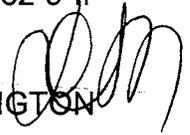


No. 35952-9-II



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY P. MADRID,

Appellant.

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

The Honorable Richard Strophy, Judge
Cause No. 06-1-01066-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether RCW 26.50.110, read in conjunction with RCW 10.31.100, is ambiguous, and if so, whether the ambiguity is such as to require reversal of Madrid's convictions for violation of a no-contact order.

2. Whether letters prohibited by a no-contact order, written and mailed at different times but received and read by the victim at the same time, constitute one or multiple units of prosecution.

3. Whether Madrid received ineffective assistance of counsel because of counsel's failure to argue the above.

B. STATEMENT OF THE CASE.

1. The State accepts the appellant's statement of the facts.

C. ARGUMENT

1. RCW 26.50.110 is ambiguous but the rules of statutory construction can resolve the ambiguity.

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. Id., 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). Strained, unlikely, or absurd consequences resulting from a literal reading are to be avoided. State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

Madrid was convicted of violating three different no-contact orders, two issued as part of a criminal case pursuant to RCW 10.99, [Exhibits 1 and 3] , and the third pursuant to a family law matter under RCW 26.50 [Exhibit 2]. All three prohibited contact in any manner with one or more protected persons.

Exhibit 2 was issued under RCW 26.50.060; the penalties for a violation of the order are contained in RCW 26.50.110(1), which reads:

(1) Whenever an order is granted under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection

order as defined in RCW 16.50.020, 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 10.31.100(2) reads, in pertinent part:

(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 7.90, 10.99, 26.09, 26.10, 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;

The orders entered as Exhibits 1 and 3 were issued pursuant to RCW 10.99.050, which reads in pertinent part:

(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)(a) Willful violation of a court order issued under this section is to be punishable under RCW 26.50.110.

(b) 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.

RCW 10.99.050, then, makes violations punishable under RCW 26.50.110, which, in turn, refers to RCW 10.31.100.

The difficulty is not so much that RCW 26.50.110 is ambiguous, but that a number of statutes are interconnected in the legislative attempt to protect victims of domestic violence. There are eight chapters listed in RCW 10.31.100(2)(a) under which orders may be issued that reference the mandatory arrest provision of that statute. It is not surprising that in the process, some ambiguity results.

Under rules of statutory construction, each provision of a statute should be read together with related provisions to determine the legislative intent underlying the entire statutory scheme. Reading the provisions as a unified whole maintains the integrity of the respective statutes.

In the Matter of the Estate of Kerr, 134 Wn.2d 328, 343, 949 P.2d 810 (1998).

. . . [T]he rule of statutory construction that trumps every other rule—“the court should not construe statutory language so as to result in absurd or strained consequences,” In re Custody of Smith, 137 Wn.2d 1, 8, 969 P.2d 21 (1998) (quoting Dube v. Boyd, 133 Wn.2d 80, 87, 942 P.2d 351 (1999)—is not violated here.

Davis v. Dept. of Licensing, 137 Wn.2d 957, 971, 977 P.2d 554 (1999).

When one reads the three statutes at issue here, only RCW 10.31.100(2)(a) refers to violations of “the order restraining the person from acts or threats of violence”. On its face, RCW 10.99.050 seems to contemplate that any violation of the no-contact order, including “mere contact,” would be a crime. The court’s written order is to contain language warning that “violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest”. Not “some violations”, not “violations other than mere contact”, not “may subject a violator to arrest”. RCW 26.50.110(2) also gives law enforcement authority to arrest:

(2) A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order issued under this chapter, chapter

7.90, 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, *that restrains the person* or excludes the person from a residence, workplace, school, or day care, or prohibits the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, if the person restrained knows of the order, (Emphasis added.)

RCW 26.50.110(3) contains this language:

(3) violation of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid protection order as defined in RCW 26.52.020, shall *also* constitute contempt of court, and is subject to the penalties prescribed by law. (Emphasis added.)

When read together, these provisions certainly seem to contemplate that any violation of the no-contact order is a criminal offense of some degree. That it may also constitute contempt does not take away the criminal liability for violations.

As with Exhibits 1 and 3, Exhibit 2 contains warnings to the respondent that violation of the provisions constitutes a criminal offense, subjecting the violator to arrest. While the language of a standard form does not control what the law is, it is an indication that the perceived intent has been that all violations, whether or not violence or threats of violence were involved, are crimes.

Legislative intent is the primary goal of statutory construction. 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). This statute addresses specifically the creation of orders to prohibit a defendant from contacting the victim when the defendant was sentenced for a domestic violence 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.

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, 56th 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, 56th 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, 56th 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, 56th 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, 56th 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, 56th 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, 56th 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, 56th 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.

On February 23, 2000, an amended version of E2SSB 6400 was passed out of the House Committee on Criminal Justice and Corrections. HOUSE JOURNAL, 56th 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, 56th 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, 56th 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 decriminalize 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, 56th 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. This interpretation also avoids “unlikely, absurd or strained” consequences that result from a literal reading of the statute. State v. McDougal, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992). The interpretation of RCW 26.50.110(1) urged by Madrid would result in 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. However, as argued by Madrid, 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 appellant'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 Madrid'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. A violation of a no-contact order, even if it is not an act or threat of violence, is a crime.

2. Even though the victims received all of the letters and cards at the same time, Madrid wrote and mailed them at different times, and therefore they do not constitute a single unit of prosecution.

Madrid correctly states the law regarding the “unit of prosecution”. He cites to State v. Tvedt, 153 Wn.2d 705, 107 P.3d 728 (2005), for the proposition that only one count of robbery may result from each separate taking of property, regardless of the number of items taken from the same person at the same time, or the number of people with an interest in the property who are present at the time of the single taking. He then attempts to apply the idea of “multiple items of property” to the multiple communications that he mailed to his mother-in-law, intending that she pass them on to the victims. It is not the same thing at all.

A number of Washington cases have dealt with the issue of unit of prosecution. From these cases, two principles emerge. One, the first inquiry is the language of the statute. If the legislature made clear what constitutes the unit of prosecution, that controls. If not, the court must determine the scope of the criminal act, and that scope focuses on the actions of the *defendant*, not the *victim*. State v. Ustimenko, 137 Wn. App. 109, 151 P.3d 256 (2007).

The first task, then, is to look at the language of the statute.

In State v. Graham, 153 Wn.2d 400, 405, 103 P.3d 1238 (2005), for instance, the Supreme Court held that in deciding whether a statute can be violated multiple times in the same incident, the court must determine the scope of a criminal act (the unit of prosecution). If the unit of prosecution is not clearly indicated, the rule of lenity must be applied. 153 Wn.2d at 405.

In Graham, the crime at issue is reckless endangerment, described as reckless conduct “not amounting to drive-by shooting but that creates a substantial risk of death or serious physical injury to another person.” . . . According to Graham, a statute that “proscribes conduct that places at risk not simply *any* person but ‘*another* person” plainly intends one unit of prosecution per victim. . . (Emphasis in original.)

The hit-and-run statute requires a driver involved in an accident to stay at the scene long enough to give the required identification information to “any person” injured or occupying the struck vehicle and to render reasonable assistance to “any person injured.” . . . The unit of prosecution is the act of leaving the scene of an accident without giving assistance and the required information, not the failure to give assistance and information to a particular individual. . . .

State v. Ustimenko, *supra*, 117-18.

In State v. Tili, 139 Wn.2d 107, 119, 985 P.2d 365 (1999), *affmd.* 148 Wn.2d 350, 60 P.3d 1192 (2003), the defendant had been convicted of three counts of rape for three separate acts of penetration that occurred in the course of one assault. The court

held that the unit of prosecution is “sexual intercourse,” which is defined as “any penetration of the vagina or anus.” Therefore, each penetration constituted a separate crime. The court held in State v. Ose, 156 Wn.2d 140, 124 P.3d 635 (2005), that the statute prohibiting the possession of stolen access devices made each device a separate unit, even though the defendant had argued that he should be guilty of only one possession of several access devices. The unit of prosecution for reckless endangerment is each person endangered, State v. Graham, *supra*, for possession of a firearm the unit of prosecution is one charge for each firearm, State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003), for sexual exploitation of a minor, each photo session for each minor, State v. Root, 141 Wn.2d 710, 9 P.3d 214 (2000), maintaining two separate marijuana grow operations is two units, In re Personal Restraint of Davis, 142 Wn.2d 164, 12 P.3d 603 (2000), and for possession of obscene pictures or photographs with intent to show them, each machine that ran a “peep show” is a separate unit, State v. Silverman, 48 Wn.2d 198, 292 P.2d 868 (1956).

On the other hand, one arson fire that damages three vehicles is only one unit of prosecution, State v. Westling, 145 Wn.2d 607, 40 P.3d 669 (2002), and possession of marijuana in

two locations is one unit, State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998).

The first inquiry then, is to determine if the statute specifies what constitutes the unit of prosecution. Here we have two statutes. RCW 26.50.110(1) makes punishable “. . . a violation of the restraint provisions, or of a provision excluding the person . . .” “A” violation implies that each breaking of the conditions of the court order is a separate crime. That would mean that each card or letter was a separate unit of prosecution, no matter when the victim read them, since each communication would be a distinct violation.

RCW 10.99.050(2)(a), on the other hand, prohibits “willful violation of a court order issued under this section. . . .” Because that is not a clear indication of legislative intent, it is helpful to look to other cases, such as those listed above, where courts have considered the unit of prosecution issue. The general theme of these cases is that the unit of prosecution depends on the actions of the *defendant*, not the *victim*. It makes little sense to allow the actions of the victim, or some third party such as the mother-in-law in this case, to determine how many offenses a defendant can be charged with. Nor is it logical to allow fortuitous circumstances to relieve the defendant of liability. Here, Madrid wrote and mailed

each card or letter separately, and if they had been forwarded on as Dixie Paulk's mother received them, the victim would have received each separately. It was only by happenstance, completely out of Madrid's control, that she received the accumulated messages at one time. A defendant's liability should be related to what he did, not what others (other than accomplices) did. If Madrid had, for example, mailed each letter separately directly to the victims, but they had been out of town for an extended period, they would have collected their mail at one time and thus received the messages in one event. It seems unlikely that a court would consider that one unit of prosecution, yet the basic situation is very similar. Madrid should be liable for each and every message he sent to the victims in violation of a court order.

3. Trial counsel was not ineffective, and Madrid was not prejudiced.

Before trial, Madrid's trial counsel brought a motion based upon State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986). He argued vigorously that the conduct of the defendant did not constitute a crime. [11-06-06 RP 4-10] The court disagreed and ruled against Madrid. He raised the same issue on the day of trial in the context of a proposed jury instruction, and again the court

ruled against him. [11-14-06 RP (Judge's Ruling)] Having lost that argument twice before the same judge, it is not ineffective assistance of counsel to fail to raise it a third time post-trial.

Following the trial, defense counsel brought a motion to arrest judgment, making the argument that all of the letters and card which were delivered at one time constituted only two counts, one for Amy Paulk and one for Dixie Paulk Madrid. He conceded that the telephone call to Dixie Paulk Madrid would constitute a third offense. [CP 269-75] The motion was argued just prior to sentencing, and the court denied it. [01-19-07 RP 3-15]

Even though the State maintains that both arguments are incorrect and thus failure to raise them would not have been ineffective assistance of counsel, trial counsel made them before the trial court, and can certainly not be found to be ineffective for failure to raise and argue the issues.

D. CONCLUSION

Although the interconnecting statutes providing for no-contact orders and prohibiting the violations thereof create ambiguity, that ambiguity can be resolved through standard rules of statutory construction. A violation of a no-contact order is (unless

otherwise specified) a gross misdemeanor even if there was no act or threat of violence.

Counts I, III, IV, V, VII, VIII, and IX do not encompass a single unit of prosecution because the cards and letters were sent separately and intended to be separate communications. It was only by the chance actions of a third party that they were delivered at one time.

Trial counsel raised and argued these issues before the trial court, and therefore did not provide ineffective assistance of counsel. Further, even if he had not raised them below, they are incorrect arguments and failure to raise them would not have been ineffective assistance of counsel.

Based upon the argument and authorities above, the State respectfully requests that this court affirm all of Madrid's convictions.

Respectfully submitted this 1st of November, 2007.



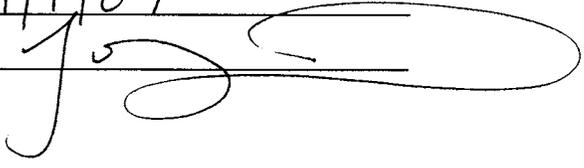
Carol La Verne, WSBA# 19229
Attorney for Respondent

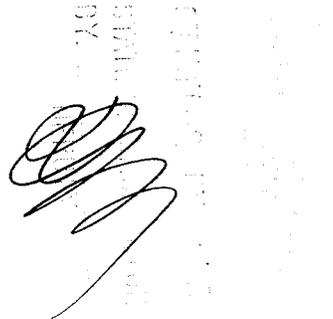
A copy of this document was properly addressed and mailed, postage prepaid, to the following individual(s) on November 1, 2007.

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: 11/1/07

Signature: 


Faint signature and stamp, possibly a notary seal, located in the lower right quadrant of the page.