26.50.110(1) already makes contempt of court the primary penalty.

Similarly, defendant’s argument that a non violent contact with the protected party does not trigger criminal punishment is hard to reconcile with the legislative requirement that every order for protection form include the following statement:

You can be arrested even if the person or persons who obtained the order invite or allow you to violate the order’s prohibitions. The respondent has the sole responsibility to avoid or refrain from violating the order’s provisions. Only the court can change the order upon written application.

RCW 26.50.035(1)(c). *See also State v. Bunker*, 144 Wn. App. 407, 419 (defendants failed to explain why the legislature required in RCW 10.99.040(4)(b) that each and every no-contact order issued by a court proclaim that “[v]iolation of this order is a criminal offense”).

The no-contact court order in effect on August 15, 2006, ordering defendant to have no contact with Jackson, contained both of the aforementioned notices. *See Exhibit 1*. Additionally, in the order, the check mark was placed next to “Expires: Two (2) years (Gross Misdemeanor).” *Id.*

Finally, defendant relies on this division’s recent holding that RCW 26.50.110(1) is unambiguous and criminalizes only offenses arrestable under 10.31.100(2)(a) and (b). *Hogan*, 145 Wn. App. 210, 218; *accord Madrid*, 145 Wn. App. 106, 115. As indicated above, both courts based their holdings on an exception to the last antecedent rule, specifically on a placement of a comma. *Id.* However, while the last antecedent rule and its exception may be applied to RCW 26.50.110(1), this time-encrusted canon is by no means determinative.

The last antecedent rule is merely one of the interpretive tools at the court’s disposal in determining legislative intent. *See Berrocal*, 155 Wn.2d at 593, 594; *Sehome Park*, 127 Wn.2d at 778, 782; *State v. McGee*, 122 Wn.2d 783, 864 P.2d 912 (1993); *McGary*, 122 Wn. App. at

314. It is “not inflexible or uniformly binding.” *McGee*, 122 Wn.2d at 788-89. The last antecedent rule should only be applied where “the grammatically correct construction of the statute makes sense within the statutory scheme as a whole.” *McGary*, 122 Wn. App. at 314; *see Id.* at 315, 317 (holding that the application of the last antecedent rule would run counter to the codified statement of legislative intent, legislative history, and the statutes defining the other degrees of criminal mistreatment, and therefore should not control).

In this case, the exception to the last antecedent rule should be disregarded because it runs counter to the weight of the legislative intent expressed in the legislative history and its application results in strained consequences.

Defendant’s reading of the statute goes against the core purpose of the domestic violence court orders: to keep the abuser away from the victim, regardless of the victim’s wishes. The harm of domestic violence extends much further than the two people involved. It affects children, coworkers, other family members, and even pets. Considering the wealth of knowledge accumulated thus far about the circle of violence and the Battered Woman Syndrome, the legislature properly recognized that the question of reconciliation cannot be entrusted to the abuser and the victim.

In conclusion, while it is not clear whether the clause referring to the arrestable offenses modified some or all of the preceding clauses, or was a scrivener's error, the extrinsic sources show that the legislature intended to criminalize all violations of a no-contact domestic violence order. Thus, to convict defendant, the State only needed to show a knowing contact between a restraint person and a protected person – the nature of that contact was immaterial.

D. CONCLUSION.

Defendant's conviction should be affirmed because, under RCW 26.50.110(5), the State proved all the elements that were necessary to convict defendant of a felony violation of a no-contact order. However, should this Court entertain defendant's argument made under RCW 26.50.110(1), the State respectfully requests that it reconsider its prior

decisions on the statutory reading of the language of the subsection and retroactively apply the 2007 amendments to cure the ambiguity.

DATED: October 30, 2008.

GERALD A. HORNE
Pierce County
Prosecuting Attorney

Kathleen Proctor
Kathleen Proctor
Deputy Prosecuting Attorney
WSB # 14811

Aryna Anderson
Rule 9 Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/3/08 Kathleen K
Date Signature

FILED
COURT OF APPEALS
DIVISION II
08 NOV -3 PM 4:54
STATE OF WASHINGTON
BY [Signature]
DEPUTY

APPENDIX "A"

RCW 26.50.110 and RCW 10.30.100(2)(a) and (b), in effect on 08/15/2006

RCW 26.50.110 in effect on August 15, 2006

(1) 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 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. 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 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.

RCW 10.31.100(2)(a) and (b) in effect on August 15, 2006.

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;

APPENDIX "B"

*RCW 26.50.110(5) in effect when defendant committed the violation and
when Chapman committed the violation*

RCW 26.50.110(5) in effect when defendant and Chapman committed the violations

Defendant Jackson

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.

Chapman

A violation of a court order issued under this chapter is a class C felony if the offender has at least two previous convictions for violating the provisions of a no-contact order issued under chapter 10.99 RCW, a domestic violence protection order issued under chapter 26.09, 26.10, or 26.26 RCW or this chapter, or any federal or out-of-state order that is comparable to a no-contact or protection order issued under Washington law. The previous convictions may involve the same victim or other victims specifically protected by the no-contact orders or protection orders the offender violated.

APPENDIX "C"

RCW 26.50.110 currently in effect

The current version of RCW 26.50.110

(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 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.]