

NO. 81921-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LEO B. BUNKER and DONALD CARL WILLIAMS,

Petitioners.

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

The Honorable Jeffrey Ramsdell, Judge
The Honorable Andrea Darvas, Judge

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SUPPLEMENTAL BRIEF OF PETITIONERS

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A. ARGUMENT IN REPLY

1. FORMER RCW 26.50.110 IS NOT AMBIGUOUS.

Following the State's lead below, the Court of Appeal rejected Bunker and Williams' appeals based on at least two erroneous conclusions. First, the Court of Appeals erroneously concluded that RCW 26.50.110(1) is ambiguous as to which preceding clauses the phrase "for which an arrest is required under RCW 10.31.100(2)(a) or (b)" is meant to modify. State v. Bunker, et. al., 144 Wn. App. 407, 413-15, 183 P.3d 1086, review granted, 165 Wn.2d 1003, 198 P.3d 512 (2008). Second, in attempting to resolve the perceived ambiguity, the Court of Appeals erroneously relied on recent amendments to the statute and other related statutory provisions to reach a result that unnecessarily renders some language in the statute superfluous. Because RCW 26.50.110(1) is not ambiguous, the Court of Appeals erred by looking beyond the language of the statute to discern its meaning. Moreover, to the extent any ambiguity does exist, it can be resolved without rendering superfluous language in the statute.

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 statute at issue in Azpitarte provided:

(a) Willful violation of a [no-contact] order is a gross misdemeanor except as provided in (b) and (c) of this subsection (4) . . .

(b) Any assault that is a violation of an order issued under this section and that does not amount to assault in the first or second degree . . . is a class C felony . . .

(c) A willful violation of a [no-contact order] is a class C felony if the offender has at least two previous convictions for violating the provisions of a no-contact order . . .

Former RCW 10.99.040(4) (emphasis added).

Azpitarte argued the statute precluded a first or second degree assault from serving as the predicate offense elevating a no-contact order violation from a gross misdemeanor to a class C felony. The issue turned on whether the statute was ambiguous on 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.

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):

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).

Under the last antecedent rule, a rule of both grammar and statutory interpretation, the presence of a comma before the qualifying phrase means the qualifier is intended to apply to all antecedents instead of only the immediately preceding one. City of Spokane v. County of Spokane, 158 Wn.2d 661, 673, 146 P.3d 893 (2006); Berrocal v. Fernandez, 155 Wn.2d 585, 600, 121 P.3d 82 (2005) (C. Johnson, J., dissenting)(the common rules of grammar, which include the last antecedent rule, are used to construe the meaning of a statute); All Seasons Living Ctrs. v. State (In re Seahome Park Care Ctr.), 127 Wn.2d 774, 781-82, 903 P.2d 443 (1995). Therefore, the phrase "for which an arrest is required under RCW 10.31.100(2)(a) or (b)" in RCW 26.50.110 modifies the entire sentence,

not merely the last phrase, because the qualifying phrase is preceded by a comma.

The language referring to RCW 10.31.100(2)(a) and (b) is not susceptible to two or more interpretations when properly interpreted under the rule of grammar. Either an arrest is required under those provisions or not. If no arrest is required, then the violation is not a gross misdemeanor or a Class C felony. It may be subject to civil sanctions, as provided for under former RCW 26.50.110(3), but it is not criminal.

RCW 10.31.100(2)(b) 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). Thus, Williams' and Bunker's order violations were not criminal unless they 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.

There was evidence to support finding Williams' violations did require an arrest under RCW 10.31.100(2)(a). The jury, however, was never instructed it had to find this element was proved beyond a reasonable doubt to convict Williams, nor was the element included in the information charging Williams with the offense.

As in Azpitarte, there is no ambiguity in the statute here. The Court of Appeals analysis in Bunker is flawed in a manner similar to its flawed analysis in Azpitarte. It found ambiguity where none exists. Compare Bunker, 144 Wn. App. at 415 (by ignoring last antecedent rule, court concludes the "for which an arrest is required" language could apply exclusively to any number of the preceding clauses) 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) (assumes an ambiguity exists without identifying what it is, and then looks beyond the plain language to interpret and resolve the assumed ambiguity). Because there is no ambiguity, there is no need to look beyond the plain language of the statute to discern the statute's meaning. This Court should therefore reverse

the Court of Appeals decision and reverse Bunker and Williams' convictions.

2. THE 2007 AMENDMENTS ARE NOT RETROACTIVE AND SUPPORT BUNKER'S AND WILLIAMS' INTERPRETATION OF FORMER RCW 26.50.110.

In 2007, the Legislature amended RCW 26.50.110 by deleting the phrase "for which an arrest is required under RCW 10.31.100(2)." Laws of 2007, ch. 173. The Court of Appeals relied on this amendment to conclude the Legislature never intended the former version to be interpreted as Bunker and Williams do and should be retroactively applied. 144 Wn. App. at 415-16. Decisions by this Court show the Court of Appeals is wrong.

This Court recently addressed whether amendments to RCW 71.09.090, purporting to clarify when persons involuntarily committed as sexually violent predators were entitled to a new commitment trial, were retroactive. In re the Detention of Elmore, 162 Wn.2d 27, 168 P.3d 1285 (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).

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.

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," no clarification was needed and therefore the amendments do not apply under the rule for retroactivity set forth in Elmore.

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 unambiguous mandatory arrest provisions in the post-2000/pre-2007 version of the statute. Appendix B at 2; Appendix C at 2. As such, like the amendments at issue in Elmore, the 2007 amendments to RCW 26.50.110 apply prospectively only and should not influence this Court's decision here.

B. CONCLUSION

For the reasons stated herein and in his petition for review (attached as Appendix D), Bunker asks this Court to reverse the Court of Appeals

decision and his conviction and dismiss the prosecution with prejudice.
For the same reasons, Williams asks this Court to reverse his convictions
as well.

DATED this 13th day of February, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



CHRISTOPHER H. GIBSON
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Attorneys for Petitioners

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

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

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

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

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

11 (iv) A provision of a foreign protection order specifically
12 indicating that a violation will be a crime(~~(, for which an arrest is~~
13 required under RCW 10.31.100(2) (a) or (b), is a gross misdemeanor
14 except as provided in subsections (4) and (5) of this section).

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

23 (2) A peace officer shall arrest without a warrant and take into
24 custody a person whom the peace officer has probable cause to believe
25 has violated an order issued under this chapter, chapter 7.90, 10.99,
26 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order
27 as defined in RCW 26.52.020, that restrains the person or excludes the
28 person from a residence, workplace, school, or day care, or prohibits
29 the person from knowingly coming within, or knowingly remaining within,
30 a specified distance of a location, if the person restrained knows of
31 the order. Presence of the order in the law enforcement computer-based
32 criminal intelligence information system is not the only means of
33 establishing knowledge of the order.

34 (3) A violation of an order issued under this chapter, chapter
35 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign
36 protection order as defined in RCW 26.52.020, shall also constitute
37 contempt of court, and is subject to the penalties prescribed by law.

1 (4) Any assault that is a violation of an order issued under this
2 chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of
3 a valid foreign protection order as defined in RCW 26.52.020, and that
4 does not amount to assault in the first or second degree under RCW
5 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in
6 violation of such an order that is reckless and creates a substantial
7 risk of death or serious physical injury to another person is a class
8 C felony.

9 (5) A violation of a court order issued under this chapter, chapter
10 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign
11 protection order as defined in RCW 26.52.020, is a class C felony if
12 the offender has at least two previous convictions for violating the
13 provisions of an order issued under this chapter, chapter 7.90, 10.99,
14 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order
15 as defined in RCW 26.52.020. The previous convictions may involve the
16 same victim or other victims specifically protected by the orders the
17 offender violated.

18 (6) Upon the filing of an affidavit by the petitioner or any peace
19 officer alleging that the respondent has violated an order granted
20 under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34
21 RCW, or a valid foreign protection order as defined in RCW 26.52.020,
22 the court may issue an order to the respondent, requiring the
23 respondent to appear and show cause within fourteen days why the
24 respondent should not be found in contempt of court and punished
25 accordingly. The hearing may be held in the court of any county or
26 municipality in which the petitioner or respondent temporarily or
27 permanently resides at the time of the alleged violation.

--- END ---

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.

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.

REC'D

JUL 16 2008

King County Prosecutor
Appellate Unit

SUPREME COURT NO. _____
COURT OF APPEALS NO. 59322-6-I
CONSOLIDATED WITH NO. 59536-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RECEIVED
COURT OF APPEALS
DIVISION ONE

Respondent,

JUL 16 2008

v.

LEO B. BUNKER and DONALD CARL WILLIAMS,

Petitioners.

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

The Honorable Jeffrey Ramsdell, Judge
The Honorable Andrea Darvas, Judge

PETITION FOR REVIEW

CHRISTOPHER H. GIBSON
Attorney for Petitioners

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Seattle, WA 98122
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A. IDENTITY OF PETITIONERS

Petitioners Leo B. Bunker and Donald Carl Williams, appellants below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Bunker and Williams seek review of the Court of Appeals published decision in State v. Bunker, et. al, __ Wn. App. __, 183 P.3d 1086 (Slip Op. filed May 5, 2008) ("Bunker"). A copy of the slip opinion is attached as Appendix A. A copy of the Order Denying Motion for Reconsideration, filed June 19, 2008, is attached as Appendix B.

C. REASONS TO ACCEPT REVIEW

This Court should accept review because Division One's published decision in Bunker, directly conflicts with Division Two's recently published decisions in State v. Hogan, __ Wn. App. __, __ P.3d __, 2008 WL 2447871 (Slip Op. filed June 19, 2008)¹ and State v. Madrid, __ Wn. App. __, __ P.3d __, 2008 WL 2426601 (Slip Op. filed June 17, 2008).² RAP 13.4(b)(2). Review is also warranted because the decision in Bunker conflicts with several of this Court's prior decisions. RAP 13.4(b)(1).

¹ A copy of Hogan is attached as Appendix C.

² A copy of Madrid is attached as Appendix D.

D. ISSUE PRESENTED FOR REVIEW

Whether no-contact order violations under former RCW 26.50.110 may be criminally penalized only if they involve "certain *types* of violations--specifically, those violations that involve assault of or threats to the victim, that consist of entering a prohibited place named in the order, or criminal violations of foreign no-contact orders that occur within Washington State." Appendix A at 6. Division One held no such limitation exists. Appendix A at 2. In contrast, Division Two held such limitations apply given the wording of former RCW 26.50.110. Appendix C at ¶¶ 1, 19; Appendix D at ¶ 30.

E. STATEMENT OF THE CASES

1. Bunker

On August 18, 2005, Bunker was pulled over by Washington State Patrol Trooper Melvin Hurd for driving his semi tractor trailer over the speed limit. 2BRP¹ 49. Bunker provided Hurd with his license, registration, hours of service log book and medical certificate. 2BRP 50. The subsequent records check revealed two court orders prohibiting Bunker from having contact with Lillian Hiatt. 2BRP 50-53; Exs. 1 & 2. One

¹ There are four volumes of verbatim report of proceedings in State v. Bunker referenced as follows: 1BRP - 11/2/06; 2BRP - 11/6/06; 3BRP - 11/7/06; and 4BRP - 12/22/06 (sentencing).

of the orders was issued July 1, 2003, and expires July 1, 2013. 2BRP 53-54; Ex. 1. The other was issued December 16, 2002, and expires December 16, 2007. 2BRP 56: Ex. 2.

Aware there was a female passenger riding with Bunker, Hurd requested assistance to help determine whether the passenger was Lillian Hiatt. 2BRP 57. Troopers James MacGregor and Michael Faulk responded. 2BRP 67, 78.

MacGregor contacted Bunker's passenger, who provided a name and date of birth. MacGregor "ran" that information through the State Patrol's communications office. 2RP 68-69. There was no information available, so MacGregor asked the passenger for additional information. 2RP 69-70. The passenger provided two other names, neither of which registered on any of the databases the troopers were accessing. 2BRP 70.

Faulk next contacted the passenger, calling her by the name "Lillian." The passenger denied she was "Lillian." 2BRP 81. When he asked her who she was, she said she was Bunker's wife. 2BRP 82. Suspecting she was lying, Faulk took the passenger into custody, transported her to the Auburn Police Department. Fingerprint analysis showed she was Lillian Hiatt. 2BRP 82-84.

Bunker was subsequently arrested, charged and convicted by a jury of violating the court orders under former RCW 26.50.110. BCP⁴ 23, 25-26; 2BRP 58. Bunker received a low-end standard range sentence of 33 months and is currently out of custody on bond. BCP 60-70.

2. Williams

Williams was charged with three counts of domestic violence felony violation of a no-contact order under RCW 26.50.110. WCP 9-10. A no-contact order was in effect from August 17, 2005 until June 4, 2006. 4WRP⁵ 26; 5WRP 29-31. It required Williams to stay at least 500 feet away from Linda Poole's home and work and prohibited all contact except phone calls to arrange visits with their five-year-old daughter. Ex. 1; 5WRP 29. The three alleged incidents occurred on March 13, 2006. 4WRP 47. The parties and the court agreed to identify the individual counts by the time frame during which they were alleged committed. 4WRP 80. Poole and her daycare provider Cathy Ramisch testified as follows.

⁴ "BCP" refers to the Clerk's papers in State v. Bunker. "WCP" refers to the Clerk's papers in State v. Williams.

⁵ There are six volumes of Verbatim Report of Proceedings in State v. Williams referenced as follows: 1WRP - 12/12/06, 2WRP - 1/8/07, 3WRP - 1/9/07, 4WRP - 1/10/07, 5WRP - 1/11/07, 6WRP - 2/2/07.

Count I: 4-5 p.m.

Poole was at the grocery store when Williams called her cell phone and asked where she was. 4WRP 47. He accused her of being unfaithful and called her several offensive names. 4WRP 47. When she returned home, the name-calling and accusations continued. 4WRP 50. At one point, Williams tried to take her keys to prevent her leaving again to pick up their daughter. 4WRP 51. He grabbed her wrist and put one hand, palm open, on her chest and pushed her. 4WRP 51. She was uninjured, but frightened. 4WRP 78.

Count II: 5-6 p.m.

During Poole's six or seven minute drive to the day care to pick up her daughter, Williams called three times. 4WRP 52-54. He called again as she was in the driveway. 4WRP 53. He told her he would tear up some things in the house and that if she did not return right away, she would have to deal with a mess. 4WRP 54-55. He also told her if she did not return immediately, he would "take off." 4WRP 55.

Ramisch saw Poole in her driveway and came out. 5WRP 10-11. Ramisch testified that from four or five feet away she could hear the screaming coming from Poole's cell phone. 5WRP 11. She came closer, maybe a foot away, recognized Williams's voice and heard the language

he was using. 4WRP 53; 5WRP 13. She also could see the face of the cell phone showing that the call was coming from "home," 5WRP 13. Williams hung up and called back moments later; this time Ramisch could see it was from his cell, labeled "Don" on Poole's phone. 5WRP 15. Ramisch heard Williams threaten to tear the phone and the computer out of the wall, trash the house, and take the truck, the tools, and the dog. 5WRP 14-15. Finally, when Poole refused to call 911, Ramisch did so herself. 5WRP 18. Officer Wright arrived and accompanied Poole home. 4WRP 63. Williams was not there when they arrived, and the Officer left. 4WRP 63.

Count III: 7:30-8:30 p.m.

While Poole was eating dinner with her daughter that night, she went downstairs to get something and saw Williams standing at her window rattling the front door trying to get in. 4WRP 63-64. He told her this was ridiculous and asked her to let him in so they could talk. 4WRP 64. She refused. 4WRP 65. After he left, she called 911 again. 4WRP 67.

Williams denied contacting Poole in any way on the day in question. 5WRP 30. He acknowledged knowing about the order and stipulated to two prior violations of no-contact orders. 5WRP 30; WCP 33. He testified that it had been a while, and he had no specific memory of contacting Poole

on any particular day, but that he certainly would have remembered the type of conduct he was accused of. 5WRP 32.

Williams was convicted as charged following a jury trial. WCP 43. He received concurrent standard range sentences. WCP 44-46.

3. Appeal

On appeal, both Bunker and Williams argued their convictions for felony violation of a court order must be reversed because the charging documents and jury instructions were fatally deficient. BOAB (Bunker's Opening Brief) at 7-18; BOAW (Williams's opening Brief) at 5-18. As Division One recognized, the gravamen of their claims was that the statute under which they were charged, RCW 26.50.110, "only imposes criminal penalties for certain *types* of violations--specifically, those violations that involve assault of or threats to the victim, that consist of entering a prohibited place named in the order, or criminal violations of foreign no-contact orders that occur within Washington State." Appendix A at 6. Bunker and Williams argued the wording and punctuation, as well as the legislative history of RCW 26.50.110, provide that other violations, such as non-threatening phone calls or consensual, non-assaultive contact outside the boundaries of any geographic restriction in the no-contact order, are punishable only as civil contempt of court. BOAB at 8-12; BOAW at 6-9.

Division One rejected Bunker's and Williams' claims. The court concluded the applicable version of RCW 26.50.110 is ambiguous and that recent amendments to the statute show it was never intended to be interpreted as argued by Bunker and Williams. Appendix A at 8-11. The court also reasoned that when the applicable version of the statute is considered as a whole and in light of related statutes, it is clear every violation of a no-contact order is a crime. Appendix A at 11-14.

Bunker and Williams filed a motion to reconsider on May 27, 2008. On June 17, 2008, Division Two of the Court of Appeals issued its published decision in State v. Madrid, reaching a contrary conclusion to that reached by Division One in Bunker. Appendix D. On June 19, 2008, Bunker and Williams cited the decision in Madrid as additional authority. The same day, Division Two issued another published decision on the same issue in State v. Hogan, in which the majority reaching the same conclusion as the court in Madrid. Appendix C. The dissent in Hogan agreed with the analysis in Bunker. Appendix C at ¶¶ 22, 24.

On June 19, 2008, the Bunker court denied Bunker's and Williams's motion to reconsider. This petition timely follows.

F. ARGUMENT

1. DIVISION ONE'S DECISION IN BUNKER ERRED IN FAILING TO APPLY THE "LAST ANTECEDENT RULE" AND DIRECTLY CONFLICTS WITH DIVISION TWO'S DECISIONS IN HOGAN AND MADRID.

The "Last Antecedent Rule" provides the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one. City of Spokane v. County of Spokane, 158 Wn.2d 661, 673, 146 P.3d 893 (2006); In re Seahome Park Care Ctr., 127 Wn.2d 774, 781-82, 903 P.2d 443 (1995); Appendix C at ¶ 12; Appendix D at ¶23. The last antecedent rule is a rule of grammar and a rule of statutory construction. Berrocal v. Fernandez, 155 Wn.2d 585, 600, 121 P.3d 82 (2005) (C. Johnson, J., dissenting)(the common rules of grammar, which include the last antecedent rule, are used to construe the meaning of a statute).

Division One correctly noted the last antecedent rule applies unless a contrary intent appears in the statute. Appendix A at 11-12; accord State v. Wentz, 149 Wn.2d 342, 351, 68 P.3d 282 (2003). Division One also correctly noted application of the rule to the pre-2007 version of RCW 26.50.110(1) would result in "imposition of criminal penalties for only those no-contact order violations for which the legislature has made arrest mandatory." Appendix A at 12.

Division One concluded the last antecedent rule did not apply, however, because RCW 26.50.110(1) is ambiguous and because there is evidence the legislative always intended that all no-contact order violations are criminal. Appendix A at 8-13. This was error. It also resulted in a conflict between published decision in Divisions One and Two.

- a. RCW 26.50.110(1) is Only Ambiguous if Common Rules of Grammar are Ignored.

The pre-2007 version of RCW 26.50.110(1) 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.

(Emphasis added).

Although it is a long sentence, it is not ambiguous. The meaning of the sentence is clear when correctly interpreted under common rules of grammar, which include the last antecedent rule. Fernandez, 155 Wn.2d at 600 (Johnson, C., J, dissenting); Appendix C at ¶ 14; Appendix D at ¶¶ 24, 25. Only by ignoring the rule could Division One find the provision ambiguous. The decision in Bunker reveals its own error, when on page

eight it postulates the possible ways the "for which an arrest is required" language could conceivably apply, and then on page twelve agrees application of the last antecedent rules renders the statute to mean what Bunker and Williams claim it means. Appendix A at 8, 12. Thus, Division One's refusal to apply the last antecedent rule allowed it to create an ambiguity that did not otherwise exist. Division Two did not make this same mistake in Hogan or Madrid.

b. Division One Found Legislative Intent Contrary to Bunker's and Williams's Interpretation Where None Exists.

Division One found legislative intent contrary to the interpretation of Bunker and Williams by noting pre-2007 RCW 26.50.110(3) provides that "violation of an order issued under this chapter [. . .] shall *also* constitute contempt of court". Appendix A at 12 (italics added by Court). But just because every violation of a court order constitutes contempt of court does not mean every violation is necessarily criminal. Rather, the fact that subsection (3) follows subsection (1), which sets forth which violations are criminal, explains the use of the term "also" in subsection (3). In other words, any criminal violation will *also* be civil contempt because all violations constitute contempt of court. Thus, it was error to rely on subsection (3) as a basis to find contrary legislative intent.

Similarly, Division One noted that under RCW 10.99.040, every no-contact order issued by a court must "proclaim that '[v]iolation of this order is a criminal offense.' [sic]" Appendix A at 13. The court then concluded that the interpretation of RCW 26.50.110(1) advanced by Bunker and Williams would render this provision meaningless or superfluous. *Id.* This conclusion arises only by relying on and interpreting a misquote of the provision, and therefore is error.

The full text of the provision relied on by Division One under RCW 10.99.040 provides:

The written order releasing the person charged or arrested shall contain the court's directives and shall bear the legend: "Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order."

RCW 10.99.040(4)(b) (emphasis added).

Division One's decision placed a period after the word "offense" and within the quotation marks. Appendix A at 13. No such period exists. Including a nonexistent period in the quote is misleading because it purports to end of the sentence and complete the phrase. The language quoted in the decision, however, does not constitute the complete phrase.

The sentence from which the language was extracted qualifies the quoted language by noting that any criminality for violation of an order will arise "under chapter 26.50 RCW". RCW 10.99.040(4)(b). The reference to "chapter 26.50 RCW" notifies the person against whom the order is issued that certain criminal consequences can follow if the order is violated. It is also clear from the language preceding subsection (b) that the criminality referenced is that which may arise under RCW 26.50.110. See RCW 10.99.040(4) ("Willful violation of a court order issued under subsection (2) or (3) of this section is punishable under RCW 26.50.110."). Therefore, to determine if a violation is a criminal offense, RCW 26.50.110 must be consulted. This, of course, loops back to the beginning the analysis of what the "for which an arrest is required" language is supposed to apply to, which inevitably requires applying common rules of grammar, including, under these circumstances, the last antecedent rule. The courts in Hogan and Madrid did not get caught up in this circular reasoning because they correctly determined there was no ambiguity when the last antecedent rule is correctly applied. Appendix C at ¶ 14; Appendix D at ¶¶ 24, 25.

2. DIVISION ONE'S DECISION CONFLICTS WITH THE DECISION IN STATE V. LILYBLAD⁶ AND IN RE ELMORE.⁷

Division One chastised Bunker and Williams for advancing an interpretation of RCW 26.50.110(1) that it found would render a portion of RCW 10.99.040(4) superfluous. Appendix A at 13. What can only be viewed as an ironic twist, Division One then interprets RCW 26.50.110(1) in a manner that renders superfluous the provision's reference to RCW 10.99.100(2)(a) & (b). Specifically, the court rejected the State's invitation to simply ignore the "for which an arrest is required" language in favor of concluding that it applies only to the immediately preceding two clauses, which involve specific geographic restrictions identified in the order and foreign protection orders indicating violation will be a crime. "This construction is not particularly surprising, insofar as the circumstances referenced are precisely those 'for which an arrest is required' in each respective subsection of RCW 10.31.100(2)." Appendix A at 13.

But under Division One's reasoning, there is no need for RCW 26.50.110(1) to reference RCW 10.99.100(2) to identify which order violations will be criminal because, according to the court, all violations

⁶ State v. Lilyblad, 163 Wn.2d 1, 177 P.3d 686 (2008).

⁷ In re Detention of Elmore, 162 Wn.2d 27, 168 P.3d 1285 (2007).

are criminal. As such, Division One's interpretation renders the reference to RCW 10.99.100(2) in RCW 26.50.110(1) superfluous. This conflicts with State v. Lilyblad, 163 Wn.2d at 10, in which this Court recently held that an appellate court "may not interpret any part of a statute as meaningless or superfluous."

Moreover, in rejecting the interpretation of the pre-2007 version of RCW 26.50.110(1) advanced by Bunker and Williams, Division One relied on the legislative history of the 2007 amendments to the statute, which deleted the "for which and arrest is required" language. Appendix A at 9-11; Laws of 2007, ch. 173. It is true the legislature claimed the amendment was not intended to change the substantive terms of RCW 26.50.110, and that the reason for the amendment was to make clear it had always intended all willful violations to be criminal. But no clarification was necessary because there was no ambiguity and therefore the amendment did substantively change the law. Appendix A at 9. Therefore, Division One erred in applying the 2007 version of RCW 26.50.110(1) to Bunker and Williams and its decision to do so conflict with this Court's decision in In re Elmore.

As noted in the reply briefs of Bunker and Williams, in Elmore this Court addressed whether amendments to RCW 71.09.090, purporting to

clarify when persons involuntarily committed as sexually violent predators were entitled to a new commitment trial, were retroactive. This 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.

162 Wn.2d at 35-36 (emphasis added). 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.

As discussed above, the pre-2007 version of RCW 26.50.110 was not ambiguous when properly read by applying common rules of grammar. Without an ambiguity, the 2007 amendment to RCW 26.50.110 should not apply to Bunker and Williams. Elmore, 162 Wn.2d at 35-36. By applying the 2007 amendments to Bunker and Williams, Division One's decision conflicts with Elmore.

G. CONCLUSION

Division One's decision in Bunker conflicts with this Court's decisions in Elmore and Lilyblad, and Division Two's decisions in Hogan and Madrid. Therefore, this Court should grant review. RAP 13.4(b)(1), (2).

DATED this 16th day of July, 2008

Respectfully submitted,

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Attorneys for Petitioners

when they were charged, only imposed criminal penalties in certain circumstances—namely, when the violator assaults or threatens the victim, or enters a prohibited area named in the order, or if the violated order was issued by a foreign jurisdiction that criminalizes no-contact violations. Bunker and Williams contend, and the State does not debate, that none of these circumstances were either alleged in Bunker’s and Williams’s charging documents, included as necessary elements of the charged offense in the “to convict” jury instructions, or proved at trial. The State responds, instead, that Bunker and Williams read the statute incorrectly. The State contends that both principles of statutory construction and recent amendments to RCW 26.50.110 demonstrate that the legislature has always intended to impose criminal penalties for domestic violence no-contact order violations. We agree with the State that RCW 26.50.110 criminalized Bunker’s and Williams’s conduct. Accordingly, we affirm their convictions. We hold, however, that the trial court abused its discretion in sentencing Bunker; thus, we remand his cause for resentencing.

Facts

Bunker

Washington State Patrol Trooper Melvin Hurd pulled Bunker over for speeding in his truck tractor. After Bunker provided Hurd with his driver’s license, registration, and other information, Hurd checked his identity against police records. The records check showed that Bunker was subject to two court orders preventing him from contacting Lillian Hiatt. A female passenger was accompanying Bunker in the cab of his truck tractor.

Hurd radioed a request for assistance. Washington State Patrol Troopers James MacGregor and Michael Faulk responded. MacGregor began talking to the passenger, asking her for her name and date of birth. He then had the State Patrol's communications office do a computer search for the name she provided, which returned no results. MacGregor asked her for additional information. She provided him with two other names, neither of which returned results.

Faulk then took a turn speaking to the passenger, calling her "Lillian." She nervously denied that her name was Lillian. When Faulk asked her who she was, she responded that she was Bunker's wife. Faulk then took her into custody and transported her to the Auburn Police Department, where fingerprint analysis showed that she was Lillian Hiatt. When Faulk radioed this information to Hurd and MacGregor, they arrested Bunker for violating the no-contact orders. Bunker was charged in an amended information stating simply that he "did know of and willfully violated the terms of a court order issued on December 16, 2002 by the Clark County Superior Court pursuant to RCW chapter 26.50, for the protection of Lillian G. Hiatt." The information alleged that this violation was contrary to RCW 26.50.110 and was a felony based on Bunker's prior convictions for violating no-contact orders.

A jury found Bunker guilty of violating the terms of the no-contact order, premised on Hiatt's presence in his truck tractor cab. The trial court sentenced Bunker to 33 months imprisonment. Bunker requested that the trial court impose an exceptional mitigated sentence based on the mitigating factor that Hiatt had been a "willing participant in the commission of the offense." The trial court

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declined to consider imposing an exceptional mitigated sentence, however, stating that “[u]nfortunately, under the statute and the case law I don’t think I have the discretion to impose an exceptional sentence downward. If I did have that discretion, I would probably do it.”

Williams

A no-contact order barred Williams from coming within 500 feet of Linda Poole’s home or work. The order also prohibited Williams from contacting Poole in any way except to telephone her for the exclusive purpose of arranging visits between Williams and the former couple’s five-year-old daughter, Carlee.

Williams called Poole on her cellular telephone from her home while she was in the checkout line at the grocery store, asking her where she was. He called her a “slut” and a “whore,” and accused her of “sleeping with her customers.”

Williams was still at Poole’s home when she returned from the grocery store. He was angry and intoxicated. When she told him that she was going to pick Carlee up from day care, he attempted to take her car keys from her. He grabbed her wrist, but she yanked it free. She fled out the door, got into her truck, locked the door, and drove to Carlee’s day care.

Williams called Poole two or three times while she was driving. He called again while she was in the driveway of Carlee’s day care provider, Cathy Ramish. He yelled at Poole that if she did not return immediately, he was going to tear her computer and telephone out of the wall and take her truck, her tools, and her dog.

Ramish saw Poole in her driveway and came outside. She could hear screaming coming from Poole's telephone from four or five feet away. As Ramish came closer, she recognized Williams's voice, and could see that the face of Poole's telephone said that the call was coming from "home." Ramish called 911, and police officers came to the daycare to escort Poole and Carlee home. Williams had left by the time they arrived.

Later that evening, after Poole and Carlee had gone upstairs to eat dinner, Poole returned downstairs to retrieve something for Carlee. As Poole came down the stairs, she saw through the window that Williams was standing on the front porch. He was rattling the door knob and attempting to open the door. The door was locked, however, and Williams could not get inside. Poole could tell that he was even more intoxicated than he had been earlier, and told him to go away. After he left, Poole called 911 to report the incident.

The King County Prosecutor charged Williams with three counts of violating a domestic violence no-contact order pursuant to RCW 26.50.110. These were felony charges due to Williams's prior no-contact order violations. After stipulating that he had twice previously violated domestic violence no-contact orders, Williams was tried before a jury. Both Williams's charging documents and the court's instructions to the jury alleged only that Williams had violated the terms of the no-contact order. The jury found him guilty as charged. The trial court imposed concurrent standard range sentences.

Former RCW 26.50.110

Bunker and Williams both contend that their charging documents and the to-convict jury instructions given in their trials were inadequate as a matter of law. They contend that this is so because both the charging documents and the jury instructions omitted essential elements of the crime of violating a no-contact order. At the root of this contention is Bunker and Williams's assertion that the statute criminalizing no-contact order violations, RCW 26.50.110 (as it was written when they were charged and convicted), only imposes criminal penalties for certain *types* of violations—specifically, those violations that involve assaults of or threats to the victim, that consist of entering a prohibited place named in the order, or are criminal violations of foreign no-contact orders that occur within Washington state. According to Bunker and Williams, because none of these circumstances were pleaded or proved by the State, both of their convictions must be reversed. Because the legislature has always intended, however, that RCW 26.50.110 impose criminal penalties for no-contact order violations like those committed by Bunker and Williams, we reject their argument to the contrary.¹

The statute at issue, as it was in effect when it was applied to Bunker and Williams, is unfortunately not a virtuosic specimen of legislative drafting:

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

¹ The contention presented raises a question of statutory interpretation, reviewed de novo on appeal. State v. Lilyblad, ___ Wn.2d ___, 177 P.3d 686, 688 (2008).

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.

Former RCW 26.50.110(1) (2006).

RCW 10.31.100(2)(a), referenced in the above-quoted section, mandates that the police will arrest any person suspected of violating a Washington domestic violence no-contact or protection order, but only if they have probable cause to believe that the restrained person has threatened or performed acts of violence, or has entered an area prohibited by the order. RCW 10.31.100(2)(b), in turn, mandates arrest under similar circumstances for all foreign protection orders, as well as whenever a foreign protection order specifically states that its violation is a crime.

The dispute in these cases centers on which of the former RCW 26.50.110(1)'s clauses that the phrase "for which an arrest is required under RCW 10.31.100(2)(a) or (b)" is intended to modify. Bunker and Williams contend that it is absolutely clear that the phrase is intended to modify every preceding clause in former RCW 26.50.110(1)'s single, long, multi-clause sentence and that, thus, "a violation of the restraint provisions" can be punished as a crime only if "an arrest is required under RCW 10.31.100(2)(a) or (b)." Stated another way, under Bunker's and Williams's reading of former RCW 26.50.110(1), criminal penalties may only be imposed for violations of no-contact orders where the arrest of the violator is mandatory under either RCW 10.31.100(2)(a) or (b).

According to Bunker and Williams, for all other violations—in essence, for any non-assaultive violation that occurs anywhere other than in an area specifically listed as prohibited to the restrained party—no criminal penalties may ever be imposed. Rather, the domestic violence victim on whose behalf the order was issued must seek sanctions for civil contempt of court against the no-contact order violator if the victim wishes the violator to be penalized.

At the outset, Bunker's and Williams's contention that former RCW 26.50.110(1) unambiguously means what they say it means is without merit; it is not obvious from the structure of the section what the phrase "for which an arrest is required under RCW 10.31.100(2)(a) or (b)" is intended to modify. It may be that it only applies to the clause "a provision of a foreign protection order specifically indicating that a violation will be a crime." Perhaps, instead, it modifies that clause *and* the clause "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 perhaps it modifies both of those clauses *as well as* the phrase "a violation of the restraint provisions." The plain text of the statute does not indicate which construction is most plausible, and each construction gives the statute a different meaning. "When statutory language is susceptible to more than one reasonable interpretation, it is considered ambiguous." Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

The primary goal of statutory construction is to discern and carry out the legislature's intent. If that intent cannot be discerned from the plain text of the

statute, the court applying the statute must “resort to principles of statutory construction, legislative history, and relevant case law to assist [it] in discerning legislative intent.” Cockle, 142 Wn.2d at 808.

The question presented in this case is made simpler by the fact that the legislature recently declared its intent with respect to RCW 26.50.110. In 2007, the legislature unanimously passed, as chapter 173 of the 2007 laws, Substitute House Bill 1642, which amended RCW 26.50.110 to make clear that nearly any conceivable domestic violence no-contact order violation is a criminal offense.² The legislature specifically stated in the text of Substitute House Bill 1642 that the legislation did not in any way change the substantive terms of RCW 26.50.110, and that the exclusive reason for the amendment was to make clear that the legislature had always intended criminal penalties to be imposed for willful violations of domestic violence no-contact orders:

The legislature finds this act necessary to *restore and make clear its intent that a willful violation of a no-contact provision of a court order is a criminal offense* and shall be enforced accordingly to preserve the integrity and intent of the domestic violence act. This act is not intended to broaden the scope of law enforcement power

² RCW 26.50.110, in its current form, provides:

(1)(a) 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 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 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;

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

(iv) A provision of a foreign protection order specifically indicating that a violation will be a crime.

or effectuate any substantive change to any criminal provision in the Revised Code of Washington.

LAWS OF 2007, ch. 173, § 1 (emphasis added). Thus, the amendment's sole purpose was to eliminate any question about whether RCW 26.50.110 was intended to impose criminal penalties for violations of domestic violence protective orders generally, rather than (as Bunker and Williams contend) only for a discrete subset of violations.

"When a statute or regulation is adopted to clarify an internal inconsistency to help it conform to its original intent, it may properly be retroactive as curative." State v. MacKenzie, 114 Wn. App. 687, 699, 60 P.3d 607 (2002) (citing In re Pers. Restraint of Matteson, 142 Wn.2d 298, 308-09, 12 P.3d 585 (2000)). Similarly, "[w]hen an amendment clarifies existing law and where that amendment does not contravene previous constructions of the law, the amendment may be deemed curative, remedial and retroactive. This is particularly so where an amendment is enacted during a controversy regarding the meaning of the law." Tomlinson v. Clarke, 118 Wn.2d 498, 510-11, 825 P.2d 706 (1992) (citing State v. Jones, 110 Wn.2d 74, 82, 750 P.2d 620 (1988); Johnson v. Cont'l West, Inc., 99 Wn.2d 555, 559, 663 P.2d 482 (1983)).

The legislature enacted Substitute House Bill 1642 solely in order to make clear that the exact interpretation of RCW 26.50.110 sought by Bunker and Williams is, and always has been, erroneous. There is no appellate opinion interpreting RCW 26.50.110 to the contrary—i.e., providing a "previous construction of the law"—that precludes the retroactive application of the

amended RCW 26.50.110 to Bunker and Williams.³ Accordingly, we hold that the legislature's 2007 amendments to RCW 26.50.110 apply to Bunker and Williams. Furthermore, under that statute, there is no ambiguity whatsoever with respect to whether a violation of the restraint provisions of a domestic violence no-contact order constitutes a criminal act.

Even were we to decline to accept the applicability of RCW 26.50.110 as it is currently written to these actions, traditional principles of statutory construction also demonstrate that the legislature always intended to criminalize violations of domestic violence no-contact orders. Contending that this is not the case, Bunker and Williams make much of the "last antecedent rule" and the rule of lenity (albeit without ever articulating precisely how those rules apply to former RCW 26.50.110). In basing their statutory interpretation argument solely on these rules, however, Bunker and Williams ignore more fundamental principles of statutory construction.

The last antecedent rule states that "unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent. . . . Yet the presence of a comma before the qualifying phrase is evidence the qualifier is

³ Bunker and Williams contend that our opinion in Jacques v. Sharp, 83 Wn. App. 532, 922 P.2d 145 (1996), provides a contrary judicial construction that prevents the retroactive application of Substitute House Bill 1642. But the version of RCW 26.50.110 examined in Jacques was different than the version we are examining here (the version created by the 2000 amendments to RCW 26.50.110). In other words, we did not, in Jacques, interpret the version of RCW 26.50.110 currently at issue because that version did not yet exist.

Indeed, had the version of RCW 26.50.110 effective in Jacques been in effect when Bunker and Williams were arrested, there is no question that their conduct would have been criminal—former RCW 26.50.110 (1991) provided criminal penalties for any violation of a no-contact order's "restraint provisions," which included prohibitions on contact with the domestic violence victim. See former RCW 26.50.110 (1991); former RCW 26.50.060(1)(g) (1991); Jacques, 83 Wn. App. at 542 (former RCW 26.50.110 (1991) categorizes violations of a court order's restraint provisions as misdemeanors).

How different are they?

intended to apply to *all antecedents* instead of only the immediately preceding one.” City of Spokane v. Spokane County, 158 Wn.2d 661, 673, 146 P.3d 893 (2006) (internal citations and quotation marks omitted). Thus, as applied to former RCW 26.50.110, this rule would appear to support Bunker’s and Williams’s contention that the phrase “for which an arrest is required under RCW 10.31.100(2)(a) or (b)” modifies every preceding clause, up to and including the phrase “violation of the restraint provisions.” Moreover, if the last antecedent rule were the sole principle of statutory construction applicable to former RCW 26.50.110, the statute would indeed appear to allow the imposition of criminal penalties for only those no-contact order violations for which the legislature has made arrest mandatory.

By urging us to rely exclusively on the last antecedent rule, however, Bunker and Williams effectively encourage us to disregard the principle that “[a]n act must be construed as a whole, considering all provisions in relation to one another and harmonizing all rather than rendering any superfluous.” State v. George, 160 Wn.2d 727, 738, 158 P.3d 1169 (2007). This we will not do.

More fundamental?

Even a cursory examination of former RCW 26.50.110’s other subsections reveals that the legislature did not intend for contempt of court sanctions to be the primary penalty for domestic violence no-contact order violations. See former RCW 26.50.110(3) (“violation of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, shall also constitute contempt of court”) (emphasis added). Moreover, Bunker and Williams fail to explain why, if the legislature had

not intended to impose criminal penalties for violations of domestic violence no-contact orders, it has required that each and every no-contact order issued by a court proclaim that “[v]iolation of this order is a criminal offense.” RCW 10.99.040. An appellate court “may not interpret any part of a statute as meaningless or superfluous.” State v. Lilyblad, ___ Wn.2d ___, 177 P.3d 686, 690 (2008). To give RCW 26.50.110(1) the construction that Bunker and Williams seek would be to do precisely that with respect to these provisions.

Ironi
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The State suggests that we simply ignore the phrase “for which an arrest is required under RCW 10.31.100(2)(a) or (b)” as surplusage in the former statute. But we do not agree that it is necessary to do so in order for the former statute to make sense as written. Notwithstanding the last antecedent rule, the structure of the statute as a whole indicates that the legislature intended the phrase “for which an arrest is required under RCW 10.31.100(2)(a) or (b)” to modify the previous two complete clauses, respectively. That is, “RCW 10.31.100(2)(a)” refers to the clause “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,” while “RCW 10.31.100(2) . . . (b)” refers to “or of a provision of a foreign protection order specifically indicating that a violation will be a crime.” Former RCW 26.50.110. This construction is not particularly surprising, insofar as the circumstances referenced are precisely those “for which an arrest is required” in each respective subsection of RCW 10.31.100(2). It also has the advantage of being the only construction whereby each of the subsections of

MG is superfluous

RCW 10.31.100(2)—(a) and (b)—is not being applied to circumstances that, by its own terms, are governed solely by the *other* subsection.

The rule of lenity is similarly unavailing to the argument advanced by Bunker and Williams. “[U]nder the rule of lenity, where two possible statutory constructions are permissible, we construe the statute strictly against the State in favor of a criminal defendant.” State v. B.E.K., 141 Wn. App. 742, 745, 172 P.3d 365 (2007) (citing State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984)). “But the rule of lenity does not apply where statutes can be reconciled in a way that reflects the legislature’s clear intent.” State v. R.J., 121 Wn. App. 215, 217 n.2, 88 P.3d 411 (2004). Here, every indication is that former RCW 26.50.110 was merely awkwardly drafted, and that the legislature always intended to criminalize violations of domestic violence no-contact orders. This being the case, we will not apply the rule of lenity in frustration of the legislature’s intent.

The legislature has amended RCW 26.50.110 explicitly to clarify that the construction of the statute that Bunker and Williams seek is incorrect. That amendment applies retroactively to Bunker and Williams because it was for the sole purpose of removing a statutory ambiguity, and changed no substantive law. Even had the legislature not amended RCW 26.50.110, however, Bunker’s and Williams’s construction of RCW 26.50.110 is itself implausible when RCW 26.50.110(1) is read in conjunction with related sections, as it must be. Accordingly, we conclude that Bunker’s and Williams’s conduct was criminal and that the charging documents and jury instructions in their cases included all of

the necessary elements of the offenses with which they were charged. This being so, we affirm both Bunker's conviction and Williams's conviction.

Bunker's Sentence

Bunker additionally contends that the trial court abused its discretion when it sentenced him because it erroneously believed that it did not have the authority to depart downward from the standard sentence range on the basis of the mitigating factor that Hiatt was willingly present in Bunker's truck tractor.⁴ Bunker is correct.

RCW 9.94A.535(1) provides that the sentencing court "may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." One statutorily enumerated mitigating factor is that, "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." RCW 9.94A.535(1)(a). The State contends that this mitigating factor could not be considered by the trial court when it sentenced Bunker because consent is not a defense to the crime of violating a domestic violence protection order. The State is correct that Hiatt's consent is not a defense to Bunker's guilt. But Bunker does not contend that it is. Rather, he contends that the trial court had the discretion to consider, in sentencing him, whether Hiatt was willingly in his presence.

The trial court erroneously concluded that it did not have the discretion to consider this mitigating factor. "While no defendant is entitled to an exceptional

⁴ Williams does not separately appeal his sentence.

sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). A trial court’s erroneous belief that it lacks the discretion to depart downward from the standard sentencing range is itself an abuse of discretion warranting remand. State v. Garcia-Martinez, 88 Wn. App. 322, 329-30, 944 P.2d 1104 (1997).

While there is, of course, no requirement that the trial court actually impose a mitigated exceptional sentence, we remand Bunker’s cause for resentencing to enable the trial court to exercise its discretion in determining whether an exceptional sentence is warranted.

With respect to Bunker’s appeal, the trial court is affirmed in part and reversed in part, and the cause is remanded for resentencing.

With respect to Williams’s appeal, the trial court is affirmed.

Dunne, A.C.J.

WE CONCUR:

Schindler, C.J.

Becker, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LEO B. BUNKER,

Appellant.

DIVISION ONE

No. 59322-6-1

CONSOLIDATED

STATE OF WASHINGTON,

Respondent,

v.

DONALD CARL WILLIAMS,

Appellant.

No. 59536-9-1

ORDER DENYING
APPELLANTS' MOTION
FOR RECONSIDERATION

The appellants, Leo B. Bunker and Donald Carl Williams, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 19th day of June, 2008.

FOR THE COURT:

Debra A. C. J.
Judge

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

2008 JUN 19 AM 11:07

[3]  KeyCite Citing References for this Headnote

⌂62 Breach of the Peace

⌂62k15 Security or Order to Keep Peace or Protect Family

⌂62k15.1 k. In General. Most Cited Cases

Under former statute setting forth criminal penalties for violation of domestic violence protection order, the phrase "for which an arrest is required" applied to any of the four provisions mentioned in the former statute, and thus the former statute only criminalized conduct for which an arrest was required under statute governing warrantless arrests for violation of protection orders. West's RCWA 10.31.100(2)(a, b), 26.50.110(1) (2000).

[4]  KeyCite Citing References for this Headnote

⌂62 Breach of the Peace

⌂62k15 Security or Order to Keep Peace or Protect Family

⌂62k15.1 k. In General. Most Cited Cases

Under former statute setting forth criminal penalties for violation of domestic violence protection order, defendant's violation of domestic violence protection order in having contact with the protected individual when she visited defendant on four occasions at county jail was not a violation for which an arrest was required under statute governing warrantless arrests for violation of protection orders, and therefore defendant's actions did not qualify as crimes; defendant did not commit any acts or threats of violence, and he did not violate any prohibition from contacting protected individual at specific locations. West's RCWA 10.31.100(2)(a, b), 26.50.110(1) (2000).

[5]  KeyCite Citing References for this Headnote

⌂361 Statutes

⌂361VI Construction and Operation

⌂361VI(A) General Rules of Construction

⌂361k223 Construction with Reference to Other Statutes

⌂361k223.1 k. In General. Most Cited Cases

When there is an apparent conflict between two statutes, courts attempt to reconcile both to give effect to each.

[6]  KeyCite Citing References for this Headnote

⌂62 Breach of the Peace

⌂62k15 Security or Order to Keep Peace or Protect Family

⌂62k15.1 k. In General. Most Cited Cases

Former statute setting forth criminal penalties for violation of domestic violence protection order provides the elements necessary to prove a violation of a no-contact order, and these elements include: (1) the existence of a protection order under specified statutory chapters, (2) the restrained party knows of the order, (3) the restrained party violates the order, and (4) arrest is required under statute governing warrantless arrests for violation of protection orders; if each of these elements is satisfied, the violation of a no-contact order is a crime. West's RCWA 10.31.100(2)(a, b), 26.50.110(1) (2000).

Appeal from Thurston Superior Court; Honorable Wm Thomas McPhee, J.
James C. Powers, Thurston County Prosecuting Attorney Ofc., Olympia, WA, for

Appellant.

Robert Mason Quillian, Attorney at Law, Olympia, WA, for Respondent.

PUBLISHED OPINION

BRIDGEWATER, P.J.

*1 ¶ 1 The State appeals the trial court's order granting a motion for arrest of judgment in favor of Dean William Hogan (Hogan) after Hogan pleaded guilty to two counts of violating a domestic violence protection order by communicating with the protected person while she visited, him when he was in custody. Although Hogan's contact with the protected person was prohibited, it was not at one of the enumerated prohibited locations nor did it involve acts or threats of violence. Because the statute unambiguously criminalizes contact for which an arrest is required and RCW 10.31.100(2)(a) or (b) only permits an arrest where there is an act or threat of violence or intrusion into a prohibited location, the trial court did not err by holding that Hogan's contact violations were not crimes under former RCW 26.50.110(1)(2000). We affirm.

FACTS

¶ 2 On January 3, 2006, as part of an earlier sentence, the Thurston County Superior Court entered an order prohibiting contact/domestic violence against Hogan. The domestic violence order prohibited Hogan from contacting Lisa Holloway. While Hogan was serving his sentence in the Thurston County jail, Holloway visited him on four separate occasions during the months of January, February, and March 2006.

¶ 3 On May 5, 2006, the Thurston County prosecutor charged Hogan with four counts of violating a no-contact, protection or restraining order/domestic violence-third or subsequent violation of any similar order. Each count was identical in language with the exception of the date of the alleged offense. Count I reads:

COUNT I-VIOLATION OF NO CONTACT, PROTECTION, OR RESTRAINING ORDER/DOMESTIC VIOLENCE-THIRD OR SUBSEQUENT VIOLATION OF ANY SIMILAR ORDER, **RCW 26.50.110(1)**, **RCW 10.99.020**, **RCW 10.99.050(2)(B)**-CLASS C FELONY:

In that the defendant, [Hogan], in the State of Washington, on or about January 2, 2006, with knowledge that the Thurston County Superior Court had previously issued a protection order, restraining order, or no contact order, pursuant to Chapter 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW in state law in Cause No. 06-1-0009-2, did violate the order while the order was in effect by knowingly violating the restraint provisions therein by having contact with Lisa Holloway, his girlfriend, and furthermore, the defendant has at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Chapter 10.99, 26.09, 26.10, 26.26, 26.50, 26.52, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.

CP at 4. On June 27, 2006, Hogan pleaded guilty to counts I and II in exchange for the State's promise to drop the two remaining counts.

¶ 4 On July 7, 2006, Hogan filed a motion to arrest judgment under CrR 7.4(a).^{FN1} Hogan acknowledged that the State charged him under former RCW 26.50.110(1), RCW 10.99.020, and RCW 10.99.050(2)(b). He also acknowledged that RCW 10.99.050(2)(a)

provides that a “[w]illful violation of a court order issued under this section is punishable under RCW 26.50.110.” CP at 29. Hogan argued, however, that former RCW 26.50.110(1) criminalized only violations “for which an arrest is required under RCW 10.31.100(2)(a) or (b).” CP at 30. Hogan based his argument on the legislature’s placement of the comma immediately preceding this phrase. Referencing the corollary to the last antecedent rule and legislative history, Hogan convinced the trial court that the State failed to prove his violations were crimes under former RCW 26.50.110(1). The trial court dismissed the charges.

ANALYSIS

I. RCW 26.50.110(1)

*2 ¶ 5 The State argues that the trial court erred by relying on former RCW 26.50.110(1) to define Hogan’s crimes when it should have relied on RCW 10.99.050(2) and former RCW 26.50.110(5). Hogan contends that the trial court: (1) properly applied former RCW 26.50.110(1) to his violations, which arose under RCW 10.99.050; and (2) properly ruled that former RCW 26.50.110(1) was not ambiguous. Hogan is correct; the trial court did not err.

¶ 6 Here, the State charged Hogan with violating former RCW 26.50.110(1), RCW 10.99.050(2)(b), and RCW 10.99.020. Accordingly, we do not reach the issue of whether Hogan’s actions might have satisfied a charge of contempt.^{FN2}

¶ 7 Our Supreme Court interpreted an even earlier version of RCW 26.50.110 (1996) in *State v. Chapman*, 140 Wash.2d 436, 448, 998 P.2d 282, cert. denied, 531 U.S. 984, 121 S.Ct. 438, 148 L.Ed.2d 444 (2000); but the legislature amended RCW 26.50.110 in 2000. Before this amendment, violation of a domestic violence no-contact order under former RCW 10.99.050(2) (1997) was a gross misdemeanor and a third violation was a felony. But in 2000, the legislature amended the statute, moving most of the language to RCW 26.50.110 and adding the “for which an arrest is required under RCW 10.31.100(2)(a) or (b)” language at issue in this case. Laws of 2000, ch. 119 § 24. Accordingly, *Chapman*, is no longer binding precedent on this court.

¶ 8 Before we continue our analysis, we note that the legislature unanimously amended RCW 26.50.110(1) during the 2007 session. See Laws of 2007, ch. 173. The legislature removed the cross-reference to RCW 10.31.100(2), which Hogan relies on here. See Laws of 2007, ch. 173, § 2. The legislature also stated in its findings that it meant “to restore and make clear its intent that a willful violation of a no-contact provision of a court order is a criminal offense and should be enforced accordingly to preserve the integrity and intent of the domestic violence act.” Laws of 2007, ch. 173, § 1.^{FN3}

¶ 9 We address Hogan’s statutory argument under the criminal statutes in effect at time he committed the crime unless the legislature expressed a different intent when subsequently amending the statute. RCW 10.01.040. The legislature expressed no such intent when it amended RCW 26.50.110(1) in 2007.

¶ 10 As amended in 2000, former RCW 26.50.110(1) provided:

Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, 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.

*3 (Emphasis ours).

¶ 11 We first look to the statute's plain language in order to give effect to legislative intent. *State v. Watson*, 146 Wash.2d 947, 954, 51 P.3d 66 (2002). If the statute is unambiguous, we derive the legislature's intent from the plain language alone. *Watson*, 146 Wash.2d at 955, 51 P.3d 66. If the statute is ambiguous, we resort to principles of statutory construction, legislative history, and relevant case law to assist in our interpretation. *Watson*, 146 Wash.2d at 955-56, 51 P.3d 66. A statute is ambiguous if a reasonable person can interpret it in more than one way. *Watson*, 146 Wash.2d at 954-55, 51 P.3d 66.

[1] [2] ¶ 12 Hogan argued and the trial court agreed that the phrase, "for which an arrest is required under RCW 10.31.100(2)(a) or (b)," applies to a violation of any of the four provisions mentioned in former RCW 26.50.110(1) because a comma precedes the phrase. CP 43, 48. Hogan based this contention on the corollary to the last antecedent rule. Br. of Resp't at 3.

The "last antecedent" rule of statutory construction "provides that, *unless a contrary intention appears in the statute*, qualifying words and phrases refer to the last antecedent." *In re Sehome Park Care Ctr., Inc.*, 127 Wash.2d 774, 781, 903 P.2d 443 (1995) (emphasis added). A corollary to the rule is that "the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one." *Sehome Park*, 127 Wash.2d at 781-82, 903 P.2d 443.

In re Smith, 139 Wash.2d 199, 204, 986 P.2d 131 (1999).

¶ 13 Under the corollary to the last antecedent rule, the legislature's insertion of a comma requires us to apply the "for which an arrest is required under RCW 10.31.100(2)(a) or (b)" language to each of the circumstances mentioned in former RCW 26.50.110(1). At oral argument, the State candidly agreed that the last antecedent rule applies. The relevant language in former RCW 26.50.110(1) provides:

[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.

(Emphasis added).

[3] ¶ 14 The comma preceding "for which an arrest is required" does not appear to be a scrivener's error because if this court removed the comma, portions of the "for which an arrest is required under RCW 10.31.100(2)(a) or (b)" language would be superfluous. The provision immediately preceding the comma reads, "or of a provision of a foreign protection order specifically indicating that a violation will be a crime." RCW 10.31.100(2)(b) relates specifically to foreign protection orders, which are not at issue here. This interpretation would render the reference in former RCW 26.50.110(1) to RCW 10.31.100(2)(a) as meaningless and inapplicable. This court interprets and construes statutes to give effect to all the language used, with no portion rendered meaningless or superfluous. *Davis v. Dep't of Licensing*, 137 Wash.2d 957, 963, 977 P.2d 554 (1999)

(citing *Whatcom County v. City of Bellingham*, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996)). Accordingly, we hold that, under the corollary to the last antecedent rule, the phrase in question applies to each of the provisions in former RCW 26.50.110(1). Former RCW 26.50.110(1) is not ambiguous as written.^{FN4}

*4 [4] ¶ 15 Given this, we must now determine whether Hogan's actions qualified as crimes under former RCW 26.50.110(1). RCW 10.31.100 provides:

(2) A police officer shall arrest ... a person without a warrant when the officer has probable cause to believe that:

(a) An order has been issued of which the person has knowledge under RCW 26.44.063, or chapter 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW restraining the person and the person *has violated the terms of the order restraining the person from acts or threats of violence*, or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person.

(Emphasis added). In this case, because Holloway contacted Hogan at the county jail, we do not address instances in which an arrest can be made for no-contact order violations involving “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).

¶ 16 Based on the remaining plain language of RCW 10.31.100(2)(a), police officers with probable cause are required to arrest violators of domestic violence no-contact orders under chapter 10.99 RCW (restraining a party from having contact with the victim) only when the violation involves a threat or act of violence.^{FN5} Because the State charged Hogan with violating former RCW 26.50.110(1) and he did not commit any acts or threats of violence nor did he violate any prohibition from contacting Holloway at specific locations,^{FN6} Hogan's conduct did not constitute a crime.

II. FORMER RCW 26.50.110(1) and RCW 10.99.050(2)(B)

[5] ¶ 17 The State contends that the trial court's decision creates a conflict between former RCW 26.50.110(1) and RCW 10.99.050(2)(b). When there is an apparent conflict between two statutes, we attempt to reconcile both to give effect to each. *In re Pers. Restraint of Mayner*, 107 Wash.2d 512, 522, 730 P.2d 1321 (1986). Although the State argues that former RCW 26.50.110(1) is in direct conflict with RCW 10.99.050(2)(b), we disagree.

¶ 18 RCW 10.99.050(2)(b) is an administrative instruction that provides the specific wording required for a no-contact order restricting the defendant's ability to have contact with the victim. RCW 10.99.050(2)(b) provides: “The written order shall contain the court's directives and shall bear the legend: Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest.”

[6] ¶ 19 We hold that former RCW 26.50.110(1) provides the elements necessary to prove a violation of a no-contact order. These elements include: (1) the existence of an order under this chapter or others, including chapter 10.99 RCW; (2) the restrained party knows of the order; (3) the restrained party violates the order; and (4) arrest is required

under RCW 10.31.100(2)(a) or (b). If each of these elements is satisfied, the violation of a no-contact order is a crime. Here, Hogan's actions did not satisfy the fourth element because his actions did not involve an act or threat of violence; nor did they violate an order prohibiting him from contacting Holloway at specific locations. Thus, Hogan's act was not one for which an arrest was required under RCW 10.31.100(2)(a) or (b). In sum, we affirm the trial court's decision that Hogan did not commit a crime under former RCW 26.50.110(1).

*5 ¶ 20 Affirmed.

I concur: HUNT, J.

QUINN-BRINTNALL, J. (dissenting).

*5 ¶ 21 Initially, I note that this case supports the maxim that bad facts make bad law. I acknowledge that I question whether the legislature contemplated that someone in jail willfully violates a court ordered no-contact order by seeing a visitor who has misrepresented her identity in order to gain entry to the jail visiting area to visit an inmate who is prohibited from contacting her, and who has not threatened or enticed her to visit. I am aware that under the law, a recipient of a no-contact order willfully violates that order by responding to the protected party's request for contact, failing to leave the area following an unanticipated contact, or contacting the protected party by telephone even from jail. *See, e.g., State v. Ward*, 148 Wash.2d 803, 814, 64 P.3d 640 (2003); *State v. Dejarlais*, 136 Wash.2d 939, 942, 943-44, 969 P.2d 90 (1998); *State v. Sisemore*, 114 Wash.App. 75, 78, 55 P.3d 1178 (2002). But when the contact is wholly initiated by the protected party and occurs in a secure facility with a glass booth preventing any actual physical contact and injury, I question whether the recipient has sufficient control over his ability to willfully make contact of the sort the legislature and the issuing court intended to prohibit with anyone not incarcerated in the same jail.

¶ 22 That said, courts have a responsibility to read statutes in a common sense and reasonable manner to avoid absurd results. And I agree with Division One's recent decision in *State v. Bunker*, --- Wash.App. ---, --- 183 P.3d 1086, 2008 WL 1932670 at *7 (2008) (finding RCW 26.50.110 ambiguous and interpreting it in accord with the legislature's intention to make violating no-contact orders a crime).

¶ 23 Because Lisa Holloway contacted Dean William Hogan at the county jail, the majority of this court properly declined to address instances in which RCW 10.31.100(2)(a) requires that arrest be made for no-contact order violations involving "going onto the grounds of or entering a residence, workplace, school, or day care." But it also failed to address that portion of the statute "prohibiting the person from knowingly coming within, or knowingly *remaining* within, a specified distance of a location." RCW 10.31.100(2)(a) (emphasis added). In my view, assuming as the majority does that the arrest requirement of RCW 10.31.100(2)(a) applies to every preceding clause in the statute's "single, long, multi-clause sentence," the phrase nonetheless requires that a police officer arrest a person without a warrant when the officer has probable cause to believe that

[a]n order [restraining the person] has been issued [under chapter 10.99 RCW] of which the person has knowledge ... and the person has violated the terms of the order ... prohibiting the person from knowingly coming within, or *knowingly remaining within, a specified distance of a location.*

*6 RCW 10.31.100(2)(a) (emphasis added). The majority reads "location" to be a permanently fixed spot or place. I do not. In the context of no-contact orders, "location" frequently means where the protected party is standing, sitting, or lying. This is a discernable, though not static, location. The statute clearly contemplates the possibility of a mobile location and employs the active phrasing "knowingly coming within, or knowingly remaining within" a specified distance of a location. Many court ordered no-contact orders prohibit the restrained party from coming within a set number of feet of the protected party. Here, the court's order could have prohibited Hogan from knowingly coming within or knowingly remaining within a specified number of feet of Holloway. The court's order at issue in this case did not specify a distance. Instead, it provided: [Hogan s]hall have no contact, directly, indirectly, in writing, by telephone or through other persons, (except attorneys) and shall have no contact with the residence, school, workplace or day care facility of: [Holloway,] but may have contact inside of doctor's office during wife's [appointments] for pregnancy.

Clerk's Papers at 41.

¶ 24 Here, Hogan violated the restraining order when he remained in the jail's visiting area in Holloway's presence and, in my view, RCW 10.31.100(2)(a) would have required police to arrest him for violating the order. By excluding from consideration the area of the protected person's location, the majority reads RCW 10.31.100(2)(a) and (b) to require arrest only after the restrained party commits acts or threats of violence. In my opinion, the majority's reading of what it considers to be the "plain reading" of the statute is unnecessarily narrow. This narrow reading does not acknowledge the statute's ambiguity and, therefore, fails to give the statute a reasonable reading that gives effect to the legislature's intent. See *Bunker*, 183 P.3d 1086, 2008 WL 1932670 at *3. The majority's reading hampers the police officer's ability to timely and effectively prevent the contact the order prohibits and avoid further violence. In my opinion, the majority's unnecessarily narrow reading of the statute defeats the purpose of restraining orders which are designed to decrease opportunities for violent interaction by keeping the persons in question away from one another.

¶ 25 Accordingly, I agree with Division One's interpretation of former RCW 26.50.110(1) as set out in *Bunker*. I would reverse the trial court's order dismissing the charge and, because I lack the authority to substitute my judgment for that of the duly elected prosecuting authority, remand for further proceedings.

FN1. CrR 7.4(a) provides: "Judgment may be arrested on the motion of the defendant for the following causes: ... (2) the indictment or information does not charge a crime; or (3) insufficiency of the proof of a material element of the crime."

FN2. Former RCW 26.50.110(3) provides, "A violation of an order issued under this chapter ..., [or] 10.99 (3)27 RCW ..., shall also constitute contempt of court, and is subject to the penalties prescribed by law."

FN3. Current RCW 26.50.110(1) reads as follows: Whenever an order is granted under this chapter ... and the 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: (i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or *restraint provisions prohibiting contact with a protected party*;

Laws of 2007, ch. 173, § 2 (emphasis added).

FN4. We note that this holding is consistent with this court's recent opinion in *State v. Madrid*, --- Wn.App. ---, --- P.3d (2008), and that it directly conflicts with Division One's

recent holding that former RCW 26.50.110 was ambiguous in *State v. Bunker*, No. 59322-6, 2008 Wash. LEXIS 1003 (May 5, 2008). Because we do not find RCW 26.50.110 ambiguous, we disagree with Division One's analysis, and do not address legislative history.

FN5. The dissent asserts: [T]he majority's unnecessarily narrow reading of the statute defeats the purpose of restraining orders which are designed to decrease opportunities for violent interaction by keeping the persons in question away from one another.

Dissent at page 12. We agree that restraining orders are "designed to decrease opportunities for violent interaction" between designated persons. But it is not our allegedly "narrow reading" that thwarts this design here. Where statutory language inadvertently falls short of accomplishing its purpose, the legislature may act to correct the deficiency. For example, just last year the legislature amended former RCW 26.50.110(1) to remove "for which an arrest is required," the language at issue here, so that the statute no longer "defeats the purpose of restraining orders." Dissent at 12. We agree with the dissent that we "lack the authority to substitute [our] judgment for that of the prosecuting authority." Dissent at 12. We respectfully add that we also lack the authority to rewrite statutes to correct plain language deficiencies.

FN6. With all due respect, the dissent mischaracterizes our holding. We do not, as the dissent asserts, "exclud[e] from consideration the area of the protected person's location" because it is not at issue here. Dissent at page 11.

Wash.App. Div. 2, 2008.

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--- P.3d ---, 2008 WL 2447871 (Wash.App. Div. 2)

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Court of Appeals of Washington,

Division 2.

STATE of Washington, Respondent,

v.

Jeffrey Patrick MADRID, Appellant.

No. 35952-9-II.

June 17, 2008.

Appeal from Thurston Superior Court; Honorable Richard A. Strophy, J.

Patricia Anne Pethick, Attorney at Law, Tacoma, WA, for Appellant.

Carol L. La Verne, Thurston County Prosecutor's Office, Olympia, WA, for Respondent.

PUBLISHED OPINION

PENOYAR, J.

*1 ¶ 1 A jury convicted Jeffrey P. Madrid for nine counts of violating a protection order issued on behalf of his estranged wife Dixie and his stepdaughter AP. Seven of the nine counts stem from letters Madrid wrote to Dixie but sent to Dixie's mother, who delivered them to Dixie several months later. Madrid argues that (1) his convictions on all nine counts should be vacated because the penalty provision statute for protection order violations (former RCW 26.50.110(1) (2000)) was ambiguous, and (2) the delivery of the seven letters supports only one conviction for violation of a protection order since only a single "contact" occurred (i.e. the delivery). We hold that former RCW 26.50.110(1) is unambiguous but that the State failed to plead or prove a required element of the crime. Thus, we reverse and vacate Madrid's convictions, and remand for proceedings consistent with this opinion.

FACTS

I. Substantive Facts

¶ 2 On August 25, 2005, Thurston County Superior Court issued a no contact order preventing Madrid from contacting or coming within 1000 feet of his stepdaughter, AP.^{FN1} On September 9, 2005, the Thurston County Sheriff's Office served Madrid with a permanent order for protection preventing Madrid from contacting or coming within one-quarter mile of his estranged wife, Dixie Paulk Madrid, or AP. The protection order restrained Madrid from "having any contact whatsoever, in person or through others, by phone, mail, or any means, directly or indirectly" with Dixie or AP. State's Ex. 2 at 2.

FN1. On January 17, 2006, the same court issued another no contact order to prevent Madrid from contacting or coming within one mile of AP. State's Ex. 3.

¶ 3 Beginning in September 2005, Madrid mailed "10 to 20" letters to Amy Bartley, Dixie's mother, a New Mexico resident. Report of Proceedings (RP) (11/14/06) at 32. Madrid addressed the envelopes to Bartley, but he enclosed letters written to Dixie and AP. Bartley told Dixie about the letters and read Dixie "four or five" of the letters over the phone before she stopped opening them altogether. RP (11/14/06) at 39.^{FN2} Bartley threw away some of Madrid's letters, but she delivered a number of them to Dixie on a visit to Washington in April 2006, including a birthday card for AP.

FN2. As the State conceded at the *Knapstad* hearing, the record does not indicate which letters Bartley read to Dixie over the phone. See *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

¶ 4 At trial, Dixie and AP testified that Madrid called Dixie's residence on May 15, 2006. When AP answered the phone, Madrid disguised his voice and asked for Dixie. Madrid spoke to Dixie about various matters before she hung up.

II. Procedural Facts

¶ 5 The information charged Madrid with eleven counts of no contact, protection or restraining order/domestic violence violations pursuant to RCW 26.50.110(1); RCW 10.99.020(2)(b);^{FN3} and/or RCW 10.99.050. The State alleged in counts I through VIX that Madrid violated the protection order by contacting Dixie between December 1, 2005 and April 30, 2006. Each of those nine counts corresponded to a letter that Madrid sent to Dixie through Bartley. Count X alleged that Madrid violated the protection order by calling Dixie at her residence on May 15, 2006. Count XI alleged that Madrid violated the no contact order and/or protection order by sending a birthday card to AP.

FN3. This RCW subsection does not exist.

*2 ¶ 6 Prior to trial, Madrid lost a *Knapstad*^{FN4} motion in which he argued that violations of no contact or protection orders are not gross misdemeanors punishable under RCW 26.50.110(1) unless RCW 10.31.100(2)(a) or (b) requires an arrest for that violation.

FN4. *Knapstad*, 107 Wn.2d 346.

¶ 7 A jury convicted Madrid on nine counts (I, III, IV, V, VII, VIII, IX, X, and XI) and acquitted him on two counts (II and VI).^{FN5}

FN5. Exhibits 6 and 10, which are letters that served as the basis for counts II and VI, respectively, are not part of the record on appeal.

¶ 8 After the trial, the court denied Madrid's motion to arrest judgment pursuant to Criminal Rule (CrR) 7.4. Madrid argued that because Bartley delivered all the letters to Dixie at once, he could only be convicted of a single violation of the protection order, not seven separate violations (counts I, III, IV, V, VII, VIII, IX). Neither Madrid nor the State was able to cite case authority on point.^{FN6}

FN6. At the motion hearing, both parties discussed *State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003). The *Ward* court held that sufficient evidence existed for a rational juror to infer that a restrained party violated a no contact order when he called the protected party's home and spoke with his wife, even though the record did not disclose whether his wife told the protected party of the phone call. *Ward*, 148 Wn.2d at 816. The trial court noted that here, unlike in *Ward*, the State presented evidence to show that the protected party was contacted.

ANALYSIS

I. Former RCW 26.50.110(1)

A. Standard of Review and Controlling Statutes

¶ 9 We review statutory construction *de novo*.^{FN7} *State v. Bright*, 129 Wn.2d 257, 265, 916 P.2d 922 (1996). Our primary duty in interpreting statutes is to determine and implement the legislature's intent. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Legislative intent is primarily revealed by the statutory language. *State v. Moses*, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002). Courts should avoid reading a statute in a way that leads to absurd results since the legislature presumably did not intend such results. *J.P.*, 149 Wn.2d at 450 (quoting *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)). When statutory language is unambiguous, we look only to that language to determine the legislative intent, without considering outside sources. *Delgado*, 148 Wn.2d at 727.

FN7. Although Madrid made a statutory argument similar to this one at his *Knapstad* hearing, a denial of a *Knapstad* motion is not reviewable on appeal after a trial takes place. *State v. Olson*, 73 Wn.App. 348, 357 n. 6, 869 P.2d 110 (1994) (noting that the *Knapstad* motion merges into the trial). Therefore, we engage in *de novo* statutory review.

¶ 10 All nine convictions involve domestic violence protection order violations that the court issued under RCW 26.50.060 to protect Dixie and AP. Such violations are punishable under RCW 26.50.110. Additionally, count XI involves no contact order violations between Madrid and AP, which the court issued under chapter 10.99 RCW. Willful violations of court orders under chapter 10.99 RCW are also punishable under RCW 26.50.110. *See* RCW 10.99.050(2).

¶ 11 The pertinent part of former RCW 26.50.110(1) stated:

Whenever an order is granted under this chapter ... [or] 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, 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)*,^{FN8} is a gross misdemeanor except as provided in subsections (4) and (5) of this section. (Emphasis added).

FN8. RCW 10.31.100(2)(b) pertains to foreign protection orders and therefore does not apply here.

*3 ¶ 12 As discussed below, the legislature added this cross-reference to RCW 10.31.100(2) in 2000 and removed it in 2007. *See* Laws of 2007, ch. 173, § 2; Laws of 2000, ch. 119, § 24.

¶ 13 Former RCW 10.31.100(2)(a) (2000)^{FN9} stated:

FN9. A 2006 amendment to RCW 10.31.100(2)(a) does not impact the present analysis. *See* Laws of 2006, ch. 138, § 23.

(2) A police officer shall arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that: (a) An order has been issued of which the person has knowledge under RCW ... 10.99 ... [or] 26.50 restraining the person and the *person has violated the terms of the order restraining the person from acts or threats of violence*, or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location.... (Emphasis added).

B. Parties' Contentions

¶ 14 Both parties assert that former RCW 26.50.110 was ambiguous. They disagree, however, on the nature and the proper resolution of the alleged ambiguity.

¶ 15 Madrid asserts that former RCW 26.50.110(1), which cross-referenced RCW 10.31.100(2), was ambiguous as to whether the State had to prove an “an act or threatened act of violence” in order to secure Madrid's conviction for a domestic violence protection order violation. Given the ambiguity, Madrid contends that we should construe the ambiguity against the State and apply the rule of lenity-i.e., the State should have been required to affirmatively prove that Madrid committed “acts or threats of violence” against Dixie or AP in order to convict him. *See* RCW 10.31.100(2)(a). He argues that since the State did not prove this, we should reverse his convictions.

¶ 16 The State disagrees, arguing at length in its brief that the legislature created an unintended statutory ambiguity when it amended several domestic violence statutes in 2000, including adding the cross reference in former RCW 26.50.110(1) to RCW 10.31.100(2). The State asserts that statutory construction and legislative history resolve the ambiguity in its favor.

C. 2007 Amendment to RCW 26.50.110(1) Resolved Ambiguity Against Madrid

¶ 17 The legislature unanimously amended RCW 26.50.110(1) during the 2007 session.^{FN10} *See* Laws of 2007, ch. 173, § 2. The legislature removed the cross-reference to RCW 10.31.100(2), which Madrid relies upon here. *See* Laws of 2007, ch. 173, § 2. The legislature also stated in its findings that it meant “to restore and make clear its intent that a willful violation of a no-contact provision of a court order is a criminal offense and

shall be enforced accordingly to preserve the integrity and intent of the domestic violence act.” Laws of 2007, ch. 173, § 1.^{FN11}

FN10. Neither party cited or discussed the 2007 amendment in its brief.

FN11. Current RCW 26.50.110(1)(a) reads as follows: Whenever an order is granted under this chapter ... and the 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: (i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or *restraint provisions prohibiting contact with a protected party*;

Laws of 2007, ch. 173, § 2 (emphasis added).

¶ 18 We address Madrid's statutory argument on the merits since a criminal prosecution must proceed under the criminal statutes in effect at time the crime was committed unless the legislature expressed a different intent when amending the statute. RCW 10.01.040. The legislature expressed no such intent when it amended RCW 26.50.110(1) in 2007.

II. *De novo* review of former RCW 26.50.110(1) and RCW 10.31.100(2)

A. Former RCW 26.50.110(1)

*4 ¶ 19 We decide whether the legislature's addition of the cross reference to RCW 10.31.100(2) in 2000 made RCW 26.50.110(1) ambiguous such that we should (1) apply the rule of lenity, or (2) look outside the statute's plain meaning for legislative intent.

¶ 20 A careful reading of former RCW 26.50.110(1) shows that it is not ambiguous. According to the amended statute's plain language, the State could not convict an individual of a gross misdemeanor violation of a protection order under chapter 26.50 RCW unless the violation warranted an arrest under RCW 10.31.100(2)(a) or (b). Therefore, we need not apply the rule of lenity, nor look outside the statute's plain meaning for contrary legislative intent.

¶ 21 A plain reading of the relevant language of former RCW 26.50.110(1) and former RCW 10.31.100(1)(a) together, as they existed at the time of the charged offenses, reveals that the legislature wrote:

Whenever an order is granted ... a violation of the restraint provisions ... [and] ... the person has violated the terms of the order ... restraining the person from acts or threats of violence, ... or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, ... or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location ... or ... a foreign protection order, as defined in RCW 26.52.020 ... for which an arrest is required ... is a gross misdemeanor.^{FN12}

FN12. Except for the word “and” these words are direct quotes from former RCW 26.50.110(1) and RCW 10.31.100(1)(a). Words from the statutes that don't affect the analysis have been omitted and the order of the language has been changed for clarity.

¶ 22 A plain reading reveals that the only possible ambiguity in former RCW 26.50.110(1) is whether the phrase “for which an arrest is required under RCW 10.31.100(2)(a) or (b)” (“arrest provision”) applied to each of the four prior antecedents of RCW 26.50.110(1), or only to the immediately preceding one. We need only address whether the arrest provision applied to “restraint provisions” because this is the only prior antecedent that could apply to Madrid's alleged crimes.

¶ 23 Under the “last antecedent rule,” qualifying words and phrases refer to the last antecedent unless a contrary intention appears in the statute. *See State v. Wentz*, 149 Wn.2d 342, 351, 68 P.3d 282 (2003) (quoting *In re Sehome Park Care Ctr., Inc.*, 127 Wn.2d 774, 781, 703 P.2d 443 (1995)). However, “the presence of a comma before the qualifying phrase is evidence [that] the qualifier is intended to apply to *all antecedents* instead of only the immediately preceding one.” *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006) (quoting *Berrocal v. Fernandez*, 155 Wn.2d 585, 593, 121 P.3d 82 (2005)).

¶ 24 The plain statutory language and last antecedent rule suggest that the arrest provision applied to the “restraint provisions” antecedent. First, the presence of the comma before the arrest provision, which is the relevant qualifying phrase, suggests that the provision applied to all previous antecedents, including “restraint provisions.” Second, the plain language of RCW 10.31.100(2)(a) and (b), the two subsections of the arrest provision that are referenced in RCW 26.50.110(1), clearly indicates that these subsections were meant to apply to all the previous antecedents, not just the last prior antecedent. Subsection (2)(b) of the arrest provision only applies to foreign protection orders, the subject of the last prior antecedent, whereas subsection (2)(a) has a broader application. This suggests that the arrest provision must have applied to all prior antecedents, including “restraint provisions,” in order to prevent subsection (2)(a) from being rendered meaningless.

*5 ¶ 25 Therefore, we hold that RCW 26.50.110 is unambiguous. Accordingly, we do not look at other sources to determine legislative intent, such as the legislative history. *See, e.g., Delgado*, 148 Wn.2d at 727. A statute's plain meaning is discerned from “all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question,” *State Dept. of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002), so other related statutory provisions and the statutory scheme are not “outside sources” when determining whether a statute is ambiguous.

B. Former RCW 10.31.100(2)(a)

¶ 26 At oral argument, counsel indicated that RCW 10.31.100(2)(a) was itself ambiguous as it could be read that *any* violation of an order that included a provision restraining the person from acts of violence required arrest *or* that arrest was required only if there was a violation of the restraint against violence itself. Reviewing de novo, we are not persuaded that RCW 10.31.100(2)(a) is ambiguous, given that the legislature specifically used the

words “the order” not “an order,” which plainly leads to the interpretation that arrest is required only where a person has violated the specific portion of the order that restrains violence.^{FN13}

FN13. The pertinent part of RCW 10.31.100(2)(a) reads: “An order has been issued of which the person has knowledge under RCW 26.44.063, or chapter 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74 .34 RCW restraining the person and the person has violated the terms of *the* order restraining the person from acts or threats of violence ...” (emphasis added).

C. Result Not Absurd

¶ 27 The next issue is whether this plain meaning analysis leads to absurd results. We avoid a “reading that results in absurd results” because “it will not be presumed that the legislature intended absurd results.” *J.P.*, 149 Wn.2d at 450 (quoting *Delgado*, 148 Wn.2d at 733).

¶ 28 The result here may be anomalous, but it is not absurd and therefore we decline to read the arrest provision out of RCW 26.50.110(1). The anomaly results from the fact that, under a plain reading of the statutes, Madrid's violation of the order's no contact “restraint provisions” did not warrant arrest under former RCW 10.31.100(2)(a) and thus did not constitute a gross misdemeanor. It could be argued that the result here is anomalous because it finds that the legislature criminalized some but not all violations of a restraining order. For instance, a conversation with the protected person in a chance encounter on the street is criminalized, but a phone call is not. However, this is the result of the language that the legislature used and it is not for us to find a different effect of these statutes than that which the legislature expressed. In any case, Madrid may still be held in contempt of court for these violations. *See* RCW 26.50.110(3).

¶ 29 In contrast, if Madrid had knowingly come within one-quarter mile of Dixie's house or AP's school, he would have committed a gross misdemeanor because he would have violated the explicit terms of the protection order and the “specified distance” provision of RCW 26.50.110(1). Although it may be anomalous that Madrid would receive a lesser sanction for contacting the protected party than for violating the “specified distance” provision, the disparity does not rise to the level of such absurdity that we should ignore the statute's plain meaning.

*6 ¶ 30 In sum, the plain language of former RCW 26.50.110(1) required the State to show that violation of a domestic violence protection order warranted an arrest under RCW 10.31.100(2) in order to convict Madrid of a gross misdemeanor violation of a protection order. The State did not plead or prove this element of the crime. Therefore, we reverse, vacate Madrid's convictions, and remand for proceedings consistent with this opinion.^{FN14}

FN14. We need not address the unit of prosecution issue on appeal, because we reverse and vacate Madrid's convictions on other grounds.

We concur: HOUGHTON, C.J., and HUNT, J.

Wash.App. Div. 2,2008.

State v. Madrid

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
) NO. 81921-1
 vs.)
)
 LEO BUNKER and DONLAD WILLIAMS,)
)
 Petitioners.)

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 13TH DAY OF FEBRUARY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPELMENTAL BRIEF OF PETITIONERS** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF FEBRUARY 2009.

x Patrick Mayovsky