

No. 44368-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JOSHUA EMANUEL HOWARD,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 12-1-03251-5
The Honorable Vicki Hogan, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court violated Joshua Howard's double jeopardy protections by entering an order vacating, but still recognizing the validity of, his first degree assault conviction.
2. The trial court exceeded its statutory sentencing authority when it imposed a lifetime no-contact order prohibiting Joshua Howard from having any contact whatsoever with his biological children.
3. The trial court violated Joshua Howard's constitutional right to parent his children when it imposed a lifetime no-contact order prohibiting him from having any contact whatsoever with his biological children.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court violate Joshua Howard's double jeopardy protections by entering an order vacating his first degree assault conviction, where the order also recognized the validity of that conviction and its associated aggravators, and where it specifically allowed that the conviction and aggravators could be reinstated if the attempted murder conviction was ever overturned? (Assignment of Error 1)
2. Did the trial court exceed its statutory sentencing authority,

and violate Joshua Howard's fundamental constitutional right to parent his children, when it imposed a lifetime no-contact order prohibiting him from having any contact whatsoever with his biological children, where there is no allegation or showing by the State that such a severe restriction is reasonably necessary to protect the children? (Assignments of Error 2 & 3)

III. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

Lorrie Howard and Joshua Howard met in 2006 and were married on October 31, 2008.¹ (RP 44, 45) Lorrie described the relationship as "off and on . . . [m]ore off than on." (RP 46) In June of 2012, Lorrie moved with her eight minor children, four of whom were Joshua's biological children, to a house on South J Street in Tacoma. (RP 43, 45, 46, 47) Although Lorrie and Joshua had not specifically discussed divorce, their relationship was strained and she was trying to "move on." (RP 48-49)

Joshua would occasionally visit Lorrie and the children at the South J Street house, and would assist with childcare and home

¹ For the sake of clarity, Lorrie Howard and Joshua Howard will be referred to in this brief by their first names.

maintenance projects. (RP 49) Lorrie and Joshua and the children spent the July 4th holiday together, and Joshua slept at the house that night. (RP 50, 52) The next day, Joshua and Lorrie argued, and Lorrie asked Joshua to leave. (RP 52) When Lorrie returned from work later that night, Joshua was still there. (RP 52-53) Because it was late, and Joshua was already getting ready to sleep on the couch, Lorrie decided not to start a confrontation with Joshua. (RP 54-55) Instead, Lorrie took the children upstairs, and told them that they would leave in the morning if Joshua would not go. (RP 56)

The next morning, July 6, 2012, Lorrie decided to get her children ready to leave because she felt worried about Joshua's continued presence at the house. (RP 56-57) As Lorrie prepared to leave, the children waited for her outside on the front porch. (RP 58, 59) Lorrie testified that Joshua was pacing back and forth, upstairs and downstairs. (RP 58) Joshua was trying to talk to her, but she did not want to argue so she ignored him. (RP 59)

According to Lorrie, Joshua followed her upstairs and told her that they should get a divorce. (RP 60) Lorrie testified that Joshua seemed calm, but he was crying. (RP 60) She testified that she began to walk down the stairs to leave, when Joshua said

that he loved her but that she had to die. (RP 60) Lorrie heard the sound of a gun being cocked, and when she turned to look she saw Joshua standing right behind her, pointing a gun at her. (RP 60-61, 63)

Lorrie turned and started to run down the stairs. (RP 63) According to Lorrie, she was about halfway down the stairs when she heard a gunshot. (RP 63) She continued to run out of the house, and turned to run towards her neighbor's house. (RP 63, 64, 66) She could hear the children on the porch screaming and crying. (RP 64)

Lorrie saw that her neighbor and her neighbor's daughter were watching from their living room window. (RP 66, 235-36) Joshua was following Lorrie, and Lorrie did not want to put her neighbors in danger, so she stopped and "gave up." (RP 66) Lorrie fell to the ground and begged Joshua not to kill her in front of their children. (RP 66, 68) According to Lorrie, Joshua walked towards her with his arm outstretched, pointing the gun at her. (RP 67, 68) Lorrie testified that Joshua stopped, pointed the gun at her face, and seemed to pull the trigger, but nothing happened. (RP 69) Joshua looked at the gun and seemed confused. (RP 69) Lorrie reached out and grabbed hold of the gun and tried to keep

Joshua from pointing it at her again. (RP 69, 70)

Lorrie testified that she and Joshua both held on to the gun while Joshua walked backwards into the house. (RP 71-72) Joshua let go of the gun once they reached the house, then he left out the back door. (RP 73) Lorrie emptied the gun, removing three bullets and one casing, then went outside to check on her children. (RP 73, 75, 79) Lorrie gave the gun, the bullets, and the casing to the responding officers when they arrived. (RP76, 80, 191)

Two of Lorrie's children, 12 year old D.R. and 11 year old N.R., testified that they were outside when they heard a gunshot and saw their mother running out of the house. (RP 102, 142-43) D.R. and eight year old N.D. testified that they saw Joshua walk towards their mother as she lay on the ground, and saw Joshua point the gun at her face. (RP 106, 107, 128, 129, 130) D.R. also testified that he saw Joshua's finger moving back and forth, as if he were pulling the trigger. (RP 107-08) N.R. did not see the incident outside because she ran to a neighbor's house for help. That neighbor called 911. (RP 144, 145, 146)

Responding officers found Lorrie and her children waiting outside the house. (RP 187-88) Several children were still crying and Lorrie seemed to be "in shock." (RP 188) Investigators found

a bullet hole at the bottom of the stairs, and eventually extracted a bullet that had lodged in wood under linoleum and subflooring. (RP 198, 210, 266-67, 268)

A firearm specialist testified that he could not conclusively determine whether the bullet had been fired from the gun Lorrie gave the responding officers because the bullet had been badly damaged. (RP 294) But he could not rule out that it had been fired from that gun either. (RP 294-95) A forensic specialist was able to measure the trajectory of the bullet, which indicated that the gun was likely fired from somewhere on the stairs. (RP 212, 214-15, 222-23)

The gun Lorrie gave the responding officer holds six bullets. (RP 194) If the gun is not loaded with six bullets, and the trigger is pulled on an empty chamber, the gun will not fire and instead will only make a clicking sound. (RP 194) But if the trigger is repeatedly pulled, the chambers move and eventually a bullet will be fired. (RP 204-05)

Joshua testified on his own behalf at trial. He stated that he never intended to hurt Lorrie. (RP 331, 338-39) He admitted that he fired the gun in the house, but that it was only because he was upset and wanted to break something. (RP 331) Joshua was not

trying to shoot Lorrie, and she was on the front porch at the time he fired the gun. (RP 331, 332) He followed Lorrie outside and could see that she was afraid, so he held out the gun to give it to her. (RP 332, 333, 335-36) Joshua also denied ever threatening to kill Lorrie. (RP 334)

B. PROCEDURAL HISTORY

The State charged Joshua Howard with one count of attempted first degree premeditated murder (RCW 9A.32.030), one count of first degree assault (RCW 9A.36.011), and one count of unlawful possession of a firearm (RCW 9.41.040). (CP 5-7) The same factual basis was alleged for both the attempted murder charge and the assault charge. (CP 5-6; RP 417) The State also alleged that Joshua was armed with a firearm during the commission of the crimes (RCW 9.94A.530), and that the offenses were aggravated because they were domestic violence offenses (RCW 9.94A.530(3)(h)). (CP 5-6)

The jury convicted Joshua as charged. (CP 83-90; RP 448-52) The trial court found that entering judgment on both the attempted murder offense and assault offense would violate double jeopardy, so the court vacated the assault conviction and its associated aggravators. (CP 91-93; RP 458) The trial court

sentenced Joshua for the attempted murder and unlawful possession of a firearm convictions, and imposed an exceptional sentence totaling 420 months of confinement. (CP 105, 94-97; RP 466-67) This appeal timely follows. (CP 114)

IV. ARGUMENT & AUTHORITIES

- A. THE TRIAL COURT VIOLATED JOSHUA'S DOUBLE JEOPARDY PROTECTIONS BY ENTERING AN ORDER VACATING, BUT STILL RECOGNIZING THE VALIDITY OF, HIS FIRST DEGREE ASSAULT CONVICTION.

At sentencing, the State acknowledged that the same factual basis supported Joshua's attempted murder conviction (count one) and his first degree assault conviction (count two), and that the two counts should merge for sentencing purposes. (RP 458) The Judgment & Sentence does not refer to the first degree assault conviction, and the court imposed a sentence on attempted murder and unlawful possession of a firearm only. (CP 100-09) However, the court also entered a separate order that states:

The conviction for Assault in the First Degree with a Firearm Sentencing Enhancement and Domestic Violence Aggravating Factor is a valid conviction.

The defendant, however, will not be sentenced on the charge of Assault in the First Degree with a Firearm Sentencing Enhancement and Domestic Violence Aggravating Factor, because to do so would violate the double jeopardy provisions of the state and federal constitutions.

. . . [T]he same factual basis for Attempted Murder in the First Degree with a Firearm Sentencing Enhancement and Domestic Violence Aggravating Factor is the same factual basis for Assault in the First Degree with a Firearm Sentencing Enhancement and Domestic Violence Aggravating Factor.

The lesser crime of Assault in the First Degree with a Firearm Sentencing Enhancement and Domestic Violence Aggravating Factor shall merge into the greater crime of Attempted Murder in the First Degree with a Firearm Sentencing Enhancement and Domestic Violence Aggravating Factor.

The conviction for the lesser crime of Assault in the First Degree with a Firearm Sentencing Enhancement and Domestic Violence Aggravating Factor is vacated.

In the event that the charge of Murder in the First Degree with a Firearm Sentencing Enhancement and Domestic Violence Aggravating Factor is vacated by an appellate court, the defendant's conviction for Assault in the First Degree with a Firearm Sentencing Enhancement and Domestic Violence Aggravating Factor shall be reinstated, and the defendant shall be sentenced accordingly.

(CP 92) By entering this order recognizing the validity of the assault conviction and its associated aggravators, and noting that it could be reinstated, the trial court violated Joshua's double jeopardy protections.

Double jeopardy violations are questions of law, which are reviewed *de novo*. State v. Womac, 160 Wn.2d 643, 649-50, 160 P.3d 40 (2007). Both our federal and state constitutions prohibit "being (1) prosecuted a second time for the same offense after

acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense.” State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010) (quoting State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006)); U.S. Const. amend. V; Wash. Const. art. I, § 9. For purposes of double jeopardy, a conviction, even without an accompanying sentence, can constitute punishment. Turner, 169 Wn.2d at 454-55; Womac, 160 Wn.2d at 656-58.

Nevertheless, the State may charge and prosecute a defendant for alternative means of committing the same crime. Womac, 160 Wn.2d at 660 n. 9. But where a jury finds a defendant guilty on the basis of more than one alternative means, the trial court may only sentence the defendant for one conviction. State v. Trujillo, 112 Wn. App. 390, 410-11, 49 P.3d 935 (2002). Thus, the trial court “should enter a judgment on the greater offense only and sentence the defendant on that charge *without reference to the verdict* on the lesser offense.” Turner, 169 Wn.2d at 463 (emphasis in original) (quoting Trujillo, 112 Wn. App. at 411).

Where a jury finds a defendant guilty of multiple counts (or of alternative means of committing a single count) for the same offense, a trial court does not violate double jeopardy principles if it

enters a judgment and sentence referring only to the greater charge. Turner, 169 Wn.2d at 462; Womac, 160 Wn.2d at 649; State v. Ward, 125 Wn. App. 138, 144, 104 P.3d 61 (2005). But a trial court is barred from conditionally dismissing a guilty verdict on a lesser charge because that would allow the State to reinstate the verdict on the lesser charge if the judgment on the greater charge were later overturned. Turner, 169 Wn.2d at 462; see also Womac, 160 Wn.2d at 658.

A court conditionally dismisses a guilty verdict if it holds that guilty verdict “‘in abeyance’ lest the[] other convictions failed on appeal, declaring ... that the [lesser] conviction retained validity.” Turner, 169 Wn.2d at 463 (alternation in original) (quoting Womac, 160 Wn.2d at 659). Thus:

a court may violate double jeopardy *either* by reducing to judgment both the greater and the lesser of two convictions for the same offense *or* by conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid. To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction—nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing.

Turner, 169 Wn.2d at 464-65 (emphasis in original).

Turner decided the consolidated appeals of Guy Turner and Faulolua Faagata. Turner was convicted of first degree robbery and second degree assault arising from the same incident. In an effort to not violate Turner's double jeopardy rights, the trial court entered an order "vacating the assault conviction for sentencing purposes but insisting that the assault conviction was 'nevertheless a valid conviction' for which Turner could be sentenced if his remaining robbery conviction did not survive appeal." 169 Wn.2d at 452-53. The court subsequently sentenced Turner for the robbery only. 169 Wn.2d at 453.

Faagata was convicted of both first degree murder and second degree felony murder for a single act. Turner, 169 Wn.2d at 453. The trial court also recognized the double jeopardy problem and sentenced Faagata for first degree murder only. It orally stated that the second degree murder conviction was vacated but only conditionally dismissed. 169 Wn.2d at 453.

The Turner Court found that the approach used by both trial courts violated double jeopardy:

The conditional written order appended to Turner's judgment and sentence and the similar court language at Faagata's sentencing both openly recognized the validity of the defendants' vacated lesser convictions. We hold that such references

offend double jeopardy and are not allowed.

Turner, 169 Wn.2d at 448.

Similarly here, the trial court entered judgment and sentenced Joshua on the attempted murder conviction only. But its written order, entered at sentencing, openly recognizes the validity of the first degree assault conviction, and specifically allows for it to be reinstated if the attempted murder conviction is ever overturned. (CP 92) Under Womac and Turner, this order is improper and must be stricken.

B. THE TRIAL COURT EXCEEDED ITS STATUTORY SENTENCING AUTHORITY, AND VIOLATED JOSHUA'S CONSTITUTIONAL RIGHT TO PARENT HIS CHILDREN, BY IMPOSING LIFETIME NO-CONTACT ORDERS WITHOUT ANY CONSIDERATION OF WHETHER SUCH RESTRICTION WAS REASONABLY NECESSARY TO PROTECT THE CHILDREN.

As a condition of sentencing, the trial court entered eight lifetime no-contact orders, prohibiting Joshua from contacting each of Lorrie's eight children, including Joshua's four biological children. (CP 104; Sup. CP 135-37, 140)

Under RCW 9.94A.505(8), a sentencing court has the authority to impose crime-related prohibitions, including no-contact orders. State v. Armendariz, 160 Wn.2d 106, 113, 156 P.3d 201 (2007). A crime-related prohibition is "an order of a court

prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(13). A court may impose probationary conditions that tend to prevent the future commission of a crime. State v. Williams, 97 Wn. App. 257, 263, 983 P.2d 687 (1999). A trial court also has discretion to order that, during a term of community custody, an offender “[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals[.]” RCW 9.94A.703(3)(b).²

On the other hand, “[p]arents have a fundamental liberty interest in the care, custody, and control of their children.” State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001) (citing Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)). This means that a parent has a constitutionally protected, fundamental right to raise children without State interference. State v. Letourneau, 100 Wn. App. 424, 438, 997 P.2d 436 (2000) (citing In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998))

² Crime-related prohibitions are reviewed for an abuse of discretion. Armendariz, 160 Wn.2d at 110. Discretion is abused when “the decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.” State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001).

When sentencing conditions interfere with a fundamental constitutional right, such as the right to parent, the extent to which a sentencing condition affects a constitutional right is subject to strict scrutiny. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Therefore, a criminal sentencing court may only impose limitations on the right to parent when it is reasonably necessary to protect children from harm and there is an appropriate nexus between the offense committed and the sentencing condition. State v. Berg, 147 Wn. App. 923, 942, 198 P.3d 529 (2008); Ancira, 107 Wn. App. at 653-54; Letourneau, 100 Wn. App. at 437-42.

For example, in Ancira, the defendant took and held one of his children for several days, refusing to return the child until his wife agreed to talk with him. 107 Wn. App. at 652. He was charged with felony violation of the domestic violence no-contact order protecting his wife. 107 Wn. App. at 652. The trial court imposed a five-year prohibition on contact with Ancira's children because they were present when Ancira violated the no-contact order protecting his wife and they witnessed the violence between their parents. 107 Wn. App. at 653.

On appeal, the court determined that while limitations on contact with the children might have been appropriate, the

complete prohibition was “extreme and unreasonable given the fundamental rights involved.” Ancira, 107 Wn. App. at 655. The evidence did not show that the no-contact order was reasonably necessary to protect the children from the harm of witnessing domestic violence. 107 Wn. App. at 654-55. Consequently, the court concluded that the prohibition on contact with the defendant's children “violated Ancira's fundamental right to parent because it was not reasonably necessary to meet the State's legitimate objectives.” 107 Wn. App. at 652.

In addition, the court expressed concerns about the use of sentencing conditions to address the safety and interests of the children: “Generally . . . the criminal sentencing court is not the proper forum to address these legitimate concerns other than on a transitory basis.” Ancira, 107 Wn. App. at 655. The court noted that decisions concerning the parent/child relationship are best left to the family law and dependency courts because they have specific procedures in place to determine the best interests of the children and can tailor orders to address these interests. 107 Wn. App. at 655; see *a/so* Letourneau, 100 Wn. App. at 443.

Similarly, in In re Rainey, the Washington State Supreme Court struck a lifetime no-contact order that prohibited a father from

having contact with his child because the sentencing court did not articulate any reasonable necessity for the lifetime duration of the order. 168 Wn.2d 367, 381-82, 229 P.3d 686 (2010). In reaching this decision, the Court noted that the fact that the child was a victim of the crime was not in itself determinative as to whether the no-contact order was proper: “It would be inappropriate to conclude that, simply because [the child] was a victim of Rainey’s crime, prohibiting all contact with her was reasonably necessary to serve the State’s interest in her safety.” 168 Wn.2d at 378. Recognizing the “fact-specific nature of the inquiry,” the court remanded the case for resentencing so that the sentencing court could “address the parameters of the no-contact order under the ‘reasonably necessary’ standard.” 168 Wn.2d at 382.

In this case, the State did not present any facts or argument that orders prohibiting contact between Joshua and his biological children are “reasonably necessary to serve the State’s interest in [their] safety.” Rainey, 168 Wn.2d at 378. And the trial court did not articulate any reason or rationale for prohibiting all contact, including indirect or supervised contact, between Joshua and his biological children for the remainder of Joshua’s lifetime.

But it is clear from Ancira and Rainey that simply witnessing

one parent commit a domestic violence crime against another does not, by itself, justify a lifetime prohibition on contact between a parent and child. The trial court in this case exceeded its statutory authority, and violated Joshua's constitutional right to parent his children, when it entered the no-contact orders in this case. Joshua's case should be remanded to the trial court for resentencing so that the court can "address the parameters of the no-contact order under the 'reasonably necessary' standard." Rainey, 168 Wn.2d at 382.

V. CONCLUSION

The trial court violated Joshua's double jeopardy protections by entering an order that vacated but also recognized the validity of his first degree assault conviction and its associated aggravators. The trial court also exceeded its statutory sentencing authority, and violated Joshua's fundamental constitutional right to parent his children, when it imposed lifetime no-contact orders without any allegation or showing by the State that such a severe restriction is reasonably necessary to protect Joshua's children. Joshua's case should be remanded to the trial court to correct these errors.

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DATED: April 26, 2013

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CERTIFICATE OF MAILING

I certify that on 04/26/2013, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Joshua E. Howard, DOC# 316714, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

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