

72329-4

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NO. 72329-4-I

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

STATE OF WASHINGTON,

Appellant,

v.

DAVID ROSS,

Respondent,

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

The Honorable Marybeth Dingledy, Judge

BRIEF OF RESPONDENT

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 MAR 10 PM 3:54

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A. INTRODUCTION

To qualify for an increased offender score under 2010 amendments to the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, a misdemeanor conviction must qualify as a “repetitive domestic violence offense,” which requires that both definitions of domestic violence in RCW 10.99.020 and RCW 26.50.010 be pled and proven. Four of David Rollin Ross’s prior misdemeanor no contact order domestic violence convictions failed to qualify as repetitive domestic violence offenses. His offender score accordingly may not be increased under the 2010 amendments. The trial court’s ruling in this regard was correct, requiring that this court 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?

7. Should this court reject the analysis provided in Division Two's recent decision in State v. Kozey, 183 Wn. App. 692, 334 P.3d 1170 (2014), review denied, 342 P.3d 327 (2015), because it relies on faulty reasoning and is therefore incorrect?

8. Where four misdemeanor offenses fail to meet the definitions of domestic violence in both RCW 10.99.020(5) and RCW 26.50.010(1), do these offenses fail to qualify as repetitive domestic violence offenses under RCW 9.94A.030(41) such that they may not be counted in an offender score pursuant to RCW 9.94A.525(21)(c)?

C. COUNTERSTATEMENT OF THE CASE

The State charged Ross with one count of felony violation of a domestic violence no contact order. CP 190. Ross pleaded guilty and admitted he had at least two prior misdemeanor convictions for violating a no contact order. CP 168-76.

The parties disputed Ross's offender score at sentencing.

Ross contended his offender score was 3. This score was based on other current charges for possession of a controlled substance and identity theft under Snohomish County cause number 14-1-00821-4, as well as a prior misdemeanor Assault IV from Everett Municipal Court under case number DV 10047. CP 136; RP 7, 10.

The State asserted Ross's score was 7. The State, relying on 2010 SRA amendments that allowed certain domestic violence misdemeanors to count as points in the offender score, argued four of Ross's prior misdemeanor violations of a no contact order should count toward Ross's offender score. Exs. 1-4; CP 32-33, 137; RP 11-12.

The trial court rejected the State's argument and concluded Ross's offender score was 3. CP 192-93; RP 12-13, 25. Based on this offender score, the corresponding standard range was 15 to 20 months. CP 17; RP 13. Invoking the residential chemical dependency treatment-based alternative under RCW 9.94A.660(3), the trial court sentenced Ross to 24 months of

community custody, including three to six months of in-patient residential chemical dependency treatment. CP 18-19; RP 21-22. The State appeals. CP 1.

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)). 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.¹ RCW 9.94A.525(21)(c); RCW 9.94A.030(41). To trigger this offender-score-increasing provision, a misdemeanor must constitute a “repetitive domestic violence offense” “where domestic violence as defined in RCW 9.94A.030, was ple[]d and proven after August 1, 2011.” RCW 9.94A.525(21)(c). RCW 9.94A.030(20) provides, “‘Domestic violence’ has the same meaning as defined in RCW 10.99.020 and 26.50.010.” The definitions of domestic

¹ 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). Because Ross has no such prior convictions, RCW 9.94A.525(21)(a) and (b) are not germane to the issues presented by this case.

violence in RCW 10.99.020 and RCW 26.50.010, however, are very different.

RCW 10.99.020(5) provides a nonexclusive 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 domestic 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 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 prior misdemeanor conviction constitutes a "repetitive domestic violence offense" under RCW 9.94A.525(21)(c) and RCW 9.94A.030(41). The answer is 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 legislative history also indicate that the legislature intended RCW 9.94A.525(21) to increase the offender scores of only violent offenders.

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(2) in Ross’s favor.

The trial court correctly interpreted RCW 9.94A.030(2) as that definitional statute bears on RCW 9.94A.525(21)(c). Under this correct interpretation, the trial court properly refused to increase Ross’s offender score under RCW 9.94A.525(21). This court should affirm this ruling.

2. Per RCW 9.94A.030(20)’s plain and 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 of 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”—after all, a reader of the statute must look to both definitions in order to ascertain what “domestic violence” means for the purposes of RCW 9.94A.030(20). The unambiguous language of RCW 9.94A.030(20) requires that both definitions of domestic violence referenced in RCW 9.94A.030(20) be satisfied for the purposes of the SRA.

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) (emphasis added).

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.

Mount Spokane Skiing Corp. v. Spokane County, 86 Wn. App. 165, 936 P.2d 1148 (1997), Division Three’s opinion interpreting “and” to mean “or,” is instructive. There, Division Three 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)). Mount Spokane Skiing, 86 Wn. App. at

173-74. Former RCW 35.21.730(4) gave cities, towns, and counties the power to create public corporations, commissions, and authorities to “[a]dminister 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, 86 Wn. App. at 174. Rejecting this argument, the 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 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.

Id. (emphasis added).² Because former RCW 35.21.730 (4) provided only a list of a public corporation’s possible functions, Division Three 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

² The Washington Supreme Court agreed with this interpretation when it construed the same statute seven months later. See 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.”).

174. It was clear from the language employed by the legislature that the legislature did not intend to require public corporations to perform each of the three functions listed in former RCW 35.21.730(4), but instead that the legislature meant that any or all of them could be performed. The Mount Spokane Skiing 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 proof of error—let alone cogent proof—in 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 the legislature intended that both statutes’ definitions of domestic violence be satisfied. There is no proof from the language to interpret RCW 9.94A.030 otherwise.

Moreover, the statute in this case is readily distinguished from the statute discussed 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 municipal corporation. In addition, former RCW 35.21.730 (4) 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 both RCW 10.99.020 and RCW 26.50.010 to obtain a definition for domestic violence.

The Kozey court acknowledged that courts are to “presume ‘and’ functions conjunctively.” 183 Wn. App. at 698 (citing Tiffany, 44 Wash. at 603-04). While it paid lip service to this plain language rule and cited Tiffany, it failed to acknowledge, let alone apply, Tiffany’s requirement that the statutory language itself must furnish proof of legislative error supporting reading “and” in the disjunctive. See Tiffany, 44 Wash. at 604. Instead, the Kozey court relied on Mount Spokane Skiing to conclude the legislature meant “and” to be “or.” Kozey, 183 Wn. App. at 699. However, Kozey

merely presumed the case before it presented the same interpretative issue as Mount Spokane Skiing, failing to analyze the significant differences between a sentencing statute that defines an offense by reference to two other statutes and a statute that empowers municipal corporations to perform certain functions. The Kozey court did not provide meaningful analysis under Tiffany or Mount Spokane Skiing that would allow an appellate court to resort to an exceptional rule of construction and convert the “and” in RCW 9.94A.030(20) into an “or.” This court should reject Kozey’s analytical shortcomings and give a commonsense interpretation to RCW 9.94A.030(20)’s unambiguous language: “and” means “and.”

This court also recently addressed how to construe the word “and” in RCW 9.94A.030(20), concluding that the “and” could be read as an “or.” State v. McDonald, 183 Wn. App. 272, 278-79, 333 P.3d 451 (2014). However, this court’s discussion of RCW 9.94A.030 in McDonald was dicta, as it was not necessary to resolve the issue before it. McDonald, 183 Wn. App. at 276 (accepting State’s concession on instructional error and remanding for new trial); Gabelein v. Diking Dist. No. 1 of Island County, 182 Wn. App. 217, 239, 328 P.3d 1008 (2014) (“A statement is dicta when it is not necessary to the court’s decision in a case and as such is not binding authority.”) (quoting Protect the Peninsula’s Future v. City of Port Angeles, 175 Wn. App. 201, 215, 304 P.3d 914, review denied, 178 Wn.2d 1022, 312

P.3d 651 (2013)). Dicta is not binding authority. Hidahl v. Bringolf, 101 Wn. App. 634, 650-51, 5 P.3d 38 (2000). As such, this court should not follow McDonald. In any event, this court in McDonald only provided a brief analysis on the issue this case presents and addressed only a plain language analysis. 183 Wn. App. at 278-79. Because the McDonald court did not consider the various statutory analyses Ross argues in this brief, its decision should not control. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) (“[Courts] do not rely on cases that fail to specifically raise or decide an issue.”).

3. The State’s and Division Two’s reading of RCW 9.94A.030(20) fails to harmonize the definitional statutes it contains and renders the inclusion of “and 26.50.010” superfluous

Courts must “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 Division Two’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 “repetitive domestic violence offense” under RCW 9.94A.525(21) and RCW 9.94A.030(41), the legislature’s inclusion of “and 26.50.010” in RCW 9.94A.030(20) would become entirely superfluous. This court must avoid such an interpretation.

By referring to 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 one 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.

The violations of the no contact orders in this case illustrate this point. 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. 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, the fear of physical harm, sexual assault, or

stalking. That is, 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 this court give full effect to the legislature’s inclusion of both RCW 10.99.020 and RCW 26.50.010 in the statute.

The Kozey court claimed that RCW 10.99.020 would be rendered superfluous from a conjunctive reading of RCW 9.94A.030(20). 183 Wn. App. at 698-99. But Kozey’s reading fails to harmonize RCW 10.99.020 and RCW 26.50.010, despite its recognition that in the context RCW 9.94A.030(20), RCW 10.99.020 and RCW 26.50.010 are related statutes. Kozey, 183 Wn. App. at 698; see also Hallauer v. Spectrum Props., Inc., 143 Wn.2d 126, 146, 18 P.3d 540 (2001) (holding related statutes must “be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes”).

As discussed, RCW 10.99.020(5) lists several crimes, including burglary, criminal trespass, malicious mischief, and violation of a no contact order. These crimes are not necessarily violent in nature. If RCW 10.99.020(5) is properly harmonized with RCW 26.50.010(1), these crimes must be committed in a violent fashion to meet both definitions of domestic violence listed in RCW 9.94A.030(20).

Division Two missed this point in Kozey, focusing instead on an issue that was not before it. It stated,

there is no ‘same meaning’ shared by both RCW 10.99.020 and RCW 26.50.010. Instead, RCW 9.94A.030(20) most logically reads as using RCW 10.99.020 to set out per se crimes of domestic violence and RCW 26.50.010 to define when a crime otherwise omitted from the nonexclusive list is nonetheless also deemed to involve domestic violence. For example, RCW 10.99.020 omits crimes such as third degree rape and child molestation, which would fall under the definition of ‘domestic violence’ in RCW 26.50.010. Reading RCW 9.94A.030(20) to require conduct simultaneously to meet both RCW 10.99.020 and RCW 26.50.010 in order to constitute domestic violence for sentence enhancement purposes would forfeit this logic.

Kozey, 183 Wn. App. at 699. But neither Kozey nor this case involves any issue of third degree rape or child molestation, so no logic is forfeited by requiring that both definitions in RCW 9.94A.030(20) be met before increasing offender scores based on nonviolent violations of no contact orders. See Electric Lightwave, 123 Wn.2d at 541 (“[Courts] do not rely on cases that fail to specifically raise or decide an issue.”).

More importantly, the Kozey court’s assertion that RCW 10.99.020(5) omits the crimes of third degree rape and child molestation is false. As Division Two acknowledged, RCW 10.99.020(5) provides, by its own terms, a nonexclusive list of crimes. Kozey, 193 Wn. App. at 697, 699; RCW 10.99.020(5) (“‘Domestic violence’ *includes but is not limited to* any of the following crimes” (emphasis added)). If third degree rape or

child molestation were “committed by one family or household member against another,” it would meet the domestic violence definition under RCW 10.99.020(5) without needing to “fall under the definition of ‘domestic violence’ in RCW 26.50.010.” Kozey, 183 Wn. App. at 699. Contrary to Division Two’s claim, a conjunctive interpretation of the word “and” in RCW 9.94A.030(20) forfeits no logic at all. Kozey, 183 Wn. App. at 699.

Logic would be forfeited, however, by a disjunctive interpretation of RCW 9.94A.030(20) that does not recognize the simple proposition that a violation of a no contact order may occur in a violent manner or in a nonviolent manner. A court that insists on increasing an offender score even when a person violates a no contact order in a nonviolent way would write the words “and 26.50.010” out of RCW 9.94A.030(20). This court should reject Division Two’s poorly reasoned decision in Kozey and require 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 Det. 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 by reference 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.521(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 in RCW 9.94A.030(20).

Sixteen of these statutory definitions refer solely to RCW 10.99.020 without also referring to RCW 26.50.010.³ Thirteen other statutory domestic violence definitions cite RCW 26.50.010 alone.⁴ RCW 9.94A.030(20) is in fact unique among all 30 statutes—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 additional reason, 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 “repetitive 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 more severely punish only violent offenders

When the legislature enacted the offender-score-increasing provisions of RCW 9.94A.525(21), as well as the corresponding definition of domestic violence in RCW 9.94A.030(20), its clear intent was to punish

³ 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 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).

⁴ 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).

only violent offenders. Indeed, the legislature unequivocally stated, “The legislature intends to give law enforcement and the courts better tools to identify *violent* perpetrators of domestic violence and hold them accountable.” LAWS OF 2010, ch. 274, § 101 (emphasis added). This statement shows that the legislature, unlike the Kozey court, fully understood the distinction between violent domestic violence perpetrators and nonviolent domestic violence perpetrators. The legislature’s “statement of intent can be crucial to interpretation of a statute.” Towle v. Dep’t of Fish and Wildlife, 84 Wn. App. 196, 207, 971 P.2d 591 (1999). Indeed, a legislature’s declaration of policy provides “an important guide in determining the intended effect of the operative sections.” Kilian v. Atkinson, 147 Wn.2d 16, 23, 50 P.3d 638 (2002). The legislature’s statement of intent unquestionably indicates that the legislature did not intend to increase the offender scores (and thereby the sentences) of nonviolent offenders.

The legislature’s final bill report buttresses this conclusion. In its final report on its own legislation, it is telling 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 was focused on punishing violent offenders only and intended to ensure that both definitions of domestic violence in RCW 10.99.020(5) and RCW 26.50.010(1) were met before increasing an offender's offender score under RCW 9.94A.525(21).

Division Two's discussion of legislative history in Kozey focused on former Attorney General Rob McKenna's proposal asking the legislature to amend RCW 9.94A.030 to define domestic violence by reference to "'RCW 10.99.020 or 26.50.010.'" Kozey, 83 Wn. App. at 703 (quoting WASHINGTON STATE ATTORNEY GENERAL—ROB MCKENNA, AG REQUEST LEGISLATION—2009 SESSION: SUPPORTING LAW ENFORCEMENT: DOMESTIC VIOLENCE SANCTIONS, at 1 (AG Proposal)).⁵ Kozey's reliance on the

⁵ Unfortunately, the URL the Kozey opinion provided at 83 Wn. App. at 703 n.4, is broken. Through Internet research, Ross has located a comparable version of McKenna's proposal at www.ofm.wa.gov/sgc/meetings/2008/11/SGCmeeting_20081114_DomesticViolenceSanctions.pdf. A copy of this proposal is attached to this brief as an appendix for this court's ease of reference. Like the proposal Division Two cited, on the second page of the appendix, the proposal suggests amending RCW 9.94A.030 "to add 'domestic violence.' . . . as defined in RCW 10.99.020 or 26.50.10." (Emphasis added.)

McKenna proposal was misplaced, as the legislature rejected McKenna's proposal as written. The legislature instead chose to separate the references to RCW 10.99.020 and RCW 26.50.010 in RCW 9.94A.030(20) with an "and." "This court may consider sequential drafts of a bill in order to help determine the legislature's intent." Lewis v. Dep't of Licensing, 157 Wn.2d 446, 470, 139 P.3d 1078 (2006). This court should consider the sequential drafts here and conclude that the legislature's choice to reject McKenna's disjunctive proposal clearly shows its intent that the statutes listed in RCW 9.94A.030(20) be read conjunctively.⁶

The legislature's intent is reflected in its own statement of intent and in its own final bill report for Engrossed Substitute House Bill 2777. The legislature intended to focus on violent offenders only when it amended RCW 9.94A.030(20) in 2010. The difference between the attorney general's proposal and the statute the legislature later enacted does not contradict the conclusion that lawmakers wished to focus only on violent offenders; it

⁶ The Kozey court acknowledged that "the change from 'or' to 'and' could also be taken as a sign of a change in legislative intent." 183 Wn. App. at 703 n.5. Ross could not have stated this principle better. However, the Kozey court went on to posit that the "purpose of the 2010 legislation, and its consistency with the attorney general's proposal, clearly support the much more direct message of legislative intent: that the disjunctive reading of RCW 9.94A.030(20) should be preserved." Id. This statement contradicts the Kozey court's recognition in the previous sentence that the legislature's enactment was inconsistent with the attorney general's proposal. And the Kozey court's purported divination of legislative intent despite the legislature's rejection of the attorney general's proposal would alarmingly permit courts to become superlegislative bodies. No court can evade the language the legislature has chosen to enact.

supports it. Consistent with the legislature's expressions of its 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 Ross

"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. 217, 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 Ross. The rule of lenity mandates interpreting RCW 9.94A.030(20) as requiring both definitions of domestic violence in RCW 10.99.020 and RCW 26.50.010 to be satisfied before imposing an enhanced offender score under RCW 9.94A.525(21).

7. None of Ross's misdemeanor convictions satisfies both definitions in RCW 10.99.020(5) and RCW 26.50.020(1) and thus none of the convictions qualifies as a "repetitive domestic violence offense" that can be counted in Ross's offender score under RCW 9.94A.525(21)(c)

The State concedes that Ross's misdemeanor convictions for violating no contact orders were not based on violent conduct and that these misdemeanor convictions therefore "did not involve 'domestic violence' as defined in RCW 26.50.010(1)." Br. of Appellant at 6. Because a proper conjunctive interpretation of RCW 9.94A.030(20) requires that both definitions of "domestic violence" in RCW 10.99.020(5) and RCW 26.50.010(1) be satisfied, none of these convictions is a repetitive domestic violence offense under RCW 9.94A.030(41). In turn, none of these misdemeanors may be counted in Ross's offender score under RCW 9.94A.525(21)(c).

Based on a proper statutory interpretation, the trial court reached the correct conclusion that Ross's offender score was 3, not 7. CP 17. The offender score of 3 carried a standard range of 15 to 20 months, which permitted the trial court to impose a residential chemical dependency treatment-based alternative under RCW 9.94A.660(3). Therefore, contrary to the State's assertion, see Br. of Appellant at 8-9, Ross was eligible for a residential treatment alternative.

Because no repetitive domestic violence offense meeting the definition of domestic violence in RCW 9.94A.030 was pled or proven in this case, the trial court properly refused to increase Ross's offender score. The trial court's reasoning and analysis were correct and must be affirmed.

E. CONCLUSION

For 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, as the State concedes, none of Ross's misdemeanor convictions satisfies both of these definitions, a "repetitive domestic violence offense" under RCW 9.94A.525(21) was never pled and proven. Ross's misdemeanor convictions cannot be used to increase his offender score. This court must accordingly affirm.

DATED this 10th day of March, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

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

KEVIN A. MARCH
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APPENDIX



**Washington State Attorney General
Rob McKenna
2009 Session — Supporting Law Enforcement: Domestic
Violence Sanctions**

THE PROBLEM

25 years after the passage of the Domestic Violence Protection Act, our laws do not treat domestic violence with the seriousness it demands. Weakness in current law results in mild sentences for repeat offenders. Extra sentencing consideration is allowed for serial drug offenders, car thieves and other chronic criminals, but not for domestic abusers. This leaves too many victims unprotected.

BACKGROUND

- Repeat felony domestic violence offenders often begin their criminal behavior as misdemeanor domestic violence offenders, yet current law does not allow the scoring of those offenses when sentencing the worst offenders--those convicted of felony domestic violence.
- The lack of sentence multipliers for domestic violence felonies is a serious problem. Unlike drug, sex, burglary, car theft and felony traffic offenses, where multiplying penalties significantly increase an offender's sentence, the Sentencing Reform Act (SRA) does not multiply offender scores for felony crimes of domestic violence.
- Today the label of "domestic violence" means nothing when it comes to punishments, as the designation alone does not increase the sanction imposed.

ENSURING PUNISHMENT FOR DOMESTIC VIOLENCE OFFENDERS

The Attorney General's Office is requesting legislation to amend the appropriate RCWs and create a new section. The changes would:

- Score prior misdemeanor domestic violence history when sentencing felony domestic violence convictions and create a new list of enumerated serious domestic violence misdemeanor offenses.
- Multiplying, or counting more heavily, a certain class of prior domestic violence felony convictions by adding language to RCW 9.94A.525 (offender score calculation) that would give two points to the certain domestic violence crimes, including: Felony Violation No Contact Order/Protection Order (assault), Felony Harassment Domestic Violence, Felony Stalking Domestic Violence, Burglary 1 Domestic Violence, and Kidnapping 1 and 2 Domestic Violence.

- 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 26.50.010.
- Make the designation of "Domestic Violence" mean something by requiring that it be plead and proven as an element of a particular offense. The benefit of pleading and proving domestic violence is significant as history at the felony level would be given new meaning and repeat offenders would receive tougher sentences

CASE STUDIES

Damon Overby: Accumulated eight domestic violence convictions for assaults on four women over an 18 year period. His latest offense involved attempting to strangle his girlfriend.

- Punishment under the current system: His domestic violence misdemeanor convictions did not "score," leading to a standard sentencing range of 9-12 months. He received 12 months of work release.
- Under our proposed reforms: Instead of an offender score of "3" his extensive prior domestic violence misdemeanors would generate a score of "9," likely extending his sentencing range to 51-60 months in custody.

Jeffrey Allison: A serial domestic violence offender and stalker who repeatedly threatened to kill his girlfriend, communicating threats in person by violating no-contact orders and electronically through text messaging and voice mail.

- Punishment under the current system: Allison pleaded guilty to a felony for violating a no-contact order and a misdemeanor for stalking. He had an offender score of "3" due to past prior convictions for four different felony offenses. Yet his misdemeanor history of domestic violence would not score. As a result, Allison received a 12 month suspended sentence, *spending no time behind bars*.
- Under our proposed reforms: Allison's domestic violence convictions for harassment and violating a no-contact order would contribute to his offender score. So instead of a "3," Mr. Allison would have an offender score of "5" and a new standard range of 33 to 43 months.

Harold Gillenwater: A notorious domestic abuser well known to the Seattle Police Department's domestic violence unit. He repeatedly violated a no-contact order, threatening to kill his victim. His rap sheet in King County spans five years and includes misdemeanors for assault, theft and property destruction.

- Punishment under the current system: For his latest felony conviction for violating a no contact order, his standard range with one prior felony conviction and a score of "2" was 13 to 17 months. He was sentenced to 13 months.

- Under our proposed reforms: Gillenwater's prior felony for violating a no contact order and his two prior domestic violence misdemeanor assault convictions would generate a score of "6." His likely sentencing range would be 22-29 months.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON)	
)	
Appellant,)	
)	
v.)	COA NO. 72329-4-1
)	
DAVID ROSS,)	
)	
Respondent.)	

DECLARATION OF SERVICE

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 10TH DAY OF MARCH 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF MARCH 2015.

X *Patrick Mayovsky*