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Court of Appeals
Division III
State of Washington

NO. 31780-3-III
Consolidated w/ 31781-1-III

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

STATE OF WASHINGTON,

Appellant,

v.

JEREMIAH HODGINS,

Respondent.

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

The Honorable Robert E. Lawrence-Berrey

BRIEF OF RESPONDENT

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A. INTRODUCTION

To qualify for an increased offender score under recent legislative amendments to the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, a conviction must qualify as a “felony domestic violence offense,” requiring that both definitions of domestic violence in RCW 10.99.020 and RCW 26.50.010 be pled and proven. Neither of Jeremiah James Hodgins’s convictions satisfies both definitions. Accordingly, Hodgins’s convictions do not qualify as felony domestic violence offenses and his offender score may not be increased under the new SRA provisions. The trial court’s ruling in this regard was correct. Therefore, this court must affirm.

B. COUNTERSTATEMENT OF THE ISSUES

1. Where a statute’s meaning is unambiguous, must this court apply the statute as written by the legislature?

2. Where there is no indication in the language the legislature has chosen that the word “and” should be read disjunctively, must this court give the word “and” a common, conjunctive interpretation?

3. Where a statutory definition depends on the distinct definitions in two other statutes, would interpreting the statutorily defined term based only on one of the distinct definitions render the legislature’s inclusion of the other definition superfluous?

4. Where the legislature uses certain statutory definitions in one instance and different statutory definitions in another, does it evince a different legislative intent?

5. Where a legislative statement of intent and pertinent legislative history reveal a legislative intent to increase the punishments of only violent offenders, should courts interpret pertinent statutes consistent with such intent?

6. Even in the event that two different interpretations of a sentencing statute are reasonable, rendering the statute ambiguous, must this court apply the rule of lenity to interpret the statute in the manner that favors the defendant?

C. COUNTERSTATEMENT OF THE CASE

The Yakima County Prosecutor charged Hodgins with seven counts of felony violation of a protection order. CP 1, 50-52. One of the counts, charged in its own cause number, was based on Hodgins's presence in the residence of the protected person under the protection order. CP 1, 102. The other six counts were based on Hodgins's telephone calls to the protected person from Yakima City Jail over the course of six days. CP 50-52, 104.

The State and Hodgins reached a plea deal in which Hodgins agreed to plead guilty to one count under each cause number. CP 17-23, 68-74.

The parties disputed the offender score. RP 4, 20-39; CP 2-4, 5-13, 53-64. The State, interpreting recently enacted legislative amendments to the SRA that allowed certain domestic violence misdemeanors to count as points in the offender score, contended that Hodgins's offender score was 4. RP 22; CP 4, 55. The State reached this number by counting one point for Hodgins's other current offense under RCW 9.94A.589(1)(a) and by counting one point each for three previous domestic violence misdemeanor violations. RP 22; CP 4, 55.

The defense, on the other hand, asserted that Hodgins's offender score was 1, counting only the other current offense under RCW 9.94A.589(1)(a). CP 13, 64. The defense argued that Hodgins's previous domestic violence misdemeanors should not count as offender score points because neither of Hodgins's present convictions was a "felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was ple[d] and proven" as required by RCW 9.94A.525(21). RP 30-31; CP 11-13, 62-64. More specifically, the defense argued that the term "domestic violence" as defined in RCW 9.94A.030 required bodily harm or injury or the fear or threat thereof and that in Hodgins's case there was no proof or pleading that the protected party had experienced any of these. RP 30-31; CP 11-13, 62-64.

At the hearing on the offender score, the trial court ruled in favor of the defense, stating “there is no current offense where domestic violence is pled and proven.” RP 37-38. The trial court later issued a letter ruling setting forth its statutory analysis. CP 14-16, 65-67. There, the trial court noted, “if a defendant’s conduct does not amount to domestic violence under *both* RCW 10.99.020 and 26.50.010, then it is not ‘domestic violence’ pursuant to RCW 9.94A.030(20). CP 15, 66. Thus, determined the trial court, “Because a violation of a restraining order does not constitute domestic violence under RCW 26.50.010, this court concludes that a violation of a restraining order does not constitute ‘domestic violence’ for purposes of RCW 9.94A.030(20).” CP 15, 66.

The day after the offender score hearing, Hodgins entered a plea of guilty. RP 49.

Invoking the first time offender waiver,¹ the trial court sentenced Hodgins to 90 days’ confinement on each count to be served concurrently, and applied 107 days of credit for time served in the Yakima City Jail. RP 65-66; CP 42, 77.

¹ The judgments and sentences indicate that the court entered an exceptional sentence downward pursuant to State v. Hilyard, 63 Wn. App. 413, 819 P.2d 809 (1991). CP 41, 76. However, it was clear at sentencing that the trial court imposed a sentence under first time offender waiver pursuant to RCW 9.94A.650. RP 65-66 (“[I]t’s in the interest of justice to impose a first time offender waiver. The sentence will be 90 days.”).

The State's appeals follow from the trial court's offender score ruling in each cause number. CP 36, 87. This court has consolidated these appeals.

D. ARGUMENT

1. The statutory framework

In 2010, the legislature amended certain SRA provisions to potentially increase offender scores for convictions of felony domestic violence offenses. LAWS OF 2010, ch. 274, § 403(21) (codified as amended at RCW 9.94A.525(21)). Specifically, under certain circumstances, misdemeanors qualifying as a "repetitive domestic violence offense"—which include misdemeanor convictions of no contact and protection orders—can now be counted as one point each in an offender score.² RCW 9.94A.525(21)(c); RCW 9.94A.030(41). To trigger the offender-score-increasing provisions of RCW 9.94A.525(21)(c), the current conviction must qualify as a "felony domestic violence offense" under RCW 9.94A.525(21).

To so qualify, "domestic violence as defined in RCW 9.94A.030" must be "ple[]d and proven." RCW 9.94A.525(21). RCW 9.94A.030(20) provides, "'Domestic violence' has the same meaning as defined in RCW

² The legislature also allowed two offender score points to be counted for each adult prior domestic violence felony offense, RCW 9.94A.525(21)(a), and one point each for each second and subsequent domestic violence juvenile conviction, RCW 9.94A.525(21)(b). As Hodgins's has no such prior convictions, RCW 9.94A.525(21)(a) and (b) are not germane to the issues presented by this case.

10.99.020 and 26.50.010.” The definitions of domestic violence in RCW 10.99.020 and RCW 26.50.010, however, are very different.

RCW 10.99.020(5) provides a non-exhaustive list of crimes that qualify as domestic violence “when committed by one family or household member against another.” Relevant in this case is RCW 10.99.020(5)(r), which reads,

Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person 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 specific distance of a location

RCW 10.99.020(5)(r) proceeds to parenthetically cite 12 statutes that authorize and state the requirements for restraining orders, no contact orders, and orders of protection under chapters 10.99, 26.09, 26.10, 26.26, 26.44, 26.50, 26.52, and 74.34 RCW. Thus, to meet the definition of “[d]omestic violence” in RCW 10.99.020(5)(r), a defendant must violate a no contact or protection order that restrains or enjoins him or her from entering or coming within a particular distance of a location.

In contrast, RCW 26.50.010(1) defines domestic violence as

(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.

This definition of domestic violence requires actual physical violence or fear of physical violence, sexual assault, or stalking. Thus, where a defendant does not physically harm or injure, or inflict fear of harm or injury, does not sexually assault, and does not stalk a family or household member, the defendant has not committed domestic violence under RCW 26.50.010(1).

The question this case squarely presents is whether both of the distinct definitions of domestic violence in RCW 10.99.020(5) and RCW 26.50.010(1) must be satisfied before a defendant's conviction constitutes a "felony domestic violence offense" under RCW 9.94A.525(21). The answer is clearly yes for several reasons.

The statute's unambiguous language requires that domestic violence have the same meaning as defined in both RCW 10.99.020 and RCW 26.50.010, and to interpret RCW 9.94A.030(20) as requiring only one of these definitions would render the legislature's inclusion of the other definition superfluous.

Moreover, the legislature knows how to define the term "domestic violence" and has done so by referring solely to RCW 10.99.020 in other definitional statutes 16 times and by referring solely to RCW 26.50.010 13 times. Had the legislature intended that only one of these definitions satisfy

RCW 9.94A.030(20), it would have referred to only one of them or used the word “or” to divide them. The legislative statement of intent and pertinent legislative history also indicate that the legislature intended RCW 9.94A.525(21) to increase the offender scores of only violent offenders.

Finally, even if the statute could be read not to require satisfaction of both definitions of domestic violence in RCW 10.99.020 and RCW 26.50.010, the rule of lenity would compel this court to interpret RCW 9.94A.030(20) in Hodgins’s favor.

Because the trial court reached the correct interpretation of RCW 9.94A.030(20) as that definitional statute bears on RCW 9.94A.525(21), and because the trial court properly refused to increase Hodgins’s offender score under RCW 9.94A.525(21), this court should affirm its ruling.

2. Per RCW 9.94A.030(20)’s unambiguous language, “and” means “and”

The “fundamental objective in construing a statute is to ascertain and carry out the intent of the legislature.” State v. Veliz, 176 Wn.2d 849, 854, 298 P.3d 75 (2013) (quoting State v. Morales, 173 Wn.2d 560, 567, 269 P.3d 263 (2012)). “If [statutory] language is unambiguous, [courts] give effect to that language and that language alone because [courts] presume that the legislature says what it means and means what it says.” State v. Costich, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). “The ‘plain meaning’ of a

statutory provision is to be discerned from the ordinary meaning of the language at issue as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (citing Dep’t of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002)).

The language of RCW 9.94A.030(20) is unambiguous. It provides in its entirety, “‘Domestic violence’ has the same meaning as defined in RCW 10.99.020 and 26.50.010.” This sentence unequivocally reads that domestic violence means the definition in RCW 10.99.020 and means the definition in RCW 26.50.010. That is, under RCW 9.94A.030(20), both RCW 10.99.020 and RCW 26.50.010 serve to define the term “domestic violence.” As such, this court should interpret RCW 9.94A.030(20) to require that both definitions of domestic violence referenced in RCW 9.94.030(20) be met.

The word “and” is typically interpreted as the conjunctive, meaning something that connects or serves to join. Ahten v. Barnes, 158 Wn. App. 343, 352-53 n.5, 242 P.3d 35 (2010) (“‘And’ conveys a conjunctive meaning, otherwise the legislature would have used ‘or’ if it meant to convey a disjunctive meaning.”). Although “‘or’ is sometimes construed to mean ‘and,’ and vice versa the plain language of a statute can only be disregarded, and this exceptional rule of construction can only be resorted to

where the act itself furnishes cogent proof of the legislative error.” State v. Tiffany, 44 Wash. 602, 604, 87 P. 932 (1906).

The Tiffany court considered Ballinger Code § 7154, a provision that made it unlawful to willfully or maliciously make any aperture in a structure built to conduct water for agricultural purposes. Tiffany, 44 Wash. at 603. The court rejected arguments that the “or” in between willfully and maliciously should be read as an “and,” stating, “We are satisfied that the act under consideration contains no such evidence of error or mistake as would warrant us in disregarding its plain language.” Id. at 604. As in Tiffany, there is no evidence in this case of a legislative error or mistake that would permit this court to disregard the plain language of RCW 9.94A.030(20). This court thus must read “and” in the conjunctive.

An examination of an opinion in which this court interpreted “and” to mean “or” is instructive. In Mount Spokane Skiing Corp. v. Spokane County, 86 Wn. App. 165, 173-74, 936 P.2d 1148 (1997), this court interpreted former RCW 35.21.730(4) (1985), amended by LAWS OF 2002, ch. 218, § 23 (codified as amended at RCW 35.21.730(5)). Former RCW 35.21.730(4) gave cities, towns, and counties the power to create public corporations, commissions, and authorities to “Administer and execute federal grants or programs; receive and administer private funds, goods, or services for any lawful public purpose; and perform any lawful public

purpose or public function.” Mount Spokane Skiing Corporation asserted that “[b]ecause the word ‘and’ connects the three listed functions of a public corporation, . . . all three functions must be undertaken by the municipal corporation.” Mount Spokane Skiing Corp., 86 Wn. App. at 174. Rejecting this argument, this court stated,

It is *clear from a plain reading* of the statute that the powers listed in paragraph (4) are the possible functions a public corporation must undertake. *Nowhere does it appear from the statutory language* that the corporation must undertake each and every function in order to be valid and legal.

Id. (emphasis added).³ Thus, because former RCW 35.21.730(4) provided only a list of a public corporation’s possible functions, this court held that the legislature did not intend to require that every function be performed for the public corporation to be acting within its lawful authority.

Mount Spokane Skiing focused on the fact that the plain language of former RCW 35.21.730(4) compelled a particular reading. 86 Wn. App. at 174. It was clear from the language employed by the legislature that the legislature did not intend public corporations to perform each of the three functions listed in RCW 35.21.730(4), but instead that the legislature meant that any or all of them could be performed. The Mount Spokane Skiing

³ The Washington Supreme Court agreed with this court’s interpretation when it construed the same statute some seven months later. CLEAN v. City of Spokane, 133 Wn.2d 455, 473-74, 947 P.2d 1169 (1997) (“Although it is true the word ‘and’ appears in the statute, all three statutory elements need not be present for a [Public Development Authority] to be acting lawfully.”).

court disregarded legislative language because the statute “itself furnishe[d] cogent proof of the legislative error.” Tiffany, 44 Wash. at 604; see also Bullseye Distrib. LLC v. Wash. State Gambling Comm’n, 127 Wn. App. 231, 239, 110 P.3d 1162 (2005) (“In certain circumstances, the conjunctive ‘and’ and the disjunctive ‘or’ may be substituted for each other *if it is clear from the plain language of the statute that it is appropriate to do so.*” (emphasis added)).

In this case, there is no cogent proof of error from RCW 9.94A.030(20)’s language that shows the legislature meant to define domestic violence by either RCW 10.99.020 or RCW 26.50.010. To the contrary, the legislature’s use of “and” to separate references to RCW 10.99.020 and RCW 26.50.010 should be given a plain, ordinary, and unambiguous reading: the legislature’s chosen language shows that the legislature intended that both statutes’ definitions of domestic violence be satisfied.

It is easy to distinguish the statute in the instant case from that in Mount Spokane Skiing. RCW 9.94A.030(20) provides a specific statutory definition for domestic violence, not a list of possible functions. The fact that RCW 9.94A.030(20) defines domestic violence by reference to two other statutes is very different than a statute that lists potential functions of a municipality. In addition, former RCW 35.21.730 is permissive and

discretionary, providing that “any city, town, or county *may* by lawfully adopted ordinance or resolution” perform various functions, including creating a public corporation. (Emphasis added.) In contrast, the definition of domestic violence in RCW 9.94A.030(20) by reference to RCW 10.99.020 and RCW 26.50.010 is not permissive but mandatory: a reader of RCW 9.94A.030(20) must look to RCW 10.99.020 and RCW 26.50.010 to obtain a definition for domestic violence.

The State fails to engage in meaningful analysis of the legislature’s inclusion of “and” between RCW 10.99.020 and RCW 26.50.010 in RCW 9.94A.030(20). Instead, the State asserts that the legislature’s use of the word “and” “was clearly meant to be inclusive, not limiting as the court had decided” and that “when considering the statute as a whole, the legislature meant ‘and’ to mean ‘in addition to’ and not ‘as limited by.’” Br. of Appellant at 9. The State cites no authority for this proposition and, even if the legislature did mean “in addition to” as the State suggests, the domestic violence definition that cross references RCW 10.99.020 and RCW 26.50.010 would still require a conjunctive interpretation. Indeed, in such a circumstance, this court would merely interpret RCW 9.94A.030(20) so that domestic violence would be defined by RCW 10.99.020 “in addition to” being defined by RCW 26.50.010. The State’s own argument belies its assertion that the “and” appearing in RCW 9.94A.030(20) should be read

disjunctively. The State’s argument is merely an improper attempt to change “and” into “or.”

When it wrote RCW 9.94A.030(20), the legislature chose to separate definitional references to RCW 10.99.020 and RCW 26.50.010 with an “and.” The meaning of “and” is plain and unambiguous—it means the common, conjunctive word “and.” There is no language suggesting a contradictory interpretation in RCW 9.94A.030(20) as in other cases when “and” has been interpreted as a disjunctive. Accordingly, this court must interpret RCW 9.94A.030(20) so that both of the definitions in RCW 10.99.020 and RCW 26.50.010 are satisfied before the offender-score-increasing provisions of RCW 9.94A.525(21) may take effect.

3. The State’s reading of RCW 9.94A.030(20) would render the inclusion of “and 26.50.010” superfluous

Courts “interpret statutes to give effect to all the language used so that no portion is rendered meaningless or unnecessary.” Cornu-Labat v. Hosp. Dist. No. 2 of Grant County, 177 Wn.2d 221, 231, 298 P.3d 741 (2013). If this court were to accept the State’s reading of RCW 9.94A.030(20) and conclude that the domestic violence definition in RCW 10.99.020 alone sufficed to constitute a “felony domestic violence offense” under RCW 9.94A.525(21), the legislature’s inclusion of “and 26.50.010” in

RCW 9.94A.030(20) would become wholly superfluous. This court must avoid such an interpretation.

By referencing both RCW 10.99.020 and RCW 26.50.010 in RCW 9.94A.030(20), the legislature meant to require the definitions of both statutes. As discussed above, RCW 10.99.020(5) nonexclusively enumerates several crimes that meet the definition of domestic violence when committed by one family or household member against another. RCW 26.50.010(1) defines domestic violence as physical harm, injury, assault, or the fear thereof, sexual assault, or stalking committed by a family or household member against another. The distinct domestic violence definitions in RCW 26.50.010(1) and RCW 10.99.020(5) are not mutually exclusive. Rather, both definitions can and do easily work in conjunction.

For example, RCW 10.99.020(5)(r) defines domestic violence as a “[v]iolation of the provisions of a . . . no-contact order, or protection order” A violation of a no contact order might result in physical harm or the fear of physical harm, sexual assault, or stalking, or a violation of a no contact order might not result in such violence or fear. In order to give full effect to the language of RCW 9.94A.030(20), which includes references to both RCW 10.99.020 and RCW 26.50.010, RCW 9.94A.030(20) must be read to require (1) a crime that qualifies as domestic violence because it was committed by one household or family member against another and (2) that

the crime so qualifying resulted in physical harm or injury, the fear of physical harm or injury, sexual assault, or stalking. Thus, the appropriate interpretation of RCW 9.94A.030(20) requires two prongs to be met—a qualifying crime prong and a violence prong. Only by interpreting RCW 9.94A.030(20) in this manner can a court give full effect to the legislature’s inclusion of both RCW 10.99.020 and RCW 26.50.010 in the statute. A contrary reading would render one of the referenced provisions superfluous.

The State proposes a reading that would result in such surplusage, asserting, “If the crimes listed [in RCW 10.99.020(5)] were limited by the definition of domestic violence in RCW 26.50.010, not only would a felony violation of a protection order not be included [in] the trial court’s definition of ‘domestic violence,’ but also” various other crimes enumerated in RCW 10.99.020(5) would not be included.⁴ Br. of Appellant at 6-7. The State would construe the legislature’s inclusion of RCW 10.99.020 and RCW 26.50.010 in RCW 9.94A.030(20) as independently defining domestic violence. This interpretation is illogical and would render the language “and 26.50.010” in RCW 9.94A.030(20) meaningless and unnecessary.

⁴ The State also points out that under the trial court’s interpretation, crimes against animals would fall outside the definition of domestic violence, ostensibly because pets are not considered family or household members under RCW 26.50.010(2). Br. of Appellant at 7. While this might make for an interesting policy discussion, the State would do better to direct such concerns to the legislature. In any event, crimes against animals are not at issue in this case and the State’s discussion is thus wholly inapposite.

The State also argues, “If the legislature wanted to limit the offender score to crimes that met the definition of ‘domestic violence’ by the definition in RCW 26.50.010, then [it] would not have included the language of RCW 10.99.020, therefore making the inclusion of RCW 10.99.020 superfluous” Br. of Appellant at 9. This is not so. As the State itself points out, all parts of a statute must be “‘harmonized to give effect to the intent of the Legislature and to avoid inconsistent and absurd results.’ State v. Postema, 46 Wn. App. 512, 515[, 731 P.2d 13] (1987).” Br. of Appellant at 8. In order to harmonize all parts of RCW 9.94A.030(20), both RCW 10.99.020 and RCW 26.50.010 must be read together to give effect to legislative intent. The legislature defined domestic violence in RCW 9.94A.030(20) in two different ways—one by enumerating qualifying crimes and the other by requiring a showing of violence. To refuse, as the State would, to harmonize both definitions would render one or the other superfluous. This court should reject the State’s arguments.

This court must interpret RCW 9.94A.030(20) as requiring that both of the domestic violence definitions in RCW 10.99.020 and RCW 26.50.010 be satisfied before sentencing courts impose higher offender scores under RCW 9.94A.525(21). Only this interpretation gives full effect to all of the language the legislature has enacted.

4. The legislature knows how to define domestic violence and its definitional choice in RCW 9.94A.030(20) shows its intent that two distinct definitions must be met for RCW 9.94A.525(21) to apply

“[W]here the [l]egislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.” In re Detention of Swanson, 115 Wn.2d 21, 27, 804 P.2d 1 (1990) (first alteration in original) (quoting United Parcel Serv., Inc. v. Dep’t of Revenue, 102 Wn.2d 355, 362, 687 P.2d 186 (1984)). In addition, “[i]t is an axiom of statutory interpretation that where a term is defined [courts] will use that definition.” United States v. Hoffman, 154 Wn.2d 730, 741, 116 P.3d 999 (2005). Where the legislature has elsewhere defined domestic violence, it has done so only by reference to RCW 10.99.020 alone or to RCW 26.50.010 alone. The legislature’s requirement that, under RCW 9.94A.030(20), both definitions in RCW 10.99.020 and RCW 26.50.010 be met in order to apply RCW 9.94A.525(21) is unique, and thus evinces a different, more specific meaning of the term “domestic violence.”

The legislature knows how to define terms such as domestic violence and has defined domestic violence some 30 times in various statutes, including RCW 9.94A.030(20). Sixteen of these statutory definitions refer solely to RCW 10.99.020 without also referring to RCW 26.50.010.⁵

⁵ See RCW 3.50.330(6); RCW 3.66.068(5); RCW 9.94A.535(1)(j), (3)(h); RCW 9.94A.703(4)(a); RCW 9.94A.729(3)(c)(i)(D); RCW 9A.36.150(1)(a); RCW

Conversely, 13 other statutory domestic violence definitions cite RCW 26.50.010 alone.⁶ RCW 9.94A.030(20) is in fact unique among all 30 statutes because it is the only statute that defines domestic violence by referring to both RCW 10.99.020 and RCW 26.50.010. This cannot be a legislative oversight; rather, it demonstrates that the legislature specifically chose to incorporate both definitions into RCW 9.94A.030(20). For this reason as well, this court must interpret RCW 9.94A.030(20) as requiring the domestic violence definitions in RCW 10.99.020(5) and RCW 26.50.010(1) to be satisfied before an offense qualifies as a “felony domestic violence offense” under RCW 9.94A.525(21).

5. The legislature’s statement of intent and legislative history demonstrate the legislature’s intent to punish only violent offenders

When the legislature enacted the offender-score-enhancing provisions of RCW 9.94A.525(21) and the corresponding definition of domestic violence in RCW 9.94A.030(20), its clear intent was to punish only violent offenders. Indeed, the legislature unequivocally stated, “The legislature intends to give law enforcement and the courts better tools to

9A.44.128(3); RCW 10.22.010(4); RCW 10.77.092(1)(d); RCW 10.99.045(1)–(2); RCW 10.99.080(4); RCW 26.52.010(1); RCW 35.20.255(1); RCW 40.24.020(2); RCW 70.83C.010(6); RCW 70.123.020(2).

⁶ See RCW 4.24.130(5); RCW 9.41.300(6)(b), (7); RCW 10.14.055; RCW 26.09.003; RCW 26.09.191(1), (2)(a)–(b); RCW 26.10.160(2)(a)–(b); RCW 26.12.260(1); RCW 26.44.020(16); RCW 41.04.655(1); RCW 49.76.020(4); RCW 50.20.050(1)(b)(iv), (2)(b)(iv); RCW 59.18.570(2); RCW 59.18.575(1)(b).

identify *violent* perpetrators of domestic violence and hold them accountable.” LAWS OF 2010, ch. 274, § 101 (emphasis added). The legislature’s express purpose of identifying and holding violent perpetrators accountable indicates that the legislature did not intend to increase the offender scores (and thereby the sentences) of nonviolent offenders.

Moreover, it is telling that in the final bill report, the legislature opted to focus on violent offenders by defining domestic violence nearly identically to how it is defined in RCW 26.50.010(1):

Domestic violence can generally be defined as any action that causes physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members; sexual assault of one family or household member by another; or the stalking of one family or household member by another family or household member.

FINAL B. REP. on Engrossed Substitute H.B. 2777, 61st Leg., Reg. Sess. (Wash. 2010); compare id. with RCW 26.50.010(1). This additional evidence supports, if not compels, the conclusion that the legislature remained focused on violent offenders and intended to ensure that both definitions of domestic violence in RCW 10.99.010(5) and RCW 26.50.010(1) were met before increasing an offender’s offender score under RCW 9.94A.525(21).

The State, attempting to show that the legislature intended to punish nonviolent offenders as well, cites Representative Roger Goodman’s

testimony before the House Public Safety and Emergency Preparedness Committee. Br. of Appellant at 4. But, as the United States Supreme Court has admonished, “The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.” Chrysler Corp. v. Brown, 441 U.S. 281, 311, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979); see also Wilmot v. Kaiser Aluminum & Chem. Co., 118 Wn.2d 46, 64, 821 P.2d 18 (1991) (“[T]estimony before a legislative committee is given little weight.”). In any event, Representative Goodman’s remarks themselves demonstrate that he too was focused on violent offenders. As reported in the State’s briefing, Representative Goodman asserted that “[i]t’s inexcusable what [offenders] do to their partners when committing *acts of violence*” and that even nonviolent, subtle acts “can erupt in *violence and death*.” Br. of Appellant at 4 (emphasis added). Representative Goodman’s statements hardly show a legislative intent to ignore RCW 26.50.010(1)’s definition of domestic violence—a definition that requires infliction of harm or fear of harm—in RCW 9.94A.030(20).

In short, the legislature’s intent as reflected in its own statement of intent and in the final bill report for Engrossed Substitute H.B. 2777 demonstrates a sustained focus on violent offenders. Representative Goodman’s statements fail to contradict these expressions of intent.

Consistent with legislative intent, nonviolent offenders should not be subjected to increased offender scores under RCW 9.94A.525(21).

6. Even if RCW 9.94A.030(20) were ambiguous and susceptible to two different interpretations, the rule of lenity compels the interpretation that favors Hodgins

“If a statute is ambiguous, the rule of lenity requires [courts] to interpret the statute in favor of the defendant absent legislative intent to the contrary.” Jacobs, 154 Wn.2d at 600. When a choice must be made between two readings of a statute, “it is appropriate, before [courts] choose the harsher alternative, to require that [the legislature] should have spoken in language that is clear and definite.” State v. Tvedt, 153 Wn.2d 705, 711, 107 P.3d 728 (2005) (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22, 73 S. Ct. 227, 97 L. Ed. 260 (1952)).

Even assuming for the sake of argument that RCW 9.94A.030(20) is susceptible to more than one reasonable interpretation and is therefore ambiguous, the rule of lenity requires courts to apply the interpretation that favors Hodgins. Accordingly, this court must apply the rule of lenity to interpret RCW 9.94A.030(20) as requiring both definitions of domestic violence in RCW 10.99.020 and RCW 26.50.010 be satisfied before imposing an enhanced offender score under RCW 9.94A.525(21).

7. Neither of Hodgins's convictions satisfies both definitions in RCW 10.99.020(5) and RCW 26.50.020(1) and thus neither conviction qualifies as a "felony domestic violence offense" under RCW 9.94A.525(21)

Turning to the facts of this case, one of Hodgins's convictions does not qualify under either definition of domestic violence in RCW 9.94A.030(20). The other conviction meets only the definition of domestic violence provided in RCW 10.99.020(5)(r). Because neither conviction satisfies both definitions of domestic violence provided in RCW 10.99.020 and RCW 26.50.010 as RCW 9.94A.030(20) requires, neither conviction constitutes a "felony domestic violence offense" under RCW 9.94A.525(21), and thus neither conviction may be used to increase Hodgins's offender score.

- a. Hodgins's violation of a no contact order by phoning the protected party from jail did not qualify as domestic violence under either RCW 10.99.020(5)(r) or RCW 26.50.020(1)

Hodgins was charged with six counts of felony violation of a protection order for phoning his fiancée and mother of his child, the protected party, from Yakima City Jail. CP 50-52, 104. Per his agreement with the Yakima County Prosecutor, Hodgins pleaded guilty to one of these counts. CP 68-74. Hodgins's conviction, however, does not qualify as a "felony domestic violence offense" under RCW 9.94A.525(21) because domestic violence as defined in RCW 9.94A.030 was not pled or proven.

Indeed, phone calls from a city jail do not satisfy the domestic violence definitions in RCW 10.99.020(5)(r) or RCW 26.50.010(1).

RCW 10.99.020(5)(r) defines domestic violence as a

Violation of the provisions of a . . . no-contact order, or protection order restraining or enjoining the person 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.

This provision speaks of a no contact or protection order violation entirely in terms of entering a prohibited place or knowingly coming or remaining within a certain distance of a location. Hodgins was in Yakima City Jail using a telephone when he violated the protection order. Thus, he neither entered a residence, workplace, school, or day care nor knowingly came or remained within a specified distance of a location. Accordingly, his phone call to the protected party did not meet the definition of domestic violence under RCW 10.99.020(5)(r). Because it fails to satisfy one of the domestic violence definitions in RCW 9.94A.030, this conviction for violating a no contact order by telephone does not qualify as a “felony domestic violence offense” for the purposes of RCW 9.94A.525(21).

The phone call violation also failed to satisfy the definition of domestic violence in RCW 26.50.010(1). RCW 26.50.010(1)’s definition requires physical harm, bodily injury, assault, or the infliction of fear thereof,

sexual assault, or stalking. Hodgins, who was incarcerated at the time, could not have committed physical harm, injury, or sexual assault. The State did not make any allegation that the phone calls inflicted any fear of physical harm or injury or that it qualified as stalking.⁷ CP 50-52, 104-05; see also RP 60 (presentencing statement of protected party that she “do[es] not and [she has] never feared [Hodgins]”). Thus, the phone call violation does not qualify as “domestic violence” as that term is defined in RCW 26.50.010(1). For this reason as well, this conviction is not a “felony domestic violence offense” under RCW 9.94A.525(21).

- b. Hodgins’s violation of a no contact order by being in the protected party’s residence did not qualify as domestic violence under RCW 26.50.010(1)

Hodgins was also charged with felony violation of a protection order in a separate cause number. CP 1. This charge was based on Hodgins’s presence in the protected party’s residence. CP 102. Hodgins also pleaded guilty to this count.⁸ CP 17-23.

⁷ The crime of stalking also requires intent to frighten, intimidate, or harass, or knowledge that a person is afraid, intimidated, or harassed even if the stalker did not intend to cause fear, intimidate or harass. RCW 9A.46.110(1)(c). There is no indication whatsoever that Hodgins’s phone calls qualified as stalking. Moreover, prior to sentencing, the protected party stated, “We, not just [Hodgins], decided to have contact with each other and [Hodgins]’s suffering the consequences because of it” and “I wanted an encouraged the contact.” RP 60. That the protected party acknowledged that she was just as responsible for communicating with Hodgins makes stalking inapplicable in this case.

⁸ Although the charge was based upon Hodgins’s presence in the protected party’s residence, Hodgins’s statement on plea of guilty only admitted to placing a phone call from Yakima City Jail on February 20, 2013. CP 23. It thus appears that the phone call

Hodgins's presence in the protected party's residence does not meet the definition of domestic violence in RCW 26.50.010(1). Again, RCW 26.50.010(1) defines domestic violence to require "(a) Physical harm, injury assault, or the infliction of fear of imminent physical harm, bodily injury or assault . . .; (b) sexual assault . . .; or (c) stalking" The State made no allegation and there is no evidence whatsoever that Hodgins caused any harm or injury to the protected party, or sexually assaulted or stalked the protected party. See CP 101-02 (declaration of probable cause). The protected party stated at sentencing that she had never feared Hodgins. RP 60. In this case, there was no harm, injury, fear, assault, or stalking of any kind. Accordingly, Hodgins's violation of the protection order by being in the protected party's residence did not satisfy the definition of domestic violence in RCW 26.50.010(1). Because Hodgins's conviction did not meet one of the definitions in RCW 9.94A.030(20), it does not qualify as a "felony domestic violence offense" under RCW 9.94A.525(21).

was the sole factual basis for establishing guilt. If this court agrees, Hodgins wholly adopts the analysis in Part D.7.a supra for this section of the brief. However, for the sake of argument, this brief will analyze whether Hodgins's presence in the protected party's residence meets the definition of domestic violence under RCW 9.94A.030(20).

- c. Because neither of Hodgins’s convictions qualify as “felony domestic violence offenses” under RCW 9.94A.525(21), the trial court properly excluded Hodgins’s previous domestic violence misdemeanors from his offender score

Because neither of his convictions meets the definition of domestic violence in RCW 9.94A.030(20), a “felony domestic violence offense” was never pled and proven under RCW 9.94A.525(21). The trial court thus appropriately refused to increase Hodgins’s offender score for repetitive domestic violence offenses under RCW 9.94A.525(21)(c).⁹

RCW 9.94A.525(21) is written as a conditional sentence: “If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was ple[]d and proven, count priors as in subsection (7) through (20) of this section; however count points as follows” This statute plainly requires a felony domestic violence offense meeting the definition of domestic violence in RCW 9.94.030 to be pled and proven in order to augment an offender score under RCW 9.94A.525(21)(a)–(c). In other words, courts may not impose an increased offender score under the provisions of RCW 9.94A.525(21) *unless* a felony domestic violence offense has been pled and proven. Because Hodgins’s present convictions did not qualify as felony domestic violence offenses

⁹ RCW 9.94A.525(21)(c) permits misdemeanor violations of no contact and protection orders to be counted as one point each in offender scores because they qualify as “repetitive domestic violence offenses.” See RCW 9.94A.030(41)(a)(ii)–(iii).

under RCW 9.94A.525(21), the court properly declined to increase Hodgins's offender score based on prior repetitive domestic violence offenses under RCW 9.94A.525(21)(c).

The State argues that, under RCW 9.94A.525(21)(c), Hodgins's previous misdemeanor domestic violence convictions should be counted in his offender score. Br. of Appellant at 12. To support this proposition, the State asserts, "Importantly, the legislature makes no such requirement in RCW 9.94A.525(21)(c) that misdemeanor convictions must satisfy the definition of 'domestic violence' under RCW 9.94A.030(20). Misdemeanor convictions only need to satisfy the definition of 'repetitive domestic violence' under RCW 9.94A.030(41) in order to count as one point." Br. of Appellant at 12. The State's contention appears to be that because RCW 9.94A.525(21)(c) does not separately require repetitive domestic violence offenses to meet RCW 9.94A.030(20)'s definition of domestic violence, that repetitive domestic violence offenses may increase an offender score regardless of whether a felony domestic violence offenses has been pled or proven. This argument ignores the language and structure of RCW 9.94A.525(21).

RCW 9.94A.525(21) requires "a felony domestic violence offense where domestic violence is defined in RCW 9.94A.030" to be "ple[d and proven" before courts may add points to an offender score under RCW

9.94A.525(21)(c). That is, adding offender score points under RCW 9.94A.525(21)(c) is conditioned entirely on whether a felony domestic violence offense as defined in RCW 9.94A.030 has been pled and proven. The State's argument ignores that RCW 9.94A.525(21) is written as a conditional statute requiring a felony domestic violence offense to be proven before any offender score augmentation may occur. Moreover, RCW 9.94A.525(21)(c) provides, "Count one point for each adult prior conviction for a repetitive domestic violence offenses as defined in RCW 9.94A.030, *where domestic violence as defined in RCW 9.94A.030 was ple[]d and proven . . .*" (Emphasis added.) Contrary to the State's assertion, RCW 9.94A.525(21)(c) explicitly requires that repetitive domestic violence offenses also meet the definition of domestic violence under RCW 9.94A.030(20).

Because no felony domestic violence offense meeting the definition of domestic violence in RCW 9.94A.030 was pled or proven in this case, the court had no authority to impose any additional points for prior repetitive domestic violence offenses under RCW 9.94A.525(21)(c). Contrary to the State's argument, the trial court refused to increase Hodgins's offender score because no felony domestic violence offense as defined in RCW 9.94A.030 was pled or proven. The trial court's reasoning and analysis were correct and must be affirmed.

E. CONCLUSION

In order to employ the provisions of RCW 9.94A.525(21) to increase an offender score, both of the distinct definitions of domestic violence in RCW 10.99.020(5) and RCW 26.50.010(1) must be pled and proven. Because neither of Hodgins's convictions satisfies these definitions in RCW 9.94A.030(20), a "felony domestic violence offense" under RCW 9.94A.525(21) was never pled and proven. Therefore, Hodgins's misdemeanor convictions cannot be used to increase Hodgins's offender score. This court must accordingly affirm.

DATED this 6th day of April, 2014.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "K. March", written over a horizontal line.

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State v. Jeremiah Hodgins

No. 31780-3-III

Certificate of Service by email

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 16th day of April, 2014, I caused a true and correct copy of the **Brief of Respondent** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 16th day of April, 2014.

X 