

COA NO. 44417-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANGELA RODRIGUEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON CLARK COUNTY

The Honorable Daniel L. Stahnke, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The court miscalculated the offender score for the felony conviction.

2. The length of the suspended sentence and probation term for the gross misdemeanor conviction exceeds the statutory maximum.

3. The no contact orders entered as part of appellant's gross misdemeanor sentence exceed the statutory maximum. CP 58, 63-64.

Issues Pertaining to Assignments of Error

1. Whether appellant's current gross misdemeanor conviction should not count in the offender score as a "repetitive domestic violence offense" because the legislature only intended such offenses to contribute to the offender score when they are actual prior offenses?

2. Whether the superior court lacked statutory authority to suspend the sentence and impose probation on appellant's gross misdemeanor conviction for five years, where the legislature has only granted that power to courts of limited jurisdiction?

3. Where the statutory maximum for the gross misdemeanor offense is less than five years, did the superior court exceed its statutory authority in ordering no contact with the victim for a period of five years?

B. STATEMENT OF THE CASE

Angela Rodriguez pled guilty to felony violation of a domestic violence court order (assault) under count I and a gross misdemeanor violation of a no-contact order under count II. CP 5-7, 14; RP¹ 3-7. Count I involved an assault on Rodriguez's father Brian Longoria and count II involved contact with her mother Danita Cash. CP 14; RP 8. A single incident formed the basis for both convictions. CP 14. Rodriguez had no prior violations of a no-contact order. CP 14.

The parties disputed the offender score for the felony conviction. CP 46-51. The State believed the offender score should be one point on the theory that Rodriguez had been convicted of a prior "repetitive domestic violence offense" under RCW 9.94A.525(21)(c). CP 46-47. The defense argued the offender score should be zero because the current offense for which Rodriguez had been convicted under count II did not count as a prior "repetitive domestic violence offense." CP 48-50.

The superior court agreed with the State and sentenced Rodriguez on count I to a term of 14 months based on an offender score of one point. CP 29-30; RP 11-19. The court also sentenced Rodriguez to 364 days in jail for the gross misdemeanor with 314 days suspended for a period of 60

¹ The verbatim report of proceedings is referenced as follows: RP - one volume consisting of 12/14/12 and 12/21/12.

months probation. CP 53, 56-57. The court further imposed no-contact orders pertaining to Rodriguez's father and mother for a period of five years. CP 27, 58, 61-64. This appeal timely follows. CP 43.

C. ARGUMENT

1. THE COURT WRONGLY INCLUDED THE CURRENT GROSS MISDEMEANOR OFFENSE IN THE OFFENDER SCORE BECAUSE IT DOES NOT QUALIFY AS A PRIOR "REPETITIVE DOMESTIC VIOLENCE OFFENSE" UNDER THE SENTENCING REFORM ACT.

The superior court erred in concluding Rodriguez's offender score was one point instead of zero. The current misdemeanor offense of violating a no-contact order under count II does not qualify as a "repetitive domestic violence offense" under RCW 9.94A.525 for offender score purposes. The legislature intended that provision to apply only to misdemeanor domestic violence convictions that are true prior convictions, not current convictions. Remand is appropriate to enable the superior court to resentence Rodriguez based on an offender score of zero.

a. The Standard Of Review Is De Novo.

Offender scores are reviewed de novo. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). The meaning of a statute is also a question of law reviewed de novo. Manary v. Anderson, 176 Wn.2d 342, 350, 292 P.3d 96 (2013).

- b. The Language Of The Statute Shows Current Misdemeanor Convictions For A Domestic Violence Offense Do Not Count Toward The Offender Score.

The purpose of statutory interpretation is to ascertain and carry out the legislature's intent. Manary, 176 Wn.2d at 350. In interpreting a statute, courts start with the plain language of the statute. Valley Environmental Laboratory LLC v. Yakima County, 139 Wn. App. 239, 244, 159 P.3d 491 (2007). "The plain meaning of a statute may be discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

Washington's Sentencing Reform Act (SRA) creates a grid of standard sentence ranges based upon the defendant's offender score and the seriousness level of the current offense. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999); see RCW 9.94A.510 (sentencing grid). An offender score is the sum of points accrued under RCW 9.94A.525, which includes points for prior convictions and points for other current offenses. RCW 9.94A.525.

RCW 9.94A.525(1) provides "A prior conviction is a conviction which exists before the date of sentencing for the offense for which the

offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed 'other current offenses' within the meaning of RCW 9.94A.589."²

RCW 9.94A.525(21) states "If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows: . . . (c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011."

RCW 9.94A.030(41)(a)(ii) defines "repetitive domestic violence offense" to include any "[d]omestic violence violation of a no-contact order under chapter 10.99 RCW that is not a felony offense."

Rodriguez's gross misdemeanor conviction for violating a no-contact order under count II was entered and sentenced on the same date as the felony conviction under count I. CP 27, 52; RP 3-10. Both offenses took place at the same time. CP 14. Under RCW 9.94A.525(1), the gross

² "'Conviction' means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." RCW 9.94A.030(9).

misdemeanor conviction for violating a no-contact order is a "present conviction," not a "prior conviction for a repetitive domestic violence offense." The gross misdemeanor conviction therefore could not be included in the offender score under RCW 9.94A.525(21)(c).

The superior court concluded otherwise, relying on the emphasized portion of RCW 9.94A.589(1)(a), which states "Except as provided in (b) or (c) of this subsection, *whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score*: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535."

According to the court and the State, the gross misdemeanor conviction is a "current offense" that must be retreated as a "prior conviction" for purposes of the offender score under RCW 9.94A.589(1)(a), thus making it subject to the scoring provision of RCW 9.94A.525(21). CP 50-51; RP 11-19. The language of RCW 9.94A.589(1)(a), however, precludes that conclusion.

The provision under RCW 9.94A.589(1)(a) that directs courts to treat current offenses as prior offenses for purposes of the offender score only applies to felonies because the statute uses the clause, "the sentence range for *each* current offense." (emphasis added). This language presumes each current offense has a sentencing range to be determined by an offender score. Only felonies have sentence ranges determined by an offender score.³ Misdemeanor convictions do not. RCW 9.94A.525; City of Bremerton v. Bradshaw, 121 Wn. App. 410, 413, 88 P.3d 438 (2004) (SRA does not apply to sentencing of misdemeanors); State v. Bowen, 51 Wn. App. 42, 46, 751 P.2d 1226 (1988) ("The SRA applies only to the sentencing of felony offenders."), review denied, 111 Wn.2d 1017 (1988).

The rule under RCW 9.94A.589(1)(a) applies when *both* current offenses have a sentencing range, as indicated by the legislature's use of the word "each." Every word of a statute must be given significance. State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). The superior court's reading of the statute is flawed because it reads the word

³ See RCW 9.94A.010 (the purpose of the Sentencing Reform Act "is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures[.]"); RCW 9.94A.505(1), (2)(a)(i) (when a person is convicted of a felony, the court shall impose a sentence within the standard sentence range established in RCW 9.94A.510); RCW 9.94A.510 (sentencing grid computing sentencing range based on seriousness level of offense and offender score); RCW 9.94A.515 (listing seriousness level of offenses, all of which are felonies).

"each" out of the statute. "[A] court must not interpret a statute in any way that renders any portion meaningless or superfluous." Jongeward v. BNSF R. Co., 174 Wn.2d 586, 601, 278 P.3d 157 (2012).

The remaining language in RCW 9.94A.589(1)(a) bolsters Rodriguez's interpretation: "PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535."

In considering the "same criminal conduct" issue, the phrase "those current offenses shall be counted as one crime" must refer to two or more current felony offenses. Current offenses that are the same criminal conduct are treated as one crime for the purpose of computing the offender score for each offense. RCW 9.94A.589(1)(a). But no offender score attaches to misdemeanor convictions. The language of the same criminal conduct provision, in using the plural phrase "those current offenses," envisions reciprocity between the two current offenses in terms of reducing the offender score for each of them. See In re Guardianship of Way, 79 Wn. App. 184, 189, 901 P.2d 349 (1995) (use of plural as opposed to singular given effect in interpreting statute), review denied,

128 Wn.2d 1014, 911 P.2d 1343 (1996). This conclusion supports Rodriguez's argument that RCW 9.94A.589(1)(a) in total refers only to two current felonies, not one felony and one misdemeanor.

Furthermore, the exceptional sentence provisions of RCW 9.94A.535 for consecutive sentences apply only when both current offenses are felonies. See State v. Whitney, 78 Wn. App. 506, 517, 897 P.2d 374 (court may run misdemeanor conviction consecutive to felony conviction without justifying the consecutive sentence under the SRA because the SRA "applies only to felony sentences and does not limit the judge's discretion in imposing a sentence for a misdemeanor conviction."), review denied, 128 Wn.2d 1003, 907 P.2d 297 (1995).

The inclusion of additional language in RCW 9.94A.589(1)(a) that applies when both current offenses are felonies indicates that the prior language on treating each current offense as a prior offense likewise applies when both current offenses are felonies. Under the doctrine of *noscitur a sociis* — a word is known by the company it keeps — "the meaning of words may be indicated or controlled by those with which they are associated." State v. Jackson, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999) (quoting Ball v. Stokely Foods, Inc., 37 Wn.2d 79, 87-88, 221 P.2d 832 (1950)); In re Guardianship of Knutson, 160 Wn. App. 854, 867 n.13, 250 P.3d 1072 (2011). In construing terms in a statute, courts "take into

consideration the meaning naturally attaching to them from the context, and to adopt the sense of the words which best harmonizes with the context." Jackson, 137 Wn.2d at 729 (quoting McDermott v. Kaczmarek, 2 Wn. App. 643, 648, 469 P.2d 191 (1970)). Particular statutory provisions are not read in isolation divorced from context. Campbell & Gwinn, L.L.C., 146 Wn.2d at 10-11.

The context of RCW 9.94A.589(1)(a), construed as a whole, shows the legislature intended it to apply to two or more current felonies rather than one felony and one misdemeanor. That interpretation best harmonizes with the overall context of RCW 9.94A.589(1)(a).

Moreover, only "repetitive" domestic violence offenses are subject to being counted in the offender score. RCW 9.94A.525(21). Repetitive means "repeating." Webster's Third New Int'l Dictionary 1924-25 (1993). Rodriguez committed her two offenses at the same time. She did not commit one domestic violence offense and then commit another at a later time. Her misdemeanor offense did not constitute a serial domestic violence offense.

- c. The Legislative History Shows The Misdemeanor Scoring Rule For "Repetitive Domestic Violence Offenses" Was Meant To Apply To Repeat Offenders, Where The Misdemeanor Offense At Issue Is An Actual Prior Conviction, Not A Current Offense.

The legislative history of RCW 9.94A.525(21)(c) supports Rodriguez's argument that the legislature intended a "repetitive domestic violence offense" to be included in the offender score only when it is an actual prior offense. Comments made by the prime sponsor of the bill and those testifying in support are illuminating. See State v. Evans, 177 Wn.2d 186, 199-203, 298 P.3d 724 (2013) (considering committee hearings as probative of legislative intent); In re Marriage of Kovacs, 121 Wn.2d 795, 807-08, 854 P.2d 629 (1993) (noting the "remarks of . . . a prime sponsor and drafter of the bill" can assist in determining legislative intent); State v. Reding, 119 Wn.2d 685, 690, 835 P.2d 1019 (1992) (legislature's intent may be discerned from legislative bill reports); Lowy v. PeaceHealth, 174 Wn.2d 769, 782, 280 P.3d 1078 (2012) (looking to testimony in bill report to divine legislative intent).

Those comments demonstrate a unified theme that the misdemeanor scoring provision was meant to apply to a small class of people that constitute repeat, recidivist offenders. No one talked about or even hinted that the misdemeanor scoring provision applied to current misdemeanor offenses that are tried and sentenced along with a current

felony offense. The remarks were exclusively made in terms of prior convictions, with no reference to treating a current conviction for a misdemeanor domestic violence offense as a prior conviction for purposes of the offender score. See Hearing on H.B. 2777 Before the H. Pub. Safety & Emergency Preparedness Comm. (Jan. 26, 2010) at 15 min. 50 sec., recording by TVW, Washington State's Public Affairs Network, available at [http:// www. tvw. org](http://www.tvw.org).⁴; Hearing on H.B. 2777 Before the H. Pub. Safety & Emergency Preparedness Comm. (Jan. 27, 2010) at 1 hour 11 min. 15 sec.; Hearing on E.S.H.B. 2777 Before the Senate Jud. Comm. (Feb. 23, 2010) at 27 min. 55 sec.; Hearing on E.S.H.B. 2777 Before the Senate Jud. Comm. (Feb. 26, 2010) at 54 min. 24 sec.

The prime sponsor explained "There was a great concern that, when you look at domestic violence, most of the time it's people just lose it, and it's inexcusable what they do to their partner as far as committing acts of violence. But a minority of the time, there are terroristic, repeated acts of, and sometimes it's not violence, it's usually a subtle, manipulative, insidious pattern of coercion and control which can erupt in violence and very often death. And these repeated offenders are the ones we're targeting from this, in this bill." See Hearing on H.B. 2777 Before the H.

⁴ Recordings of all committee hearings cited herein are available at <http://www.tvw.org>.

Pub. Safety & Emergency Preparedness Comm. (Jan. 26, 2010) at 19 min.
48 sec.

The prime sponsor continued, "So the bill here will allow those prior misdemeanors to count. So if you have three or four or however many, it is as if, when you commit a felony offense, so the current offense is a felony offense, a dv offense, and the fiscal effect I'm assuming of this bill won't be felt, and again, it's a relatively small universe of repeat offenders, until future biennia because the -- nothing's gonna take effect until these misdemeanors are committed in the future as well, so this sort of, the scoring system isn't going to be accumulating for offenders until three or four years from now." See Hearing on H.B. 2777 Before the H. Pub. Safety & Emergency Preparedness Comm. (Jan. 26, 2010) at 20 min.
54 sec.

The following day, the sponsor reiterated "This is a sibling to the omnibus domestic violence bill moving through the judiciary committee, follows very much the intent of Representative Pearson's bill coming out of the Attorney General's office to hold accountable the repeat domestic violence offenders. The bill would be counting prior misdemeanors when the current offense is a felony. And that would allow for proper accountability and also incapacitation of these repeat domestic violence

offenders."⁵ See Hearing on H.B. 2777 Before the H. Pub. Safety & Emergency Preparedness Comm. (Jan. 27, 2010) at 1 hour 12 min. 50 sec.

Testimony in support of H.B. 2777 reflects, "This bill is targeting those repeat domestic violence offenders. It is hard to prosecute an offender as a first-time offender when in reality this person has a history of committing domestic-violence-misdemeanor offenses. This bill will allow those prior violations for Assault, Harassment, Stalking, and Violations of a No-Contact Order to now be counted like a felony offense." H.B. Rep. on H.B. 2777 at 3 (testimony in support) (attached as app. B).

A representative from the Washington Association of Prosecuting Attorneys told the House committee "Our issue is that, you know, we'll get an offender in felony court for their first felony, and it's uncomfortable to deal with them like they're a first time offender when we can see this long history of domestic violence assaults. And I think the best part of this bill

⁵ Representative Pearson's bill was E.S.H.B. 2427, which contained an identical scoring provision for "repetitive domestic violence offenses." See E.S.H.B. 2427 Bill Report 2427 at 1, 3-4 (attached as app. A); Hearing on E.S.H.B. 2777 Before the Senate Jud. Comm. (Feb. 23, 2010) at 28 min. 14 sec. Testimony in support of E.S.H.B. 2427 provided "Studies have shown that there is a small group of offenders that recidivate. This bill targets the worst of the worst serial domestic violence abusers. Passage of this legislation will help restore victim confidence in the criminal justice system by putting serial abusers away for a long time and holding them accountable." E.S.H.B. 2427 Bill Report 2427 at 4.

allows us, and allows the court to take into account, the actual history. We're not talking about dealing with allegations, we're talking about actual prior convictions." See Hearing on H.B. 2777 Before the H. Pub. Safety & Emergency Preparedness Comm. (Jan. 26, 2010) at 31 min. 17 sec.

Testifying in support of the bill before the Senate Judiciary Committee, a King County prosecutor gave the "recidivist dv offender" as an example of how the scoring rule on misdemeanors should apply, emphasizing the rule would apply to a "very narrow group of folks." Hearing on E.S.H.B. 2777 Before the Senate Jud. Comm. (Feb. 23, 2010) at 1 hour 19 min. 15 sec. to 25 min. 52 sec.

The legislative history of the bill shows the legislature intended the misdemeanor scoring provision of RCW 9.94A.525(21)(c) to apply to actual prior convictions, not current convictions. The bill targeted repeat offenders; i.e., recidivist offenders who commit domestic violence crimes over a period of time. Rodriguez's gross misdemeanor conviction was a present conviction, not an actual past conviction. The offense for that conviction took place at the same time as her felony offense. Rodriguez had no actual prior domestic violence convictions. CP 14. The scoring provision of RCW 9.94A.525(21)(c) was not meant to apply under such circumstances.

d. The Rule Of Lenity Mandates The Statute Be Construed In Rodriguez's Favor.

Even if the statutory scheme were ambiguous on this point, the rule of lenity applies in favor of Rodriguez. "Under the rule of lenity, any ambiguity in the meaning of a criminal statute must be resolved in favor of the defendant." In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999). "The policy behind the rule of lenity is to place the burden squarely on the legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are." State v. Jackson, 61 Wn. App. 86, 93, 809 P.2d 221 (1991).

A statute is ambiguous if it is susceptible to more than one reasonable interpretation. State v. Parent, 164 Wn. App. 210, 212, 267 P.3d 358 (2011). As set forth above, Rodriguez's interpretation of when misdemeanor domestic violence offenses will count in the offender score under RCW 9.94A.525(21)(c) is reasonable. The rule of lenity requires that provision be interpreted in favor of Rodriguez, resulting in an offender score of zero.

e. The Remedy Is Resentencing With An Offender Score Of Zero.

The remedy for a miscalculated offender score is to remand for resentencing based on the correct offender score. Ford, 137 Wn.2d at 485.

Rodriguez is entitled to be resentenced using a correct offender score of zero.

2. THE SUPERIOR COURT LACKED STATUTORY AUTHORITY TO IMPOSE A FIVE YEAR TERM OF PROBATION ON THE GROSS MISDEMEANOR COUNT.

Courts lack inherent authority to suspend a sentence. State v. Clark, 91 Wn. App. 581, 585, 958 P.2d 1028 (1998). The power to suspend a sentence must be granted by the legislature. State v. Bird, 95 Wn.2d 83, 85, 622 P.2d 1262 (1980). "The terms of the statutes granting courts these powers are mandatory; when a court fails to follow the statutory provisions, its actions are void." Clark, 91 Wn. App. at 585.

The superior court had no authority imposing a suspended sentence and attendant probation for a term of five years on the gross misdemeanor conviction. CP 56-57. Defense counsel did not raise this challenge below, but erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

Neither the superior court nor the State cited the statutory provision it purported to rely upon to impose the five year term of probation at issue here. Statutory provisions applicable to courts of limited jurisdiction authorize a five year term of probation for domestic

violence offenses. RCW 3.66.068 (district court); RCW 3.50.330 (municipal court).

The suspended sentence statutes applicable to superior courts, however, do not authorize a five year term of probation for such offenses. RCW 9.92.064; RCW 9.95.210(1)(a). The superior court therefore erred in imposing a five year term of probation on Rodriguez for her misdemeanor domestic violence conviction under count II. CP 56-57.

RCW 3.66.068 provides "[f]or a period not to exceed five years after imposition of sentence for a defendant sentenced for a domestic violence offense . . . the court has continuing jurisdiction and authority to suspend or defer the execution of all or any part of its sentence upon stated terms, including installment payment of fines . . . For the purposes of this section, 'domestic violence offense' means a crime listed in RCW 10.99.020 that is not a felony offense." An identically worded provision applies to municipal courts. RCW 3.50.330.

The offense of violating a no contact order under count II is a crime listed in RCW 10.99.020. See RCW 10.99.020(5)(r). But Title 3 RCW applies to courts of limited jurisdiction. RCW 3.02.010; see State v. Williams, 97 Wn. App. 257, 262, 983 P.2d 687 (1999) (court of limited jurisdiction has authority to impose probationary terms as a condition for suspending a sentence under RCW 3.66.068).

Rodriguez was convicted and sentenced in the superior court. RCW 3.66.068 (district court) and RCW 3.50.330 (municipal court) are therefore inapplicable to Rodriguez.

The statutory authority of the superior court to suspend a sentence and impose probation lies elsewhere. There are two statutory schemes under which a superior court may impose a suspended sentence: (1) RCW 9.92.060-.064, the Suspended Sentence Act, and (2) RCW 9.95.210, the Probation Act. State v. Monday, 85 Wn.2d 906, 907, 540 P.2d 416 (1975); State v. Davis, 56 Wn.2d 729, 730, 737, 355 P.2d 344 (1960).

RCW 9.92.060(1) provides "Whenever any person is convicted of any crime except murder, burglary in the first degree, arson in the first degree, robbery, rape of a child, or rape, the superior court may, in its discretion, at the time of imposing sentence upon such person, direct that such sentence be stayed and suspended until otherwise ordered by the superior court." RCW 9.92.064 specifies "In the case of a person granted a suspended sentence under the provisions of RCW 9.92.060, the court shall establish a definite termination date for the suspended sentence. *The court shall set a date no later than the time the original sentence would have elapsed[.]*" (emphasis added).

The superior court sentenced Rodriguez to 364 days in jail on count II, with 314 days suspended and 50 days credit for time served. CP

53. The original sentence, then, would have elapsed after 314 days. Under RCW 9.92.064, the superior court had authority to impose a maximum term of probation of 314 days.

The Probation Act offers an alternative to superior courts for imposing probation. Monday, 85 Wn.2d at 907; Davis, 56 Wn.2d at 730, 737. RCW 9.95.210(1)(a) states "Except as provided in (b) of this subsection in granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, *not exceeding the maximum term of sentence or two years, whichever is longer.*"⁶ (emphasis added).

The maximum term of a gross misdemeanor sentence is 364 days. RCW 9A.20.021(2). Under RCW 9.95.210(1)(a), the superior court had authority to impose a maximum term of probation of two years on Rodriguez.

Under no applicable statute did the superior court have authority impose a five year term of probation on Rodriguez. "Since even superior courts do not have inherent power to suspend a sentence, their

⁶ RCW 9.95.210(1)(b) authorizes a five year term of probation for defendants sentenced under RCW 46.61.5055, which pertains to convictions for driving or being in physical control of a vehicle while under the influence.

probationary jurisdiction is also limited to that provided by statute." City of Spokane v. Marquette, 146 Wn.2d 124, 131-32, 43 P.3d 502 (2002). Under 9.95.210(1)(a), the superior court may impose a two year term of probation on Rodriguez. Under RCW 9.92.064, the superior court may set termination date for Rodriguez's probation "no later than the time the original sentence would have elapsed," i.e., 314 days.

In 2010, the legislature amended RCW 3.66.068 to authorize district courts to impose a five year term of probation for "domestic violence" offenses. Laws of 2010, ch. 274, § 405. The legislature also amended RCW 3.50.330 to give municipal courts the same power. Laws of 2010, ch. 274 § 406.

The legislature, however, did not act to give superior courts the power to impose a five year term of probation in suspending a sentence for a domestic violence offense. The maximum probation terms under RCW 9.92.064 or RCW 9.95.210(1)(a) remained undisturbed. The legislature did not amend either statute to make misdemeanor domestic violence offenses subject to a five year probation term.

The plain language of the statutes at issue show the legislature intended to reserve the ability to impose a five year term of probation for domestic violence offenses to courts of limited jurisdiction. When words in a statute are clear and unequivocal, the reviewing court is "required to

assume the Legislature meant exactly what it said and apply the statute as written." Duke v. Boyd, 133 Wn.2d 80, 87, 942 P.2d 351 (1997).

The legislature knows the difference between courts of limited jurisdiction and the superior court. It also plainly knows how to choose which courts receive authority to impose a five year term of probation for domestic violence offenses. The legislature could have amended RCW 9.92.064 or RCW 9.95.210(1) to allow superior courts to impose a five year probation term, just as it did with district and municipal courts in RCW 3.66.068 and RCW 3.50.330. It chose not to do so.

The plain language of the statutes demonstrate the legislature knew exactly what it was doing in limiting the five year term of probation for domestic violence offenses to district and municipal courts. Cf. See State v. Hayes, 37 Wn. App. 786, 788, 683 P.2d 237 (plain language of RCW 10.05.010 — "Upon arraignment in a court of limited jurisdiction a person charged with a misdemeanor or gross misdemeanor may petition the court to be considered for a deferred prosecution program" — showed legislature intended that deferred prosecution be made available in misdemeanor cases only at the district court level), review denied, 102 Wn.2d 1008 (1984).

The legislature also knows how to give the superior court the authority to impose a five year term of probation for certain offenses.

There is a stated exception to the two year maximum under RCW 9.95.210(1)(a) ("Except as provided in (b) of this subsection in granting probation . . ."). Under RCW 9.95.210(1)(b), the legislature specifically allows the superior court to impose a five year term of probation for those sentenced under RCW 46.61.5055, which pertains to convictions involving driving or having control of a vehicle while under the influence. There is no comparable authority for the superior court to impose a five year term of probation for any other kind of offense, including domestic violence offenses.

"Where a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, i.e., the rule of *expressio unius est exclusio alterius* applies." Wash. State Republican Party v. Wash. State Public Disclosure Com'n, 141 Wn.2d 245, 280, 4 P.3d 808 (2000). That is, "[w]here a statute provides for a stated exception, no other exceptions will be assumed by implication." Jepson v. Dep't of Labor & Indus., 89 Wn.2d 394, 404, 573 P.2d 10 (1977). RCW 9.95.210(1)(b) plainly lists the sole exception to the two year maximum term of probation under the Probation Act. Conviction for a gross misdemeanor domestic violence offense does not fall under that exception.

The legislative history of the 2010 amendment supports Rodriguez's argument. The bill reports refer exclusively to courts of

limited jurisdiction having the new authority to impose a five year probation term for domestic violence offenses. See H.B. Rep. on H.B. 2777, at 2, 61st Leg., Reg. Sess. (Wash. 2010) ("The maximum period of probation that may be imposed by courts of limited jurisdiction is increased from two years to five years.") (attached as app. B); F.B. Rep. on E.S.H.B. 2777, at 4, 61st Leg., Reg. Sess. (Wash. 2010) ("The maximum period of probation that may be imposed by district and municipal courts is increased from two years to five years.") (attached as app. C). The bill reports make no mention of the superior court having that authority for domestic violence offenses.

Even if the statutory scheme is ambiguous on this point, the rule of lenity applies in favor of Rodriguez. Hopkins, 137 Wn.2d at 901. Under the rule of lenity, Rodriguez is only subject to a term of probation authorized by RCW 9.92.064 or RCW 9.95.210(1)(a) rather than a five year term of probation. The superior court's order imposing a five year term of probation on Rodriguez must be reversed and the case remanded for resentencing to ensure a lawful term of probation.

3. THE LENGTH OF THE NO-CONTACT ORDERS ENTERED AS PART OF THE GROSS MISDEMEANOR SENTENCE EXCEEDS THE STATUTORY MAXIMUM TERM.

The no-contact orders for the misdemeanor count exceed the statutory maximum. They must be corrected to reflect a lawful expiration date.

As a special condition of probation for the gross misdemeanor conviction under count II, the court ordered "The defendant shall not have any contact with the victim(s), Danita Marie Cash, including but not limited to personal, verbal, written, electronic, telephonic or through a third person. Defendant allowed to write to victim solely on children issues. This condition is for the statutory maximum of 60 months." CP 58.

The Domestic Violence No-Contact Order entered in conjunction with the judgment and sentence contains an expiration date of "12/21/17" — 60 months from the date of the judgment and sentence. CP 63-64.

As set forth in section C. 2., supra, the length of the suspended sentence for the gross misdemeanor conviction cannot exceed two years under RCW 9.95.210(1)(a) or the time the original sentence would have elapsed under RCW 9.92.064 (314 days). One of the conditions of Rodriguez's suspended sentence is to have no contact with Cash for five

years. CP 58. The domestic violence no-contact order entered in conjunction with the judgment and sentence likewise has a five year expiration date. CP 64. Both orders exceed the statutory maximum of two years under RCW 9.95.210(1)(a) or 314 days under RCW 9.92.064.

The court issued the post-conviction domestic violence no contact order under the authority of RCW 10.99.050. RCW 10.99.050(1) provides "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." (emphasis added). RCW 10.99.050 indicates the order restricting contact is a condition of the sentence. See State v. Luna, 172 Wn. App. 881, 885, 292 P.3d 795 (where a pretrial domestic violence no-contact order entered under RCW 10.99.050 is followed by a conviction, the order does not automatically expire and may be extended as a sentencing condition) (citing State v. Schultz, 146 Wn.2d 540, 547, 48 P.3d 301 (2002)), review denied, 302 P.3d 180 (2013).

As with all conditions of a suspended sentence, the duration of the no-contact order cannot exceed the length of the suspended sentence. RCW 9.95.210(1)(a); RCW 9.92.064. The maximum term of the no-contact orders cannot exceed the statutory maximums set forth in RCW 9.95.210(1)(a) or RCW 9.92.064.

The court lacked statutory authority to order no contact with Cash for five years as part of the judgment and sentence and attendant domestic violence no-contact order because that length of time exceeds the statutory maximum.⁷ This Court should vacate the no-contact orders pertaining to Cash and remand for entry of a lawful expiration date that does not exceed the statutory maximum.

D. CONCLUSION

For the reasons set forth, Rodriguez respectfully requests that this Court (1) remand for resentencing based on an offender score of zero for count I; (2) strike the five year term of probation for count II and remand for imposition of probation term that contains a lawful expiration date; and (3) strike the no-contact order pertaining to Cash and remand imposition of an order that contains a lawful expiration date.

⁷ The court orders prohibiting Rodriguez from contacting Longoria for a period of five years are lawful. CP 32, 61-62. The conviction under count I is a class C felony with a five year statutory maximum. CP 27; RCW 26.50.110(4). Under the Sentencing Reform Act, the court has authority to order no contact for a period up to the statutory maximum for a felony offense. State v. Armendariz, 160 Wn.2d 106, 108, 156 P.3d 201 (2007).

DATED this 17th day of July 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

APPENDIX A

HOUSE BILL REPORT

ESHB 2427

As Passed House:
February 12, 2010

Title: An act relating to punishment for domestic violence offenders.

Brief Description: Ensuring punishment for domestic violence offenders.

Sponsors: House Committee on Public Safety & Emergency Preparedness (originally sponsored by Representatives Pearson, Hurst, Bailey, Goodman, Kirby, Chandler, Herrera, O'Brien, Warnick, Ross, Condotta, Dammeier, Shea, Klippert, Smith, Walsh, Parker, Jacks, Blake, Rodne, Williams, McCune, Campbell, Johnson, Eddy, Morrell, Kelley, Short, Maxwell, Sullivan, Conway, Roach, Kristiansen, Haler, Sells, Schmick, Ericks, Ormsby, Kretz, Moeller and Hope; by request of Attorney General).

Brief History:

Committee Activity:

Public Safety & Emergency Preparedness: 1/12/10, 1/13/10 [DPS];
General Government Appropriations: 2/4/10 [DPS(PSEP)].

Floor Activity:

Passed House: 2/12/10, 97-0.

Brief Summary of Engrossed Substitute Bill

- Requires double scoring for prior felony offenses that are domestic violence-related and single scoring for prior non-felony offenses that are domestic violence-related for purposes of calculating an offender's sentence.

HOUSE COMMITTEE ON PUBLIC SAFETY & EMERGENCY PREPAREDNESS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Hurst, Chair; O'Brien, Vice Chair; Pearson, Ranking Minority Member; Klippert, Assistant Ranking Minority Member; Appleton, Goodman, Kirby and Ross.

Staff: Yvonne Walker (786-7841).

HOUSE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Majority Report: The substitute bill by Committee on Public Safety & Emergency Preparedness be substituted therefor and the substitute bill do pass. Signed by 15 members: Representatives Darneille, Chair; Takko, Vice Chair; McCune, Ranking Minority Member; Armstrong, Assistant Ranking Minority Member; Blake, Crouse, Dunshee, Hudgins, Kenney, Klippert, Pedersen, Sells, Short, Van De Wege and Williams.

Staff: Alex MacBain (786-7288).

Background:

Under the Sentencing Reform Act (SRA), an offender convicted of a felony has a standard sentence range that is based on the seriousness of the offense and the offender's prior felony convictions. The number of points an offender receives for current and prior felonies varies according to certain rules. Generally, the SRA and the points that an offender receives does not apply for misdemeanor or gross misdemeanor offenses.

Domestic violence can be generally 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.

Often victims of domestic violence seek help and protection through a court order. There are several types of orders a court may grant that restrict a person's ability to have contact with another: (1) protection orders; (2) no-contact orders; (3) restraining orders; and (4) foreign protection orders.

Protection Orders. A protection order can be issued by a court in a civil proceeding. There are two types of protection orders authorized by statute: domestic violence protection orders and anti-harassment protection orders. A victim of domestic violence can obtain a domestic violence protection order against a respondent. The order can provide several types of relief including electronic monitoring, batterer's treatment, and a requirement that the respondent refrain from contacting the petitioner. Violation of a domestic violence protection order is a gross misdemeanor offense unless the respondent has two prior convictions for violating a domestic violence protection order or other similar federal or out-of-state order, in which case the violation is a class C felony offense.

No-Contact Orders. A no-contact order can be issued by a court in a criminal proceeding. The court generally issues a no-contact order when a defendant is released from custody prior to trial or as part of the defendant's sentence. There are two types of prosecutions for which no-contact orders are statutorily authorized: prosecutions for criminal harassment and prosecutions for crimes involving domestic violence. A law enforcement officer must enforce a no-contact order issued as part of a prosecution for a crime involving domestic violence. Violation of such a no-contact order is a gross misdemeanor offense, unless the defendant has two previous convictions for violating a domestic violence protection order or other similar federal or out-of-state order, in which case the violation is a class C felony offense.

Restraining Orders. As part of a civil proceeding, a court may also issue a restraining order that enjoins the person subject to the order from contacting another party. Such restraining orders can be permanent or temporary. A court can grant a permanent or temporary restraining order as part of a divorce proceeding, a non-parental action for child custody, an action involving the abuse of a child or an adult dependent person, or a paternity action. A court can grant a temporary restraining order (and not a permanent restraining order) in connection with proceedings where there have been allegations of abuse of a child or a dependent adult person. A violation of a restraining order issued as part of a divorce proceeding or an action involving the abuse of a child or an adult person is a misdemeanor offense. A violation of a restraining order issued as part of a non-parental action for child custody or a paternity action is a gross misdemeanor offense.

Foreign Protection Orders. A foreign protection order is an injunction or similar order relating to domestic violence, Harassment, sexual abuse, or Stalking issued by a court of another state, territory, or possession of the United States, the Commonwealth of Puerto Rico, the District of Columbia, a United States military tribunal, or a tribal court. A violation of a foreign protection order is generally a gross misdemeanor offense, but becomes a class C felony offense in the following three circumstances: (1) the violation is an Assault that does not amount to Assault in the first or second degree; (2) the violation involved conduct that is reckless and creates a substantial risk of death or serious physical injury to another person; or (3) the offender has at least two prior convictions for violating the provisions of a no-contact order, a domestic violence protection order, or a comparable federal or out-of-state order.

Aggravating Circumstances.

Under the SRA, the court may impose imprisonment in addition to the standard sentencing range if specific conditions for sentencing enhancements are met. The U. S. Supreme Court, in *Blakely v. Washington*, ruled that any factor that increases a defendant's sentence above the standard range, other than the fact of a prior conviction, must be proven to a jury beyond a reasonable doubt. To do otherwise would violate the defendant's right to a jury trial under the Sixth Amendment. The SRA includes a specific list of aggravating and mitigating circumstances that a court may consider when imposing a sentence outside of the standard sentencing range for a felony offense involving domestic violence.

Summary of Engrossed Substitute Bill:

The formula for calculating an offender's score under the SRA is adjusted. For the purpose of computing an offender's score, if the present conviction is for a felony domestic violence offense, an offender must receive:

- two points (double score) for each prior adult and juvenile offense involving one of the following felony domestic violence-related offenses:
 1. a violation of a no-contact order or protection order;
 2. Harassment;
 3. Stalking;
 4. first degree Burglary;
 5. first and second degree Kidnapping;
 6. Unlawful Imprisonment;
 7. first and second degree Robbery;

8. first, second, and third degree Assault; and
9. first and second degree Arson.

- one point (single score) for each prior adult and juvenile repetitive domestic violence offense where domestic violence was plead and proven. "Repetitive domestic violence offenses" include the following non-felony offenses: Assault, violation of a no-contact order or protection order, Harassment, and Stalking.

In all cases, the charge for domestic violence must be plead and proven to a jury.

Repetitive domestic violence convictions must not be included in an offender's score if the offender has spent 10 years in the community without being convicted of a new crime since his or her last date of release from confinement or entry of judgment and sentence.

Aggravating Circumstance.

An aggravating circumstance that permits an exceptional sentence when the offense was part of a an ongoing pattern of abuse of the victim is changed to a pattern or abuse involving a victim or multiple victims.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect on August 1, 2011.

Staff Summary of Public Testimony (Public Safety & Emergency Preparedness):

(In support) Between January 1997 and June 2006 there have been an estimated 359 people killed by domestic violence abusers. Last year the Pierce County YMCA served an estimated 300 women and children in shelters and had to turn away over 200 people. There are enumerable costs that relate to each domestic violence offense that takes place. Domestic violence affects not only the victim, but the victim's friends, family members, employers, police officers, and the community at large.

Studies have shown that there is a small group of offenders that recidivate. This bill targets the worst of the worst serial domestic violence abusers. Passage of this legislation will help restore victim confidence in the criminal justice system by putting serial abusers away for a long time and holding them accountable. This bill will not only target violent crime but will also save lives.

Washington has always been a leader in preventing domestic violence but last year's economy and fiscal constraints had a devastating effect in the community. Many programs were eliminated, services were reduced, and many programs lost valuable employees. In addition, an amendment is suggested to clarify that there will be no retroactive scoring until after the date of implementation.

(With concerns) There is fear that there will not be funding to implement this bill and even prosecutors' offices across the state worry that there will be no money or personnel to implement the changes in the bill.

(Opposed) It appears the way the bill is currently structured that there may be a *Blakely v. Washington* problem relating to when the sentencing occurs. It is suggested that the bill should be reviewed for potential constitutional problems that could result in costly litigation.

Staff Summary of Public Testimony (General Government Appropriations):

(In support) Studies show that domestic violence felons are the single greatest risk for future violent behavior. Under the current sentencing scheme, these offenders are cycled through the system, which costs a lot of money. There is also ongoing collateral damage that domestic violence causes. It has costly impacts that are not reflected in the fiscal note. Domestic violence drives huge costs for emergency rooms, it is one of the leading causes of homelessness, it leads to job loss for victims, and it has a huge impact on children. Domestic violence presents huge costs for law enforcement, employers, victims, families, and the community at large.

There is a small population of domestic violence offenders who commit a huge amount of the crime. This bill targets the worst of the worst and holds them accountable for their crime. King County did a study that indicated that there would be about 271 offenders that would be impacted by this bill after about seven years. If an offender's misdemeanor domestic violence criminal history doesn't matter and the offender knows it doesn't matter, then the offender will just keep committing the violence. This bill targets those repeat offenders and stages the impact over time, which is necessary in the current economic environment.

There are a lot of people who have been invested in this issue for many years to get this bill to this point.

(Opposed) None.

Persons Testifying (Public Safety & Emergency Preparedness): (In support) Representative Pearson, prime sponsor; Trese Todd, Thrivers Action Group; Natalie McNair-Huff, YWCA Pierce County; David Martin, King County Prosecuting Attorney; Mickey Newberry and Chris Johnson, Office of the Attorney General; and Judy Bradley, Washington Federation of State Employees.

(With concerns) Mark Roe, Snohomish County Prosecuting Attorney.

(Opposed) Michael Hanbey, Washington Association of Criminal Defense Lawyers.

Persons Testifying (General Government Appropriations): David Martin, King County Prosecuting Attorney; Keith Galbraith, Family Renewal Shelter; Chris Johnson, Office of the Attorney General; Trese Todd, Thrivers Action Group; and Maria Cumeru.

Persons Signed In To Testify But Not Testifying (Public Safety & Emergency Preparedness): None.

Persons Signed In To Testify But Not Testifying (General Government Appropriations):
None.

APPENDIX B

HOUSE BILL REPORT

HB 2777

As Reported by House Committee On:
Public Safety & Emergency Preparedness

Title: An act relating to modifying domestic violence provisions.

Brief Description: Modifying domestic violence provisions.

Sponsors: Representatives Goodman, O'Brien, Driscoll, Kessler, Maxwell, Finn, Hurst, Williams, Appleton, Hudgins, Kelley, Ericks, Morrell, McCoy, Seaquist, Green, Carlyle, Conway, Pearson and Simpson.

Brief History:

Committee Activity:

Public Safety & Emergency Preparedness: 1/26/10, 1/27/10 [DPS].

Brief Summary of Substitute Bill

- Adjusts how prior non-felony, domestic violent-related offenses are calculated for purposes of calculating an offender's sentence.

HOUSE COMMITTEE ON PUBLIC SAFETY & EMERGENCY PREPAREDNESS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Hurst, Chair; O'Brien, Vice Chair; Pearson, Ranking Minority Member; Klippert, Assistant Ranking Minority Member; Appleton, Goodman, Kirby and Ross.

Staff: Yvonne Walker (786-7841).

Background:

Under the Sentencing Reform Act (SRA), an offender convicted of a felony has a standard sentence range that is based on the seriousness of the offense and the offender's prior felony convictions. The number of points an offender receives for current and prior felonies varies according to certain rules. Generally, the SRA and the points that an offender receives does not apply to convictions for misdemeanor or gross misdemeanor offenses. Courts of limited

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

jurisdiction may impose a maximum of two years probation following a sentence for a non-felony offense involving domestic violence.

Domestic violence can be generally 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. Often victims of domestic violence seek help through a court order. There are several types of orders a court may grant that restrict a person's ability to have contact with another: (1) protection orders; (2) no-contact orders; (3) restraining orders; and (4) foreign protection orders.

Generally, the standard sentencing range is presumed to be appropriate for the typical felony case. However, the law provides that in exceptional cases, a court has the discretion to depart from the standard range and may impose an exceptional sentence below the standard range (with a mitigating circumstance) or above the range (with an aggravating circumstance). The SRA provides a list of factors that a court may consider in deciding whether to impose an exceptional sentence outside of the standard range. Any factor that increases a defendant's sentence above the standard range, other than the fact of a prior conviction, must be proven to a jury beyond a reasonable doubt.

Summary of Substitute Bill:

The formula for calculating an offender's score is adjusted under the SRA. For the purpose of computing an offender's score, if the present conviction is for a felony domestic violence-related offense, where domestic violence was plead and proven, an offender receives one point for each "repetitive domestic violence offense." A repetitive domestic violence offense is any of the following non-felony offenses that are domestic violence-related: Assault, Violation of a No-Contact Order, Harassment, and Stalking. The maximum period of probation that may be imposed by courts of limited jurisdiction is increased from two years to five years.

Under the SRA, a court may impose an exceptional sentence below the standard sentence range for offenses involving domestic violence if the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense, and the offense is a response to that coercion, control, or abuse. An aggravating circumstance that permits an exceptional sentence when the offense was part of an ongoing pattern of abuse of the victim is changed to a pattern of abuse involving a victim or multiple victims.

Substitute Bill Compared to Original Bill:

The amendment restores the aggravating circumstance relating to an "offense that occurs within the sight or sound of the victim's or offender's minor children under the age of 18 years old" back to its original language as in current statute.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This bill is the result of a workgroup that convened over the summer to take a comprehensive look at domestic violence. This bill is targeting those repeat domestic violence offenders. It is hard to prosecute an offender as a first-time offender when in reality this person has a history of committing domestic violence-misdemeanor offenses. This bill will allow those prior violations for Assault, Harassment, Stalking, and Violations of a No-Contact Order to now be counted like a felony offense. The bill is not retroactive so the costs under the fiscal note will not take effect until later in future years. This bill will hold offenders accountable.

The bill as drafted allows a judge to impose an aggravating circumstance when violence is committed in front of any child. An amendment will be offered to delete that provision and restore that particular aggravating factor back to current law.

(Opposed) There is concern over the scoring of misdemeanors. Our current law has a better system in place than to start scoring misdemeanor offenses and it retains judicial discretion. Under the SRA, prosecutors can charge and file an aggravating factor where the offense involves an ongoing pattern of abuse. A judge in turn can impose an exceptional sentence. This is a better way to punish the worst offenders. Scoring misdemeanors is going to create more litigation because under this bill the domestic violence offense would have to be plead and proven. In addition, courts will have to change their practices to retain records on these domestic violence allegations. The current law strikes the appropriate balance, will not result in costs, and allows more punishment for offenders than they would otherwise get under this bill.

Persons Testifying: (In support) Representative Goodman, prime sponsor; and Tom McBride, Washington Association of Prosecuting Attorneys.

(Opposed) Amy Muth, Washington Association of Criminal Defense Lawyers and Washington Defender Association.

Persons Signed In To Testify But Not Testifying: None.

APPENDIX C

FINAL BILL REPORT

ESHB 2777

PARTIAL VETO C 274 L 10 Synopsis as Enacted

Brief Description: Modifying domestic violence provisions.

Sponsors: House Committee on Public Safety & Emergency Preparedness (originally sponsored by Representatives Goodman, O'Brien, Driscoll, Kessler, Maxwell, Finn, Hurst, Williams, Appleton, Hudgins, Kelley, Ericks, Morrell, McCoy, Seaquist, Green, Carlyle, Conway, Pearson and Simpson).

House Committee on Public Safety & Emergency Preparedness
Senate Committee on Judiciary

Background:

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.

Often victims of domestic violence seek help and protection through a court order. There are several types of orders a court may grant that restrict a person's ability to have contact with another: (1) protection orders; (2) no-contact orders; (3) restraining orders; and (4) foreign protection orders.

Law Enforcement and Arrest Provisions.

Generally, a police officer is required to arrest a person 16 years of age or older if the officer has probable cause to believe that the person has assaulted a family or household member within the four hours preceding arrest. The officer is required to arrest the person who the officer believes is the primary physical aggressor. In making this determination, the officer must consider certain factors, such as the comparative extent of injuries inflicted and the history of domestic violence between the parties.

No-Contact Orders.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

A defendant arrested or cited for an offense involving domestic violence is required to appear in person before the court. The court must determine the necessity of imposing a no-contact order or other conditions of pretrial release. Upon arrest or conviction of an offense involving domestic violence, a court may enter a no-contact order prohibiting a defendant from contacting the protected party. No-contact orders may be issued without either the request or permission of the protected party.

Protection Orders.

A victim of domestic violence who is 16 years of age or older may petition the court for a civil protection order. A court issuing a protection order may impose a variety of conditions, such as restraining the respondent from having contact with the victim.

Sentencing Reforms.

Sentencing. Under the Sentencing Reform Act (SRA), an offender convicted of a felony has a standard sentence range that is based on the seriousness of the offense and the offender's prior felony convictions. The number of points an offender receives for current and prior felonies varies according to certain rules. Generally, the SRA and the points that an offender receives do not apply to convictions for misdemeanor or gross misdemeanor offenses.

Courts and Probation. District and municipal courts may impose a maximum of two years probation following a sentence for a non-felony offense involving domestic violence.

Aggravating Circumstance. Generally, the standard sentencing range is presumed to be appropriate for the typical felony case. However, the law provides that in exceptional cases a court has the discretion to depart from the standard range and may impose an exceptional sentence below the standard range (with a mitigating circumstance) or above the range (with an aggravating circumstance). The SRA provides a list of factors that a court may consider in deciding whether to impose an exceptional sentence outside of the standard range for a felony offense involving domestic violence. Any factor that increases a defendant's sentence above the standard range, other than the fact of a prior conviction, must be proven to a jury beyond a reasonable doubt.

Treatment/Services for Perpetrators and Victims.

The Department of Social and Health Services (DSHS) certifies domestic violence perpetrator programs that: (1) accept perpetrators of domestic violence into treatment to satisfy court orders; or (2) represent themselves as treating domestic violence perpetrators. The DSHS must adopt rules and enforce minimum qualifications for treatment programs.

Human Remains Disposition.

Washington law governs who has the right to control the disposition of a person's remains. Absent a prearrangement filed by the decedent, the right to control the disposition of the remains vests in the following order:

1. the surviving spouse or registered domestic partner;
2. the surviving adult children;

3. the surviving parents of the decedent;
4. the surviving siblings of the decedent; or
5. a person acting as a representative of the decedent under the signed authorization of the decedent.

Summary:

Law Enforcement and Arrest Provisions.

For the purposes of identifying the primary physical aggressor, the arresting officer must consider the history of domestic violence of each person involved, including whether the conduct was part of an ongoing pattern of abuse. When funded, the Washington Association of Sheriffs and Police Chiefs must convene a model policy work group to address the reporting of domestic violence to law enforcement in cases where the victim is unable or unwilling to make a report in the jurisdiction where the alleged crime occurred.

No-Contact Orders.

At the time of the defendant's first appearance before the court for an offense involving domestic violence, the prosecutor must provide the court with the defendant's criminal history and history of no-contact and protection orders.

All courts are required to develop policies and procedures to grant victims a process to modify or rescind a no-contact order. The Administrative Office of the Courts (AOC) is required to develop a model policy to assist the courts in implementing this requirement. The AOC also must develop a pattern form for no-contact orders issued for offenses involving domestic violence. A no-contact order issued by the court must substantially comply with the pattern form developed by the AOC.

Protection Orders.

New provisions are created to address when a court, in issuing protection orders for domestic violence, sexual assault, and harassment, may exercise personal jurisdiction over a nonresident. When issuing a domestic violence protection order, courts may restrain the respondent from cyber stalking or monitoring the actions, location, or communication of the victim by using wire or electronic technology.

Any person 13 years of age or older may petition the court for a domestic violence protection order if he or she is the victim of violence in a dating relationship and the respondent is 16 years of age or older. A petitioner who is under the age of 16 must petition the court through a parent, guardian, or next friend. "Next friend" means any competent individual, over eighteen years of age, chosen by the minor and capable of pursuing the minor's stated interest in the action.

With regard to protection orders, the AOC must update the law enforcement information form that it provides for the use of a petitioner who is seeking an ex parte protection order, as a way to prompt the petitioner to disclose on the form whether the person whom the petition is seeking to restrain has a disability, brain injury, or impairment requiring special assistance.

Any law enforcement officer that knowingly serves a protection order to such a respondent requiring special assistance must make a reasonable effort to accommodate the needs of the respondent to the extent practicable without compromise to the safety of the petitioner.

Reconciling No-Contact and Protection Orders.

By December 1, 2011, the AOC must develop guidelines for all courts to establish a process to reconcile duplicate or conflicting no-contact or protection orders issued in Washington. The AOC must provide a report to the Legislature by January 1, 2011, concerning the progress made to develop these guidelines.

Sentencing Reforms.

Sentencing. The formula for calculating an offender's score under the SRA is adjusted. For the purpose of computing an offender's score, if the present conviction is for a felony domestic violence offense, an offender must receive:

- (1) two points (double score) for each prior adult offense conviction, (2) a one-half point for the first juvenile offense conviction, and (3) one point (single score) for each second and subsequent juvenile offense convictions, involving one of the following felony domestic violence-related offenses:
 1. a violation of a no-contact order or protection order;
 2. Harassment;
 3. Stalking;
 4. first degree Burglary;
 5. first and second degree Kidnapping;
 6. Unlawful Imprisonment;
 7. first and second degree Robbery;
 8. first, second, and third degree Assault; and
 9. first and second degree Arson.
- one point (single score) for each prior adult repetitive domestic violence offense where domestic violence was plead and proven. "Repetitive domestic violence offenses" include the following non-felony offenses: Assault, violation of a no-contact order or protection order, Harassment, and Stalking.

In all cases, the charge for domestic violence must be plead and proven to a jury.

Courts and Probation. During sentencing for a non-felony offense involving domestic violence, the prosecutor must provide courts of limited jurisdiction with the defendant's criminal history and history of no-contact and protection orders. The maximum period of probation that may be imposed by district and municipal courts is increased from two years to five years. In sentencing for an offense involving domestic violence, courts of limited jurisdiction must consider whether:

- the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse;
- the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time; and

- the offense occurred within the sight or sound of the victim's or the offender's minor children under the age of 18.

Aggravating Circumstance. Under the SRA, a court may impose an exceptional sentence below the standard sentence range for offenses involving domestic violence if the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense, and the offense is a response to that coercion, control, or abuse. An aggravating circumstance that permits an exceptional sentence when the offense was part of an ongoing pattern of abuse of the victim is changed to a pattern of abuse involving a victim or multiple victims.

Treatment/Services for Perpetrators and Victims.

Any program that provides domestic violence treatment to perpetrators of domestic violence must be certified by the DSHS and meet minimum standards for domestic violence treatment purposes. The DSHS may conduct on-site monitoring visits of treatment programs, including reviewing program and management records, to determine the program's compliance with minimum certification qualifications and rules.

Transmittal of Concealed Pistol License Information between Agencies.

The AOC must convene a work group to address the issue of transmitting information between the courts and law enforcement regarding the revocation of concealed pistol licenses for those individuals that are subject to a protection order or no-contact order. The workgroup must review current practices, identify methods to expedite the transfer of information, and report its recommendations to the Legislature by December 1, 2010.

Human Remains Disposition.

A person who has been arrested for or charged with first or second degree Murder or first degree Manslaughter by reason of the death of the decedent is prohibited from controlling the disposition of the decedent's remains. The right to control the disposition vests in an eligible person in the next applicable class listed in statute.

Votes on Final Passage:

House	97	0	
Senate	47	0	(Senate amended)
House	95	0	(House concurred)

Effective: June 10, 2010

Partial Veto Summary: The provision is vetoed that required the Washington Association of Sheriffs and Police Chiefs, when funded, to convene a model policy work group to address the reporting of domestic violence to law enforcement in cases where the victim is unable or unwilling to make a report in the jurisdiction where the alleged crime occurred.

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 44417-8-II
)	
ANGELA RODRIGUEZ,)	
)	
Appellant.)	

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 17TH DAY OF JULY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] ANGELA RODRIGUEZ
DOC NO. 363320
MISSION CREEK CORRECTIONS CENTER FOR WOMEN
3420 NE SANDHILL ROAD
BELFAIR, WA 98528

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF JULY 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

July 17, 2013 - 3:10 PM

Transmittal Letter

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Case Name: Angela Rodriguez

Court of Appeals Case Number: 44417-8

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

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