NO.

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

KELLY JOE WEISS, Appellant

FROM THE COURT OF APPEALS DIVISION I
NO. 86839-0-I

PETITION FOR REVIEW

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

COLIN P. HAYES, WSBA #35387
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (564) 397-2261

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Other Authorities

I. IDENTITY OF PETITIONER

The State of Washington asks this Court to accept review of the unpublished decision designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals, Division I's unpublished decision filed on November 25, 2024, reversing Weiss's conviction for felony violation of a no contact order (FVNCO). A copy of the opinion is attached as Appendix (App.) A.

III. ISSUE PRESENTED FOR REVIEW

Is the State required to disprove second-degree assault as the basis for charging under the assault prong of FVNCO, RCW 7.105.450(4), when second-degree assault is separately charged given that: (1) convictions for both crimes do not offend double jeopardy; (2) the crimes do not merge; (3) RCW 7.150.565(1) allows for separate criminal punishment; (4) the provision "that does not amount to assault in the first or second degree" is not an essential element; (5) the provision is open to different reasonable interpretations, triggering construction; and (6) statutory construction and legislative intent clearly demonstrate that the legislature intended that the two crimes may be charged together, punished separately,

yet not be factually exclusive?

IV. STATEMENT OF THE CASE

A. Procedural history

The State charged Weiss in Count 1 with second-degree assault, domestic violence, under RCW 9A.36.031(1)(a), occurring on September 27, 2022. Clerk's Papers – Volume I (CP) 32-33. In Count 2, the State charged FVNCO under the assault prong of RCW 7.105.450(1)(a), (4), occurring on the same date; the jury only received instructions on the assault prong of subsection (4). *Id.*; CP 55. A jury found Weiss guilty of both counts. [1] CP 60-63.

B. Statement of facts

On April 4, 2022, the Clark County Superior Court entered a pretrial no contact order protecting Carol Sandusky and restraining Weiss. Verbatim Report of Proceedings (RP)

[1] The jury also convicted on a separate misdemeanor no contact order violation occurring on May 12, 2022. Weiss did not challenge that conviction on appeal.

197-98. At trial, the State admitted and played a 9-1-1 call made by Sandusky on September 27, 2022. RP 227-28, 231-242.[2] In the call, Sandusky indicates Weiss had been staying at her house and while at a WinCo, Weiss kicked her and "beat me up again." RP 231-32, 234. Sandusky indicated that after she refused to give Weiss a cigarette, he tried to steal her purse and she grabbed it. RP 234. Weiss then started "beating" her, punching her with a fist, kicking her, and dragging her across the ground. *Id.* The assault knocked out one of Sandusky's teeth and bruised her neck. RP 234, 240:21.

Law enforcement contacted Sandusky and observed she appeared as if she had been "rolling around in the dirt." RP 247-48, 266. Sandusky appeared upset as if she had "just been through something." *Id.* The State admitted photographs taken by law enforcement showing dirt on Sandusky's clothes as well as her injuries: a mark under her ear just below the jawline,

[2] Sandusky did not testify at trial.

scrapes and red spots on her hip, scrapes on her arm, marks on her leg, and a missing tooth. RP 251-52, 260. When interviewed later by law enforcement, Weiss acknowledged having contact with Sandusky at WinCo but denied any physical altercation. RP 253, 258. Weiss admitted he was not supposed to have contact with Sandusky because of a restraining order. *Id.*

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should grant review under RAP 13.4(b)(1), (2), and (4), because Div. I's decision conflicts with decisions by this Court and the Court of Appeals and involves an issue of substantial public interest that should be determined by this Court. Contrary to Div. I's assertion based on *Azpitarte*, *infra*, that the State did not present sufficient evidence of FVNCO, a proper interpretation of RCW 7.105.450(4) shows the contrary. The statute requires proof of *any* assault in violation of a valid no contact order; the State is not required to prove the assault

did not amount to second-degree assault when also charging second-degree assault. In reversing the FVNCO conviction, Div. I failed to (1) properly discern the plain meaning of RCW 7.105.450(4) in line with case law, (2) correctly apply the rules of statutory construction required by case law, and (3) discern legislative intent. *See* discussion *infra*, p. 27-30. Further, Div. I's opinion essentially forces prosecutors statewide to elect between pursuing convictions for FNVCO and either first- or second-degree assault for the same incident, thus limiting the State's ability to prevent domestic violence, provide adequate punishment for offenders, and maximize protection for victims as intended by the legislature. For the reasons set forth below, this Court should accept review and reverse Div. I's decision.

A. The State presented sufficient evidence to support the conviction for FVNCO

The Due Process Clause requires proof beyond a reasonable doubt of every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct.

1068, 1073, 25 L. Ed. 2d 368 (1970). "The sufficiency of the evidence is a question of constitutional law that we review de novo." *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Evidence is legally sufficient if any rational trier of fact, viewing the evidence in a light most favorable to the state, could find the essential elements of the charged crime beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 414, 420-21, 5 P.3d 1256 (2000).

While the legislature generally defines the elements of a crime, not every clause in every criminal statute creates an essential element. *State v. Goss*, 186 Wn.2d 372, 377–78, 378 P.3d 154 (2016). Instead, an essential element is one whose specification is necessary to establish the very illegality of the behavior charged. *State v. Ward,* 148 Wn.2d 803, 811, 64 P.3d 640 (2003). "Facts that merely divide a lower degree of a crime from a higher one will rarely meet this standard." *Goss*, 186 Wn.2d at 379, 379–82 (victim's lower age limit in child molestation statute does not create an essential element); *see*

also State v. Smith, 122 Wn. App. 294, 297-99, 93 P.3d 206 (2004) (same); *State v. Keend*, 140 Wn. App. 858, 870–72, 166 P.3d 1268 (2007) ("not amounting to assault in the first degree" in RCW 9A.36.021(1)(a) does not create an essential element of second-degree assault); *State v. Tinker*, 155 Wn.2d 219, 222, 118 P.3d 885 (2005) (third-degree theft language that the property or services "does not exceed two hundred and fifty dollars in value" is not an essential element); *State v. Rogers*, 30 Wn. App. 653, 655, 638 P.2d 89, 90 (1981) (language referencing vehicle valued at less than $1,500 did not create an essential element of second-degree possession of stolen property).

Washington courts review questions of statutory interpretation *de novo*. *State v. Votava*, 149 Wn.2d 178, 183, 66 P.3d 1050 (2003). Statutory interpretation begins with the statute's plain meaning, which is "discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the

statutory scheme as a whole." *State v. James-Buhl*, 190 Wn.2d 470, 474, 415 P.3d 234 (2018). If the plain language is unambiguous, the court must give it effect. *Id.*

An ambiguity will be deemed to exist if the statute is subject to more than one reasonable interpretation. *In re Marriage of Kovacs*, 121 Wn.2d 795, 804, 854 P.2d 629 (1993). To the extent that the language of a statute remains ambiguous, reviewing courts "presume the legislature does not intend absurd results and, where possible, interpret ambiguous language to avoid such absurdity." *State v. Ervin*, 169 Wn.2d 815, 823-24, 239 P.3d 354 (2010). If the statute remains susceptible to more than one reasonable interpretation, reviewing courts may resort to statutory construction, legislative history, and relevant case law to discern legislative intent. *Id.* at 820. If a statute is subject to interpretation, it will be construed in the manner that best fulfills the legislative purpose and intent. *Kovacs*, 121 Wn.2d at 804.

1. The FVNCO statute at issue

RCW 7.105.450(1)(a) states that a willful violation of a no-contact order is a gross misdemeanor "except as provided in subsections (4) and (5) of this section." Under RCW 7.105.450(4), "[a]ny assault that is a violation of a domestic violence protection order … and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony …." Additionally, under RCW 7.105.565(1)[3], "[a]ny proceeding under this chapter is in addition to other civil or criminal remedies." In RCW 10.99.010[4], the legislature made clear their intent that domestic violence be regarded as a serious crime and that official responses to that crime must protect victims:

> The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which

[3] Formerly RCW 26.50.210.

[4] The first codification of FVNCO occurred in Chapter 10.99, Domestic Violence – Official Response, under RCW 10.99.040(4). *See* Laws of 1991, ch. 301, sec. 4.

> the law and those who enforce the law can provide. … It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated.

2. *Azpitarte* and subsequent case law

In 2001, this Court in *State v. Azpitarte* held that second-degree assault cannot serve as the predicate assault that elevates violation of a no-contact order from a gross misdemeanor to a felony under RCW 10.99.040(4)(b)[5]. 140 Wn.2d 138, 140–42, 995 P.2d 31 (2000). In addition to being wrongly decided, *Azipitarte* ignored legislative intent, the holding leads to absurd results, its analysis predated the applicability of RCW 7.105.565, and its short analysis does not hold up in the face of subsequent cases interpreting RCW 7.105.450(4). For these reasons, *Azpitarte* should not dictate the outcome here.

[5] Subsequently recodified as RCW 26.50.110(4) and later as RCW 7.105.450(4). *See* Laws of 2000, ch. 119, sec. 18; Laws of 2021, ch. 215, sec. 170; Laws of 2021, ch. 215, sec. 56; RCW 10.99.050(2)(a).

Prior to review being granted by this Court in *Azpitarte*, Div. I rejected a construction that excluded second-degree assault from those assaults that enhance a no-contact order violation from a gross misdemeanor to a felony. 95 Wn. App. 721, 727, 976 P.2d 1256 (1999), *reversed*, 140 Wn.2d 138 (2000). Div. I engaged in statutory construction to reach this conclusion. *Id.* at 726. Div. I rejected the defense interpretation because it would lead to absurd results: a misdemeanor assault would result in a class C felony violation under RCW 10.99.040(b); a non-assaultive misdemeanor order violation would be a class C felony under RCW 10.99.040(4)(c)[6] if the perpetrator had two prior convictions; but a second-degree assault could only result in a misdemeanor violation of the no contact order under RCW 10.99.040(4)(a). *Id.* at 728. Div. I also relied on the "strong statement of legislative intent" in

[6] "A willful violation of a court order issued under this section is a class C felony if the offender has at least two previous convictions for violating the provisions of a no-contact order issued under this chapter …"

RCW 10.99.010 that domestic violence is a serious crime and the official response must protect victims. *Id.* at 728-29.

In contrast, in reversing, this Court did not engage in statutory construction or consider legislative intent – it simply said the language, "does not amount to assault in the first or second degree," was clear and unambiguous and took no further steps to discern meaning. *Azpitarte*, 140 Wn.2d at 141–42. This Court stated that "[a]ll assault convictions connected to violation of a no-contact order will result in a felony, either through the assault itself or through the application of subsection (b)." *Id.* at 142. The language "through the assault itself" suggests this Court contemplated first- and second-degree assaults being charged only under the assault statutes, not RCW 10.99.040(4)(b).

Because *Azpitarte* involved a prosecution brought under former RCW 10.99.040(4), this Court did not have the benefit

of considering former RCW 26.50.210[7] (currently RCW 7.105.565) to determine plain meaning, which became applicable to the crime of FVNCO when the legislature recodified RCW 10.99.040 as RCW 26.50.110.[8] *See* Laws of 2000, ch. 119, sec. 18 (filed March 24, 2000; effective June 8, 2000). Because of the recodification of former RCW 10.99.040(4), it now must be read in conjunction with RCW 7.10.565 when discerning statutory plain meaning. *See State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10–12, 43 P.3d 4 (2002) (courts examine related statutes and other provisions of the same act when determining plain meaning). Accordingly, an ambiguity *does* now exist requiring statutory construction of RCW 7.105.450(4) by this Court. *See Kovacs*, 121 Wn.2d at 804 (an ambiguity exists if the statute is subject to more than one reasonable interpretation).

---

[7] "Any proceeding under [this chapter] is in addition to other civil or criminal remedies."
[8] The *Azpitarte* decision was filed on March 9, 2000.

Furthermore, the evolution of cases after *Azpitarte* demonstrates the need to revisit its holding. In 2003, in *State v. Ward*, this Court held that the provision in RCW 26.50.110(4), "does not amount to assault in the first or second degree," does not establish an essential element of FVNCO that must be pleaded and proved by the State, "but rather serves to explain that all assaults committed in violation of a no-contact order will be penalized as felonies." 148 Wn.2d at 806. This Court ruled that the charging document was not insufficient for failing to include this provision. *Id.* at 811-13. The *Ward* court clarified that *Azpitarte* did not hold that this provision was an essential element. *Id.* at 811.

But although the provision is not an essential element, this Court determined "[t]he State is required to prove that the predicate assault 'does not amount to assault in the first or second degree' only when the State additionally charges the defendant with first- or second-degree assault." *Id.* at 806, 814 (relying on *Azpitarte*). In reaching this conclusion, this Court

engaged in statutory analysis including the consideration of legislative intent:

> If we were to interpret the statutory language as requiring the State to disprove assault in the first or second degree as an essential element of felony violation of a no-contact order, the defendant would be placed in the awkward position of arguing that his conduct amounts to a higher degree of assault than what the State has charged. Such an interpretation does not advance the legislature's purpose of assuring victims of domestic violence maximum protection from abuse, nor does it support the statute's intent to penalize assaultive violations of no-contact orders more severely than nonassaultive violations.

Id. at 810, 812–13 (internal citations omitted). This same rationale applies to the current case.

This Court in *Ward* also rejected the challenge to the sufficiency of the evidence, holding the State was not required to prove beyond a reasonable doubt that the assault did not amount to first- or second-degree assault because the State did not additionally charge first- or second-degree assault. *Id.* at 814. Because *Ward* dealt only with the essential elements of

RCW 26.50.110(4), the analysis did not involve any consideration of former RCW 26.50.210.

Next, *State v. Moreno* held that convictions for FVNCO, RCW 26.50.110(4), and third-degree assault did not violate double jeopardy even though they stemmed from the same assault. 132 Wn. App. 663, 666, 132 P.3d 1137 (2006). Even though the two offenses were the same in fact, clear legislative intent existed indicating that separate punishments for each crime were intended. *Id.* at 668–71. The court found two bases for this conclusion. *Id.* First, assault is codified in Title 9A of the Washington Criminal Code while FVNCO is not within the criminal code; rather, it is contained within Title 26, Domestic Relations, located under the chapter titled "Domestic Violence Protection." *Id.* at 669. The court reasoned:

> The legislature was presumably aware that the [third-degree assault] statute existed when it passed the [FVNCO statute]. We can think of no plausible reason why the legislature chose to enact a statute for the latter crime and place it in a location outside the then existing criminal code if it did not intend

that the two crimes should be treated separately. *Id.* The court also noted that former RCW 26.50.210 expressly provides that any proceeding under RCW 26.50 is in addition to other civil or criminal remedies. *Id.*

Second, the assault and protection order statutes serve different purposes. *Id.* at 670. The assault statute serves to prevent assaultive behavior. *Id.* at 670. The FVNCO statute serves to prevent domestic violence and to provide maximum protection to victims of abuse. *Id.* at 670-71. Also, FVNCO crimes carry a greater seriousness level than either second- or third-degree assault: the former has a seriousness level of five while second- and third-degree assaults carry seriousness levels of four and three respectively. *Id.* at 671. The court also noted that the legislature recognized that violation of a no-contact order is a crime against the court and punishable as contempt of court per RCW 26.50.110(3)[9]. All the reasons cited in *Moreno*

[9] Currently RCW 7.105.450(3).

for separately punishing the crimes of FVNCO and third-degree assault apply equally to FVNCO and second-degree assault.

Then, *State v. Leming* held that convictions for second-degree assault predicated on felony harassment, RCW 9A.36.021(1)(e), and FVNCO, RCW 26.50.110(4), for the same incident did not violate double jeopardy and did not merge. 133 Wn. App. 875, 882–87, 890-91, 138 P.3d 1095 (2006), *as corrected* (July 25, 2006). In the analysis, the court determined that the same evidence test showed that the legislature has treated these two crimes separately. *Id.* at 885. The court also considered legislative intent: the statutes are located in different chapters and thus RCW 26.50.210[10] specifically allows for a separate punishment under RCW 9A.36.021(1). *Id.* at 886-87. Further, in considering RCW 26.50.210,

> The Legislature's express exclusion of first and second degree assaults from RCW 26.50.110(4) further illustrates its intent to allow

[10] Currently RCW 7.105.565(1).

> separate punishment for such higher degrees of assault in addition to punishment under RCW 26.50.110 for lesser degree assaults committed in violation of a no-contact order.

Id. at 886, 886 n5. Also, the legislature expressed its intent for separate punishment by increasing the punishment for violating a court order when it is based on an assault. *Id.* at 886. The court cited *Moreno* for additional support for its conclusions. *Id.* at 887.

Later, *State v. Olsen* held that a person can be convicted of FVNCO under the reckless conduct prong as well as second-degree assault arising from one incident. 187 Wn. App. 149, 157–58, 348 P.3d 816 (2015). Then, *State v. Novikoff* held that separate convictions for fourth-degree assault and FVNCO for the same conduct do not violate double jeopardy and do not merge. 1 Wn. App. 2d 166, 167, 172-73, 404 P.3d 513 (2017). Even though fourth-degree assault was the same in law and fact as the charged felony, the clear legislative intent compelled the conclusion that both the assault and no contact order statutes

can be enforced simultaneously. *Id* at 172-73. The court cited the legislative intent recognized in *Moreno* and *Leming* as support. *Id.* at 170-71.

Additionally, *Novikoff* relied on the intent section of Laws of 2007, ch. 173, sec. 1, which made amendments to chapter 26.50 RCW[11]: "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." *Id.* at 171-72. This intent statement further demonstrated the legislature wanted chapter 26.50 RCW enforced on its own merits without regard to the criminal code. *Id.* at 172.

[11] The amendments addressed the failure of some courts to treat violations of no contact orders as criminal offenses when they were not otherwise a crime. *See State v. Bunker*, 169 Wn.2d 571, 581, 238 P.3d 487 (2010); *Novikoff*, 1 Wn. App. 2d at 172 n5.

Because *Azpitarte* has not been reexamined in light of subsequent case law and the subsequent applicability of RCW 7.105.565(1), this Court can and should distinguish and diverge from *Azpitarte*. Here, Div. I failed to recognize this fact. *See* discussion *infra*, p. 27-30. To the extent either *Azpitarte* or *Ward* cannot be distinguished, they should be reconsidered. Courts can reconsider precedent when (1) it has been shown to be incorrect and harmful or (2) when the legal underpinnings of the precedent have changed, disappeared, or been eroded by subsequent decisions. *W.G. Clark Const. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014). The decisions in *Noreno*, *Leming*, and *Novikoff* compel a different outcome here than *Azpitarte* and its discussion in *Ward*.

Unlike *Azpitarte*, this Court now *does* need to engage in statutory construction of RCW 7.150.450(4). The provision, "that does not amount to assault in the first or second degree," does not mean that separate evidence must support both

FVNCO and second-degree assault, but instead means the two can be punished separately even when stemming from one act. *See Leming*, 133 Wn. App. at 886, 886 n5. At the least, an ambiguity exists because the meaning of the provision in RCW 7.150.450(4) is subject to more than one reasonable interpretation, especially when considered in conjunction with RCW 7.105.565(7). *See Kovacs*, 121 Wn.2d at 804. The fact that *Leming* read this provision along with former RCW 26.50.210 to mean something different than this Court in *Azpitarte* highlights the existence of an ambiguity.

3. Constructing RCW 7.105.450(4)

Turning to construction, the legislative intent recognized in *Ward*, *Moreno*, *Leming*, and *Novkikoff*, taken with RCW 10.99.010 and RCW 7.105.565(1), clearly shows that the legislature intended that second-degree assault and FVNCO stemming from the same act may be charged and punished separately. *See Ward*, 148 Wn.2d at 812-13; *Moreno*, 132 Wn. App. at 667-71; *Leming*, 133 Wn. App. at 886-87; *Novikoff*, 1

Wn. App. 2d at 170. For example, assault is codified in Title 9A of the Washington Criminal Code while FVNCO is not within the criminal code; rather, it is contained within Title 7, Special Proceedings and Actions, located under the chapter titled "Civil Protection Orders." Second, the assault and protection order statutes serve different purposes. The purpose of the assault statute is to prevent assaultive behavior. The FVNCO statute serves to prevent domestic violence and to provide maximum protection to victims of abuse.

In addition, the legislature recognized that violation of a no-contact order is a crime against the court and punishable as contempt of court per RCW 7.105.450(3). Also, FVNCO carries a greater seriousness level than second-degree assault: the former has a seriousness level of five while the latter carries a seriousness level of four. *See* RCW 9.94A.515.

Furthermore, adopting the contrary position leads to absurd results, including that a defendant may be forced to argue his conduct amounts to a higher degree of assault than

what the State has charged to avoid a conviction for felony order violation. Additionally, a misdemeanor assault would result in a class C felony violation under RCW 7.105.450(4); a non-assaultive misdemeanor order violation would be a class C felony under RCW 7.105.450(5) if the perpetrator had two prior convictions; but a second-degree assault could only result in a misdemeanor violation of the no contact order under RCW 7.105.450(1).

To further this point, consider a scenario wherein the State charges FVNCO under RCW 7.105.450(4) for a misdemeanor assault in violation of a domestic violence no contact order based on slapping the victim. With no prior criminal history, the perpetrator faces a standard range of 6-12 months with an offender score of zero. Under Div. I's interpretation of RCW 7.105.450(4), if the perpetrator instead commits a second-degree assault in violation of the order by strangling or seriously maiming the victim, the perpetrator faces the same range of 6-12 months under either of the two

permissible charging scenarios: (1) a single count of FVNCO under the assault prong of RCW 7.105.450(4); (2) one count of misdemeanor order violation, RCW 7.105.450(1), and one count of second-degree assault with an offender score of one.[12] The perpetrator thus would not face increased punishment even though a more serious assault occurred. Such an interpretation does not advance the legislature's purpose of assuring domestic violence victims maximum protection from abuse, nor does it support the statute's intent to penalize assaultive violations of no-contact orders more severely than nonassaultive violations.

4. Div. I's decision to vacate the FNVCO count conflicts with current case law.

The State is not required to disprove second-degree assault as the basis for charging under the assault prong of RCW 7.105.450(4) when second-degree assault is separately charged because: **(1)** convictions for second-degree assault and

[12] The misdemeanor order violation would count as one point for the second-degree assault. *See* RCW 9.94A.525(21)(c); RCW 9.94A.030(42)(a)(ii), (a)(iii).

FVNCO stemming from the same act do not offend double jeopardy, *see Moreno*, 132 Wn. App. at 666, *Leming*, 133 Wn. App. at 882-87, *Novikoff*, 1 Wn. App. 2d at 172; **(2)** second-degree assault and FVNCO for the same act do not merge, *see Leming*, 133 Wn. App. at 890-91, *Novikoff*, 1 Wn. App. 2d at 172-73; **(3)** RCW 7.150.565(1) allows for criminal punishment aside from chapter 7.105 RCW; **(4)** the provision of RCW 7.105.450(4) in question is not an essential element, *see Ward*, 148 Wn.2d at 806, 814; **(5)** the provision of RCW 7.105.450(4) in question is now open to different reasonable interpretations, triggering construction; and **(6)** statutory construction and legislative intent clearly demonstrate that the legislature intended that the two crimes may be charged together, punished separately, yet not be factually exclusive. If convictions for the two crimes stemming from the same assault do not merge and do not constitute double jeopardy, an issue of insufficient evidence cannot exist wherein the State must prove a different assault for each crime. Because *any* assault elevates a no

contact order violation to a felony, the State presented sufficient evidence for Count 2: Weiss "beat," punched, kicked, and dragged the victim across the ground. RP 234. The assault knocked out one of Ms. Sandusky's teeth and caused bruising on her neck. RP 234, 240:21. Thus, Div. I wrongly vacated Weiss's FVNCO conviction for insufficient evidence.

In reversing the FVNCO conviction, Div. I felt bound by *Azpitarte*. App. A at 7-9. Based on language in *Azpitarte* that "there was no obvious mistake" in the FVNCO statute, Div. I dismissed outright the notion that the *Azpitarte* holding leads to absurd results – this employs circular reasoning[13] and fails to recognize the illogical outcomes discussed above. App. A at 9; *see* discussion *supra* p. 23-25.

Further, Div. I rejected the notion that consideration of RCW 7.105.565 creates an ambiguity and triggers the need for

[13] The premise is dependent on, or equivalent to, the conclusion: the *Azpitarte* opinion does not lead to absurd results because it *says* it does not lead to absurd results.

statutory construction because the legislature has not specifically amended RCW 7.105.450(4) since *Azpitarte* – thus signaling "legislative acquiescence." App. A at 10-11. But in doing so, Div. I ignored the fact that (1) the legislature recodified the FVNCO statute *subsequent* to *Azpiarte* such that RCW 7.105.565 now applies and (2) an ambiguity exists merely by virtue of the statutes being subject to more than one reasonable interpretation. *Kovacs*, 121 Wn.2d at 804; *Campbell & Gwinn*, 146 Wn.2d at 10–12 (in determining plain meaning, related statutes or other provisions of the same act must be considered.). Also, Div. I's conclusion regarding plain meaning conflicts with that of *Leming*, 133 Wn. App. at 886, 886 n5.

Div. I further reasoned that, assuming an ambiguity, a general statutory provision must yield to a more specific statutory provision in statutory construction, citing *Wash. Ass'n of Counties v. State*, 199 Wn.2d 1, 13, 502 P.3d 825 (2022); App. A at 10-11. Per Div. I, this "general–specific" rule would result in RCW 7.105.450(4) being considered as an exception to

RCW 7.105.565. But Div. I's statutory construction failed to (1) "presume the legislature [did] not intend absurd results and … interpret ambiguous language to avoid such absurdity" and (2) construe the statutes in the manner that best fulfills the legislative purpose and intent. *Ervin*, 169 Wn.2d at 820, 823-24 (courts may consider legislative history and relevant case law for assistance in discerning legislative intent); *Kovacs*, 121 Wn.2d at 804. Div. I's rationale ignores the obvious way these two statutes can be reconciled to give effect to both: the provision in RCW 7.105.450(4), "does not amount to assault in the first or second degree," 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. *See Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000) ("apparently conflicting statutes must be reconciled to give effect to each of them."); *Leming*, 133 Wn. App. at 886, 886 n5; *cf. Ward*, 148 Wn.2d at 806. Because RCW 7.105.450(4) and

RCW 7.105.565 can be harmonized, Div. I erred by employing the "general–specific" construction rule. *See Wark v. Washington Nat. Guard*, 87 Wn.2d 864, 867, 557 P.2d 844 (1976) ("where concurrent general and special acts are in pari materia and *cannot be harmonized*, the latter will prevail, unless it appears that the legislature intended to make the general act controlling." (italics added)).

Because Div. I misinterpreted RCW 7.105, it wrongly vacated the FVNCO count despite sufficient evidence to sustain both second-degree assault and FVNCO convictions. This decision conflicts with caselaw, involves an issue of substantial public interest, and warrants review by this Court.

VI. CONCLUSION

For the reasons stated above, this Court should grant review, reverse Div. I, and uphold the convictions.

This document contains 5,000 words based on the word count calculation of the word processing software used to prepare this motion, excluding the parts of the document exempted from the word count by RAP 18.17(b). Additionally, I certify that all text appears in 14 point serif font equivalent to Times New Roman. RAP 18.17(a)(2).

DATED this 20th day of December 2024.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: Colin Hayes

Colin P. Hayes, WSBA #35387
Senior Deputy Prosecuting Attorney
OID# 91127

VII. APPENDICES

APPENDIX	BATE STAMP
Appendix A – Unpublished Opinion	001-011

APPENDIX A

FILED
11/25/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KELLY JOE WEISS, Appellant.	No. 86839-0-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — A jury convicted Kelly Joe Weiss of assault in the second degree and felony violation of a court order (FVCO), both with domestic violence indicators. Weiss argues the State did not prove all the elements of the FVCO conviction because the jury could have based that conviction on the same acts constituting the assault in the second degree. We agree there is that risk. Thus, we vacate Weiss' conviction of FVCO and remand this matter for further proceedings.

I. BACKGROUND

In April 2022, a superior court entered a no contact order which prohibited Weiss from having contact with C.S.[1] or coming within 1,000 feet of her residence

[1] We refer to C.S. by her initials to protect her privacy.

or person for a duration of 10 years. In September 2022, C.S. called 911 and reported that Weiss had been staying with her and assaulted her. She stated that Weiss "kicked [her]" and "beat [her] up again." She explained that Weiss had tried to steal her purse after she refused to give him one of her cigarettes and, when she grabbed it back, a struggle ensued and he punched her two or three times and "knocked [her] tooth out." She further reported that Weiss kicked her and dragged her by the legs across the ground over some rocks.

Law enforcement arrived at her residence within the hour and observed C.S.'s condition. A sheriff's deputy testified that it looked as though she had been "rolling around in the dirt," had "some scrapes and stuff," and was upset. A responding deputy took pictures of her injuries, including of her missing tooth and the abrasions and contusions to her jaw, arms, legs, and torso.

The State charged Weiss with committing assault in the second degree under RCW 9A.36.021(1)(a) and FVCO under RCW 7.105.450(4), both with domestic violence indicators as Weiss and C.S. were in an intimate relationship.[2]

The case proceeded to trial and, in its closing argument, the State asked the jury to find Weiss guilty of the assault charge because the evidence showed he committed an assault against C.S. that "recklessly" inflicted substantial bodily harm, pointing to the tooth Weiss punched out. The State further asked the jury to find him guilty of the FVCO charge based upon Weiss' actions on the same date

[2] The State also charged, and a jury convicted, Weiss of misdemeanor violation of a court order based on a separate incident in May 2022. Weiss assigns no error to that conviction.

(September 27, 2020) when "he clearly assaulted her." The State further argued that "[e]ach one of these pictures was taken right after this happened. The injuries to her neck that she describes in the 911 call; the injury to her hip occurring after she describes being dragged through a parking lot; the injury to her shoulder blade." Otherwise, nothing in the State's closing argument distinguished between the degree of the assault in the first and second counts.

The jury instructions also did not distinguish between the degrees of the assault in the separate counts and did not specify that the assault in the second count (FVCO) must be less than first or second degree assault.

The jury convicted Weiss as charged, and the court imposed its sentence in December 2022. Weiss timely appeals, challenging only the conviction for the FVCO, and not the conviction for assault.

II. ANALYSIS

This appeal centers on whether RCW 7.105.450(4) requires the State to ensure the jury bases an FVCO conviction on an assault other than one that "amounts to" an assault in the second degree. Pursuant to binding precedent, we hold that the State here was so required and did not meet its obligation.

A. Applicable Constitutional, Statutory, and Interpretive Law

The State's power to convict a criminal defendant is contingent upon convincing the factfinder the evidence "is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." In re Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970). The prosecution bears this burden under the due process clause of the Fourteenth

Amendment to the United States Constitution. State v. McCullum, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983). Stated differently, a case that is missing any required element for a crime is constitutionally unsupportable. See State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995).

As it is a question of constitutional law, this court reviews the sufficiency of evidence de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). We will reverse a conviction "where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt." State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).

RCW 7.105.450(1)(a) classifies violations of inter alia domestic violence protection orders, such as the one here, as gross misdemeanors. However, a violation of such a protection order rises to the level of a felony, if the violation is an assault "*that does not amount to assault in the first or second degree* under" the statutes defining those crimes. RCW 7.105.450(4) (emphasis added) (citing RCW 9A.36.011 or 9A.36.021 respectively).

Washington courts "do not treat words in a statute as meaningless." State v. Tandecki, 153 Wn.2d 842, 847, 109 P.3d 398 (2005). We afford meaning to the words in a statute "even in those cases where the statute seems peculiar to us." Id. "If the language of a statute is clear on its face, courts must give effect to its plain meaning and should assume the Legislature means exactly what it says." State v. Chapman, 140 Wn.2d 436, 450, 998 P.2d 282 (2000). In other words, "[a] statute that is clear on its face is not subject to judicial interpretation." Id.

B. Discussion

In State v. Azpitarte, 140 Wn.2d 138, 139, 995 P.2d 31 (2000), our Supreme Court addressed a claim directly on point to the issue raised in Weiss' appeal, so a close examination of the case is warranted. There, the State prosecuted Azpitarte after a violent altercation in which he assaulted a person more than once who was subject to a protective order against him. Id. Specifically, it charged Azpitarte with second degree assault for pulling the victim's hair, and it charged him with a FVCO. Id. at 140. The State expressly based the FVCO charge on an assault in the fourth degree (for pulling the victim's arm), earlier during the extended altercation, which the State did not charge. Id. Indeed, before trial, the State maintained it would solely rely on the facts of the (arm-pulling) assault in the fourth degree to prosecute the FVCO charge. Id.

At closing, however, the State invited the jury to use proof of either one of the assaults to find he committed the FVCO. Id. Further, as here, the jury instructions did not specify which assault or what degree of assault was necessary to convict him of this charge. Id. The jury returned guilty verdicts on both counts. Id.

Just like Weiss, Azpitarte was convicted of both assault in the second degree and of FVCO, and he appealed the latter. Id. He contended that the assault in the second degree could not be the predicate assault to convict him of FVCO because of the statutory language defining the felony. Id. at 140. The language in the statute in place at the time there is identical to the successor statute here, stating any violation of a protection order based on an assault must "not amount to assault in the first or second degree" to rise to the level of a felony.

Id. at 141.

Our Supreme Court agreed with Azpitarte. Id. at 140. Reviewing the statute de novo, the Court concluded this language was clear and unambiguous, holding "[t]he statute clearly excludes the use of first and second degree assaults to elevate violation of a no-contact order form a gross misdemeanor to a felony." Id. at 141. It repeated that the language "is unambiguous with respect to the issue in this case. The statute clearly states that second degree assault cannot serve as the predicate to make the violation a felony." Id.

Our Supreme Court also addressed this court's earlier ruling that had rejected this reading of the statute. Id. at 141-42. This court had concluded the statute did *not* prohibit using assault in the second degree as the predicate for a FVCO because we decided such a construction yielded results which made "no sense." State v. Azpitarte, 95 Wn. App. 721, 728, 976 P.2d 1256 (1999), vacated by 140 Wn.2d 138, 995 P.2d 31 (2000) ("Adopting Azpitarte's construction of subsection (b) would mean that in this case he would face only a gross misdemeanor charge for tearing out D.L.'s hair. Yet if he had twice before been convicted of pulling D.L.'s arm, and this case was his third arm-pulling incident, Azpitarte would face a class C felony punishment").

Our Supreme Court responded that, "without a showing of ambiguity, we derive the statute's meaning from its language alone." Azpitarte, 140 Wn.2d at 142. It held, "[b]y finding that any assault can elevate a violation of a no-contact order to a felony, the Court of Appeals reads out of the statute the requirement that the assault 'not amount to assault in the first or second degree.'" Id. The Court

emphasized, "[w]e will not delete language from a clear statute even if the Legislature intended something else but failed to express it adequately. No part of a statute should be deemed inoperative unless the result of obvious mistake." Id. And it concluded, "[t]here is no obvious mistake." Id.

And as to the remedy, our Supreme Court held that Azpitarte's FVCO conviction must be set aside because the jury "*could have* relied on Azpitarte's second degree assault in finding him guilty of felony violation of a court order." Id. (emphasis added).

The Court's holding in Azpitarte controls here, and its reasoning applies even more straightforwardly in Weiss' case. The jury there heard evidence of two distinct assaults. Azpitarte, 140 Wn.2d at 140. Here, the State implicitly concedes it charged Weiss and he was convicted on both counts "for the same incident." Therefore, under Azpitarte, it is plain we must vacate Weiss' conviction for FVCO because the jury here, at a minimum, "could have relied on" the assault in the second degree to convict him of the FVCO. 140 Wn.2d at 142. And, there was nothing in the State's argument or the jury instructions which distinguish between the degrees of the assault in the separate counts.

Subsequent cases have reconfirmed the holding in Azpitarte. In State v. Ward, 148 Wn.2d 803, 805, 64 P.3d 640 (2003), our Supreme Court considered a challenge to simple convictions for FVCO. The defendants, in a consolidated case, each claimed that the State did not disprove the FVCO charges were not assaults in the first or second degree. Id. at 806. The Court rejected the contention that Azpitarte requires the State to *disprove* assault in the first or second degree

in order to convict a defendant of FVCO in *all* cases. Id. at 813. But, it upheld the rule that such assaults cannot serve as the basis for FVCO convictions, finding that the law "explain[s] that all assaults committed in violation of a no-contact order will be penalized as felonies." Id.

The Court stressed that "[d]ue process *does* require the State to prove every fact necessary to constitute the charged crime beyond a reasonable doubt." Id. at 814. But it concluded, "[i]n *this* case, however, . . . the State did *not* additionally charge first or second degree assault. Accordingly, all elements of the crime were submitted to the jury for a finding beyond a reasonable doubt." Id. (emphasis added). More directly, our Supreme Court held, "proof that the predicate assault 'does not amount to assault in the first or second degree' . . . *is required* . . . when the State additionally charges first or second degree assault." Id. (emphasis added). While it was not the situation in Ward, that is precisely the situation here.

Most recently, this court in State v. Heutink, 12 Wn. App. 2d 336, 350-51, 458 P.3d 796 (2020) examined our Supreme Court's holdings in Azpitarte and Ward. We rejected Heutink's attempt to contort their reasoning in interpreting a similar stalking statute, accurately noting "the court vacated Azpitarte's conviction because the jury may have relied on his second degree assault conviction instead of an uncharged fourth degree assault in finding him guilty of felony violation of a no-contact order." Id. at 350. Most directly, we described our Supreme Court's holding in Ward to mean that, "if a defendant is charged and convicted of first or second degree assault, the statute *proscribes* the use of *that assault* to enhance a no-contact violation to a felony." Id. (emphasis added). Finally, we explained

that the legislature's purpose behind the provision was for no contact violations to always be prosecuted as felonies when an assault is committed, and there was no need to increase the penalty for first or second degree assault because both of those crimes are already felonies. Id. at 351.

In summary, the Court in Azpitarte clearly dictated that, if a defendant is charged and convicted of first or second degree assault, we must reverse if the jury could have used those convictions as the basis for a conviction for FVCO.

In response, the State makes a number of arguments we address briefly.

First, the State argues that Azpitarte was "wrongly decided in the first place" and we should "reconsider" its principle holdings. It claims we can—and must—because the precedent "has been shown to be incorrect and harmful[.]" As an intermediate appellate court, we have no authority to simply disregard a decision of our Supreme Court as we "are bound to follow that controlling precedent." State v. Wallin, 125 Wn. App. 648, 664, 105 P.3d 1037 (2005).

Second, the State claims the Court in Azpitarte and Ward ignored legislative intent. Again, in each case, our Supreme Court has found the legislative intent of the statute. For example, the Ward Court concluded the purpose of the statute was to ensure "assaultive violations of no-contact orders" were treated as felonies, and that this reading was consistent with the legislature's intent because an assault that is charged as assault in the first or second degree is already charged as a felony. Ward 148 Wn.2d at 813. What's more, we need not reach the question of constructing legislative intent when the statutory language is clear, as Azpitarte held that it is. Am. Disc. Corp. v. Shepherd, 160 Wn.2d 93, 98, 156 P.3d 858

(2007); Azpitarte, 140 Wn.2d at 142.

Likewise, the State contends we should depart from the Court's reading because it leads to absurd results. Azpitarte expressly rejected this very argument, holding "there was no obvious mistake." 140 Wn.2d at 142.

Third, the State argues that Azpitarte's analysis "predated the applicability" of what is currently RCW 7.105.565, which it claims should change our understanding of the "does not amount to" provision. RCW 7.105.565(1) directs that "[a]ny proceeding under this chapter is in addition to other civil or criminal remedies." The State avers that this broad language creates an ambiguity regarding how to construct the "does not amount to" language and that it is a possible interpretation that the legislature intended to allow separate punishments for assault in the second degree and FVCO for the same conduct.

While the statutory scheme has been amended and revised over time, the "does not amount to" language has remained the same. See RCW 7.105.450(4). Azpitarte considered the same material terms governing Weiss' appeal. Moreover, "[t]his court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision." City of Federal Way v. Koenig, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009). Even supposing, as the State argues, that there is any statutory ambiguity, the Supreme Court has held that a general statutory provision must yield to a more specific statutory provision. Wash. Ass'n of Counties v. State, 199 Wn.2d 1, 13, 502 P.3d 825 (2022). In other words, where there is possible conflict, we will treat a more

specific statute as an exception to, or qualification of the more general one, regardless of the timing of when it was passed. Id. Like our Supreme Court, we decline to engage in statutory interpretation when a party makes efforts "to read ambiguities" into language that is clear and unambiguous. Chapman, 140 Wn.2d at 450-51.

Finally, the State argues its reading of the statute does not violate double jeopardy. While that may or may not be true, that point does not explain how the "same" assault can be punished as assault in the second degree and as a FVCO, despite the plain language of the statute. The cases it cites are simply inapposite, as the issue before us is, not whether Weiss' conviction violates double jeopardy, but rather, whether the State met its constitutional burden of proof on the FVCO.[3]

III. CONCLUSION

We vacate Weiss' conviction of FVCO and remand this matter for further proceedings consistent with this opinion, including at a minimum, resentencing. This court also directs the court to strike the VPA from his judgment and sentence.

Díaz, J.

WE CONCUR:

Birk, J.

Smith, C.J.

[3] Weiss also assigns error to the court's imposition of a $500 victim penalty assessment (VPA). The State concedes that the VPA should be stricken under the amended, current version of RCW 7.68.035.

CLARK COUNTY PROSECUTING ATTORNEY

December 20, 2024 - 10:22 AM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	State of Washington, Respondent v. Kelly Joe Weiss, Appellant (868390)

The following documents have been uploaded:

- PRV_Petition_for_Review_20241220102224SC470023_5507.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- chris@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Amber Lyon - Email: amber.lyon@clark.wa.gov
Filing on Behalf of: Colin Patrick Hayes - Email: colin.hayes@clark.wa.gov (Alternate Email: CntyPA.GeneralDelivery@clark.wa.gov)

Address:
PO Box 5000
Vancouver, WA, 98666-5000
Phone: (564) 397-2261 EXT 5686

Note: The Filing Id is 20241220102224SC470023