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Court of Appeals
Division III
State of Washington
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NO. 37005-4-III

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

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STATE OF WASHINGTON,

Respondent,

v.

KENNETH BRYAN GOLLADAY,

Appellant.

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APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY, STATE OF WASHINGTON
Cause no. 19-1-00059-20

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**BRIEF OF RESPONDENT**

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## TABLE OF CONTENTS

A. ISSUES PRESENTED……...…….…….……....1

B. STATEMENT OF THE CASE……..…….…….....…1-2

C. ARGUMENT…….….……....2-11

RCW 26.50.110 sets out separate elements for gross-misdemenor and felony violations of a court order, and the appellant's reliance on RCW 26.50.110(1)(a) is misplaced as to what elements the State had to prove in this case…….…….

The State's evidence was sufficient to prove a violation of the surveillance restriction provision of the court order…….

D. CONCLUSION…….....12

## TABLE OF AUTHORTIES

**CASES**

*In Re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....8

*Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d (1979)……...8

*Cf. State v. Emmanuel*, 42 Wash.2d 799, 259 P.2d 845 (1953)……...7

*State v. Delmarter*, 94 Wn.2d 634, 618 P.2d 99 (1980)……..……9

*State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992)……8

*State v. Chapman,* 140 Wn.2d 436, 998 P.2d 282 (2000)…….5,6

*Am. Continental Ins. Co. v. Steen,* 151 Wash.2d 512, 91 P.3d 864 (2004)……...…4

*State ex rel. Citizens Against Tolls v. Murphy,* 151 Wash. 2d 226, 88 P.3d 375 (2004)……....4

*State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005)……...7

*State v. Alvarado*, 164 Wash.2d 556, 192 P.3d 345 (2008)…….....4

*State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888 (2014)……8,9

*State v. Rich*, 184 Wn.2d 897, 365 P.3d 746 (2016)……....8

*State v. Johnson*, 188 Wn.2d 742, 399 P.3d 507 (2017)……..…8

*State v. Hogan*, 145 Wash.App. 210, 192 P. 3d 915 (2008)…….....5,6

*State v. Bunker*, 144 Wash.App. 407, 183 P.3d 1086 (2008)……..……4

*State v. Wofford*, 148 Wn.App. 870, 201 P.3d 389 (2009)…….4,5,6

*State v. Melland*, 452 P.3d 562 (Wash.App. Div 1, 2019)…….8,9

**CONSTITUTIONAL PROVISIONS**

U.S. CONST. amend. XIV…….10

WASH. CONST. art I § 3……..……10

**STATUTES**

RCW 26.50.110……...3

RCW 26.50.110(1)(a)……....2,3,7

RCW 26.50.110(5)……..3,5,6,7

**OTHER SOURCES**

BLACK'S LAW DICTIONARY 559 (8th ed., 2004)…….…9

Washington Pattern Jury Instruction – Criminal, 36.51……..8

Washington Pattern Jury Instruction – Criminal, 36.51.02…….9

## A. ISSUE PRESENTED

1. Whether or not RCW 26.50.110 limits the types of violations of a court order that constitute felony criminal conduct.

2. If so, whether the statutory limits on the types of violations that constitute a crime is an essential element the State must prove at trial.

3. Whether the State's evidence that the appellant surveilled the trailer of his ex-wife was sufficient to support a conviction for a criminal violation under RCW 26.50.110(5).

## B. STATEMENT OF THE CASE

The Appellant was charged by amended information with four counts of felony violation of a court order, alleged to have occurred on February 4, February 7, February 20, and on or between between March 30 and May 17th. (CP 52-54). The Appellant had two prior convictions for violation of a court order. (Exhibits 1-3;VRP 169, 320).

The State's theory of the case was that the violations alleged in Counts 1 through 3, the February violations, occurred when the Appellant made Facebook posts addressing, directly or by reference, his ex-wife, Rebecca Golladay, knowing that people were telling her what he was posting. As to Count 4, the State's theory of the case was that Appellant violated the provisions of the court order by keeping Rebecca Golladay's RV under surveillance.

This matter proceeded to jury trial on August 7, 2019 in Klickitat

County Superior Court. The jury acquitted the Appellant of Counts 1 through 3, and convicted him of Count 4. (CP 89-93.) The jury returned a special verdict that the crime was committed against a family or household member. (CP 93).

On August 19, 2019 the court sentenced the appellant to 17 months prison, followed by twelve months of community custody. (CP 97-106; VRP 320-21). He filed this timely appeal.

## C. ARGUMENT

### i. RCW 26.50.110 sets out separate elements for gross-misdemeanor and felony violations of a court order, and the appellant's reliance on RCW 26.50.110(1)(a) is misplaced as to what elements the State had to prove in this case.

The Appellant asserts that Revised Code of Washington 26.50.110(1)(a) criminalizes only specific types of violations of a court order: restraint provisions prohibiting acts of violence or stalking, contact, entering a residence, workplace, school, or daycare, coming within a specified distance of a location, interfering with pets or minor children or violating any foreign order that specifically indicates a violation will be a crime. (Appellant's Brief 8). The Appellant argues that the State was required as a matter of law to prove a specific type of violation, and notes that under RCW 26.50.110(1)(a) a surveillance restriction, as the State alleged the defendant violated in Count 4, is not one of enumerated criminal violations of a court order. (Appellant's Brief 8). The Appellant

argues that the State's failure to inform the jury in the to-convict instruction that the State had to prove a specific type of violation improperly permitted the jury to convict the defendant of conduct that was not criminal under the statute. (Appellant's Brief 8).

The Appellant's reliance on RCW 26.50.110(1)(a) is misplaced. RCW 26.50.110 as a whole relates to the violation of a court orders. The statute, however, contains separate provisions for gross-misdemeanor violations, subsection (1)(a) upon which the Appellant relies, and felony violations, subsection (5).

RCW 26.50.110(5) states:

> A violation of a court order issued under this chapter, chapter 7.92, 7.90, 9A.40, 9A.46, 9A.88, 9.94A, 10.99, 26.09, *26.10, 26.26A, 26.26B, 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, 9A.40, 9A.46, 9A.88, 9.94A, 10.99, 26.09, *26.10, 26.26A, 26.26B, 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.

The plain language of this subsection makes it clear that any violation of a court order issued under Chapter 26.50, as the order in this case was (Exhibit 1), is a Class C felony if the offender has at least two previous convictions for violating the provisions of such an order, or a valid protection order. This is different than the language of the gross-

misdemeanor subsection, which only criminalizes specific types of violations as enumerated in the Appellant's brief. As the order at issue in this case included a provision restraining the Appellant from keeping the protected party, Rebecca Golladay, under surveillance, physically or electronically, and as the Appellant had two prior convictions for gross-misdemeanor violations of the no-contact provision of the order, the State properly charged the Appellant for a felony court order violation on the theory that he violated the surveillance restraint provision of the order.

Regardless, the issue in this case is a matter of statutory interpretation, which the court reviews de novo. *State v. Wofford*, 148 Wn.App. 870, 877, 201 P.3d 389 (2009), citing *State v. Alvarado*, 164 Wash.2d 556, 561, 192 P.3d 345 (2008). The court's goal in construing a statute is to carry out the legislature's intent. *Id.*, citing *Am. Continental Ins. Co. v. Steen*, 151 Wash.2d 512, 518, 91 P.3d 864 (2004). If a statute is ambiguous, the court looks to principles of statutory construction and legislative history to discern the legislature's intent. *Id*., citing *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wash. 2d 226, 242-43, 88 P.3d 375 (2004). A statute is ambiguous if its language is susceptible to more than one reasonable interpretation. *Id*., citing *State v. Bunker*, 144 Wash.App. 407, 414, 183 P.3d 1086 (2008). If a statute is unambiguous, courts apply it according to its plain language. *State v. Wofford*, 148 Wn.App. 870 at 877, citing *State*

*v. Hogan*, 145 Wash.App. 210, 216, 192 P. 3d 915 (2008).

The State contends that the language of RCW 26.50.110(5), relating to felony violations of no contact orders is plain and unambiguous.

Washington courts addressed the issue of interpretation of the language of RCW 26.50.110(5) in *State v. Chapman*, 140 Wn.2d 436, 998 P.2d 282 (Wash. 2000), superseded on other grounds by *Hogan* and *Wofford* following the legislature's 2000 amendment to RCW 26.50.110(1). Although *Chapman* is no longer binding precedent, the Supreme Court's analysis of RCW 26.50.110(5), which contained the same language regarding violation of a court order issued under Chapter 26.50 with at least two prior convictions, is helpful. The court in *Chapman* found the language of RCW 26.50.110(5) to be plain and unambiguous. *Chapman*, 140 Wn.2d 436 at 448.

In *Chapman*, the court found that as RCW 26.50.110(1) and (5) related to the same subject, relief and penalties for viola of protection orders, they are to be read together. *Id*. In doing so, the *Chapman* court held that RCW 26.50.110(1), which has since been amended to provide clarification of the legislature's intent to strengthen domestic violence laws, and RCW 26.50.110(5) are not inconsistent. *Id*. "Reading the two provisions together, one logically concludes violation of a no-contact or protection order subjects the violator to criminal prosecution only if certain stringent

conditions are met. 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 reference to whether that violation, standing alone, would subject the offender to criminal prosecution." *State v. Chapman*, 140 Wn.2d 436, 448-49, 998 P.2d 282 (Wash. 2000) (superseded on other grounds by *State v. Hogan*, 145 Wash.App. 210, 213, 192 P. 3d 915 (2008), and *State v. Wofford*, 148 Wn.App. 870, 880, 201 P.3d 389 (2009)), emphasis in original.

Lastly, the Washington Pattern Jury Instructions – Criminal also reflect the legislature's intent that any violation of a court order is criminal for felony purposes if that violation is the offender's third. Like the statute, the pattern jury instructions contain different to-convict elements for gross-misdemeanor and felony violations.

Specifically, the to-convict instruction for a gross-misdemeanor violation of a court order, WPIC 36.51, requires, in relevant part, that the State prove beyond a reasonable doubt that a defendant knew of a court order applicable to the defendant, and that the defendant knowingly violated a specific provision of the order reflective of the criminal

violations enumerated in RCW 26.50.110(1)(a), and as enumerated in the Appellant's brief.

The to-convict instruction for a felony violation of a court order, WPIC 36.51.02, requires, in relevant part, that the State prove beyond a reasonable doubt that the defendant knew of the existence of a court order, that the defendant knowingly violated a provision of that order, and that the defendant has twice been previously convicted for violating the provisions of a court order. The to-convict instruction in the underlying matter was patterned directly from WPIC 36.51.02.

The elements of a crime are those facts "that the prosecution must prove to sustain a conviction." *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (Wash. 2005), quoting BLACK'S LAW DICTIONARY 559 (8th ed. 2004). Courts first look to the statute to determine the elements of a crime. *Id*., citing *Cf. State v. Emmanuel*, 42 Wash.2d 799, 820, 259 P.2d 845 (1953). The statute says in relevant part that "whenever an order is granted under this chapter….and the respondent or person to be restrained knows of the order….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 an order issued under this chapter." RCW 26.50.110(1), (5). Nothing in the statute requires the State to prove a specific provision was violated as an element of felony violation of a court

order.

The defendant's conviction should be affirmed.

ii. <u>The State's evidence was sufficient to prove a violation of the surveillance restriction provision of the court order.</u>

The State has the burden to prove every element of the crime charged beyond a reasonable doubt. U.S. CONST. amend. XIV; WASH. CONST. art. I § 3; *State v. Melland*, 452 P.3d 562, 570 (Wash.App. Div 1, 2019) citing *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Sufficiency of the evidence is a question of constitutional law that the court reviews de novo. *Melland*, 452 P.3d 562 at 570, citing *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

Evidence is sufficient to support a conviction if any rational trier of fsct could hsve found the essential elements of the crime charged beyond a reasonable doubt. *Id.*, citing *State v. Johnson*, 188 Wn.2d 742, 750-51, 399 P.3d 507 (2017). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *Id.*, citing *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014). "All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.*, quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d (1979). In determining sufficiency, circumstantial evidence is no less reliable than direct evidence, and the court defers to the

triers of fact on issues of witness credibility. *State v. Melland*, 452 P.3d 562, 570, citing *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888.

In the underlying case, the jury had the testimony of multiple witnesses to rely upon, in addition to a number of exhibits, including the court order at issue, which contained a provision prohibiting the Appellant from placing Rebecca Golladay under surveillance, and three Facebook posts made by the defendant referencing Rebecca Golladay's RV, and a guest who visited it. (Exhibits 1, 5, 6, 9).

Bingen-White Salmon Police Officer Ashley Hackett testified that she made contact with the Appellant when he asked for an animal welfare check; the animals he and his wife had were at the RV but Rebecca Golladay was not present, and he was worried they weren't being taken care of. (VRP 86). Officer Hackett performed the welfare check, and noted that Rebecca Golladay's RV was visible from the road. (VRP 87, 105). Rebecca Golladay, when Officer Hackett got hold of her, informed Officer Hackett that she had not let anyone know she was going out of town. (VRP 88). Officer Hackett was aware that the court order, which she had served on the defendant, contained a provision prohibiting him from keeping Rebecca Golladay under electronic or physical surveillance. (VRP 103).

On May 16, 2019, the Appellant contacted Officer Hackett and told her that a friend had told him that a man pulled in to park outside of the RV, got out of his vehicle and went into the RV, and that the lights went off. He asked Officer Hackett if she would drive by the RV and verify the information, but she refused as it would be a way for the Appellant to verify Rebecca Golladay's comings and goings. (VRP 88). When asked how he knew about the man visiting the RV on May 16th, the Appellant told Officer Hackett that "he can't help it if people just tell him things."

Joyce Schultz testified that the RV was visible from the intersection of Lincoln and El Camino, and was the first thing one sees from the intersection, and the easiest to notice. (VRP 114-115). She also testified to having observed the Appellant walking along Lincoln. (VRP 112).

Ronald Schultz testified that he suspected the Appellant was keeping the residence under surveillance based upon a Facebook post made by the defendant. (VRP 138). Ronald explained that he moved his travel trailer from storage and parked it in front of the RV due to the wet ground, which blocked the view of the RV from the intersection. (VRP 145). After the travel trailer was moved from storage, the Appellant made a Facebook post regarding the RV being gone. (VRP 145).

Rebecca Golladay testified that the court order prohibited the Appellant from surveilling her. (VRP 149). She testified as to three

Facebook posts made on the Appellant's account, brought to her notice by friends. Exhibit 5 was a Facebook post in which the Appellant referenced a letter he believed was sent from the city telling Rebecca to vacate the RV. (VRP 157-158). Exhibit 6 was a March 30, 2019 Facebook post made after the previous one in which the Appellant wrote, in part, "Since Rebecca moved the trailer, which is ours, not her's, I'm going to file theft charge…." (VRP 158). Rebecca recalled the travel trailer being out of storage at the time the Facebook post was made. Exhibit 9 was a Facebook post made by the Appellant in which he spoke about a male friend who had visited Rebecca at the RV. The post contained a description of the man's car, and included an Oregon license plate number. (VRP 165-169). Rebecca testified that the Appellant would have had to be close to the RV to get a license plate number on a vehicle that was parked in her driveway. (VRP 166). Lastly, Rebecca testified to the Appellant's two prior convictions for violating a no contact order, a fact which was supported by the admission of the judgment and sentences in those matters. (VRP 169; Exhibits 2-3).

It is the State's position that a rational trier of fact, based on the testimony and documentary evidence presented at trial, could have found that the elements of the crime had been proved beyond a reasonable doubt.

## D. CONCLUSION

A violation of a specific provision of the court order is not an element of a felony violation of a court order the State must prove. Sufficient evidence existed to support the conviction that the Appellant violated the court order by surveilling Rebecca Golladay's RV. The Appellant's conviction should be affirmed.

Respectfully submitted this 6th day of April, 2020.

KLICKITAT COUNTY
PROSECUTING ATTORNEY

/s/ Samantha J. Gouveia
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WSBA NO. 51398
Deputy Prosecuting Attorney

**COURT OF APPEALS OF WASHINGTON**
**DIVISION III**

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|---|---|
| **STATE OF WASHINGTON**<br>**Respondent,**<br>**vs.**<br><br>**KENNETH BRYAN GOLLADAY,**<br>**Appellant** | **NO. 37005-4-III**<br><br>**Superior Court No. 19-1-00059-20**<br><br>**CERTIFICATE OF SERVICE** |

I, Samantha J. Gouveia, declare that on April 6, 2020, I emailed per agreement a copy of the Brief of Respondent to:

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

DATED this 6th day of April, 2020.

KLICKITAT COUNTY
PROSECUTING ATTORNEY

/s/ Samantha J. Gouveia
Samantha J. Gouveia,
WSBA No. 51398
Deputy Prosecuting Attorney

# KLICKITAT COUNTY PROSECUTING ATTORNEY

## April 06, 2020 - 4:00 PM

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