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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 37005-4-III

STATE OF WASHINGTON, Respondent,

v.

KENNETH B. GOLLADAY, Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

The State's argument rests entirely on its assertion that *State v. Chapman*, 140 Wn.2d 436, 998 P.2d 282 (2000), governs the interpretation of a statute that was enacted after *Chapman* was decided despite recognition that it is no longer binding precedent. *Respondent's Brief*, at 4-6; *State v. Wofford*, 148 Wn. App. 870, 881, 201 P.3d 389 (2009), *review denied*, 170 Wn.2d 1010 (2010). Moreover, the State's interpretation fails to reconcile the relationship between the gross misdemeanor and felony violation provisions of RCW 26.50.110.

The portion of the statute defining criminal violations, RCW 26.50.110(1)(a), states:

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.**

(Emphasis added). Under the plain language of the statute, a violation of the enumerated provisions is a gross misdemeanor, unless the conditions of subsection (5) are met to elevate the violation to a felony. Under RCW 26.50.110(5):

A violation of a court order . . . is a class C felony if the offender has at least two previous convictions for violating the provisions of an order The previous convictions

may involve the same victim or other victims specifically protected by the orders the offender violated.

The State's interpretation asserts that, contrary to the plain language of subsection (1), a violation of *any* provision of a protective order is a felony crime if there are two prior criminal convictions. *Respondent's Brief*, at 6-7. But this interpretation is strained in light of the structure of the sentence. Had the legislature stated that a violation of the order is a felony under subsections (4) and (5) and a violation of any of the specified provisions is a misdemeanor, the State's interpretation would clearly be reasonable. But this is not what the legislature said. It said that a violation of the specified provisions is a gross misdemeanor, unless subsection (5) applies, in which case the violation is a felony. Under the State's interpretation, there was no reason for the legislature to address subsections (4) and (5) at all in subsection (1), as they define different types of violations entirely. But the statute must be interpreted in its entirety, so as to render no portion meaningless or superfluous. *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010).

Moreover, to the extent the statute is susceptible to both interpretations – that subsections (4) and (5) incorporate the specified restraint provisions, or are excepted from them – then the statute is ambiguous and the court should apply the rule of lenity. “Where two

possible constructions are permissible, the rule of lenity requires us to construe the statute strictly against the State in favor of the accused.” *State v. Gore*, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). Under the rule of lenity, the construction of RCW 26.50.110 requiring the State to prove a specific type of violation in order to establish a crime, whether misdemeanor or felony, should be adopted.

II. CONCLUSION

For the foregoing reasons, Golladay respectfully requests that the court REVERSE his conviction and DISMISS the case for insufficient evidence of a criminal violation.

RESPECTFULLY SUBMITTED this 5 day of May, 2020.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Reply Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed and sworn this 5 day of May, 2020 in Kennewick, Washington.



Andrea Burkhart

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