

NO. 45258-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT WALLS,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

Before the Honorable John F. Nichols, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The court miscalculated the offender score for the felony conviction.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

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

C. STATEMENT OF THE CASE

Robert Walls met Britany Middleider in 2006 and had a child with her. Report of Proceedings (RP) at 35, 366, 367.¹ At approximately 10:00 p.m. on March 2, 2013, Mr. Walls and Ms. Middleider were involved in an argument in the parking area of Mr. Walls' apartment complex in Vancouver, Clark County, Washington. RP at 371. After they argued for approximately fifteen minutes, Mr. Walls went upstairs to his apartment to retrieve some

¹The Verbatim Report of Proceedings consists of five volumes: RP May 30, June 10, July 2, July 30, August 8, 2013, pretrial hearings; July 19, 2013, omnibus hearing; and July 23, 2013, CrR 3.5 hearing; 1RP August 5, 2013, jury trial; 2RP August 6, 2013, jury trial; 3RP August 7, 2013, jury trial; and RP August 14, 2013, sentencing.

belongings and then returned to the parking lot. RP at 37. Ms. Middleider stated that she went back into the apartment because she suspected that Mr. Walls had taken her electronic benefit transfer (EBT) card when he went back into the apartment. RP at 38. She determined that her EBT card was not in the apartment and then ran downstairs after him. RP at 38. Mr. Walls, who was using a rental car, got into the vehicle and began to drive out of the parking lot. RP at 373. Ms. Middleider, who had returned to the parking lot, stepped in front of the car and asked him to stop and told him that she wanted her EBT card back. RP at 39, 44. She later told police she was hit by the vehicle.

Mr. Walls denied touching her with the car. RP at 374. After he drove away, Ms. Middleider called law enforcement, who responded to the apartment to meet with her. RP at 35. Mr. Walls was subsequently charged with fourth degree assault as a result of the incident and a no contact order was issued by the District Court on March 4, 2013. Exhibit 12.

Following issuance of the no contact order, Mr. Walls was alleged by the State to have had contact with Ms. Middleider on May 14, May 15, and May 17, 2013, and to have tampered with her proposed testimony in the pending gross misdemeanor assault case. Phone records were entered as

Exhibit 19. He denied having contact with her following the no contact order by either of two phones he used at or in person. RP at 385.

Mr. Walls testified that after leaving the complex, he received several text messages from Mr. Middleider. RP at 374. After leaving the parking lot, he used the EBT card at a Fred Meyer store to obtain \$323.00, which was the amount remaining on the card on March 2. RP at 99, 375. Ex. 13. He had previously used the EBT card with Ms. Middleider's permission, who had also given him the Personal Identification Number in order to access money from the EBT card. RP at 63, 375. His name had also been placed on the card for approximately a month, after the incident on March 2. RP at 61, 375.

Later on March 2 Mr. Walls was contacted by police investigating the incident and he voluntarily went to police station in Vancouver in order to speak with law enforcement. RP at 376, 379. He was subsequently placed under arrest for fourth degree assault and booked into the Clark County Jail. RP at 376. When he was taken into custody, he had the money that he withdrew from the EBT card on his person. The card itself was in the rental car. He stated that he was not asked about the EBT card when questioned by police, and that they seemed concerned only with the alleged assault. RP at

391, 392.

Mr. Walls was charged by information filed in Clark County Superior Court with one count of fourth degree assault, witness tampering, identity theft, and three counts of misdemeanor violations of a no-contact order. Clerk's Papers 27.

Trial to a jury began August 5, 2013, the Honorable John F. Nichols presiding.

The jury found Mr. Walls guilty of identity theft in the second degree with a domestic violence special verdict, as charged in Count 3 of the amended information filed July 23, 2013,, and guilty of three gross misdemeanor violations of a no-contact order as charged in Counts 2, 5, and 6. CP 27- Mr. Walls was acquitted of witness tampering and fourth degree assault. RP at 492; CP 105-111.

The matter came on for sentencing on August 14, 2013. The parties disputed the offender score for the felony identity theft conviction and both filed a Sentencing Memorandum. CP 113, 120. The State argued the offender score should be three points on the theory that Mr. Walls had been convicted of a prior "repetitive domestic violence offense" under RCW 9.94A.525(21). The defense argued the offender score should be zero for the

felony matter because the current offenses for which Mr. Walls had been convicted under Counts 2, 5, and 6 did not count as a prior "repetitive domestic violence offense."

The sentencing court agreed with the State and sentenced Mr. Walls on Count 3 to a term of 150 days based on an offender score of three points. CP 144.

Timely notice of appeal was filed August 20, 2013. CP 156. This appeal follows.

D. ARGUMENT

1. **THE TRIAL COURT ERRED WHEN IT INTERPRETED RCW 9.94A.030(20) TO NOT REQUIRE THE STATE TO PROVE EACH OF THE DEFINITIONS FOUND IN RCW 26.50.010(1) AND RCW 10.99.020(5)(r)**

The issue raised in this case requires this Court to determine if the trial court erred when it ruled that under RCW 9.94A.030(20), the State was not required to prove that Mr. Walls committed a domestic violence crime as defined under both RCW 10.99.020(5)(r) and RCW 26.50.010(1) in order to seek the enhanced sentencing provisions available in RCW 9.94A.525(21).

As an initial matter, this issue is properly before this Court. A defendant may raise an unlawful, illegal or erroneous sentence for the first time

on appeal. *State v. Allen*, 150 Wn. App. 300, 207 P.3d 483 (2009), review denied, 170 Wn.2d 1014 (2010); see *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Further, a defendant generally "cannot waive a challenge to a miscalculated offender score," except to the extent that he makes an agreement to facts which ultimately result in the sentence he challenges. *State v. Ross*, 152 Wn.2d 220, 231, 95 P.3d 1225 (2004), quoting, *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002).

Offender scores are reviewed *de novo*. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). The meaning of a statute is also a question of law reviewed *de novo*. *Manary v. Anderson*, 176 Wn.2d 342, 350, 292 P.3d 96 (2013), see also *Ford*, 137 Wn.2d at 479-80.

In this case, the Superior Court erred in concluding Mr. Walls' offender score was three points instead of zero. The current gross misdemeanor offenses of violating a no-contact order does not qualify as a "repetitive domestic violence offense" under RCW 9.94A.525 for offender score purposes. RCW 9.94A.030(20) in relevant part, defines "domestic violence" as having "the same meaning as defined in RCW 10.99.020 and 26.50.010." (Emphasis added). The plain language of RCW 9.94A.030(20) requires that it be read as a conjunction in order to ensure a sentencing court

is in compliance with intent of the legislature. A disjunctive reading of the statute renders the legislature's explicit reference to RCW 26.50.010 superfluous because the definition contains elements not present in RCW 10.99.020(5)(r).

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

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

RCW 26.50.010(1). The definition for domestic violence in RCW 26.50.010 specifically requires physical harm, bodily injury, assault, or the fear of the same, or stalking, or sexual assault. Without these elements, the State cannot prove domestic violence under RCW 26.50.010. Similarly, without these elements the State could not prove RCW 9.94A.030. This issue of divergent definitions of "domestic violence" did not exist prior to the enactment 9.94A.030(20), on August 1, 2011.

RCW 9.94A.030(20) is plain on its face; it defines domestic violence by referring to two different statutes: RCW 26.50.010 "and" RCW 10.99.020

in the conjunctive. Each definition within these two statutes is also equally plain and clear, which requires this Court to give effect to that plain meaning as an expression of legislative intent. *Jongeward*, 174 Wn.2d at 594. RCW P.2d 616 (1999)9.94A.030 requires the State to plead and prove **both** RCW 26.50.010 **"and"** RCW10.99.020.

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

Last, even if the statute is determined to be ambiguous, Mr. Walls' argument must prevail; the rule of lenity requires the court to "interpret the statute in favor of the defendant absent legislative intent to the contrary." *Bunker*, 169 Wn.2d at 601. "Under the rule of lenity, any ambiguity in the meaning of a criminal statute must be resolved in favor of the defendant." *In re Pers. Restraint of Hopkins*, 137 Wn.2d 897, 901, 976 P.2d 616 (1999). A

statute is ambiguous if it is susceptible to more than one reasonable interpretation. *State v. Parent*, 164 Wn. App. 210, 212, 267 P.3d 358 (2011). As set forth above, Mr. Walls' interpretation of when misdemeanor domestic violence offenses will count in the offender score under RCW 9.94A.525(21)(c) is reasonable and supportable by time-honored statutory interpretation. The rule of lenity requires that provision be interpreted in favor of Mr. Walls, resulting in an offender score of zero.

The remedy for a miscalculated offender score is to remand for resentencing based on the correct offender score. *Ford*, 137 Wn.2d at 485. Walls is entitled to be resentenced using a correct offender score of zero.

E. CONCLUSION

The State did not plead and prove the necessary elements under RCW 9.94A.030(20). Therefore Mr. Walls cannot be subjected to an enhanced sentence under RCW 9.94A.525(21).

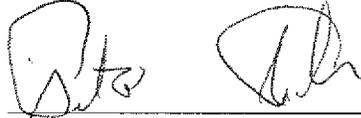
Mr. Walls respectfully requests this Court remand for resentencing based on an offender score of zero for Count 3.

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DATED: March 12, 2014.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
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CERTIFICATE OF SERVICE

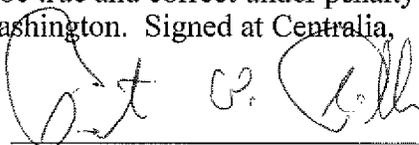
The undersigned certifies that on March 12, 2014, that this Appellant's Opening Brief was sent via JIS Link, to (1) Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, (2) and was sent by first class mail, postage pre-paid to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 12, 2014.



PETER B. TILLER

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March 12, 2014 - 4:35 PM

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