

NO. 35534-5-II

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

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STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
DEAN W. HOGAN,  
  
Appellant.

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
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BY DEPUTY

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
CAUSE NO. 06-1-00803-4

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HONORABLE WM. THOMAS MCPHEE, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that the elements of the crime of felony violation of no-contact order were set forth in RCW 26.50.110(1) and (5), rather than in RCW 10.99.050(2) and RCW 26.50.110(5).

2. The trial court erred in finding that, pursuant to RCW 26.50.110(1), contact that was in violation of a no-contact order could not constitute the crime of violation of no-contact order unless the contact involved the threat of violence or use of violence.

3. In the Order Granting Motion for Arrest of Judgment, the trial court erred in finding that Counts I through IV in the Information in Thurston County Superior Court Cause No. 06-1-00803-4 failed to charge a crime.

4. The trial court further erred by granting the defendant's motion for arrest of judgment in this case, pursuant to CrR 7.4(a)(2), and thereby vacating the convictions previously entered, and dismissing Counts I through IV in the Information.

B. STATEMENT OF THE ISSUES

1. When, pursuant to RCW 10.99.050, a no-contact order is entered prohibiting a defendant from having contact with the victim, as part of a criminal sentence, and the defendant has at least two prior convictions for violating the provisions of an order issued under an RCW chapter listed in RCW 26.50.110(5), if the defendant thereafter willfully has contact with the victim while knowing of the order, whether the defendant has thereby committed a felony offense defined by the elements set forth in RCW 10.99.050(2) and RCW 26.50.110(5).

2. If the elements of the crime of felony

violation of a no-contact order issued pursuant to RCW 10.99.050 are held to be set forth in RCW 26.50.110(1) and RCW 26.50.110(5), rather than in RCW 10.99.050(2) and RCW 26.50.110(5), whether willful contact in violation of such an order by a defendant who knows of the order and who has at least two prior convictions for violating similar orders constitutes the crime of felony violation of a no-contact order.

B. STATEMENT OF THE CASE

On May 5, 2006, an Information was filed in Thurston County Superior Court Cause No. 06-1-00803-4 charging the defendant, Dean William Hogan, with four counts of Violation of a No Contact, Protection or Restraining Order/Domestic Violence - Third or Subsequent Violation of any Similar Order. CP 4-6. Count I of that Information read as follows:

COUNT I - VIOLATION OF NO CONTACT,  
PROTECTION, OR RESTRAINING ORDER/DOMESTIC  
VIOLENCE - THIRD OR SUBSEQUENT VIOLATION OF  
ANY SIMILAR ORDER, RCW 26.50.110(1), RCW  
10.99.050(2)(B) - CLASS C FELONY:

In that the defendant, DEAN WILLIAM HOGAN, in the State of Washington, on or about January 2, 2006, with knowledge that the Thurston County Superior Court had previously issued a protection order, restraining order, or no contact order, pursuant to Chapter 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW in state law in Cause 06-1-0009-2, did violate the order while the order was in effect by knowingly violating the restraint provisions

therein by having contact with Lisa Holloway, his girlfriend, and furthermore, the defendant has at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Chapter 10.99, 26.09, 26.10, 26.26, 26.50, 26.52, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.

CP 4. The other three counts were identical in language, except that Count II alleged a violation date of February 15, 2006, Count III alleged a violation date of March 7, 2006, and Count IV alleged March 28, 2006 to be the date of violation. CP 4-5.

On June 27, 2006, the defendant submitted to the court a Statement of Defendant on Plea of Guilty, in which he admitted guilt to Counts I and II. CP 20-26. In return, the State agreed to dismiss Counts III and IV. CP 9, 22. The defendant acknowledged he was pleading guilty to two counts of violation of a no-contact order as charged in the original Information. CP 20, 25. He then indicated that, instead of making a statement, he agreed that the court could review the prosecution's statement of probable cause to

establish a factual basis for the plea. CP 25.

A Declaration of Prosecutor Supporting Probable Cause had been filed in this case on May 4, 2006. CP 3. In that Declaration, it was stated that on February 28, 2006, a domestic violence no-contact order had been issued in Thurston County Superior Court Cause No. 06-1-00009-2 as part of a criminal sentence, requiring that the defendant not have contact with Lisa Holloway. The no-contact order was to remain in effect until February 28, 2011. It was noted that the defendant had signed the Order indicating receipt of a copy. CP 3.

The Declaration further stated that on four occasions in January, February, and March of 2006, the victim and the defendant had contact at the Thurston County Jail while the defendant was incarcerated there. It was noted that during one of these visits the defendant and the victim had discussed how the victim had used a false name and partially covered her face in order to visit the defendant at the jail. CP 3.

Finally, the Declaration stated that the defendant had two prior convictions for violation of a domestic violence protection order. CP 3. The trial court found that there was a factual basis for the defendant's guilty pleas. CP 26. On that same day, June 27<sup>th</sup>, the court sentenced the defendant to 14 months in prison on each count, to run concurrently. CP 7-17.

On July 7, 2006, the defendant filed a motion to arrest judgment pursuant to CrR 7.4(a). CP 28-32. In that motion, the defendant acknowledged that the four counts charged in this case concerned a no-contact order that had been issued by the court as part of a sentence in Cause 06-1-00009-2, prohibiting the defendant from having contact with Lisa Holloway, and was therefore an Order issued pursuant to RCW 10.99.050. The defendant then noted that RCW 10.99.050(2)(a) states that a willful violation of a court order issued under that section is punishable under RCW 26.50.110. CP 29. Based on that language, the defendant argued that the elements of the offenses

to which the defendant had pled guilty were to be found in RCW 26.50.110(1), and that the elements which caused a violation of a no-contact order to become a felony crime, as set forth in RCW 26.50.110(5), would only come into play provided the elements of RCW 26.50.110(1) had first been met. CP 29-31.

The defendant then focused on the wording of RCW 26.50.110(1), which is as follows:

Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2)(a) or (b), is a gross misdemeanor except as provided in subsections(4) and (5) of this section.

RCW 26.50.110(1). The defendant argued that, given the above language, a violation of a no-contact order would only be a crime if it was the sort of violation for which an arrest is required

under RCW 10.31.100(2)(a) or (b). Those latter sections are worded as follows:

. . .(2) A police officer shall arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that:

(a) An order has been issued of which the person has knowledge under RCW 26.44.063, or chapter 10.99, 26.09, 26.20, 26.26, 26.50, or 74.34 RCW restraining the person and the person has violated the terms of the order restraining the person from acts or threats of violence, 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 or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person; or

(b) A foreign protection order, as defined in RCW 26.52.010, has been issued of which the person under restraint has knowledge and the person under restraint has violated a provision of the foreign protection order prohibiting the person under restraint from contacting or communicating with another person, or excluding the person under restraint from 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, or a violation of any provision for which the foreign protection order specifically indicates that a violation will be a crime; . . .

RCW 10.31.100(2)(a) and (b).

RCW 10.31.100(2)(a) refers to an order

restraining a person from going onto grounds of or entering a particular location, restraining a person from coming within a certain distance of a location, or restraint from acts or threats of violence. Since there was no specific reference to restraint from contact, the defendant argued that under RCW 26.50.110(1) a violation of a no-contact order was not a crime unless the defendant committed an act of violence or a threat of violence. CP 30-32.

In a reply memorandum, the defendant contended that the reason for de-criminalizing contact in violation of a no-contact order was because this was considered to be less serious than other types of violations of protective orders. CP 45. He claimed that the legislative history regarding the enactment of the language he relied upon in RCW 26.50.110(1) supported this interpretation. CP 44-45.

A hearing to consider the defendant's motion was held on September 15, 2006 before the Honorable Judge Wm. Thomas McPhee. At that

hearing, the court found it was uncontested that the no-contact order had been issued, that the defendant had visited with Lisa Holloway while he was incarcerated in the Thurston County Jail, and that this had been a clear violation of the no-contact order. RP 19. However, the court accepted the defense argument that the elements of the criminal offense for violation of a no-contact order were to be found in RCW 26.50.110(1), including cases, such as the present one, in which felony violations of a no-contact order were alleged. The court further agreed that, reading RCW 26.50.110(1) in conjunction with RCW 10.31.100(2)(a), contact which violated a no-contact order did not constitute the crime of violation of no-contact order unless the contact included an act of violence or threat of violence. RP 20-21. The court found that RCW 26.50.110(1) was unambiguous in this regard. However, the court also found that this interpretation of legislative intent was supported by the applicable legislative history. RP 21.

On October 6, 2006, the court entered an Order Granting Motion for Arrest of Judgment. Therein, the court found that Counts I through IV in the Information of this cause did not charge a crime. Therefore, the court granted the motion for arrest of judgment, vacated the convictions based on the defendant's guilty pleas, and dismissed the counts filed in this cause without prejudice to the State's ability to re-file with proper charges.

The State appealed the decision pursuant to RAP 2.2(b)(3), which states as follows:

(b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

... (3) *Arrest or Vacation of Judgment.*  
An order arresting or vacating a judgment.

The State seeks to re-instate the defendant's two convictions for violation of a no-contact order based on the defendant's guilty pleas.

#### C. ARGUMENT

1. A no-contact order having been entered as part of a criminal sentence, pursuant to RCW

10.99.050, prohibiting this defendant from having contact with the victim of his offense, and the defendant having two prior convictions for violating a similar order, the defendant's willful contact with the victim in violation of the order did constitute the criminal offense of felony violation of a no-contact order, pursuant to RCW 10.99.050(2) and RCW 26.50.110(5).

The defendant in this case contended that he had pled guilty to two counts of felony violation of no-contact order by admitting to alleged facts which did not constitute that crime, as a matter of law. A conviction based upon a guilty plea that is not voluntary is constitutionally invalid. To be voluntary, the defendant must have an understanding of the law in relation to the facts. In re Personal Restraint of Bratz, 101 Wn. App. 662, 672, 5 P.3d 759 (2000). Thus, it was appropriate for the trial court to consider the defendant's claim even though he had pled guilty and had received the benefit of his bargain. Bratz, 101 Wn. App. at 672-673.

The defendant's claim was based upon the assumption that the essential elements for the crime of violation of no-contact order were to be found in RCW 26.50.110(1). However, the State

contends on appeal that the elements of the crime of violation of no-contact order are set forth in RCW 10.99.050(2), and that RCW 26.50.110 simply identifies the penalties applicable to that crime depending on certain circumstances, such as whether the contact also involves an assault or whether the defendant has prior convictions for violating the same type of order or a similar type of order. Since it was alleged in this case that the defendant had two or more such prior convictions, RCW 26.50.110(5) was the section which identified the additional facts which must be proved, beyond those set forth in RCW 10.99.050(2), to fully prove the level of no-contact order violation alleged. Consequently, RCW 26.50.110(1) was irrelevant to this case, and the trial court therefore erred in relying on that subsection to hold that the facts the defendant admitted to in pleading guilty failed to constitute the alleged crime.

Prior to changes made in the 2000 session of the Washington Legislature, RCW 10.99.050

addressed both the elements for the criminal offense of violation of no-contact order and the penalties resulting from such a criminal violation. The pertinent sections of that statute read as follows:

(1) When a defendant is found guilty of a crime and a condition of the sentence restricts the defendant's ability to have contact with the victim, such condition shall be recorded and a written certified copy of that order shall be provided to the victim.

(2) Willful violation of a court order issued under this section is a gross misdemeanor. Any assault that is a violation of an order issued under this section and that does not amount to an assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of a protective order issued under this section that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony. A willful violation of a court order issued under this section is also a class C felony if the offender has at least two previous convictions for violating the provisions of a no-contact order issued under this chapter, or a domestic violence protection order issued under chapter 26.09, 26.10, 26.26, or 26.50 RCW, or any federal or out-of-state order that is comparable to a no-contact order or protection order that is issued under Washington law. The previous convictions may involve the same victim or other victims specifically protected by the no-contact orders or protection orders the offender violated.

The written order shall contain the court's directives and shall bear the legend: Violation of this order is a criminal offense under chapter 10.99 RCW and will subject the violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony.

Laws of 1997, Ch. 338, S. 55, amending RCW 10.99.050(1) and (2). In State v. Clowes, 104 Wn. App. 935, 18 P.3d 596 (2001), the Court of Appeals held that RCW 10.99.050, as in effect in 1999, set forth the following as the essential elements of the crime of violating a no-contact order: (1) the defendant's willful contact with another; (2) the prohibition of such contact by a valid no-contact order; and (3) the defendant's knowledge of the no-contact order. The court further ruled that proof the defendant acted knowingly was proof he acted willfully. Clowes, 104 Wn. App. at 943-944; RCW 9A.08.010(4).

During the 2000 regular session of the Washington Legislature, a bill was passed amending a number of provisions relating to domestic violence, including RCW 10.99.050 and RCW 26.50.110. Laws of 2000, ch. 119, s. 20 and

s. 24. The penalty provisions of RCW 10.99.050 were transferred to RCW 26.50.110. However, the language previously held to set forth the elements of the crime of no-contact order violation was retained in RCW 10.99.050. The amended version of RCW 10.99.050(2) now read as follows, in pertinent part:

Willful violation of a court order issued under this section is punishable under RCW 26.50.110.

RCW 10.99.050(2)(a). This language did not state that a willful violation of a no-contact order could be punishable, depending on other factors, under RCW 26.50.110, but rather said that such a violation is punishable. Further evidence that contact in violation of a no-contact order was intended to constitute a crime was provided by RCW 10.99.050(2)(b), which stated:

The written order shall contain the court's directives and shall bear the legend: Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony.

As a result of the 2000 legislative

amendments, RCW 26.50.110(5), addressing penalty, now set forth circumstances regarding a defendant's prior criminal history which, if proved, would cause a willful violation of the no-contact order to become a felony offense.

That section read as follows:

A violation of a court order issued under this chapter, chapter 10.99, 26.09, 26.10, 26.26, 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 prior convictions for violating the provisions of an order issued under this chapter, chapter 10.99, 26.09, 26.10, 26.26, 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.

RCW 26.50.110(5), as amended by Laws of 2000, ch. 119, s. 24.

Under those same 2000 amendments, RCW 26.50.110(1) set forth the circumstances in which a violation of an order issued under RCW 10.99.050, or under the other provisions providing for similar orders, would constitute a gross misdemeanor. It was at this point that the reference to RCW 10.31.100 was added to the

language of that subsection.

Whenever an order is granted under this chapter, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions . . . for which an arrest is required under RCW 10.31.100(2)(a) or (b) is a gross misdemeanor, except as provided in subsections (4) and (5) of this section.

RCW 26.50.110(1) as amended by Laws of 2000, ch. 119, s. 24. Thus, RCW 26.50.110(1) stated its provisions applied except as provided in subsections (4) and (5) of RCW 26.50.110. As can be seen above, RCW 26.50.110(5) made no reference to RCW 26.50.110(1), but stated directly that a violation of a court order issued under chapter 10.99 would be a felony offense if the defendant had the prior convictions described therein.

Statutory interpretation is a question of law, subject to de novo review. The purpose of such statutory interpretation is to discern and implement the intent of the legislature. City of Spokane v. Spokane County, 158 Wn.2d 661, 672-673, 146 P.3d 893 (2006). Where the meaning of statutory language is plain on its face, that plain meaning must be given effect as the

expression of legislative intent. In discerning the plain meaning of a statute, one should consider the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose legislative intent. City of Spokane v. Spokane Count, 158 Wn.2d at 673. When a statute is ambiguous, the reviewing court should resort to aids of construction, such as legislative history, principles of statutory construction, and relevant case law, for guidance in determining legislative intent. State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196 (2005).

The stated purpose of chapter 10.99 RCW is "to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide". RCW 10.99.010; State v. Ward, 148 Wn.2d 803, 810, 64 P.3d 640 (2003). RCW 10.99.050(1), as in effect when the

defendant in the present case committed the offenses to which he pled guilty, addressed specifically the creation of orders to prohibit a defendant from contacting the victim when the defendant was sentenced for a domestic violence crime. RCW 10.99.050(2)(a) and (b) then unambiguously declared that a violation of such a no-contact order was a criminal offense under chapter 26.50 RCW and that willful violation of such a no-contact order would be punishable under RCW 26.50.110.

Having willful contact with someone in knowing violation of a court order prohibiting that contact is obviously a violation of that order. Pursuant to RCW 10.99.050(2)(a) and (b), therefore, that willful contact constituted a criminal offense and was punishable under RCW 26.50.110. On the plain face of RCW 10.99.050, there was no requirement that such a violation involve an act of violence or threat of violence before it became a crime.

Under this statutory scheme created by the

Legislature in 2000, one had to then look to RCW 26.50.110 to determine what the potential penalties were for this RCW 10.99.050 criminal offense of violating a no-contact order. In the present case, the allegation was that the defendant had two prior convictions for violating a no-contact order or similar order. Therefore, the pertinent section of RCW 26.50.110 for purposes of determining the potential punishment in this case was RCW 26.50.110(5), rather than RCW 26.50.110(1).

RCW 26.50.110(5), as amended in 2000, was also unambiguous. It stated that "a violation" of a court order, such as one issued pursuant to RCW 10.99.050, would be a class C felony if there were at least two prior convictions for violating a similar order. That is what this defendant pled guilty to. RCW 10.99.050(2) and RCW 26.50.110(5) defined the offense and the penalty that were the bases for this defendant's two convictions. The essential elements of a felony violation of no-contact order, such as was

alleged in this case, must be derived from the plain language of those two provisions.

Thus, the elements of a felony no-contact order, as alleged in this case, were as follows: (1) that the defendant had willful contact with another person, which could be proved, pursuant to RCW 9A.08.010(4), by evidence the defendant had knowing contact with that person; (2) that there was a court order in effect, issued under RCW 10.99.050, which prohibited the contact; (3) that the defendant knew of the order; and (4) that at the time of the contact the defendant had at least two prior convictions for violating the provisions of an order issued under chapter 10.99 RCW or under chapter 26.09, 26.10, 26.26, or 74.34 RCW, or a valid protection order as defined in RCW 26.52.020. RCW 10.99.050(2)(a); RCW 26.50.110(5); Clowes, 104 Wn. App. at 944.

The factual basis for the defendant's guilty pleas in this case, as set forth in the prosecutor's declaration of probable cause, addressed all of these elements. CP 3. That

declaration stated that a domestic violence no-contact order had been issued as part of a criminal sentence imposed upon the defendant, prohibiting the defendant from having contact with Lisa Holloway. It further stated that the defendant had signed the order, attesting to his having received a copy. The declaration then stated that on four separate occasions the defendant and Holloway had visited with each other while the defendant was incarcerated at the Thurston County Jail, and had discussed how Holloway had fooled the jail staff into letting her have contact with the defendant. Finally, the declaration stated that the defendant had two prior convictions for violating a domestic violence protection order. CP 3. Therefore, the defendant's pleas of guilt were to allegations which constituted the crimes of felony violation of a no-contact order.

However, the trial court in this case did not look to RCW 10.99.050(2) and RCW 26.50.110(5) to define the crimes to which the defendant pled

guilty. Instead, the trial court relied upon the wording of RCW 26.50.110(1) to define the elements of a violation of no-contact order as alleged here. Relying specifically on the wording of RCW 26.50.110(1), which stated when a violation of a no-contact order would be a criminal gross misdemeanor, and the reference in RCW 26.50.110(1) to RCW 10.31.100(2)(a) and (b), the court determined that the allegations in this case did not constitute crimes of felony no-contact violation because the defendant's contacts with Holloway did not involve acts or threats of violence. RP 19-21.

The trial court's reliance on RCW 26.50.110(1) to establish the elements of a felony violation of a no-contact order, and the court's subsequent conclusion that such a crime required proof that any alleged contact include an act or threat of violence, constituted error. Had the court relied upon the proper statutory provisions setting forth the elements of the crimes the defendant had pled guilty to, the

court would not have found any problem with the entry of those pleas, since the factual basis for those pleas satisfied the actual elements of felony violation of a no-contact order. Therefore, the proper remedy for the trial court's error is to re-instate the convictions and the Judgment and Sentence imposed as a result of the defendant's pleas of guilt.

2. If this court should determine that the elements of the crime of felony violation of a no-contact order, issued pursuant to RCW 10.99.050, are to be found in RCW 26.50.110(1) and RCW 26.50.110(5), rather than in RCW 10.99.050(2) and RCW 26.50.110(5), it is still the case that a willful violation of such an order, committed by a defendant who knows of the order and who has two prior convictions for violating similar orders, would constitute a felony offense even if the contact in violation of the order did not involve an act or threat of violence.

In the prior section of this Brief, it was argued that the basic elements of a criminal violation of a no-contact order, issued pursuant to RCW 10.99.050(1), are to be found in RCW 10.99.050(2) rather than RCW 26.50.110(1), and that the latter provision is intended to solely be a penalty provision. Therefore, since RCW

26.50.110(5) was the penalty provision applicable to the charges in this case, RCW 26.50.110(1) does not apply here.

In contrast, the defendant contended to the trial court that the basic elements of the crimes charged in this case were to be found in RCW 26.50.110(1). In his arguments, the defendant basically ignored the wording of RCW 10.99.050. The trial court agreed with the defendant, and further found that contact in violation of a no-contact order could not constitute a crime under RCW 26.50.110(1) unless such contact included an act or threat of violence.

Should this court find that the elements of the crime of violating a no-contact order are set forth in RCW 26.50.110(1), as found by the trial court, the State contends that the trial court erred in concluding that only contact involving an act or threat of violence could constitute the crime of violating a no-contact order pursuant to that subsection.

The trial court found that the wording of

RCW 26.50.110(1), including the language of RCW 10.31.100(2)(a) and (b) incorporated therein, was unambiguous and plainly precluded a criminal conviction based on simple contact in violation of a no-contact order issued pursuant to RCW 10.99.050. RP 20-21. However, as argued above, RCW 10.99.050 is also unambiguous and states very plainly that a violation of a no-contact order issued pursuant to that section is a crime.

One way in which statutory ambiguity is created is when two statutes are in apparent conflict with each other. Gorman v. Garlock, Inc., 155 Wn.2d 198, 210, 118 P.3d 311 (2005). In that instance, the primary objective of a reviewing court must be to ascertain and carry out the intent and purpose of the legislature. Gorman, 155 Wn.2d at 210. Legislative history and principles of statutory construction can be utilized for guidance in resolving the apparent conflict. Id. at 210-211. Since there is an apparent conflict between the plain wording of RCW 10.99.050(2) and the language of RCW

26.50.110(1) incorporating RCW 10.31.100(2)(a) and (b), it is appropriate in this case to use these tools of statutory interpretation to determine the legislature's actual intent.

While the trial court found that its interpretation of RCW 26.50.110(1) was supported by legislative history, that is not accurate. The legislative history for the 2000 amendments to RCW 26.50.110(1) does not support the contention that the intent was to de-criminalize contact which occurred in violation of an order issued pursuant to RCW 10.99.050.

During the regular session of the Washington Legislature in 2000, Senate Bill 6400 was introduced to amend various provisions concerning domestic violence, including RCW 10.99.050 and RCW 26.50.110. S.B. 6400, 56<sup>th</sup> Leg, 2000 Reg. Sess., at s. 16 and s. 20 (Wash. 2000). The bill was based on recommendations from the Governor's Domestic Violence Action Group, and its primary goal was to improve Washington State's response to domestic violence. Senate Bill Report on SB

6400, 56<sup>th</sup> Leg., 2000 Reg. Sess. at 1 (February 8, 2000).

In State v. Chapman, 96 Wn. App. 495, 980 P.2d 295 (1999), the Court of Appeals had held that RCW 26.50.060, relating to the issuance of a domestic violence protection order, did not provide a court with authority to restrain an individual from coming within a certain distance of the petitioner's residence. Chapman, 96 Wn. App. at 500. One of the purposes of SB 6400 was to provide statutes concerning domestic violence protection orders and similar orders with specific language authorizing such distance restrictions, and to make violation of such a restraint a criminal offense. Senate Bill Report on SB 6400, 56<sup>th</sup> Leg., 2000 Reg. Sess. at 1-2 (February 8, 2000).

In State v. Chapman, 140 Wn.2d 436, 452-453, 998 P.2d 282 (2000), the Washington Supreme Court reversed the decision of the Court of Appeals in Chapman, supra. However, that decision was entered on April 27, 2000, after SB 6400 in an

amended form had already been enacted into law.

Under laws existing in Washington prior to the 2000 legislative session, a violation of a criminal no-contact order, pursuant to RCW 10.99.050, or a violation of a domestic violence protection order, pursuant to RCW 26.50.110, was a gross misdemeanor, and could be a felony under certain circumstances. However, violation of a family law restraining order was always only a misdemeanor. A second purpose of SB 6400 was to make the criminal penalty authorized for a certain type of restraint violation the same, regardless of the type of domestic violence order containing the restraint provision that was violated. Senate Bill Report on SB 6400, 56<sup>th</sup> Leg., 2000 Reg. Sess. at 1-2 (February 8, 2000). This purpose was accomplished by making RCW 26.50.110 the penalty provision for the various criminal violations of no-contact or restraining orders defined in other statutes, including RCW 10.99.050. S.B. 6400, 56<sup>th</sup> Leg., 2000 Reg. Sess. at sections 15-20 (Wash. 2000).

A Second Substitute SB 6400 passed the Senate on February 11, 2000. Senate Bill Report on E2SSB 6400, 56<sup>th</sup> Leg., 2000 Reg. Sess. at 1 (February 11, 2000). That substitute bill maintained the same language used initially to create a single penalty provision for a number of criminal violations of domestic violence orders. E2SSB 6400, 56<sup>th</sup> Leg., 2000 Reg. Sess. at sections 16-21 (Wash. 2000). At the point of passage in the Senate, the amendments to RCW 26.50.110(1), in pertinent part, read as follows:

Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within a specified distance of a location or another person, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, is a gross misdemeanor except as provided in subsection (4) and (5) of this section. . . .

E2SSB 6400, 56<sup>th</sup> Leg., 2000 Reg. Sess. at s. 21.

The bill was then considered in the State

House of Representatives. The Committee on Criminal Justice and Corrections held a hearing on the bill on February 18, 2000. Those testifying opposed to the bill did not voice concerns about no-contact provisions in situations, such as those covered by RCW 10.99.050, where there was evidence of prior domestic violence. Rather, the opponents to the legislation generally followed a common theme, decrying what was referred to as the criminalization of family law restraining orders. It was argued that such orders are often issued in situations where there has not been any prior act or threat of violence. It was further noted that such orders often include restraint provisions which have nothing to do with preventing contact, such as provisions prohibiting transfers of property. Yet, under the bill's amended version of RCW 26.50.110, a violation of any restraint provision of any such order was made a gross misdemeanor. H. Comm. On Crim. Justice and Corrections Hearing (Wash. Feb

18, 2000) at 1:06:30 to 1:34:00 of audio record, audio available at <http://www.tvw.org>.

On February 23, 2000, an amended version of E2SSB 6400 was passed out of the House Committee on Criminal Justice and Corrections. HOUSE JOURNAL, 56<sup>th</sup> Leg., 2000 Reg. Sess. at 900 (Wash. 2000). In that version, the section amending RCW 26.50.110(1) was itself amended in an apparent response to the criticisms voiced at the hearing with regard to the effect the proposed bill would have on family law restraining orders. The new version of RCW 26.50.110(1) read as follows in pertinent part:

Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2)(a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section.

E2SBB 6400 as amended in H. Comm. On Crim. Justice and Corrections, 56<sup>th</sup> Leg, 2000 Reg. Sess. at s. 21 (Wash. 2000) (emphasis added). Thus, the new version limited criminal violations of restraint provisions to those violations which would require arrest under RCW 10.31.100(2)(a) or (b). It was this version of RCW 26.50.110(1) which then passed the House, was approved by the Senate on March 7, 2000, and was enacted into law. Laws of 2000, ch. 119, s. 24.

The House Bill Report which accompanied the legislation back to the Senate, after it was passed by the House of Representatives, provides further evidence that the changes made to RCW 26.50.110(1) in the House committee were intended to address criticisms at the committee hearing concerning the effect of the new law on restraining orders issued in family law cases. The following was written concerning the testimony against the bill at that hearing:

More troubling is the fact that the language referring to violations of all family law orders, criminalizes every restraint in

every order (note: this has been corrected in the House striker to the Senate bill).

H. Bill Report on E2SSB 6400, 56<sup>th</sup> Leg., 2000 Reg. Sess. at 6 (March 3, 2000). Thus, the change made to RCW 26.50.110(1) was to prevent the criminalization of restraints in family law orders that were not related to domestic violence, rather than to de-criminalize provisions that did relate to domestic violence.

That same House Bill Report provides indication that this amendment to RCW 26.50.110(1) was not intended to make any change in the protection afforded victims of domestic violence by means of no-contact orders. In summarizing the provisions of the amended bill, the report stated the following:

No-Contact Orders

The penalties for violating a no-contact order issued during pre-trial or as part of a sentence are removed from the criminal domestic violence statute. The penalties are moved to a new section of law in order to consolidate all violations of domestic violence orders in a more uniform structure. As a result, violations of no-contact orders are subject to the same penalties applied to domestic violence protection orders.

H. Bill Report on E2SSB 6400, 56<sup>th</sup> Leg., 2000 Reg.

Sess. at 4 March 3, 2000). There can be no doubt that willful contact in violation of a no-contact order was a criminal offense under RCW 10.99.050(2) prior to this legislation in 2000. Clowes, 104 Wn. App. at 943-945. Yet, the bill report does not evidence any intent to decriminalize those violations. Rather, the report refers only to "moving" the penalties for purposes of consolidation. It is inconceivable that a change resulting in such a drastic reduction in the protection afforded by a domestic violence no-contact order would go unmentioned in this report.

As noted above, rules of statutory construction are also pertinent to interpreting statutory provisions which are in apparent conflict. One such principle is that statutes in apparent conflict should be reconciled to give effect to each of them. Another such rule is that statutes should be interpreted so that all language used is given effect, with no portion rendered meaningless or superfluous. Gorman, 155

Wn.2d at 210.

RCW 10.99.050(2)(b) states that a no-contact order issued pursuant to that section shall contain the following statement:

Violation of this order is a criminal offense under chapter 26.50 and will subject a violator to arrest; . . .

The only way to give effect to this language is to hold that willful contact in violation of a no-contact order is a crime.

RCW 26.50.110(1) limits criminal violations of restraint provisions to those for which arrest is required under RCW 10.31.100(2)(a) or (b). RCW 10.31.100(2)(a) refers to requiring an arrest when an officer has probable cause to believe that

"[a]n order has been issued of which the person has knowledge under . . . chapter 10.99 . . . restraining the person and the person has violated the terms of the order restraining the person from acts or threats of violence . . . ."

It should be noted that this provision does not require that the violator have committed a threat or act of violence, but only that the violation be of the "terms of the order restraining the

person from acts or threats of violence".

When a defendant is sentenced for a domestic violence crime, the prohibition of contact with the victim in a no-contact order issued pursuant to RCW 10.99.050(1) is clearly intended to protect the victim from any further acts or threats of violence. Therefore, contact prohibited by the order would be a violation of the "terms of the order restraining the person from acts or threats of violence". However, a violation of a provision in a family law restraining order unrelated to domestic violence, such as prohibiting a transfer of property, would not be such a violation, and so would not be a criminal offense under RCW 26.50.110(1).

Interpreted in this way, the language of RCW 10.99.050, RCW 26.50.110(1), and RCW 10.31.100(2)(a) would all be given effect, and in a manner consistent with the intent of the legislature evidenced by the House Bill Report discussed above.

Another applicable rule of statutory

construction is that unlikely, absurd or strained consequences resulting from a literal reading of a statute should be avoided. State v. McDougal, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992). The interpretation of RCW 26.50.110(1) adopted by the trial court results in such unlikely and absurd consequences.

For example, a no-contact order issued pursuant to RCW 10.99.050(1) as part of a criminal sentence would be intended to protect the victim from further threats or acts of violence. Yet, according to the trial court's interpretation, contact in violation of the order could not result in criminal penalties until such a threat or act of violence actually occurred, the very thing the no-contact provision was designed to prevent from happening.

Second, under the trial court's interpretation, a violation of a domestic violence order consisting of going onto the grounds of a residence would be a criminal offense, given the wording of RCW

10.31.100(2)(a). Additionally, violating the order by going within a certain distance of the residence would be a criminal offense. However, violating the order by actually contacting the protected person would not be a crime. Given that the purpose of such an order is to protect a person, not a location, such a discrepancy would make no sense at all.

Third, as previously discussed, a no-contact order issued to a defendant as part of a criminal sentence would be required to inform the defendant that contact in violation of the order would be a criminal offense. RCW 10.99.050(2)(b). However, according to the trial court's interpretation of RCW 26.50.110(1), that violation would not be a criminal offense.

The legislative history pertaining to both RCW 10.99.050 and RCW 26.50.110, and the applicable rules of statutory construction, lead to the same conclusion. The trial court erred in concluding that contact in violation of a no-contact order, issued pursuant to RCW 10.99.050,

would not constitute a criminal offense under RCW 26.50.110(1).

#### D. CONCLUSION

The elements of felony violation of a no-contact order, as alleged in this case, can be found in RCW 10.99.050(2)(a) and RCW 26.50.110(5). The factual basis for the defendant's guilty pleas in this case satisfied all those elements. The trial court erred in relying upon RCW 26.50.110(1) to determine the elements of the crime of violating a no-contact order.

However, even if the elements for that crime are to be found in RCW 26.50.110(1), the trial court erred in its interpretation of that statutory provision. RCW 26.50.110(1) cannot be accurately interpreted in a vacuum. Because of the apparent conflict between the provisions of RCW 10.99.050 and RCW 26.50.110(1), it is important to consider the relevant legislative history and applicable rules of statutory construction in order to ascertain and carry out the purpose of the legislature in regard to those

provisions.

The purpose of chapter 10.99 RCW is to assure victims of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide. RCW 10.99.010; Ward, 148 Wn.2d at 810. An interpretation of RCW 26.50.110(1) with regard to what constitutes a criminal violation of an order issued pursuant to chapter 10.99 RCW should be made consistent with that general purpose.

The purpose of SB 6400 was to improve Washington's response to domestic violence. S. Bill Report on SB 6400, 56<sup>th</sup> Leg., 2000 Reg. Sess. at 1 (February 8, 2000). Nothing in the legislative history of that bill indicates an intent to de-criminalize willful contact in violation of no-contact order issued as part of the sentence for a domestic violence crime.

RCW 10.99.050 and RCW 26.50.110(1) should be reconciled to give effect to both. That can be done by holding that contact in violation of a no-contact order, issued as part of a criminal

sentence pursuant to RCW 10.99.050(1), constitutes a violation of the terms of an order restraining a defendant from acts or threats of violence. Therefore, such a violation is a criminal offense under the wording of RCW 26.50.110(1).

The trial court erred in granting the defendant's motion for arrest of judgment. Based on the arguments set forth above, the State respectfully asks that this court re-instate the defendant's two convictions for felony violation of a no-contact order pursuant to his guilty pleas, and the Judgment and Sentence imposed pursuant to those convictions.

DATED this 9th day of February, 2007.

Respectfully submitted,

  
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JAMES C. POWERS/WSBA #12791  
DEPUTY PROSECUTING ATTORNEY

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
Respondent	)	DECLARATION OF
	)	MAILING
v.	)	
	)	
DEAN W. HOGAN,	)	
Appellant	)	

STATE OF WASHINGTON	)	
	)	ss.
COUNTY OF THURSTON	)	

COURT OF APPEALS  
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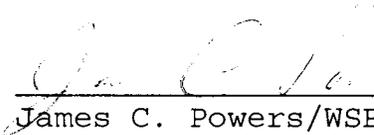
James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 12th day of February, 2007, I caused to be mailed to the Respondent's attorney, ROBERT M. QUILLIAN, a copy of the Brief of the Appellant, addressing said envelope as follows:

Robert M. Quillian,  
Attorney at Law  
2633 Parkmont Lane SW, Suite A  
Olympia, WA 98502-5793

I certify (or declare) under penalty of perjury  
under the laws of the State of Washington that  
the foregoing is true and correct to the best of  
my knowledge.

DATED this 12<sup>th</sup> day of February, 2007 at Olympia,  
WA.



James C. Powers/WSBA #12791  
Senior Deputy Prosecuting Attorney