NO. 44594-8-II

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

STATE OF WASHINGTON,

Appellant,

v.

ANTHONY LEO KOZEY,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court Nos. 12-1-00414-3 & 12-1-00415-1

BRIEF OF APPELLANT

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SERVICE		
	Lise Ellner Po Box 2711 Vashon, Wa 98070-2711 Email: liseellnerlaw@comcast.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the right, electronically.* . I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED July 8, 2013, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

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2. The trial court erred when it found that the legislative intent of RCW 9.94A.525(21) was to only punish more stringently those domestic violence offenders who committed crimes that were both violent and repetitive.

II. STATEMENT OF THE ISSUES

1. Did the Legislature intend for the "and" in RCW 9.94A.030(20) to be read in the disjunctive so that the enhanced sentencing provisions in RCW 9.94A.525(21) applied to the definition of domestic violence both RCW 10.99.020(3) and RCW 26.50.110?

2. Was the legislative intent of RCW 9.94A.525(21)to punish more stringently domestic violence offenders who repeatedly commit crimes against family or household members, even if all of those crimes did not include an act of physical violence?

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Anthony Leo Kozey was charged by information filed in Kitsap County Superior Court with two counts of felony violation of a court

order. 1CP 1-7. Kozey elected to proceed with a stipulated facts trial. 1CP 170-188. Prior to the trial, Kozey filed a brief arguing that RCW 9.94A.030(20) must be interpreted in the conjunctive rather than the disjunctive. 1CP 8-98. A ruling in Kozey's favor would mean that the State could not apply the enhanced domestic violence scoring provisions of RCW 9.94A.535(21). 1CP 127-142. The Court granted Kozey's motion. 1CP 155-169.

After the stipulated facts trial, Kozey failed to appear for sentencing and a bench warrant issued for his arrest. 1CP 259. On February 1, 2013, the Court sentenced Kozey to a residential DOSA. 1CP 197-207. Kozey's residential DOSA was revoked on March 1, 2013, and he was sentenced to 15 months in each case. 1CP 274-281.

B. FACTS

Chalene Johnston called her boyfriend, Anthony L. Kozey, to request a ride. Mr. Kozey and Ms. Johnston have been in a dating relationship for more than six years and have two children together. Mr. Kozey responded to Ms. Johnston's request and picked her up. 1CP 158. While they were parked in front of the Pawn X-Change, Kitsap County Sheriff's Deputy Jeff Schaefer arrived to follow up on an unrelated case. Deputy Schaefer conducted a Washington DOL check on the van which showed it was registered to a Kevin Kozey of Bremerton. Deputy

Schaefer observed a woman later identified as Johnson seated in the front passenger seat and a man later identified as Kozey at the trunk of the van. 1CP 159.

Deputy Schaefer determined that Kozey had an outstanding warrant for his arrest out of Bremerton Municipal court for violation of a no-contact order, a no-contact order protecting Chalene Johnston from contact by Anthony Kozey. 1CP 159.

Schaefer arrested Kozey for the outstanding warrant and for violating the court order by being with Johnston. Mr. Kozey begged the deputy not to charge him with the new order violation because he stated it would be his third charge of that crime and he was told it would be a felony. 1CP 160.

Without any prompting by the Deputy, Mr. Kozey went on to say that he had picked up Ms. Johnston and their two children and gone to the Pawn X-Change in order to sell some things so that they might obtain money for food. Mr. Kozey stated that they were going to go eat lunch and then go to Walmart for groceries after getting money at Pawn X-Change. 1CP 160.

While that charge was pending, Chalene Johnston invited Anthony Kozey over to her grandmother's home so he could spend the night with her and their two children. Mr. Kozey accepted Ms. Johnston's invitation. The family ate dinner together, watched a movie, and then went to bed.

1CP 160.

Kozey had previously been convicted of two counts of violation of a 10.99 court order. 1CP 161.

IV. ARGUMENT

A. THE LEGISLATURE INTENDED FOR THE "AND" IN RCW 9.94A.030(20) TO BE READ IN THE DISJUNCTIVE SO THAT THE ENHANCED SENTENCING PROVISIONS IN RCW 9.94A.525(21) APPLIED TO THE DEFINITION OF DOMESTIC VIOLENCE BOTH RCW 10.99.020(3) AND RCW 26.50.110

The legislature intended for the "and" in rcw 9.94a.030(20) to be read in the disjunctive so that the enhanced sentencing provisions in RCW 9.94a.525(21) applied to the definition of domestic violence in both rcw 10.99.020(3) and rcw 26.50.110.

RCW 9.94A.030(20) states that domestic violence has the same meaning as it is defined in RCW 10.99.020 and RCW 26.50.010. Those statutes provide two different definitions of "domestic violence"—RCW 10.99.020 focuses on the relationship between individuals while RCW 26.50.010 is a narrower definition that focuses on physical violence in a relationship. The trial court erred when it found that the "and" should be read in the conjunctive because this interpretation is contrary to legislative intent. This is a question of law that is reviewed *de novo*. *State v. Armenta*, 134 Wash.2d 1, 9, 948 P.2d 1280 (1997).

1. A plain reading of the language of RCW 9.94A.030(20) indicates that either of the definitions of domestic violence in RCW 10.99.020 and RCW 26.50.110 are sufficient

A plain reading of RCW 9.94A.030(20), as well as case law, supports that State's interpretation—that the State can meet either the definition in RCW 10.99.020 or the definition of RCW 26.50.110 for the Court to find that the crime constituted domestic violence.

The first and greatest principle of statutory construction is that the Legislature means what it says. In other words, the Court looks to the plain language of the statute before going to other statutory construction principles. "If the statute is clear on its face, its meaning will be procured from the plain language of the statute." *State v. Beaver*, 148 Wn.2d 338, 344-45, 60 P.3d 586 (2002). "Statutory construction begins by reading the text of the statute or statutes involved. If the language is unambiguous, a reviewing court is to rely solely on the statutory language ... Legislative history, principles of statutory construction, and relevant case law may provide guidance in construing the meaning of an ambiguous statute." *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). A court interpreting a statute is "not obliged to discern any ambiguity by imagining a variety of alternative interpretations." *In re Washington*, 125 Wn. App. 506, 509, 106 P.3d 763 (2004).

Under the rules of construction, "statutes should not be interpreted

so as to render any portion meaningless, superfluous or questionable." *Wright v. Engum*, 124 Wn.2d 343, 352, 878 P.2d 1198 (1994); *Addleman v. Bd. of Prison Terms & Paroles*, 107 Wn.2d 503, 510, 730 P.2d 1327 (1986). The theory of statutory construction called *Noscitur a scoiis* provides that a word should not be read in isolation but in context with those it is associated with. Under rules of statutory construction, provisions of a statute should be read together with other provisions in order to determine the legislative intent underlying the statutory scheme. This is also known as *in pari material*. *State v. Chapman*, 140 Wn.2d 436, 448, 998 P.2d 282 (2000). "If alternative interpretations are possible, the one that best advances the overall legislative purpose should be adopted..." *Roy v. City of Everett*, 118 Wn.2d 352, 357, 823 P.2d 1084 (1992).

Applying the above principles to the present case requires the Court to examine the interplay between four different statutes.

RCW 9.94A.525(21) requires certain prior "domestic violence" misdemeanor convictions to count in the offender score if the present offense is also one of domestic violence:

> If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:

* * *

> (c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.

The question then, is what is a "domestic violence offense"? Under RCW 9.94A.030(20), "'Domestic violence' has the same meaning as defined in RCW 10.99.020 and 26.50.010."

RCW 10.99.020(5) defines "domestic violence" essentially as any crime committed against a family or house hold member:

> "Domestic violence" includes but is not limited to any of the following crimes when committed by one family or household member against another:
>
> * * *
>
> (r) 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 specified distance of a location (RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.44.063, 26.44.150, 26.50.060, 26.50.070, 26.50.130, 26.52.070, or 74.34.145);

RCW 26.50.010(a), on the other hand, 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." Both RCW 10.99.020(3) and RCW 26.50.010(b) include in the definition of a "family or household member" "persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage."

A plain reading of the statutory language is that RCW 9.94A.030 means simply that "domestic violence," for pleading and proving purposes, is defined in the same way that it is in RCW 10.99.020. Furthermore, the definition in RCW 26.50.110 is also sufficient under the statute.

The trial court found that statutory clues found in RCW 10.99 and 26.50 are indicative of the Legislature's intent to treat these provisions differently and therefore crimes committed under these statutes are treated in a different manner under the sentencing scheme of RCW 9.94A.525(21). The court found that while RCW 10.99 references RCW 26.50, the reverse was not true—RCW 26.50 does not reference or incorporate RCW 10.99. RP 8.[1] The court further found that "In RCW 10.99, the legislative intent discusses that it is important to recognize domestic violence as a serious crime against society and to assure victims'

[1] All references are to the report of proceedings for July 19, 2012.

maximum protection. Crimes involving cohabitation should be treated differently." RP 9-10. The trial court held that it was apparent "that the legislative intent means to punish violent or repeat offenders more stringently." RP 10.

The trial court's ruling fails to recognize the plain meaning of RCW 9.94A.030(20). Nothing in the language of the statute requires that the definitions of domestic violence in both RCW 10.99.020 and RCW 26.50.010 must be met for the enhanced statutory sentencing scheme to apply. The definition for domestic violence that is contained in RCW Ch. 26.50 is not applicable to RCW Ch. 10.99 because RCW Ch. 10.99 already contains a definition for domestic violence. This definition is decidedly different than the definition in RCW 26. RCW 26.50.010 makes clear that the definition of domestic violence applies only to Chapter 26.

2. The Legislature did not intend for a crime to meet two different definitions of domestic violence for the enhanced sentencing scheme of RCW 9.94A.525(21) to apply.

RCW 9.94A.525(21) was enacted so that repeat domestic violence offenders could be sentenced under an enhanced sentencing scheme. The Legislature intended the statute to apply to those domestic violence offenders who came before the sentencing court with an extensive history of crimes involving domestic violence.

The trial court found that the word "and" as used in RCW 9.94A.030(20)'s requires that the State meet both definitions of domestic violence in 10.99.020 and 26.50.010. RP 14. The flaw in this finding is that Washington courts have routinely recognized that the word "and" is not limited to this narrow definition. Applying this finding would lead to a litany of absurdities and is inconsistent with recent cases from the Washington Supreme Court and the Court of Appeals.

For instance, in *Mount Spokane Skiing Corp. v. Spokane County*, the Court addressed a statute that said a government entity was authorized to:

> (4) 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.

86 Wn. App. 165, 172-73, 936 P.2d 1148 (1997). The plaintiff in that case argued that a public authority was improperly created because if failed to meet all the requirements of RCW 35.21.730(4). Specifically, the plaintiff argued that because the word "and" connects the three listed functions of a public corporation, all three functions must be undertaken by the municipal corporation. *Id.*, 86 Wn. App. at 172-73.

The Court of Appeals, however, rejected this argument, holding that "The disjunctive "or" and conjunctive "and" may be interpreted as

substitutes." *Id.*, 86 Wn. App. at 174 (*citing State v. Tiffany*, 44 Wash. 602, 604, 87 P. 932 (1906)). The court went on to note that:

> It is clear from a plain reading of the statute that the powers listed in paragraph (4) are the possible functions a public corporation may 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. Nor does such an interpretation comport with common sense.* Based upon the plain language and intent of the statute, a public corporation may undertake one or more of the functions listed in paragraph (4).

Id., 86 Wn. App. at 174 (emphasis added).

The Washington Supreme Court reached the same result in a similar case, *CLEAN v. City of Spokane*, 133 Wn.2d 455, 947 P.2d 1169 (1997). In *CLEAN*, the Court looked at RCW 35.21.730, which allows cities to create public corporations "to improve the administration of authorized federal grants or programs, to improve governmental efficiency and services, or to improve the general living conditions in the urban areas." *Id.* The appellants argued that a public development authority violated RCW 35.21.730(4), which sets forth three potential functions for a PDA: to administer federal grants, receive private assistance, *and* perform any lawful public purpose. *Id*, 133 Wn.2d at 473. Appellants argued that the Spokane PDA was violating this portion of the law because, worded conjunctively, the statute required a PDA to perform *all three of these functions.* The Supreme Court, however, held that:

> This argument is meritless. The plain language of the

> statute states that a city "may" create a public corporation for these varied purposes. Although it is true the word "and" appears in the statute, all three statutory elements need not be present for a PDA to be acting lawfully.

Id. at 473-74, 947 P.2d at 1178.

In addition, in *Bullseye Distributing LLC v. State Gambling Com'n*, 127 Wn. App. 231, 110 P.3d 1162 (2005), this Court examined RCW 9.46.0241, which defined a "gambling device" as:

> Any device or mechanism the operation of which a right to money, credits, deposits, or other things of value may be created, in return for a consideration, as the result of the operation of an element of chance, including, but not limited to slot machines, video pull-tabs, video poker, and other electronic games of chance;
>
> (1) Any device or mechanism which, when operated for a consideration, does not return the same value or thing of value for the same consideration upon each operation thereof;
>
> (2) Any device, mechanism, furniture, fixture, construction or installation designed primarily for use in connection with professional gambling; *and*
>
> (3) Any subassembly or essentially part designed or intended for use in connection with any such device, mechanism, furniture, fixture, construction or installation.

The defendant argued that RCW 9.46.0241 contains four elements that must all be met for a machine to qualify as a gambling device. The Court, however, disagreed and held that "[a]lthough the statute is not written in the disjunctive, we hold that it contains four separate definitions of 'gambling device.'" *Id.*, 127 Wn. App. at 238-39. In addition, the Court found "RCW 9.46.0241 unambiguous in defining four separate devices,

any one of which is a gambling device." *Id.*, 127 Wn. App. at 240.

In the present case, the trial court found that in order for the statute to be read in the disjunctive, first, "[c]ourts require a strained or absurd result before they can find that the disjunctive should take place of the conjunctive...because of the presumption of the plain language of the statute." RP 11-12. The trial court held that "[t]he courts recognize a certain interchangeability but with a huge context-based caveat attached. 'And' and 'or' are interchangeable where the alternative simply is illogical." RP 12-13.

But the caveat imposed by the trial court is not consistent with the law. *Bullseye*, for example, has no discussion of these "exceptional circumstances"—rather, the Court clearly relied on the plain language of the statute as the basis of its ruling. Because the language was clear and unambiguous, the conjunctive statute there could be read in the disjunctive. These are not exceptional circumstances, but simply a court applying the principles of statutory construction to reach its conclusion. As in CLEAN and *Mount Spokane*, the Legislature's use of the word "and" simply means that in order to qualify, the crime must meet either the definition in 10.99.020 or the definition in 26.50.010. Either is sufficient.

In each of these three cases, the appellate courts addressed statutes that followed the same basic formula found in the present case. The

formula, in essence, could be summarized as follows:

A can be defined as B, C, and D.

In each case, one party claimed that this meant in order for something to qualify as "A" it had to meet the definitions of "B", "C", *and* "D." The courts, however, disagreed and said that they statute simply meant that something that qualified as "B" meets the definition of "A" *and* that something that qualified as "C" meets the definition of "A" *and* that something that qualified as "C" meets the definition of "A."

This analysis supports the State's interpretation. In short, the plain language of RCW 9.94A.030(20) simply means that the phrase "domestic violence" has the same meaning that it has in RCW 10.99.020. In addition, it can also mean the same thing as in RCW 26.50.010. Both definitions are independently sufficient, and a crime that qualifies under either is to be considered a crime of domestic violence under RCW 9.94A.030(20). As in the *Bullseye* case, RCW 9.94A.030(20) is unambiguous in defining two separate definitions of domestic violence, either of which is sufficient to qualify as domestic violence under RCW 9.94A.030(20) and therefore be subject to the enhanced sentencing provisions of RCW 9.94A.525(21). The trial court's ruling is erroneous and should be reversed.

B. THE LEGISLATIVE INTENT OF RCW 9.94A.525(21) WAS TO PUNISH MORE STRINGENTLY DOMESTIC VIOLENCE OFFENDERS WHO REPEATEDLY COMMIT CRIMES AGAINST FAMILY OR HOUSEHOLD MEMBERS, EVEN IF ALL OF THOSE CRIMES DO NOT INCLUDE AN ACT OF PHYSICAL VIOLENCE

In addition to its erroneous reading of the plain language of RCW 9.94A.030(20), the trial court's ruling also violates the policy behind domestic violence laws in Washington State.

Today, domestic violence is no longer understood as encompassing merely physical acts of violence. Domestic violence law as we know it today stems from an interesting background. The common law allowed husbands to physically discipline their wives without worry of repercussions from the courts. Sully, Patricia, *Taking it Seriously: Repairing Domestic Violence Sentencing in Washington State*, 34 Seattle U. L. Rev., 963-992, 968-69 (2011). While this idea was essentially abandoned in the late 1800s, it was not until the 1960s that states enacted legislation that focused on protecting abused wives. *Id.* at 970. The concept of "domestic violence" was recognized in Washington State law in 1979 with the enactment of the Domestic Violence Act, a law that essentially "required law enforcement, prosecutors, and the courts to respond to domestic violence." *Id.* at 972. The main purpose of the act was to ensure that a crime between family members was treated the same

as similar crimes between strangers. *Id.*

In 1981, Washington's Sentencing Reform Act (SRA) changed the way felony crimes were sentenced. No longer did judges have the discretion to implement the sentence they saw fit; the SRA required them to follow a standardized sentencing grid that mandated time based on the seriousness level of the crime and the defendant's criminal history. *Id.* at 973; RCW 9.94A (2011). Courts later lost their discretion to enhance sentences based on aggravating circumstances after the U.S. Supreme Court decided *Blakely v. Washington.* 542 U.S. 296 (2004). As a result, Washington State now requires a jury for all contested facts for an aggravated sentence above the standard sentencing range. *Taking it Seriously* at 974. Until RCW 9.94A.525(21) was enacted, there were no enhanced penalties for domestic violence crimes.

RCW 9.94A.525(21) was specifically designed to address recidivist domestic violence offenders. The law was based on a 2009 proposal by the Attorney General, which was intended to address what he perceived to be a weakness in sentencing for repeat domestic violence offenders.[2] As the proposal noted, "*[r]epeat* domestic violence offenders often being their criminal behavior as misdemeanor domestic violence offenders, yet current law does not allow for the scoring of these offenses

[2]http://atg.wa.gov/uploadedFiles/Home/Office_Initiatives/Legislative_Agenda/2009/DV_Sanctions%20(2-sided).pdf

when sentencing the worse offenders---those convicted of felony domestic violence." *Id.* (emphasis added). Further, it observed that "[w]eakness in current law results in mild sentencing for repeat offenders." *Id.* The proposal included changes to, among other things, "amend 9.94A.030 (Sentencing Reform Act definitions) to add "domestic violence", defined as a criminal offense committed between a defendant and a victim having a relationship as defined in RCW 10.99.020 *or* 26.50.110." *Id.* (emphasis added)

As domestic violence law has evolved, so has its definition. According to the Washington State Coalition Against Domestic Violence, domestic violence is "*any behavior* the purpose of which is to gain power and control over a spouse, partner, girl/boyfriend or intimate family member." Several of the most common ways abusers control victims include, in addition to physical and sexual assault, isolation, emotional abuse, and dominating finances and family resources.[3] Today, the dictionary definition of violence is no longer applicable to the term domestic violence, which is now understood to encompass more acts than simply physical violence. *Id.*

The trial court recognized that "[c]rimes involving cohabitants, therefore, should be treated differently." RP 9-10. The trial court

[3] http://www.wscadv.org/aboutDV.cfm

nevertheless found that "RCW 26.50.110 provides different classes of offenses, felonies versus misdemeanors, for different violations of protection orders. It seems, therefore, apparent that the legislature means to punish violent or repeat offenders more stringently." RP 10

The State's interpretation of RCW 9.94A.030(20) recognizes today's definition of "domestic violence." RCW 10.99.020 is applicable to the family/relationship aspect of the definition (which is often where power and control may come into play) while RCW 26.50.010 recognizes the physical aspect of the definition.

The findings of the trial court dramatically narrow the number of offenders that RCW 9.94A.525(21) was intended to apply to, essentially cutting out those repeat offenders where power and control is the primary motivation behind the crime. Rather than focusing on the entire cycle of domestic violence as RCW 9.94A.525(21) was intended to do, the trial court's ruling only allows sentencing to focus on each single act, no matter how many times that act may occur. That was clearly not the intent of the legislature when it drafted RCW 9.94A.525(21). The trial court's ruling should be reversed.

V. CONCLUSION

For the foregoing reasons, the State urges this Court to reverse the trial court's order and remand the cause for resentencing under the enhanced provisions of RCW 9.94A.525(21).

DATED July 8, 2013.

Respectfully submitted,
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