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Appellate Unit

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NO. 59322-6-I

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

FILED
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STATE OF WASHINGTON
2007 NOV 20 PM 4:41

STATE OF WASHINGTON,

Respondent,

v.

LEO BUNKER,

Appellant.

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

The Honorable Andrea Darvas, Judge

REPLY BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

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

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A. ARGUMENT IN REPLY

1. FORMER RCW 26.50.110 IS NOT AMBIGUOUS.

The State claims application of the rules of statutory interpretation require this Court to reject Bunker's challenge to his violating a no-contact order conviction. Brief of Respondent (BOR) at 4-26. The State's argument assumes RCW 26.50.110 is ambiguous.[1] Missing from the State's brief, however, is analysis explaining why RCW 26.50.110 is ambiguous. Because it is not, the State's claim fails.

When the plain language of a statute is clear, the court assumes the Legislature meant exactly what it said. State v. Azpitarte, 140 Wn.2d 138, 141, 995 P.2d 31 (2000). Absent ambiguity, a statute's meaning is derived from its language alone. Id. at 142.

In Azpitarte, the issue was "[w]hether a second degree assault can serve as the predicate assault that enhances violation of a no-contact order from a gross misdemeanor to a felony under RCW 10.99.040(4)." Id. at 140. The issue turned on whether the relevant statute was ambiguous on

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[1] See BOR at 6 (noting only ambiguous statutes require interpretation); BOR at 15 (claiming "grammatically awkward structure" of statute requires "resort to a rarely used principle of statutory interpretation"); BOR at 17 (arguing recent amendments to statute may be used to "'clarify or technically correct ambiguous statutory language'") quoting In re Detention of Elmore, __ Wn.2d __, 168 P.3d 1285, 1289 (2007); BOR at 20 ("because ambiguity can be resolved and the legislative intent is clear, the rule of lenity does not apply.").

this point, and the Court noted that "[a]n ambiguity exists if the language at issue is susceptible to more than one reasonable interpretation." 140 Wn.2d at 141. The Court concluded the statute "clearly excludes" second degree as a basis to elevate a violation for a gross misdemeanor to a felony. Id.

Here, the pertinent statutory language provides:

> Whenever an order is granted under . . . chapter 10.99 . . . 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, work place, 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.

Former RCW 26.50.110 (emphasis added).

Subsection (2)(b) of RCW 10.31.100(2) applies only to foreign protection orders and does not apply here. Subsection (2)(a) requires arrest only if a 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 . . .

RCW 10.31.100(2)(a).

Like the statutory language at issue in Azpitarte, there is no ambiguity here. Former RCW 26.50.110 clearly states violation of a no-contact order is criminal only if the violation requires an arrest under RCW 10.31.100(2)(a) or (b). The language referring to RCW 10.31.100(2)(a) and (b) is not susceptible to two or more interpretations. Either an arrest is required under that statute or it is not.

The order here is not a foreign order. Bunker's violation of the order thus was not criminal unless it involved (1) acts or threats of violence or (2) entering or remaining in a prohibited location. RCW 10.31.100(2)(a). There is no evidence Bunker's order violation met either criteria. To the contrary, the violation was based on Bunker and Hiatt voluntarily riding together in Bunker's semi tractor trailer. There was no evidence of acts or threats of violence by Bunker toward Hiatt, and nothing to conclude Bunker's semi tractor trailer constitutes a location Bunker is prohibited from entering. An arrest was therefore not required and the violation was not criminal.

Like the Court of Appeals in Azpitarte, here the State has failed to establish an ambiguity in the statute. The State's discussion of statutory interpretation is therefore misplaced. Compare BOR at 4-23 with State v. Azpitarte, 95 Wn. App. 721, 726-29, 976 P.2d 1256, reconsideration

denied (1999), reversed, 140 Wn.2d 139, 995 P.2d 282 (2000) (both assume an ambiguity exists without identifying what it is). This Court should therefore reject the State arguments and reverse and dismiss Bunker's conviction. See Brief of Appellant at 12-19 (setting forth three basis for reversal, including insufficient evidence for which the correct remedy is reversal and dismissal with prejudice).

2. RECENT STATUTORY AMENDMENTS ARE NOT RETROACTIVE AND SUPPORT BUNKER'S INTERPRETATION OF FORMER RCW 26.50.110.

As the State correctly notes, the Legislature recently amended RCW 26.50.110 by deleting the phrase "for which an arrest is required under RCW 10.31.100(2)." BOR at 19-20 (citing Laws of 2007, ch. 173). The State claims this amendment shows the Legislature never intended the former version to be interpreted as advocated by Bunker and should be retroactively applied. The State is wrong.

The Washington Supreme Court recently addressed whether amendments to RCW 71.09.090, purporting to clarify when persons involuntarily committed as sexually violent predators where entitled to a new commitment trial, were retroactive. In re the Detention of Elmore, __ Wn.2d __, 168 P.3d 1285 (Slip Op. filed October 18, 2007). The Court

first noted there is a presumption against retroactive application of statutory amendments, but this presumption may be overcome by showing:

> (1) the legislature intended to apply the amendment retroactively, (2) the amendment is curative and "clarifies or technically corrects *ambiguous* statutory language," or (3) the amendment is remedial in nature. Barstad v. Stewart Title Guar. Co., 145 Wn.2d 528, 536-37, 39 P.3d 984 (2002) . . .
>
> A court may only consider an amendment curative and remedial if the amendment "clarifies . . . an *ambiguous* statute without changing prior case law constructions of the statute." Id.

168 P.3d at 1289 (emphasis added). The Court concluded the State failed to overcome the presumption against retroactive application because the amendments expressly contravened the holding in In re the Detention of Young[, 120 Wn. App. 753, 86 P.3d 810 (2004).[2] 168 P.3d at 1289.

Thus, under Elmore, a statutory amendment may apply retroactively only if (1) the Legislature intended retroactive application, (2) the amendment clarifies "ambiguous" language in the former version of the statute, and (3) the amendment does not contravene prior judicial interpretation of the ambiguous language. The 2007 amendment to RCW

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[2] In Young, this Court held that change in a single demographic factor, such as advanced age, may be sufficient to warrant a new commitment trial. The 2005 Amendments to RCW 71.09.090 specifically overruled Young.

26.50.110 fails to meet these criteria and therefore may only be applied prospectively.

As discussed above, the pre-2007 version of RCW 26.50.110 unambiguously provided that only violations requiring an arrest under RCW 10.31.100(2) were criminal. Thus, to the extent the 2007 amendments were intended to "clarify," any clarification was not made on the basis of an ambiguity in the former version of the statute.

Similarly, there is no clear express legislative intent that the amendment be applied retroactively. See SHB 1642, attached as Appendix A. To the contrary, the legislative intent is to "restore and make clear its intent" that any willful violation of a no-contact order is criminal. Appendix A at 2 (emphasis added). The reason for use of the term "restore" is apparent from reviewing the legislative reports associated with SHB 1642. For example, the House Bill Report notes that "[s]ome trial courts have interpreted the statute to require that the violation of a restraint provision be one for which an arrest is required under RCW 10.31.100(2)-(a) or (b) in order for the violation of the order to be a gross misdemeanor." House Bill Report-SHB 1642 at 2 (attached as Appendix B).

Notably, those testifying before the House in support of the amendment urged that without the proposed amendment, some violation

of a no-contact order will continue to not be criminal. Appendix B at 3. Similarly, those testifying against the amendment argued it has been the Legislature's reasoned intent since 2000 *not* to criminalize all violations, only those that involve actual danger to the protected person or involve invasion of a particular location by the perpetrator. Appendix B at 3.

The Senate Bill Report (attached as Appendix C) is even more revealing. Those testifying before the Senate in favor of the amendment noted that before 2000 all violations of a no-contact order were criminal, but this changed in 2000, when amendments created "a mandatory arrest situation . . . before the violation can be considered a gross misdemeanor." Appendix C at 3. This reveals that by using the term "restore" in expressing its intent, the 2007 Legislature was seeking to restore the pre-2000 standard for criminalizing no-contact order violations.

There may be no case law directly contravened by the 2007 amendment. Both the House and Senate Bill Reports, however, show the amendments are intended to contravene how trial courts were enforcing no-contact orders in light of the mandatory arrest provisions in the pre-2007 version of the statute. Appendix B at 2; Appendix C at 2. In addition, this Court has previously held that only certain violations of no-contact orders are criminal and therefore subject to arrest. Jacque v. Sharp, 83

Wn. App. 532, 540, 922 P.2d 145 (1996) (agreeing that only three types of violations were criminalized under a former version of RCW 26.50.110, *i.e.*, "act of domestic violence," violating provision excluding person from protected person's residence and contacting the protected person or their family). As such, like the amendments at issue in Elmore, the 2007 amendments to RCW 26.50.110 apply prospectively only and therefore should not influence this Court's decision here.

B. CONCLUSION

For the reasons stated herein and in his opening brief, Bunker respectfully asks this Court to reverse his conviction and dismiss the prosecution with prejudice.

DATED this 20th day of November, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

CHRISTOPHER H. GIBSON
WSBA No. 25079
Office ID No. 91051

Attorneys for Appellant

Appendix A

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 1642

60th Legislature
2007 Regular Session

Passed by the House February 28, 2007
Yeas 97 Nays 0

Speaker of the House of Representatives

Passed by the Senate April 10, 2007
Yeas 49 Nays 0

President of the Senate

Approved

Governor of the State of Washington

CERTIFICATE

I, Richard Nafziger, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 1642** as passed by the House of Representatives and the Senate on the dates hereon set forth.

Chief Clerk

FILED

Secretary of State
State of Washington

SUBSTITUTE HOUSE BILL 1642

Passed Legislature - 2007 Regular Session

State of Washington 60th Legislature 2007 Regular Session

By House Committee on Judiciary (originally sponsored by Representatives Pedersen, Lantz, Williams, Moeller, Wood, Kirby, O'Brien, Chase, Ormsby and Green)

READ FIRST TIME 02/16/07.

1 AN ACT Relating to criminal violations of no-contact orders,
2 protection orders, and restraining orders; amending RCW 26.50.110;
3 creating a new section; and prescribing penalties.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** The legislature finds this act necessary to
6 restore and make clear its intent that a willful violation of a
7 no-contact provision of a court order is a criminal offense and shall
8 be enforced accordingly to preserve the integrity and intent of the
9 domestic violence act. This act is not intended to broaden the scope
10 of law enforcement power or effectuate any substantive change to any
11 criminal provision in the Revised Code of Washington.

12 **Sec. 2.** RCW 26.50.110 and 2006 c 138 s 25 are each amended to read
13 as follows:
14 (1)(a) Whenever an order is granted under this chapter, chapter
15 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid
16 foreign protection order as defined in RCW 26.52.020, and the
17 respondent or person to be restrained knows of the order, a violation

of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:

(i) The restraint provisions((~~, or of~~)) prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party;

(ii) A provision excluding the person from a residence, workplace, school, or day care((~~, or of~~));

(iii) A provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location((~~,~~)); or ((~~of~~))

(iv) 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~~)).

(b) Upon conviction, and in addition to any other penalties provided by law, the court may require that the respondent submit to electronic monitoring. The court shall specify who shall provide the electronic monitoring services, and the terms under which the monitoring shall be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the convicted person to pay for electronic monitoring.

(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. Presence of the order in the law enforcement computer-based criminal intelligence information system is not the only means of establishing knowledge of the order.

(3) A 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 foreign protection order as defined in RCW 26.52.020, shall also constitute contempt of court, and is subject to the penalties prescribed by law.

(4) Any assault that is a 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 foreign protection order as defined in RCW 26.52.020, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

(5) A violation of a court order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of 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. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

(6) Upon the filing of an affidavit by the petitioner or any peace officer alleging that the respondent has violated an order granted 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, the court may issue an order to the respondent, requiring the respondent to appear and show cause within fourteen days why the respondent should not be found in contempt of court and punished accordingly. The hearing may be held in the court of any county or municipality in which the petitioner or respondent temporarily or permanently resides at the time of the alleged violation.

--- END ---

Appendix B

HOUSE BILL REPORT
SHB 1642

As Passed Legislature

Title: An act relating to criminal violations of no-contact orders, protection orders, and restraining orders.

Brief Description: Concerning criminal violations of no-contact orders, protection orders, and restraining orders.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives Pedersen, Lantz, Williams, Moeller, Wood, Kirby, O'Brien, Chase, Ormsby and Green).

Brief History:
Committee Activity:
Judiciary: 2/7/07, 2/14/07 [DPS].
Floor Activity:
Passed House: 2/28/07, 97-0.
Passed Senate: 4/10/07, 49-0.
Passed Legislature.

Brief Summary of Substitute Bill

- Provides that a violation of certain restraint provisions in a no-contact, restraining, or protection order is a gross misdemeanor, regardless of whether the violation is one for which an arrest is required.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives Lantz, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Warnick, Assistant Ranking Minority Member; Ahern, Kirby, Moeller, Pedersen, Ross and Williams.

Staff: Trudes Tango (786-7384).

Background:

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.

There are several different types of no-contact, protection, and restraining orders. The provisions in these orders can vary. For example, domestic violence protection orders may include provisions: (a) restraining the respondent from committing acts of domestic violence; (b) excluding the person from another's residence, workplace, school, or daycare; (c) prohibiting the respondent from coming within a specified distance of a location; (d) restraining the respondent from contact with a victim of domestic violence or the victim's children; and (e) ordering that the petitioner have access to essential personal effects and use of a vehicle.

A restraining order issued in a dissolution proceeding may include many of the same provisions as in a domestic violence protection order, and may also: (a) restrain one party from molesting or disturbing another person; (b) restrain the respondent from transferring, selling, removing, or concealing property; and (c) restrain the respondent from removing a minor child from the jurisdiction.

A no-contact order, which can be issued when a person has been arrested or charged with a domestic violence crime, prohibits the person from having any contact with the victim.

Regardless of the type of order, violations of no-contact, protection, and restraining orders are punishable under the Domestic Violence Protection Act. Violations of these orders can constitute contempt of court, a gross misdemeanor, or a felony, depending on the circumstances.

The relevant part of the statute establishing when a violation is a gross misdemeanor reads:

> 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 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.

Some trial courts have interpreted the statute to require that the violation of a restraint provision be one for which an arrest is required under RCW 10.31.100(2)(a) or (b) in order for the violation of the order to be a gross misdemeanor. An arrest is required under RCW 10.31.100(2)(a) when, among other things, the person violates a provision restraining the person from committing acts of threats or violence. Thus, some trial courts have ruled that a violation of a no-contact order is a gross misdemeanor when the person violates the restraint provision of the order by committing acts of threats or violence. Short of acts of threats or violence, a violation of a restraint provision in an order is punishable as contempt of court.

Summary of Substitute Bill:

The provision describing when it is a gross misdemeanor to violate a no-contact, protection, or restraining order is amended.

It is a gross misdemeanor when a person who is subject to a no-contact, protection, or restraining order knows of the order and violates a restraint provision prohibiting acts or threats of violence against, or stalking of, a protected party, or a restraint provision prohibiting contact with a protected party.

Appropriation: None.

Fiscal Note: Not requested.

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

Staff Summary of Public Testimony:

(In support) It was not the intent of the original statute to have these orders not be enforceable. The Domestic Violence Prevention Act gave judges authority to prohibit all contact and there is a warning on the order saying that it's a crime if the person contacts the victim. Without this fix, the person can contact the victim without it being a crime. It is a technical fix to restore the intended protections of the law. Some courts are interpreting the statute to mean there are less severe violations of no contact orders. The recent ruling that nonviolent violations of an order are not enforceable leaves victims feeling unsure and re-victimized. There needs to be clarity in this area. Contact, by itself, is a key tool for domestic violence perpetrators. The person doesn't need to make a verbal threat for the victim to feel threatened.

(Opposed) When SB 6400 was passed in 2000, there was discussion about what parts of a restraining order would be criminalized. The parts that are criminalized are those that address when a person is actually put in danger and when the perpetrator is in a physical location. When the major revisions were done in 2000, these questions were answered. Not all violations are always willful. This bill will increase the number of criminal charges. Prosecutors can already bring contempt of court actions to enforce these orders. The burden of proof applicable to get one of these orders is very low. There are too many protection orders granted when there is no evidence of abuse. These orders can often be misused.

Persons Testifying: (In support) Representative Pedersen, prime sponsor; Teresa Cox, City of Everett; Katie Kuciembra, Snohomish County; Lisa Aguilar, Center for Battered Women; Jennifer Samson, Detective, Seattle Police Department; and David Martin, King County Prosecutors Office, Domestic Violence Unit.

(Opposed) Lisa Scott and Clyde Wilbanks, Taking Action Against Bias in the System.

Persons Signed In To Testify But Not Testifying: None.

Appendix C

SENATE BILL REPORT
SHB 1642

As Reported By Senate Committee On:
Judiciary, March 21, 2007

Title: An act relating to criminal violations of no-contact orders, protection orders, and restraining orders.

Brief Description: Concerning criminal violations of no-contact orders, protection orders, and restraining orders.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Pedersen, Lantz, Williams, Moeller, Wood, Kirby, O'Brien, Chase, Ormsby and Green).

Brief History: Passed House: 2/28/07, 97-0.
Committee Activity: Judiciary: 3/20/07, 3/21/07 [DP].

SENATE COMMITTEE ON JUDICIARY

Majority Report: Do pass.
Signed by Senators Kline, Chair; Tom, Vice Chair; McCaslin, Ranking Minority Member; Carrell, Hargrove, Murray, Roach and Weinstein.

Staff: Dawn Noel (786-7472)

Background: A court has authority to issue certain restraint provisions in circumstances involving sexual assault, domestic violence response, marriage dissolution and separation proceedings, non-parental actions for child custody, parental determination proceedings, domestic violence prevention, and abuse of vulnerable adults. A subset of these restraint provisions is punishable under the Domestic Violence Prevention Act as a gross misdemeanor or felony, depending on the circumstances. Regardless of the type of provision violated, violation of orders involving these circumstances is punishable in civil contempt proceedings.

A question has arisen as to whether the subset of restraint provisions that is criminally punishable under the Domestic Violence Prevention Act includes provisions prohibiting contact with a protected party. In the statutory chapters governing sexual assault protection orders, criminal no-contact orders (issued in connection with domestic violence response), abuse of vulnerable adults, and foreign protection orders, violation of no-contact provisions is specifically punishable under the Domestic Violence Prevention Act.

In the chapters governing dissolution and separation proceedings, non-parental actions for child custody, and parental determination proceedings, issuance and enforcement of no-contact provisions is not specifically mentioned. However, each of these chapters contains a

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.

provision authorizing a court to issue relief under the Domestic Violence Prevention Act, which specifically authorizes issuance of a provision restraining a person from having any contact with a victim of domestic violence or the victim's children or members of the victim's household.

In *State v. Turner*, 118 Wn. App. 135 (2003), the Washington Court of Appeals determined that a restraining order issued in a marriage dissolution proceeding restraining the spouse from having any contact with the other spouse except through counsel constituted a "restraint provision" punishable as a gross misdemeanor (or felony under certain aggravating circumstances) under the Domestic Violence Prevention Act.

The statute specifying which "restraint provisions" are criminally punishable under the Domestic Violence Prevention Act reads in pertinent part:

> 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 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.

Some trial courts have interpreted the statute to require that the violation of a restraint provision be one for which an arrest is required under RCW 10.31.100(2)(a) or (b) in order for the violation of the order to be a gross misdemeanor. An arrest is required under RCW 10.31.100(2)(a) when, among other things, the person violates a provision restraining the person from committing acts of threats or violence. Therefore, some trial courts have ruled that a violation of a no-contact order is a gross misdemeanor when the person violates the restraint provision of the order by committing acts of threats or violence. Short of acts of threats or violence, a violation of a restraint provision in an order is punishable as contempt of court only.

In the portion of the Washington criminal code relating to harassment, a person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime: (1) he or she intentionally and repeatedly harasses or repeatedly follows another person; (2) the person reasonably fears that the stalker intends to injure the person, another person, or property of the person or of another person; and (3) the stalker intends to frighten, intimidate, or harass the person, or knows or reasonably should know that the person is afraid, intimidated or harassed. Stalking is a gross misdemeanor, unless certain circumstances justify elevation to a Class C felony, such as if the stalking violates any protective order protecting the person being stalked.

Summary of Substitute Bill: The statute specifying which "restraint provisions" in several types of protective and restraining orders are criminally punishable as gross misdemeanors (or

as felonies in certain aggravating circumstances) under the Domestic Violence Prevention Act is amended.

It is clarified that the "restraint provisions" criminally punishable include those provisions prohibiting acts or threats of violence against, or stalking of, a protected party, and those provisions prohibiting contact with a protected party. Reference to the arrest requirement is eliminated for purposes of determining whether a provision violation is a gross misdemeanor.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This is a pretty straightforward bill. No contact means no contact, whether it's in the form of an email or phone call. The best way to protect victims of domestic violence is to prohibit contact from abusers. The law recognizes that domestic violence constitutes a pattern of acts that may only be perceived as threatening by the victim. The 2000 amendments merged the criminal penalties for violation of various types of protection, restraining and no-contact orders. Before 2000, violation of a no-contact order was a gross misdemeanor in the statute governing no-contact orders. Because of the merging of criminal penalties in 2000 into a separate statute, a mandatory arrest situation is now required before the violation can be considered a gross misdemeanor. And because of that, the violation must involve an act or threat or violence. This was not the intent. The arrest requirement was only supposed to refer to foreign protection orders. Currently the defendant must be notified of the restrictions in the order. Yet multiple defendants have violated no-contact orders and cannot be arrested without this fix. Offenders must have consequences to stop their threatening behaviors.

CON: This bill makes substantive changes to the law. An entire phrase is being deleted, and an entire phrase is being added. In 2000, the arrest requirement was added after testimony that the changes would criminalize every restraint provision. The arrest requirement was not meant to only refer to foreign protection orders, because the arrest requirement describes more than just violation of foreign protection orders. Violation of every provision in these orders is already punishable under contempt of court up to one year in jail, yet this bill would make that provision superfluous. The bill would criminalize de minimus violations, like a chance encounter at a public location, and acts involving laudatory purposes such as notifying the protected party that their son or daughter is in the hospital.

Persons Testifying: PRO: Representative Pedersen, prime sponsor; Teresa Cox, City of Everett; Grace Huang; Washington State Coalition Against Domestic Violence; Tom McBride, Washington Association of Prosecuting Attorneys.

CON: Steven Lewis, Washington Association of Criminal Defense Lawyers, Washington Defender's Association.