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STATE OF WASHINGTON  
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NO. 103720-1

THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

KELLY WEISS,

Respondent.

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FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

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ANSWER TO PETITION FOR REVIEW

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CHRISTOPHER PETRONI  
Attorney for Respondent

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, WA 98101  
(206) 587-2711

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## A. INTRODUCTION

A violation of a court order rises from a gross misdemeanor to a felony if the conduct violating the order is an assault. However, the predicate assault must “not amount to assault in the first or second degree.” RCW 7.105.450(4). This Court has read this unambiguous text to mean a person cannot be convicted of both second-degree assault and a felony court order violation based on the same assault.

Premised on the same assault, the trial court entered convictions against Kelly Weiss of second-degree assault and a felony court order violation. Based on the statute’s plain text and this Court’s precedent, the Court of Appeals vacated the latter conviction.

Resisting this straightforward conclusion, the prosecution repeats the arguments it attempted below. The Court of Appeals correctly rejected the arguments

that the plain text of the statute is ambiguous, that it leads to absurd results, or that applying that plain text in Mr. Weiss's case is contrary to precedent. This Court should do the same.

## B. ISSUE PRESENTED FOR REVIEW

The plain, unambiguous text of a statute reflects the intent of the Legislature. Here, the Legislature stated plainly that an assault elevates a court order violation to a felony only if it “does not amount to assault in the first or second degree.” RCW 7.105.450(4). As this Court has held and reaffirmed, this text means a person cannot be convicted of second-degree assault and a felony court order violation based on the same assault. The decision below to vacate Mr. Weiss's felony conviction follows from the statute's plain text and this Court's precedent. The prosecution has shown no basis for this Court's review.

### C. STATEMENT OF THE CASE

The prosecution charged Mr. Weiss with both second-degree assault and a felony violation of a court order predicated on an assault. CP 32–33; RCW 9A.36.021; RCW 7.105.450(4). Both counts were based on a course of conduct described in a 911 call, in which Carol Sandusky said Mr. Weiss struck her, kicked her, pushed her, and dragged her on one occasion. RP 231–35. The prosecution has never disputed that the two counts are based on a single course of assaultive conduct. Br. of Resp. at 6–32; Pet. for Rev. at 4–30.

The jury found Mr. Weiss guilty of both counts, as well as a misdemeanor count not at issue. CP 60–65.

On appeal, the Court of Appeals held that RCW 7.105.450(4) precluded the trial court from convicting Mr. Weiss of both second-degree assault and a felony court order violation based on the same assault. Slip

op. at 9. According to the court, the statutory requirement that a predicate assault “not amount to assault in the first or second degree,” as well as this Court’s opinions interpreting the statute, require this conclusion. *Id.* at 4, 7–9 (emphasis omitted). The court rejected the prosecution’s arguments and vacated the conviction of a felony court order violation, leaving only the second-degree assault conviction. *Id.* at 9–11.

#### D. WHY REVIEW SHOULD BE DENIED

**The prosecution cannot show that the Court of Appeals’s straightforward application of the statute’s plain text calls for this Court’s review.**

The statute states in black and white that an assault cannot elevate a violation of a court order to a felony if it “amount[s] to assault in the first or second degree.” RCW 7.105.450(4). The Court of Appeals’s decision straightforwardly applies the plain statutory text and this Court’s decisions interpreting it. In



arguing the contrary, the prosecution disregards the statute's plain language and misconstrues the authority it cites. This Court's review is unwarranted.

*a. The Court of Appeals's decision follows from the statute's plain language and this Court's opinions interpreting it.*

This Court interprets a statute to determine the Legislature's intent. *State v. M.Y.G.*, 199 Wn.2d 528, 531, 509 P.3d 818 (2022). "If a statute's language is plain and subject to only one interpretation, that ends the inquiry . . . ." *In re Pers. Restraint of Brooks*, 197 Wn.2d 94, 100, 480 P.3d 399 (2021). This Court considers the provision at issue, the surrounding context, "related provisions, . . . and the statutory scheme as a whole." *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015) (quoting *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 350, 340 P.3d 849 (2015)).

As relevant here, the meaning of RCW 7.105.450(4) could not be plainer. A violation of a court order becomes a felony if the violation was “[a]ny assault . . . that does not amount to assault in the first or second degree.” RCW 7.105.450(4). Necessarily, then, an assault that *does* “amount to assault in the first or second degree” cannot elevate a violation from a gross misdemeanor to a felony.

This Court reached this conclusion decades ago. “The statute clearly states that second degree assault cannot serve as the predicate to make the violation a felony.” *State v. Azpitarte*, 140 Wn.2d 138, 141, 995 P.2d 31 (2000). This Court reiterated soon afterward that, “when the State additionally charges first or second degree assault,” it must prove “the predicate assault ‘does not amount to assault in the first or

second degree.” *State v. Ward*, 148 Wn.2d 803, 814, 64 P.3d 640 (2003) (quoting former RCW 26.50.110(4)).

Though the statute has been amended and recodified multiple times since this Court decided *Azpitarte*, the requirement that the predicate assault “does not amount to assault in the first or second degree” has remained constant. Former RCW 10.99.040(4)(b) (1998); former RCW 10.99.050(2) (1998); former RCW 26.50.110(4) (2000). And this Court has consistently read that language to mean a person cannot be convicted of both second-degree assault and felony violation of a court order based on the same assault. *Ward*, 148 Wn.2d at 814; *Azpitarte*, 140 Wn.2d at 141.

This Court’s task begins and ends with the statute’s unambiguous pronouncement that a felony court order violation cannot be premised on an assault

that “amount[s] to assault in the first or second degree.” RCW 7.105.450(4). Where the jury convicted Mr. Weiss of second-degree assault, the statute prohibited it from convicting him of a felony violation based on the same assault. The Court of Appeals correctly held that the latter conviction is contrary to the plain text of the statute. Slip op. at 7–9.

*b. The prosecution’s contrary arguments disregard the statute’s plain text and misapply the authorities on which they rely.*

In arguing the Court of Appeals erred to a degree calling for this Court’s review, the prosecution contends the decision below is inconsistent with this Court’s precedent, the statute is ambiguous, and reading the statute according to its plain text leads to absurd results. Each argument is incorrect.

The prosecution insists the Court of Appeals’s decision in this case—and this Court’s decision in

*Azpitar*—is inconsistent with *Ward's* holding that the prosecution need not prove in every case that the predicate assault does not meet the elements of first- or second-degree assault. Pet. for Rev. at 14–16, 26; see RAP 13.4(b)(1). The prosecution is wrong.

*Azpitar* and *Ward* are perfectly consistent.

*Ward* establishes that, as a general proposition, whether the predicate assault falls short of an assault in the first or second degree is not an essential element the prosecution must plead and prove. 148 Wn.2d at 813–14. Accordingly, where the prosecution alleges only a felony court order violation based on an assault, it need not disprove the elements of first- or second-degree assault to win a conviction. *Id.*

However, where the prosecution alleges both a felony court order violation and first- or second-degree assault, it assumes the burden of proving the predicate

assault is of a lower degree than the first or second.

*Ward*, 148 Wn.2d at 814. Otherwise, an unacceptable risk arises the jury will find the accused guilty of both the felony violation and second-degree assault based on the same conduct, contrary to the statute's plain text. *Id.* at 812. *Ward* endorsed *Azpitarte*'s holding on this point. *Id.* at 812 (citing *Azpitarte*, 140 Wn.2d at 142).

The prosecution also argues another section of chapter 7.105 RCW makes section 450(4) ambiguous. Pet. for Rev. at 13. Specifically, RCW 7.105.565(1) provides that any proceeding under the chapter "is in addition to other civil or criminal remedies." The prosecution asserts this provision represents legislative intent that an assault be punished separately under both the second-degree assault statute and the statute defining a felony court order violation. Pet. for Rev. at 21–22. It contends the exclusion of first- or second-

degree assault “merely serves to explain that all assaults committed in violation of a no-contact order will be penalized as felonies, separate from and in addition to any assault charged under Chapter 9A.36 RCW.” *Id.* at 29.

The problem with this argument is that, with or without RCW 7.105.565(1), RCW 7.105.450(4) cannot reasonably be read to mean anything other than what it says. The prosecution’s insistence that the Legislature intended to allow punishment under both statutes for the same assault cannot be reconciled with the plain-text requirement that the predicate assault “not amount to assault in the first or second degree.” RCW 7.105.450(4); Slip op. at 10–11.

The prosecution relies heavily on *State v. Leming*, 133 Wn. App. 875, 138 P.3d 1095 (2006), but that opinion is inapposite. Pet. for Rev. at 18–19, 21–

22, 26, 28–30. There, the Court of Appeals held that convictions of second-degree assault and felony violation of a court order did not merge because they rested on different assaultive conduct. *Leming*, 133 Wn. App. at 891; *see also State v. Olsen*, 187 Wn. App. 149, 157, 348 P.3d 816 (2015) (holding “a person can be convicted of both offenses” only if “the felony violation of a court order is not predicated on the second degree assault”). Here, by contrast, the prosecution has never disputed that the two convictions are based on the same course of assaultive conduct.

The other opinions the prosecution cites do not address first- or second-degree assault at all, much less hold a person can be convicted of those offenses and a felony court order violation based on the same assault. *Pet. for Rev.* at 16–20. And, as the Court of Appeals observed, these opinions concern double jeopardy and



the merger doctrine, not the plain text of RCW 7.105.450(4) as it applies here. Slip op. at 11.

Finally, the prosecution urges this Court to reject a plain-text reading because applying the statute as it is written leads to absurd results. Pet. for Rev. at 23–25. The prosecution observes that, where a person violates a court order by way of an assault that rises to the second degree, the statute restricts the prosecution to charging either (1) one count of a felony court order violation; or (2) one count each of a gross misdemeanor violation and second-degree assault. *Id.* at 24–25. This, the prosecution contends, is absurd. *Id.*

There is no absurdity here. Courts may not disregard the Legislature’s clearly expressed intent unless the statute contains an “obvious mistake.” *Azpitarte*, 140 Wn.2d at 142. Here, “[t]here is no obvious mistake.” *Id.* The statute furthers its purpose

of preventing domestic violence by ensuring that “[a]ll assault convictions connected to violation of a no-contact order will result in a felony”—either a felony court order violation or a felony assault. *Id.*

Besides, the prosecution is wrong in contending there is no significant difference in punishment between a felony court order violation and second-degree assault. Pet. for Rev. at 24–25. Second-degree assault is a “most serious offense”—a “strike” exposing the accused to the possibility of being sentenced to remain in prison until they die. RCW 9.94A.030(32)(b); RCW 9.94A.570. A felony court order violation, on the other hand, is not a strike. RCW 9.94A.030(32). The Legislature could reasonably suppose the risk of a death-in-prison sentence under the three-strikes law is enough to deter a would-be violator.

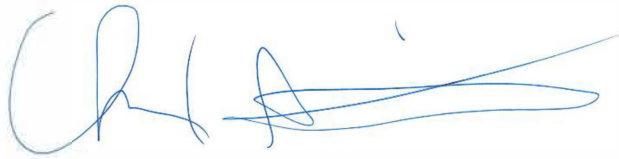
RCW 7.105.450(4) provides in unmistakable terms that a second-degree assault cannot elevate a court order violation to a felony. The statute's plain text is neither ambiguous nor absurd, and applying it to Mr. Weiss's case is consistent with—indeed, required by—this Court's precedent.

#### E. CONCLUSION

This Court should deny review.

Per RAP 18.17(c)(10), the undersigned certifies this answer contains 2,040 words.

DATED this 30th day of December, 2024.



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Christopher Petroni, WSBA #46966  
Washington Appellate Project - 91052  
Email: wapofficemail@washapp.org  
chris@washapp.org

*Attorney for Kelly Weiss*

### DECLARATION OF FILING AND MAILING OR DELIVERY

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[colin.hayes@clark.wa.gov]  
[CntyPA.GeneralDelivery@clark.wa.gov]  
Clark County Prosecutor's Office

☒ respondent

☐ Attorney for other party



MARIA ANA ARRANZA RILEY, Paralegal  
Washington Appellate Project

Date: December 30, 2024

# WASHINGTON APPELLATE PROJECT

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