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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ISRAEL ALLEN PLACENCIA MCGUIRE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frank Cuthbertson, Judge

No. 17-1-01810-6

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Does *State v. Foster* make clear that the no-contact order preventing defendant from contacting the mother of his child does not violate his fundamental right to parent when the no-contact order does not list the child?
2. Did defendant present sufficient cause to warrant a CrR 7.8 hearing below?
3. Has defendant presented proof of parentage establishing that he has a fundamental right to parent?

B. STATEMENT OF THE CASE.

The State charged Israel McGuire, hereinafter “defendant,” with one count of residential burglary in violation of RCW 9A.52.025, and one count of assault in the fourth degree in violation of RCW 9A.36.041(1) and (2). CP 3-4. Both counts were charged as domestic violence incidents pursuant to RCW 10.99.020. CP 3-4. The victim identified in the original information is C.P. CP 3-4.

On June 15, 2017, defendant pleaded guilty to an Amended Information that charged one count of burglary in the second degree as a domestic violence incident. CP 5. The Amended Information does not specify any victim(s). CP 5. At sentencing, defendant’s grandfather—the owner of the home defendant unlawfully entered—addressed the court as a

victim. 06/15/17 RP 6-8. C.P. was also identified as a victim at sentencing. 06/15/17 RP 8-9.

At sentencing, the parties jointly recommended the high end of the seventeen to twenty-two month sentencing range, as well as a no contact order with C.P. for 10 years, among other conditions. 06/15/17 RP 2-3, 5, 8. Defense counsel addressed the court regarding defendant's position on the recommendation, stating,

The victim in this case is now living, I believe, in West Virginia. I don't know her attitude about the no contact order. I do know that the State requested that; that was our agreement in reaching this plea agreement. [...] She's not present today. I anticipate in the future she may address the Court in some other forum to have this either lifted or modified. One of the reasons for that is she is pregnant with [defendant's] child, and so [defendant] wants to have contact with that child, although he understands he can't have contact with the victim ... so that's going to complicate things going forward.

06/15/17 RP 8-9. Defendant admitted to having a drinking problem that causes him not to remember things and took responsibility for his actions during a colloquy with the court. 06/15/17 RP 9-10. The court found defendant's plea to be knowing, intelligent, and voluntary. 06/15/17 RP 4. The court ultimately followed the jointly recommended 22-month sentence. 06/15/17 RP 11. The court also imposed the jointly recommended 10-year no-contact order with victim C.P., a domestic violence evaluation and completion of follow-up treatment, various fees, and a condition of law-

abiding behavior. 06/15/17 RP 5; CP 62-63. Defendant was served with the jointly agreed no-contact order in open court. 06/15/17 RP 11.

Defendant's Judgment and Sentence includes a paragraph stating, "The defendant shall not have contact with [C.P.] including, but not limited to, personal, verbal, telephonic, written or contact through a third party for 10 years (not to exceed the maximum statutory sentence.)" CP 23. Defendant signed the Judgment and Sentence. CP 27. The order prohibiting contact with the victim as a condition of defendant's sentence was entered consistent with the description above,<sup>1</sup> and defendant's signature is present on the last page. CP 62-63.

On April 6, 2018, defendant filed a pro se CrR 7.8 motion to modify his Judgment and Sentence. CP 40-51. The factual basis for defendant's motion relied on the assertions that C.P. gave birth to his child on November 4, 2017, that C.P. has been the primary custodial parent of the child, and for fear of violating the order, defendant has not been able to "enjoy any of his parental rights." CP 40-51. Defendant alleged the trial court erred in entering the no-contact order that "had and has a collateral consequence of abridging defendant's fundamental right to parent his child without being

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<sup>1</sup> Although the order was later amended to correct a clerical error with the cause number. CP 36-37.

afforded due process” and that the order was entered without a factual determination of reasonableness or narrow tailoring of the order. CP 38-39.

On May 18, 2018, the court held a hearing to decide defendant’s motion. 05/18/17 RP 1.<sup>2</sup> Defendant appeared telephonically. 05/18/17 RP 2. Defendant recited the reasons for his motion as enumerated in his written motion. 05/18/17 RP 1-3. The State reiterated that defendant agreed to the no-contact order as part of his plea agreement. 05/18/17 RP 3. The court ruled:

... I’m going to deny the motion. Number one the child wasn’t born when you were convicted, and the child isn’t listed in the no contact order. Number two, you have a remedy. Your remedy is to get a lawyer, get a parenting plan, and seek visitation with your kids. There’s nothing in that judgment and sentence that precludes you from having contact with your children other than you can’t contact your wife,<sup>3</sup> [sic] but you have other remedies, so I’m going to deny the motion.

05/18/17 RP 3. Defendant filed a notice of appeal of the trial court’s denial of the motion on June 13, 2018. CP 56-57.

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<sup>2</sup> The volume containing the ex parte hearing has a mislabeled year. The State will refer to the volume as labeled.

<sup>3</sup> There is no indication in the record that defendant and the victim are or were married.

C. ARGUMENT.

1. **STATE V. FOSTER** CONTROLS. THUS, THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CRR 7.8 MOTION.

The trial court did not abuse its discretion by denying defendant's CrR 7.8 motion. A trial court abuses its discretion when it exercises its discretion in a manifestly unreasonable manner, or when the exercise of discretion is based on untenable grounds or reasons. *State v. Aguirre*, 73 Wn. App. 682, 686, 871 P.2d 616 (1994). A trial court may be affirmed on any basis supported by the record. *State v. Poston*, 138 Wn. App. 898, 128 P.3d 1286 (2007).

Defendant asserts that he has a child in common with C.P., and the no-contact order barring all contact with her has the collateral consequence of infringing his fundamental right to parent. Brief of Appellant, 9-10. A no-contact order between two parents that does not list shared children is not a violation of a person's fundamental right to parent.<sup>4</sup> The Court of Appeals has decided this very issue in *State v. Foster*, 128 Wn. App. 932, 939-40, 117 P.3d 1175 (2005). In *Foster*, the defendant was charged with felony violation of a no contact order. *Id.* at 939. For the first time on appeal, that defendant claimed the order violated his fundamental parental rights by

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<sup>4</sup> "Parents 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).

precluding him from having contact with his daughter. *Id.* at 939. The court held, the “no-contact order does not prohibit Foster from having contact with his daughter; it only prohibits contact with [] the mother of his daughter. Therefore, [defendant] cannot show that the order will interfere with his right to parent, at least as constitutionally recognized.” *Id.* at 939. In that case, as in defendant’s case, the no-contact order did not have an exception for contacting the mother with the purpose of contacting the daughter. *Id.* at 939.

Defendant relies on *State v. Ancira*, 107 Wn. App. 650, 27 P.3d 1246 (2001) to support his claim that this no-contact order interferes with his fundamental right to parent. Brief of Appellant, 7. The defendant in *Foster* similarly relied on *Ancira*. *Foster*, 128 Wn. App. at 938. The court in *Foster* distinguished *Ancira* on the fact that, in *Ancira*, the no-contact order prohibited contact with that defendant’s wife *and* his children. *Id.* at 939. The *Ancira* court reversed, finding an infringement on a constitutional right to parent. *Id.* *Ancira* is distinguishable from defendant’s case for the same reason it was distinguishable in *Foster*: the order in the present case only prohibits contact between defendant and the child’s mother. Defendant should not be offered the opportunity to contact the mother of his child, exposing her to him, when defendant has other alternatives.

In distinguishing *Ancira*, the *Foster* court reasoned,

Foster has always had the ability to ask the family court to establish visitation rights with his daughter and avoid contact with [the mother]. While the order may be an inconvenience, any interference with his parental rights is not substantial or beyond that which is justified by the need to protect the mother of his child. Foster cannot establish there is any infringement on his parental rights and we conclude the no-contact order issued under RCW 10.99.050 is valid.

*Id.* at 940. Accordingly, the no-contact order prohibiting defendant from contacting the mother of his child does not interfere with his fundamental right to parent, it is constitutional, and he similarly has alternative remedies in family court to establish visitation with his child. Moreover, the no-contact order is necessary to protect the victim in this case. Because the trial court's decision was sound with controlling case law, the court was well within its discretion when it denied defendant's CrR 7.8 motion.

Defendant acknowledges that the cases he relies on prohibit contact between defendants and their children. Brief of Appellant, 10. Defendant argues that, despite that distinguishing factor, "it is readily apparent, however, that the order interferes with [defendant's] fundamental right to parent. There is no reason the cases discussed should not apply with equal force here." As discussed above, the Court of Appeals in *Foster* has already determined that no-contact orders prohibiting contact between parents, not children, do not violate a person's fundamental right to parent. Accordingly,

defendant's arguments regarding the scope and necessity of the no-contact order need not be addressed.

Defendant admitted to committing a domestic violence offense against the now mother of his child, C.P. 06/15/17 RP 4. Defendant has a ten-year history of committing domestic violence crimes. CP 16-18. Defendant conceded at sentencing that restraint is necessary between himself and the victim<sup>5</sup> in this case. Defendant admitted to the court that the victim "did the best thing for her and the child." 06/15/17 RP 11. By upholding the no-contact order, the trial court ensured the victim of this domestic violence offense received the maximum protection of the law. The court's decision was consistent with case law and was not an abuse of discretion. The no-contact order should be affirmed.

2. DEFENDANT DID NOT PRESENT SUFFICIENT CAUSE TO WARRANT A CRR 7.8 HEARING BECAUSE HE FAILED TO ESTABLISH EXTRAORDINARY OR UNANTICIPATED CIRCUMSTANCES JUSTIFYING RELIEF.

A court has jurisdiction under CrR 7.8 to correct an erroneous sentence. *State v. Hardesty*, 129 Wn.2d 303, 315-16, 915 P.2d 1080 (1996). Defendant brought this motion under CrR 7.8(b)(1) or CrR 7.8(b)(5). CP 38-39, 40-51. CrR 7.8(b)(1) and (5) allows a trial court to relieve a party from a final judgment for "... mistakes, inadvertence, surprise, excusable

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<sup>5</sup> CP 42.

neglect or irregularity in obtaining a judgment or order [... or] any other reason justifying relief from the operation of the judgment.” “A sentence following a criminal conviction can be subsequently modified only for extraordinary circumstances that could not have been anticipated at the time of sentencing.” *State v. Smith*, 159 Wn. App. 694, 696, 247 P.3d 775 (2011).

Though defendant cited CrR 7.8(b)(1), he made no argument that the Judgment and Sentence needed to be modified due to any mistake, surprise, neglect or irregularity. CP 40-51. Defendant alleged the circumstances changed since his original sentence because C.P. gave birth, which warranted a modification to the no-contact order. CP 41-42. At best, defendant may have been arguing the “inadvertence” prong of CrR 7.8(b)(1) justified relief. That argument necessarily failed, however, because the court did not inadvertently impose the no-contact order below, and defendant did not inadvertently agree to it. Defendant was well aware that C.P. was pregnant at the time of his sentencing. 06/15/17 RP 8-9, 10 (“She’s going to have my child.”) Defense counsel acknowledged the exact complications the no-contact order would have on defendant’s parenting before they recommended the sentence to the court. *Id.* Because the no-contact order was not inadvertently recommended or imposed, defendant’s argument did not support modification under CrR 7.8(b)(1), and the trial

court did not abuse its discretion in denying defendant's motion under CrR 7.8(b)(1).

Defendant more clearly argued for modification under CrR 7.8(b)(5). CrR 7.8(b)(5) permits relief from a Judgment and Sentence for "any any other reason justifying relief." That relief may not fit circumstances covered by any other section of the rule. *State v. Brand*, 120 Wn.2d 365, 369, 842 P.2d 470 (1992). Additionally, "CrR 7.8(b)(5) will not apply when the circumstances used to justify the relief requested existed at the time the judgment was entered." *State v. Smith*, 159 Wn. App. 694, 700, 247 P.3d 775 (2011) (citing *State v. Cortez*, 73 Wn. App. 838, 842, 871 P.2d 660 (1994)). As discussed above, defendant was well aware that he was going to have a baby in common with C.P. after he was sentenced. He agreed to the order as part of a valid, negotiated plea agreement.<sup>6</sup> The baby now being born is neither an extraordinary nor unforeseen circumstance warranting relief under CrR 7.8(b)(5). CrR 7.8 motions are not a vehicle for a second chance at sentencing. Because defendant did not present the trial court with new circumstances warranting relief from his Judgment and Sentence, the trial court properly exercised its discretion in denying defendant's CrR 7.8 motion.

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<sup>6</sup> Reviewing courts have held that defendants who agree to terms of a plea deal, when aware of the consequences, should be held to that agreement. See *State v. Majors*, 94 Wn.2d 354, 358, 616 P.2d 1237 (1980).

3. DEFENDANT HAS NOT MADE AN AFFIRMATIVE SHOWING THAT HE IS THE FATHER OF C.P.'S CHILD.

Defendant's entire claim relies on the assertion that he has a child in common with C.P., entitling him to contact with this child. CP 41 ("This motion relies upon the fact that [defendant] now has a child in common with [C.P.]"). Defendant has not made an affirmative showing that he is the father of the child C.P. allegedly birthed. Children born into wedlock are presumed to be legitimate. See RCW 26.26A.115; *State v. Frenger*, 158 Wn. 683, 689, 291 P. 1089 (1930). Here, defendant and C.P. were not married,<sup>7</sup> thus no presumption of fatherhood exists. Defendant has the right to adjudicate parentage of this child under RCW 26.26A.400, but that process is a civil matter. For defendant to assert a fundamental right to parent, he will need to establish that he is, in fact, a parent. That determination is a matter for family court, not this criminal proceeding.

If defendant does so establish himself as the father in family court, he can use that legal avenue to establish contact with his child in congruence with the no-contact order in this case. Modifying defendant's Judgment and Sentence to allow him a lever against his domestic violence victim is not the proper remedy for defendant's grievance. The no-contact order protecting C.P. should be affirmed.

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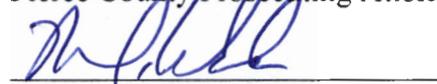
<sup>7</sup> See CP 62-63 ("relationship to defendant if known: GIRLFRIEND")

D. CONCLUSION.

The trial court properly exercised its discretion in denying defendant's CrR 7.8 motion when defendant willingly agreed to the order, when his child is not listed on the order, and when the trial court's decision was consistent with controlling precedent. Further, the trial court properly denied defendant's CrR 7.8 motion when he presented no new or unanticipated circumstances warranting relief. Finally, defendant's grievance regarding his parental rights are improperly before the criminal courts. Because the trial court committed no error, the no-contact order protecting the victim of defendant's domestic violence crime should be affirmed.

DATED: January 31, 2019.

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Angela Salyer  
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1-30-19 Cheney Ko  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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