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COURT OF APPEALS
DIVISION ONE

DEC 30 2008

NO. 61027-9-I

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

CITY OF SEATTLE

Petitioner,

v.

ROBERT MAY,

Respondent/Cross-Petitioner,

FILED
COURT OF APPEALS
STATE OF WASHINGTON
DEC 30 PM 4:02

AMENDED BRIEF OF RESPONDENT/CROSS-APPELLANT

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TABLE OF CONTENTS

I. CROSS-ASSIGNMENT OF ERROR1

II. ISSUES1

III. STATEMENT OF THE CASE2

IV. ARGUMENT & AUTHORITY8

A. The Predicate Protection Order Was Not Applicable Because The Order Was Not Issued In Compliance With The Governing Statute. The Issuing Court Failed to Make the Threshold Finding Required By RCW 26.50.060(2) For Issuance Of A Permanent Order Restraining May From Contact With His Minor Son8

 1. May’s challenge to the applicability of the predicate protection order is not an impermissible collateral attack, but is a proper threshold question for the trial court in the criminal prosecution for violation of the order10

 2. The court issuing the permanent order failed to make the threshold finding required by RCW 26.50.060(2)14

B. May Was Denied Due Process Because He Was Only Given Notice That A Violation Of the Order Is A Crime Under State Law. Where the Charged Conduct Did Not Constitute A Violation Of State Law And May Was Not Given Notice That A Violation Could Be Prosecuted Under The City Code, The Prosecution Violated Due Process21

V. CONCLUSION30

TABLE OF AUTHORITIES

Cases

<u>City of Seattle v. Edwards</u> , 87 Wn.App. 305, 941 P.2d 697 (1997)	10, 11, 25
<u>City of Seattle v. Termain</u> , 124 Wn.App. 798 (2004)	19
<u>City of Redmond v. Moore</u> , 151 Wn.2d 664 (2004)	19
<u>Kolender v. Lawson</u> , 461 U.S. 352, 357-358, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983)	26
<u>Papachristou v. Jacksonville</u> , 405 U.S. 156, 162, 31 L.Ed.2d 110, 92 S. Ct. 839, 843 (1972).....	26
<u>Spence v. Kaminski</u> , 103 Wn.App. 324, 12 P.3d 1030 (2000)	18, 19-21
<u>State v. Ancira</u> , 107 Wn. App. 650, 27 P.3d 1246 (2001).	16
<u>State v. Anaya</u> , 95 Wn.App. 751, 976 P.2d 1251 (1999)	13
<u>State v. Bobic</u> , 140 Wn.2d 250, 996 P.3d 610 (2000)	22
<u>State v. Bunker</u> , 144 Wn.App. 407, 183 P.3d 1086 (Div. I 2008)	22, 28
<u>State v. Esquivel</u> , 132 Wn.App. 316 (2006)	11
<u>State v. Ford</u> , 110 Wn.2d 827, 755 P.2d 806 (1988)	10
<u>State v. Hogan</u> , 145 Wn.App. 210, 192 P.3d 915 (Div. II 2008)	22, 28
<u>State v. Joy</u> , 128 Wn.App. 160, 114 P.3d 1228 (2005).....	13-14
<u>State v. Madrid</u> , 145 Wh.App. 106, 192 P.3d 909 (Div. II 2008)	22, 28
<u>State v. Marking</u> , 100 Wn.App. 506, 997 P.2d 461 (2000)	11, 13

<u>State v. Michielli</u> , 132 Wn.2d 229, 937 P.2d 587 (1997).....	22
<u>State v. Miller</u> , 156 Wn.2d 23, 123 P.3d 827 (2005)	10-14, 19, 21
<u>State v. Minor</u> , 162 Wn.2d 796, 174 P.3d 1162 (2008).....	22-24
<u>State v. Schultz</u> , 146 Wn.2d 540 (2002)	13
<u>State v. Snapp</u> , 119 Wn.App. 614, 82 P.3d 252 (2004)	11, 19
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997)	10
<u>State v. Sutherland</u> , 114 Wn.App. 133, 56 P.3d 613 (2002)	11, 25
<u>State v. Turner</u> , 118 Wn.App. 135 (2003)	12
<u>State v. Van Woerden</u> , 93 Wn.App. 110, 967 P.2d 13 (1998)	29
<u>State v. Wilson</u> , 117 Wn.App. 1, 75 P.3d 573 (2003)	17, 23-24
<u>Wold v. Wold</u> , 7 Wash.App. 872, 503 P.2d 118 (1972).	15

Statutes, Court Rules and Other Authorities

CR 52	15
Laws of Washington 1984 ch. 263 § 7	8
Laws of Washington 1992 ch. 143 § 2	8
Laws of Washington 1995 ch. 246 § 7	9
RALJ 9.1	10
RCW 10.31.100	23, 25
RCW 26.50.060	9, 10, 15

RCW 26.50.11023, 25, 27, 28

SMC 12A.06.18028

I. CROSS-ASSIGNMENT OF ERROR

The municipal court erred in considering the protection order and finding a violation of the protection order where the order failed to give May notice that a violation could be prosecuted under the Seattle Municipal Code.

II. ISSUES

1. May was charged with violating a permanent protection order issued by the King County Superior Court pursuant to RCW 26.50. The order does not contain on its face the requisite finding for a permanent order, that May was likely to resume acts of domestic violence against the petitioner or her family when the order expires. The superior court file contained no such finding either. Did the municipal court error by failing to suppress the order as inapplicable to the prosecution? If the order is not applicable, then is the evidence insufficient to support the conviction?

2. The predicate protection order only warned May that a violation of the order is a crime under RCW 26.50 and RCW 10.31.100, but not SMC 12A.06.180. The evidence is insufficient to support a conviction for the crime of violating the provisions of a no-contact order pursuant to RCW

26.50.110(1) as found by Division II in *State v. Hogan* and *State v. Madrid*.

The municipal code is broader and includes conduct which does not violate state law as interpreted in those cases. Was May denied due process when the City prosecuted him under the City code without fair warning?

III. STATEMENT OF THE CASE

Robert May was charged and convicted in Seattle Municipal Court No. 471005 with two counts of violating the restraint provisions of a domestic violence protection order issued by King County Superior Court on December 30, 1996 pursuant to RCW 26.50, a violation of SMC 12A.08.180. The predicate order was issued in *Douglass v. May*, No. 94-5-03704-9 SEA. CP 132-33. Generally, the duration of such orders do not to exceed one year when the respondent is restrained from contacting his minor children. RCW 26.50.060(2). The order in this case purported to be a permanent order issued pursuant to RCW 26.50.060(2) but did not contain the specific finding required by the statute (“that the respondent is likely to resume acts of domestic violence against the petitioner or the petitioner’s family or household members or minor children when the order expires. . . .”).

Rather, the order contained only the following boilerplate, conditional language.

THIS ORDER FOR PROTECTION IS PERMANENT. ✓
If the duration of this order exceeds one year, the court finds that an order of *less than one year* will be insufficient to prevent further acts of domestic violence.

CP 133.

A search of the superior court file --when finally located-- did not turn up any record that such a finding was made when the superior court issued the permanent order. CP 42.

Also, the order contained only the following warning regarding criminal prosecution.

WARNING TO RESPONDENT: Violation of the provisions of this order with actual notice of its terms is [a] criminal offense under chapter 26.50 RCW and 10.31.100 RCW and will subject the violator to arrest.

Any assault that is a violation of this order and that does not amount to assault in the first degree or second degree under RCW 9A.36.011 is a class C felony. Any conduct in violation of this order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

CP 133.

May challenged the applicability of the predicate protection order, asserting that the superior court did not have authority to issue a permanent order because the findings required by the statute for issuance of an order exceeding one year was not made. CP 23-44 (Transcript of Proceedings); CP 92-98, 150-205 (Defendant's Memorandum In Support Of Motion To Suppress, Defendant's Supplemental Memorandum In Support Of Motion to Suppress). The court file which would have contained any such findings was initially missing, but then was found. CP 42; CP 151. Nonetheless, the superior court file did not contain any separate order or findings required by the statute for issuance of a permanent order pursuant to RCW 26.50.060(2).

CP 151.

May's challenge to the applicability of the protection order was first heard on February 7, 2006. CP 27-34. *See also* CP 23-24 (issue discussed at November 3, 2006 hearing). At the time of that hearing, the relevant portion of the superior court file could not be located and, thus, it could not be determined whether any findings not reflected on the face of the order

were made. CP 28. The City argued that the challenge was an impermissible collateral attack. CP 31. The municipal court properly rejected that argument, noting that the Washington Supreme Court's recent decision in *State v. Miller*, 156 Wn.2d 23 (2005) required the trial court to determine whether a protection order was issued in compliance with applicable statute in the prosecution of a violation of the order. CP 32. But the municipal court shifted the burden to the defendant to prove that the order was void or voidable because --in her opinion-- *Miller* did not designate which party had the burden of proof to establish the validity of the order. CP 32. Thus, the municipal judge concluded that the "burden in showing that there is some problem with the court's finding that the order is permanent. That burden has to be on the defense. And the defense has not been able to find evidence that the court made an inappropriate finding." CP 32. The court denied the motion, giving May leave to move for reconsideration if additional information was discovered. CP 32-34..

On May 18, 2006, the municipal judge revisited this issue after the relevant volume of the superior court action was located and additional

documentation was presented by both parties. CP 41-44; CP 150-205. (Defendant's Supplemental Motion). May's counsel was able to confirm the superior court file did not contain any record that the court made the requisite finding for issuance of a permanent order pursuant to RCW 26.50.060(2). CP 41-42. In response to the defense motion, the City presented to the municipal court voluminous materials from the superior court file, which included the various petitions and claims that Ms. Douglass had made against May in that proceeding. The City never claimed that within these numerous page was evidence of the finding required by RCW 26.50.060(2) for issuance of a permanent order. Instead, the City rested on its supplemental brief which cited to several cases involving direct appellate review of protection orders issued pursuant to RCW 26.50. CP 42.

The municipal court held that RCW 26.50.060(2) "doesn't require any specific findings as part of the statutory scheme for granting a permanent order." CP 43. The trial judge then went on to find "after a review of the voluminous materials from the superior court file" the superior court did not appear to have abused its discretion in issuing the order. CP 42, 43. The

municipal judge ultimately denied the motion because she believed the boilerplate language in the predicate order was found to be a sufficient basis for issuance of a permanent order in *Spence v. Kaminski*, 103 Wn.App. 325 (2000). CP 44. The municipal judge found that any failure to make a specific factual finding does not require exclusion of the order. CP 44.

[T]his court would not find that that type of error is, if it is an error, is of the nature that the court should exclude this order in terms of its gate keeping function. It's clear that the type of error that the court is to consider is part of its gate keeper functions are errors of another level where the order is of such that it should not be considered by a jury because there's something so fundamentally wrong with the order that the court should not allow the matter to go to the jury. The fact that the court [inaudible] there maybe some argument which is not clear given the Spence case that there should be an actual recitation of the reasons for the order being permanent in and of the statute does not so require. Its certainly not the type of error, if it is an error that the Miller case requires.

CP 44.

The municipal court then found May guilty of two counts of violation of a domestic violence protection order under SMC 12A.06.180 on stipulated facts. CP 56, 59-60. The court found that May violated the December 30, 1996 protection order on March 11, 2005 by leaving a phone message for the

protected party and that on March 24, 2005 May emailed her as well. CP 59. The contacts were not pursuant to an emergency and, thus, violated the restraint provisions of the predicate order. CP 59-60.

May appealed his conviction. The King County Superior Court reversed, holding the order was facially invalid because the finding on the face of the order did not satisfy the statutory prerequisite for issuance of a permanent order. CP 98. The superior court did not reach the other issue raised by May on appeal: whether he was denied due process because the warning on the face of the protection order did not inform him that he could be prosecuted under the Seattle Municipal Code which is broader than the state law, RCW 26.50.

IV. ARGUMENT & AUTHORITY

A. The Predicate Protection Order Was Not Applicable Because The Order Was Not Issued In Compliance With The Governing Statute. The Issuing Court Failed to Make the Threshold Finding Required By RCW 26.50.060(2) For Issuance Of A Permanent Order Restraining May From Contact With His Minor Son.

The permanent protection order in dispute here cannot support May's

conviction because the issuing court did not make the threshold finding required by RCW 26.50.060(2). Where the protection order restricts respondent's access to his or her minor children, the order cannot exceed one year.¹ The issuing court is authorized to exceed that limit and enter a permanent order of protection only when the court finds

the respondent is likely to resume acts of domestic violence against the petitioner or petitioner's family or household members or minor children when the order expires . . .

RCW 26.50.060(2). The superior court record contained no evidence that this finding was made.

The only evidence of any such finding is contained in the boilerplate language on the face of the order and does not satisfy the statutory requirement.

¹The original statute strictly limited such protection orders to one year. Laws of Washington 1984 ch. 263 § 7 ("Any relief granted by the order for protection . . . shall be for a fixed period not to exceed one year."). In 1992, the legislature expanded the court's authority to issue orders for a longer duration, but required the threshold finding that is at issue here. Laws of Washington 1992 ch. 143 § 2. In 1995, the legislature eliminated the one year restriction for restraining orders issued in dissolution proceedings (RCW 26.09), third party child custody cases (RCW 26.10) and parentage actions (RCW 26.26). Laws of Washington 1995 ch. 246 § 7.

THIS ORDER FOR PROTECTION IS PERMANENT. ✓

If the duration of this order exceeds one year, the court finds that an order of *less than one year* will be insufficient to prevent further acts of domestic violence.

CP 133(emphasis added).

The King County Superior Court correctly ruled the language on the order did not satisfy the threshold finding for issuance of a permanent order.

That decision is supported and controlled by *State v. Miller*, 156 Wn.2d 23, 24, 123 P.3d 827 (2005) and the plain language of RCW 26.50.060(2).²

- 1. May's challenge to the applicability of the predicate protection order is not an impermissible collateral attack, but is a proper threshold question for the trial court in the criminal prosecution for violation of the order.**

In a prosecution for violation of a domestic violence protection order, the validity or "applicability" of the predicate protection order must be established by the prosecution or the case must be dismissed. State v. Miller.

² This court reviews the municipal court in the same manner as the superior court did. State v. Ford, 110 Wn.2d 827, 829, 755 P.2d 806 (1988). This court is charged with discerning whether the municipal court committed any errors of law and whether its factual determinations are supported by the record. RALJ 9.1(a), (b). The City did not challenge any of the municipal court's factual findings so those findings are verities on appeal. State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997).

156 Wn.2d 23, 24, 123 P.3d 827 (2005), overruling State v. Edwards, *infra*, and State v. Marking, *infra*, insofar as inconsistent (but affirming the results).

We hold that the “existence” of a no-contact order is an element of the crime of violation such an order. However, the “validity” of the no-contact order is a question of law appropriately within the province of the trial court to decide as part of the court’s gate-keeping function. The trial judge should not permit an invalid, vague, or otherwise inapplicable no-contact order to be admitted into evidence.

Miller, 156 Wn.2d at 24. The predicate order may be invalid or inapplicable for a number of reasons. See City of Seattle v. Edwards, 87 Wn.App. 305, 308, 941 P.2d 697 (1997) (order vague as to expiration date or event); State v. Marking, 100 Wn.App. 506, 512, 997 P.2d 461 (2000) (warning on order was insufficient rendering order invalid); State v. Snapp, 119 Wn.App. 614, 624-25, 82 P.3d 252 (2004) (validity of no contact order must be proved when challenged). Cf. State v. Esquivel, 132 Wn.App. 316 (2006) (warnings not required by the law of another jurisdiction for a foreign protection order—such as a tribal order-- need not appear to be valid for purposes of prosecution); State v. Sutherland, 114 Wn.App. 133, 135, 56 P.3d 613 (2002) (warning on order was sufficient). The court held that “invalid or

deficient orders are properly excluded.” Miller, 156 Wn.2d at 32. The *Miller* court set out an illustrative list of challenges to the validity or “applicability” of the predicate order (as opposed to impermissible collateral attacks).

While we are inclined to believe that the Court of Appeals reached appropriate results in Marking and Edwards, *issues relating to the validity of a court order* (such as whether the *court granting the order was authorized to do so*, whether the order was adequate on its face, and *whether the order complied with the underlying statutes*) are uniquely within the province of the court. Collectively, we refer to these issues as applying to the “applicability” of the order to the crime charged. An order is not applicable to the charged crime if it is not issued by a competent court, *is not statutorily sufficient*, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order. The court, as part of its gate-keeping function, should determine as a threshold matter whether the order is alleged to be violated is applicable and will support the crime charged. Note 4. Orders that are not applicable to the crime should not be admitted. If no order is admissible, the charge should be dismissed.

Note 4. We do not suggest that orders may be collaterally attacked after the alleged violations of the orders. Such challenges should go to the issuing court, not some other judge.

Miller, 156 Wn.2d at 31 (emphasis added).

This same analysis was employed in State v. Turner, 118 Wn.App.

135, 138 (2003).

We address three questions: (1) Under what statute was the order against Rickey issued? (2) Did the order meet the requirements of the statute at the time it was issued? (3) Assuming that the order met all of the requirements of the statute under which it was issued, can it serve as the basis for a criminal prosecution?

Written no contact orders --that are enforced by criminal prosecution-- are creatures of statute. Marking, 100 Wn.App. at 509-510 (validity of protection order turns on compliance with the statute); Edwards, 87 Wn.App. at 308 (authorizing statute, RCW 26.50.060(2), permitted permanent orders and orders for fixed terms); State v. Anaya, 95 Wn.App. 751, 754-60, 976 P.2d 1251 (1999) (no statutory authority for protection order issued under RCW 10.99.040 to survive dismissal of the charges [now codified at RCW 10.99.040(3)]); State v. Schultz, 146 Wn.2d 540, 548 (2002) (where defendant is convicted, trial court may issue a new no-contact order or extend the one issued pretrial). Courts issuing protection orders must comply with the governing statute. The issuing court's failure to do so may be grounds to challenge the validity or applicability of the predicate

order in a criminal prosecution for violating that order. Miller, supra.

The City argues that May's challenge is an impermissible collateral attack, citing *State v. Joy*, 128 Wn.App. 160, 114 P.3d 1228 (2005).

However, in *Joy*, the defendant did not merely assert that the issuing court failed to make threshold findings required by the governing statute. Rather, he argued the evidence presented to the issuing court was insufficient to support the threshold findings that of imminent harm or stalking. That was an impermissible collateral attack. "Mr. Joy's underlying evidence sufficiency challenge extends beyond the scope of the trial court's obligation to decide facial validity questions." State v. Joy, 128 Wn.App. 160, 164, 114 P.3d 1228 (2005).

In contrast, May did not ask the trial and appellate courts to look behind any findings actually made. Rather, he asserts only that the issuing court failed to make the finding required for issuance of a permanent order.

2. The court issuing the permanent order failed to make the threshold finding required by RCW 26.50.060(2).

The King County Superior Court correctly held that the finding of the

face of the protection order did not satisfy the statutory prerequisite for issuance of a permanent order. The court issuing the protection order was required to make findings necessary to the findings of fact concerning all of material issues. CR 52(a)(2)(C); Wold v. Wold, 7 Wash.App. 872, 503 P.2d 118 (1972). The duration of the protection order cannot exceed one year unless the issuing court first finds “the respondent is likely to resume acts of domestic violence against the petitioner or petitioner’s family or household members or minor children *when the order expires . . .*” RCW 26.50.060(2) (emphasis added.). The only evidence that any such finding was made when the permanent order in this case was issued appears on the face of the order.

If the duration of this order exceeds one year, the court finds that an order of *less than one year* will be insufficient to prevent further acts of domestic violence.

CP 133 (emphasis added). This language merely states that an order of *less than one year* is insufficient to prevent further acts of domestic violence.

The presumptive duration of a protection order issued pursuant to RCW 26.50.060 is *one year*. Thus, this abbreviated “finding” does no more than state why the order is being issued in the first place, to prevent future acts of

domestic violence for a period of one year. The “finding” merely states that an order of *less than* the statutory presumptive duration of one year is not sufficient. It does not establish the need for an order that exceeds the one year period. It does not state that respondent is expected to resume perpetrating domestic violence upon the expiration of the one year period. At best, the language may state that a longer order may have a deterrent effect during the one year period. But in any event, this is not the finding required by the statute, that domestic violence will resume upon the expiration of the initial one year period.

Moreover, this “finding” is conditional; it is not an affirmative statement that the court has entered the finding. Rather, the “finding” is effective only if the duration of the order exceeds one year. At best, this language glosses over the threshold requirement and treats it like a formality. At worst, this boilerplate appears to be an anticipatory attempt to justify every order that exceeds one year. In determining whether the appropriate findings have been made, this court should be mindful of the fact that this order is permanent and prevents May from seeing his child. Thus, strict compliance

with the statute is required because it implicates May's fundamental right to parent his child. State v. Ancira, 107 Wn. App. 650, 27 P.3d 1246 (2001).

Finally, the language on the face of the order is the only evidence that any such finding was actually made. There was no other record –clerk's minute or electronic recording– that the superior court made the statutorily required finding before issuing the permanent order. The form language on the face of the order is not sufficient to demonstrate that the order was issued in compliance with the statute.

The City properly concedes “[t]he findings themselves must of course be made”, but asserts that the threshold finding is not required to be on the face of the order and such findings need not mirror the statutory language. Brief of Appellant at 3-4. The City asserts that the only language required on the face of the order is the warning of criminal penalties. Brief of Appellant at 4-5. The City's position is unsupported by any of the cited authorities.

In this court, the City relies primarily on *State v. Wilson*, 117 Wn.App. 1, 75 P.3d 573 (2003). *Wilson* actually supports May's position. In that case, the statutorily required warnings appeared on the face of the order; the

court held that the governing statute did not require a warning on the face of the order that a third violation of the no-contact order would be a felony and the defendant was not affirmatively misled by the statutorily required warning. Wilson, 117 Wn.App. at 12-13. *Wilson* merely stands for the proposition that every adverse consequence of violating the protection order need not be listed on the face of the order.

In the case at bar, the governing statute requires that a particular threshold finding be made prior to the issuance of a permanent order, just as the statute requires certain warnings to appear on the face of the order. But the only evidence that any such finding was made was when the predicate order was issued is the language on the face of the order. The superior court record contained no other evidence that the threshold finding was made. Consequently, that language must satisfy the statutory prerequisites.

The City further claims this case is controlled by *Spence v. Kaminski*, 103 Wn.App. 324, 12 P.3d 1030 (2000) upon which the municipal court premised its decision. *Spence* is inapplicable to the controversy before this court, as explained below.

The municipal court erred in denying May's motion to exclude the protection order in two respects. First, the court impermissibly shifted the burden to establish the applicability of the order --in other words, its admissibility-- to the defense. While the *Miller* court did not expressly state that the prosecution bears the burden of establishing the admissibility or applicability of the evidence against the accused, there is no authority to shift that responsibility to the defense. *Miller* did not hold that the defense is in any way responsible for establishing the applicability or inapplicability of the predicate order. The prosecution bears the burden to prove the elements of the offense and is the proponent of the inculpatory evidence. Generally where the validity of an underlying order or administrative action is at issue in a criminal prosecution, the government bears the burden to prove the validity of the predicate action. See State v. Snapp, 119 Wn.App. 614, 625 (2004); City of Redmond v. Moore, 151 Wn.2d 664 (2004) (in DWLS prosecution the government must prove that the underlying suspension complies with due process). While *Snapp*, relies on cases disapproved in part by *Miller*, nothing in that decision relieves the prosecution of its duty to

present evidence of an applicable predicate order. It is axiomatic that the proponent of the evidence bears the burden to establish its admissibility. The existence and validity of the protection order is essential to the prosecution. Miller, supra; City of Seattle v. Termain, 124 Wn.App. 798, 804 (2004). Thus, the burden to establish that the order is “applicable” when challenged falls squarely with the prosecution and is consistent with the constitutional principle that the government bears the burden of proof in all criminal prosecutions.

Second, the municipal court erred by holding the language on the face of the order was sufficient to establish the statutory prerequisite for issuance of a permanent order. At this point, the municipal court relied primarily on *Spence v. Kaminski*. That reliance was misplaced. *Spence* was a direct appeal challenging an order issued pursuant to RCW 26.50. *Spence* challenged the order on several constitutional grounds, but the primary question before the court was whether due process requires the court to find a recent act of domestic violence before issuing a protection order. Spence, 103 Wn.App. At 328 (the answer was no). The section apparently relied

upon by the municipal court holds that the language on the pre-printed form --which is nearly identical to that used in this case-- sufficiently stated findings to support the issuance of the order. But in *Spence*, the court was engaged in a full appellate review of the record below. Based on that record, the court found a sufficient factual basis for issuance of the order and that the trial court did not abuse its discretion in doing so. *Id.* at 331-32. *Spence* does not control here because there trial court complied with the statutory mandate; the court made the requisite finding and the evidence in the record supported that finding. *Spence* is also distinguishable because the order in that case contained additional hand written findings that supported the issuance of a permanent order. *Id.* at 329 (“the long history of allegations back to . . . 1992 have been investigated by law enforcement[,] ICPS or others. All this court can determine is that Mr. Kaminski has threatened Ms. Spence in the past and she is afraid of him.”).

In sum, the predicate permanent order in this case is facially defective. This is exactly the type of defect that *Miller* identified as rendering the protection order inapplicable for purposes of criminal prosecution. *Miller*,

supra (the order is not applicable if it is not statutorily sufficient, adequate on its face or fails to comply with the governing statute; such an order will not support a conviction of violating the order). Under *Miller*, the order is inapplicable and should not have been admitted. Without the protection order, the evidence is insufficient to support May's conviction.

B. May Was Denied Due Process Because He Was Only Given Notice That A Violation Of the Order Is A Crime Under State Law. Where the Charged Conduct Did Not Constitute A Violation Of State Law And May Was Not Given Notice That A Violation Could Be Prosecuted Under The City Code, The Prosecution Violated Due Process.

May asks this court to address the constitutional issue that he raised in his appeal. May was denied due process because the protection order warned him only that he could be criminally prosecuted under RCW 26.50.110. He was not informed that he could be prosecuted under the Seattle Municipal Code, SMC 12A.06.180. The municipal ordinance is broader than the state law was found to be in *State v. Hogan*, 145 Wn.App. 210, 192 P.3d 915 (Div. II 2008) and *State v. Madrid*, 145 Wn.App. 106, 192 P.3d 909 (Div. II 2008). Cf. *State v. Bunker*, 144 Wn.App. 407, 183 P.3d

1086 (Div. I 2008), *petition for review pending Supreme Court No. 81921-2, December 2, 2008*. Thus, the warning was affirmatively misleading and insufficient to provide May with notice of prohibited contacts. See State v. Wilson, 117 Wn.App. 1, 12-15, 75 P.3d 573 (2003) and State v. Minor, 162 Wn.2d 796, 174 P.3d 1162 (2008). This court may affirm the trial court for any reason supported by the law and the record. State v. Bobic, 140 Wn.2d 250, 258, 996 P.3d 610 (2000); State v. Michielli, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997).

The predicate order did not warn May that a violation of the order is a crime under the Seattle Municipal Code. The legend on the order only warned him that a violation of the order is a crime under state law, specifically RCW 26.50 and RCW 10.31.100. (The former does not define a crime, but only sets out the authority for warrantless arrests.) The conduct established by the stipulated facts does not establish a violation of the state law, RCW 26.50.110(1), as explained further below. Thus, the warning on the protection order in this case was incomplete and confusing such as to mislead May. State v. Wilson, 117 Wn.App. 1, 12-15, 75 P.3d 573 (2003).

See also State v. Minor, 162 Wn.2d 796, 174 P.3d 1162 (2008) (court's failure to check box indicating felony firearm prohibition on order affirmatively misled defendant into believing that his right to possess firearm was not restricted). Similarly, May was not given "fair notice of what conduct is prohibited" by the protection order.

In *Wilson*, the defendant was charged under RCW 26.50.110(1) with violating a protection order that was apparently issued as a condition of pre-trial release by the Seattle Municipal Court. The court held that "where statutory notice is required but not given, a due process violation may occur." *Wilson*, 117 Wn.App. at 12. In that case, the predicate protection order warned the defendant that a violation of the order constituted a crime under both state law and the Seattle Municipal Code. While the court held that the warning was constitutionally sufficient, the court also noted that the failure to give a proper warning on the face of the protection order may violate due process. The *Wilson* court explained.

[A]lthough ignorance of the law is generally no defense, a small exception exists where a court fails to give statutorily required notice of prohibited conduct and actively misleads a

defendant as to the status of the law. In *State v. Leavitt*, a court failed to give a defendant the statutorily required written notice that his firearm restrictions would last longer than one year, issued an order that seemed to imply that the ban would last only one year, and allowed the defendant to retain his concealed weapons permit. Thus, when the defendant was later convicted of violating the court order after repossessing his firearms after a year had passed, the Court of Appeals reversed finding that his due process rights were violated.

Wilson, 117 Wn.App. at 13.

This same principle was applied to the failure of the predicate offense court to notify the defendant of the statutorily required notice of the loss of his firearms right. State v. Minor, 162 Wn.2d 796, 802-04, 174 P.3d 1162 (2008). The court failed to check the appropriate paragraph on the disposition order and the record was silent on oral notification. The court reasoned that the notification did not place an onerous burden on the prosecution and any reasonable person would rely upon the representations of the court. Id. at 804. The remedy for the lack of notification was vacation of the subsequent conviction for unlawful possession of a firearm. Id.

Similarly, May was misled by the warning which referenced only the state law criminalizing a violation of the order where his conduct did not

violate that law. He could not have found out about the broader the municipal code by looking up RCW 26.50.110(1) because that statute does not reference the Seattle code in particular or municipal codes in general. *Compare with State v. Sutherland*, 114 Wn.App. 133, 136, 56 P.2d 613 (2002) (order is not invalid where the warning legend referenced RCW 10.99 which in turn specifically references RCW 26.50.110, the criminal sanctions for violations of such orders). If May's conduct did not violate the state law and he had no notice that his conduct would be tested against the broader City code, then the order does not sufficiently appraise him of what is prohibited. *City of Seattle v. Edwards*, 87 Wn.App. 305, 308, 941 P.3d 697 (1997) (protection order was vague as to its expiration date). "We cannot allow a conviction to stand where the State has not given fair notice of the proscribed conduct." *Id.*

An individual's right to due process of law under the Fourteenth Amendment and Wash. Const. art. 1 § 3 includes the fundamental notions of fair notice and equal application of the laws. Born out of these considerations, the "void-for-vagueness" doctrine requires that a penal statute

define the criminal offense: (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited; and (2) in a manner that does not encourage arbitrary or discriminatory enforcement. Kolender v. Lawson, 461 U.S. 352, 357-358, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983); Papachristou v. Jacksonville, 405 U.S. 156, 162, 31 L.Ed.2d 110, 92 S. Ct. 839, 843 (1972).

Based on the stipulated facts, May did not violate RCW 26.50.110(1). Appendix 2. That statute provides:

Whenever an order is granted under this chapter, chapter 7.90, 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, . . . specifically indicating that violation will be a crime, for which an arrest is required under RCW 10.31.100(2)(a) . . . is a gross misdemeanor . . .

The plain language of the statute does not criminalize conduct unless it includes one of the following acts: (1) acts or threats of violence, (2) going onto the grounds of or entering a residence, workplace, school, or day care,

or (3) knowingly coming within, or knowingly remaining within, a specified distance of a location identified in the no-contact order. This language mimics the language of RCW 10.31.100(2)(a), which mandates the arrest of a person if there is probable cause to believe that:

An order has been issued of which the person has knowledge under RCW 26.44.063, or chapter 7.90, 10.99, . . . 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). Appendix 3. Only violations that fall within this italicized portion are criminal. Others are mere violations that may be subject to a finding of contempt at the court's discretion.³

The Court of Appeals, Division II, accepted this view of the scope of the statute. State v. Hogan, 145 Wn.App. 210, 218, 192 P.3d 915 (2008);

³ The Legislature recently amended RCW 26.50.110, effective July 22, 2007, to read that any "willful violation of a no-contact provision of a court order is a criminal offense and shall be enforced[.]" Substitute H.B. 1642 §1 (as passed by the House Feb. 28, 2007).

State v. Madrid, 145 Wn.App. 106, 114, 192 P.3d 909 (2008). This court disagrees. State v. Bunker, 144 Wn.App. 407, 183 P.3d 1086 (2008), *petition for review pending Supreme Court No. 81921-1 set for December 2, 2008*. Since the two divisions of this court do not agree, the Washington Supreme Court is bound to accept review and settle the dispute.

Assuming the truth of the City's evidence, May's violation of the no-contact order was not criminal under RCW 26.50.110. Nothing in the stipulated facts indicates that May's conduct involved an act or threat of violence towards the protected party, going onto the grounds of or entering a residence, workplace, or school of Douglass, or knowingly coming within or knowingly remaining within, a specified distance of a location listed on the no-contact order. Therefore, May did not violate RCW 26.50.

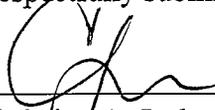
The comparable City code provision is broader than the state law. SMC 12A.06.180 does not contain the limiting phrase for which an arrest is required under RCW 10.31.100(2). Appendix 4. Thus, the City code criminalizes a broader range of conduct than the state law. May had no notice that he would be held to the City's standard when the warning referenced only

the state law. As applied to the particular facts of this case, the specific reference in the protection order is an ambiguous and must then be construed in May's favor. If a crucial provision is ambiguous, the rule of lenity requires it to be interpreted in favor of the accused absent evidence of intent to the contrary. State v. Van Woerden, 93 Wn.App. 110, 116-17, 967 P.2d 13 (1998). May did not have fair notice that his conduct would be measured against the City code when his conduct did not violate the state law of which he was particularly warned. In fact, he was affirmatively misled to believe that a violation of the order was criminalized only by state law. May did not receive fair notice of the prohibited conduct and the prosecution violated his right to due process. His conviction should be vacated.

V. CONCLUSION

The protection order upon which the prosecution is predicated was inapplicable because the issuing court failed to comply with the statute. In addition, May was not warned that he could be prosecuted for violating the order under the Seattle Municipal Code which is broader than the state law. This court should affirm the superior court.

Respectfully submitted this 26th day of December, 2008,



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