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No. 53617-0-II
(with consolidated cause no. 54061-4-II)

**Court of Appeals, Div. II,
of the State of Washington**

Stacey Marie Jurss,

Respondent,

v.

Liam Aloysha Mooney,

Appellant.

Brief of Appellant

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1. Introduction

Stacey Jurss and Liam Mooney had a single, drunken sexual encounter on New Years Eve 2009-10, resulting in the birth of a child. Jurss was so drunk she could not remember what happened that night. Many years later, as Jurss is coming to terms with the trauma she suffered as a result, she requested a Domestic Violence Protection Order based on that incident nine years prior. The trial court found by a preponderance of evidence that Jurss was incapable of consenting to sex that night, meaning Mooney had committed an act of domestic violence entitling Jurss to a DVPO.

Mooney does not challenge that central finding in this appeal. However, in entering the DVPO, the trial court overstepped its authority and granted protections and restrictions to which Jurss was not entitled under the facts of this case, including extending the duration of the DVPO to September 28, 2028, the child's 18th birthday. This Court should reverse and vacate the erroneous portions of the trial court orders. All that should remain is a basic, one-year DVPO, expiring on May 8, 2020, that protects Jurss alone, not the child, and does not restrict Mooney's right to possess a firearm.

2. Assignments of Error

Assignments of Error

1. The trial court erred in entering the long-term Order for Protection dated May 8, 2019, with restrictions that were beyond the scope of the petition.
2. The trial court erred in entering the long-term Order for Protection dated May 8, 2019, with restrictions that were not supported by substantial evidence.
3. The trial court erred in entering protections for the child without any evidence of domestic violence toward or any threat or fear of harm to the child.
4. The trial court's finding that "[Mooney] represents a credible threat to the physical safety of the protected person/s," was not supported by substantial evidence. 1 CP 468.¹
5. The trial court erred in entering a long-term order, effective until September 28, 2028 (a duration of over nine years) without any evidence that Mooney was likely to resume acts of domestic violence when the order expires.
6. The trial court erred in restraining Mooney from committing acts of domestic violence against the child.
7. The trial court erred in restraining Mooney from interfering with physical or legal custody of the child.
8. The trial court erred in restraining Mooney from removing the child from the state.

¹ These cases were consolidated after the clerk's papers in each case had been completed. This brief will refer to the clerk's papers in Cause No. 53617-0-II as "1 CP [page number]" and to the clerk's papers in Cause No. 54061-4-II as "2 CP [page number]."

9. The trial court erred in entering firearm prohibitions against Mooney.
10. The trial court's finding that Mooney "presents a serious and imminent threat to public health or safety, or the health or safety of any individual by possessing a firearm or other dangerous weapon," was not supported by substantial evidence. 1 CP 472.
11. The trial court erred in entering the Order to Surrender Weapons, dated May 8, 2019.
12. The trial court erred in making Finding/Conclusion 12, in particular that portion that reads, "The court concludes that if Mr. Mooney knew that Ms. Jurss did not have the capacity to drive her car, he should have suspected she did not have the capacity to consent." 1 CP 478.
13. The trial court erred in making Finding/Conclusion 15, in particular that portion that reads, "The court concludes that Ms. Jurss has an ongoing, reasonable fear of Mr. Mooney." 1 CP 478.
14. The trial court erred in making Finding/Conclusion 16, in particular that portion that reads, "Ms. Jurss is entitled to the order requested." 1 CP 478.

Issues Pertaining to Assignments of Error

1. RCW 26.50.060(5) prohibits a court from granting relief in a protection order "except upon notice to the respondent ... pursuant to a petition." Here, the trial court granted relief that was not requested in the petition. **Did the trial court abuse its discretion in granting relief not requested in the petition?**
(assignments of error 1, 3, 6, 9, 11)
2. RCW 26.50.060(2) permits a court to grant a long-term or permanent protection order only if "the court finds that the respondent is likely to resume acts of

domestic violence ... when the order expires.” The court made no such finding in this case. There is no evidence to support such a finding. **Did the trial court abuse its discretion in entering an order for a duration longer than one year?** (assignments of error 1, 2, 4, 5, 13)

3. RCW 26.50.060(1) permits a court to grant relief necessary for the protection of the petitioner and other family members sought to be protected. The only act of domestic violence in this case was a single act of sexual intercourse with Jurss ten years ago. There was no evidence of any risk of physical harm to the child to whom Mooney has been a capable primary parent for four years. **Did the trial court abuse its discretion in entering restraints to protect the child?** (assignments of error 1-4, 6-8)
4. RCW 9.41.800 permits a court to restrict a respondent’s right to possess firearms if the court makes specific findings of fact. The trial court made such pro forma findings, but the findings are not supported by substantial evidence. **Did the trial court abuse its discretion in ordering firearm restrictions against Mooney?** (assignments of error 1, 2, 4, 9-11)
5. A trial court’s findings of fact must be supported by substantial evidence. Many of the trial court’s findings were not. **Did the trial court err in entering these findings?** (assignments of error 4, 10, 12-14)

3. Statement of the Case

3.1 The parties had sex one time, ten years ago, after coming home drunk from a party. A child was born as a result. The trial court found that Jurss lacked capacity to consent to sex.

Liam Mooney and Stacey Jurss were coworkers and roommates for several months toward the end of 2009 and into 2010. 1 CP 476. Liam stayed in a separate bedroom. 1 CP 442. He had a girlfriend at the time. 1 CP 442. That relationship ended the day of December 31, 2009. 1 CP 445. Jurss was aware of the breakup and invited Mooney to a New Years Eve party. 1 CP 445.

Mooney drove Jurss to the party. 1 CP 477. Both Mooney and Jurss drank alcohol at the party and both were intoxicated. 1 CP 477. Jurss has no memory of what happened after the party. 1 CP 477. She testified that only Mooney had a clear recollection of that night. 1 CP 268.

According to Mooney's testimony, another coworker drove them both home. 1 CP 446. When they got into the apartment, Jurss led Mooney into her bedroom. 1 CP 446. By words or conduct, she invited and consented to sex. 1 CP 446, 477. This was the only sexual encounter between the parties. 1 CP 477. Jurss became pregnant as a result, and a daughter was born in September 2010. 1 CP 477.

The trial court would ultimately find, nearly nine years later, that Jurss did not have the capacity to consent to sex on that night due to her intoxication. 1 CP 478-79. The trial court later clarified that Jurss had established this fact by a preponderance of the evidence (as required to obtain a domestic violence protective order) but not by clear, cogent, and convincing evidence (as would be required to disestablish paternity). 1 CP 494.

3.2 Years later, a dependency action was commenced to protect the child from Jurss' alcohol abuse. Mooney established paternity and the parties entered an agreed parenting plan.

Mooney had occasional contact with the child over the first four years of her life. 1 CP 448. In 2015, a dependency action was initiated because Jurss suffered from mental health and alcohol issues that rendered her an unfit parent. Ex. 7. When Mooney learned of the dependency action, he filed a parentage action, changed his employment, and moved back to Olympia to be able to take care of his daughter. 1 CP 449-50.

Mooney was established as the child's father, and the parties agreed to a parenting plan, which was entered by the court in September 2016. 1 CP 281, 452; 2 CP 11-24 (the parenting plan). The dependency action was dismissed by agreement. 1 CP 285, 452.

The agreed parenting plan placed the child primarily with Mooney, with Jurss having six days of visitation every two weeks. 2 CP 14. After June 2018, the plan shifted to 50/50 co-parenting. 2 CP 14. Neither parent had any § 191 restrictions, despite the requirement that Jurss comply with treatment plans for her alcohol and mental health issues. 2 CP 14. Decision making was joint. 2 CP 14.

3.3 Jurss struggled with the plan as she came to recognize herself as a victim of sexual assault. She was diagnosed with PTSD, which is triggered by contact with Mooney.

Initially, things went smoothly under the parenting plan. *See* 1 CP 576. But Jurss struggled to adapt to Mooney's involvement in their daughter's life. 1 CP 396. Jurss was upset by Mooney's attempt to change their daughter's last name to Jurss-Mooney in late 2017. 1 CP 287-88. Jurss filed a petition for a domestic violence protection order against Mooney in February 2018. Ex. 17. Mooney believed that Jurss was retaliating for the attempted name change. *See, e.g.*, 1 CP 172.

The parties settled the dispute with an agreed order dismissing the DVPO petition. 1 CP 97-99. The agreement modified the parenting plan with two new requirements: 1) The parties could only communicate through Our Family Wizard and only about parenting issues. 2) Jurss and Mooney would not

both be present at any visitation transfer; Jurss would use an agent to accomplish all transfers. 1 CP 98.

Jurss testified in this case that she has slowly, over the years, recognized that she was a victim of sexual assault. *E.g.*, 1 CP 211, 224-25, 237-38. The trauma of this event caused her mental health and alcohol problems. 1 CP 224. She now knows that she suffers from Post-Traumatic Stress Disorder. 1 CP 238. Every contact she has with Mooney triggers her PTSD and causes great fear, anxiety, and disruption of her normal life. 1 CP 237-38. Jurss' PTSD also manifests in her inability to discuss parenting issues with Mooney. *E.g.*, 2 CP 71-73. Jurss described her fear of contact with Mooney: "Each time he even messages me at all results in my feeling threatened. It doesn't have to be mean. It doesn't have to be aggressive." 1 CP 594.

3.4 Jurss initiated this DVPO petition, based on the sexual encounter nine years prior.

Jurss was not satisfied with the limited contact provided in the agreed dismissal order. 1 CP 226. She petitioned again for a DVPO. 1 CP 1-14. The petition alleged as grounds for the requested order, sexual assault (the New Years 2009-10 encounter); an allegedly harassing email from Mooney to Jurss' employer; and triggering of PTSD by contacts with Mooney allowed under the parenting plan. 1 CP 5-9.

Jurss asked the court to restrain Mooney from committing acts of domestic violence against her; from harassing or surveilling her; from having any contact with her; and from coming within 300 feet of her home, work, or school. 1 CP 2-3. She did not ask for any such protections for her daughter, only for herself. 1 CP 2-3. Jurss asked for a long-term order lasting more than one year. 1 CP 3. She did not ask for any firearm restrictions. 1 CP 4.

3.5 The trial court granted the DVPO with a duration of nearly ten years and a panoply of restrictions.

The trial court held a hearing over three days. *See* 1 CP 189-307 (transcript of April 15, 2019), 329-458 (transcript of April 22, 2019), 499-627 (transcript of May 6, 2019). Testimony at the hearing focused on the issues of sexual assault and whether Jurss had a reasonable fear of future acts of domestic violence. *See, e.g.*, 1 CP 579, 591. The commissioner gave the parties broad leeway to explore those questions from multiple angles. 1 CP 531.

There was no evidence of any act of domestic violence by Mooney toward their daughter. There was no evidence of an ongoing fear that Mooney posed a threat of imminent physical harm, bodily injury, or assault. There was no evidence that Mooney ever possessed a firearm or other weapon or that he

would pose a danger to anyone if he did. There was no evidence that Mooney had ever threatened or attempted to interfere with Jurss' physical or legal custody of their daughter or to improperly remove their daughter from the state. The only evidence of fear of future actions by Mooney was Jurss' testimony regarding being triggered by ordinary contacts with Mooney. *E.g.*, 1 CP 237-38, 594.

After the hearing, the trial court entered Findings of Fact and Conclusions of Law, 1 CP 476-79; an Order for Protection, 1 CP 468-73; and an Order to Surrender Weapons, 1 CP 474-75. The trial court made the DVPO effective until the child's 18th birthday, September 28, 2028—a duration of nearly ten years. 1 CP 468. Despite the lack of evidence, the trial court found that Mooney “represents a credible threat to the physical safety of the protected person/s,” 1 CP 468, and that Mooney “presents a serious and imminent threat to public health or safety, or the health or safety of any individual by possessing a firearm or other dangerous weapon, 1 CP 472. The trial court found that Jurss “has an ongoing, reasonable fear of Mr. Mooney.” 1 CP 478.

The trial court restrained Mooney from committing acts of domestic violence against Jurss or their daughter. 1 CP 469. It restrained Mooney from harassing or surveilling Jurss or from coming near her residence, workplace, or school. 1 CP 469. It restrained Mooney from having “any contact whatsoever” with

Jurss, except contact permitted under the parenting plan. 1 CP 469, 470. The trial court restrained Mooney from interfering with Jurss' physical or legal custody of their daughter and from removing their daughter from the state. 1 CP 470. The trial court entered firearm restrictions under RCW 9.41.800. 1 CP 471-72, 474-75.

Mooney moved for reconsideration, arguing that the DVPO and its additional restrictions were improper under the facts of the case. 1 CP 628-40. The trial court denied the motion. 1 CP 658. Mooney appealed. 1 CP 645.²

4. Argument

The scope and duration of the protective orders entered by the trial court against Mooney exceed what is permitted by law or justified by the evidence. Mooney's challenges to the orders can be classified into five major categories, which will be addressed in order: 1) The trial court improperly granted relief that was not requested in the petition. 2) The trial court improperly granted a long-term protective order without

² Mooney also appealed from a contempt order in a related action for modification of the parenting plan. 2 CP 546. That appeal was consolidated with this one because of the intertwined facts and issues. Upon further review, Mooney still disagrees with the trial court's contempt order but does not believe this Court would find it to be an abuse of discretion. Mooney withdraws his challenge to the contempt order.

evidence that Mooney was likely to resume acts of domestic violence. 3) The trial court abused its discretion in entering restraints to protect the child without evidence that Mooney posed any risk of harm to the child. 4) The trial court improperly ordered firearm restrictions without evidence that Mooney would pose any danger to anyone by possessing a firearm. 5) The trial court erred in making other findings not supported by substantial evidence.

This court reviews a trial court decision to grant a DVPO for abuse of discretion. *Rodriguez v. Zavala*, 188 Wn.2d 586, 590-91, 398 P.3d 1071 (2017). This court should reverse those parts of the trial court orders that were manifestly unreasonable or based on untenable grounds or reasons. *Freeman v. Freeman*, 169 Wn.2d 664, 671, 239 P.3d 557 (2010). “A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

The trial court’s findings of fact are reviewed for substantial evidence. *In re Marriage of Fahey*, 164 Wn. App. 42, 55, 262 P.3d 128 (2011). Substantial evidence exists if the record

contains sufficient evidence to persuade a fair-minded, rational person of the finding's truth. *Id.* at 55.

4.1 The trial court abused its discretion in granting relief not requested in the petition.

RCW 26.50.060(5) prohibits a court from granting relief in a protection order “except upon notice to the respondent ... pursuant to a petition.” Here, the trial court granted relief that was not requested in the petition. This is an abuse of discretion because it is manifestly unreasonable and does not meet the requirements of the proper legal standard.

Washington is a notice pleading state. CR 8(a). However, a complaint or petition that fails to give the opposing fair notice of the claim asserted is insufficient. *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006). Relief cannot be granted on an insufficiently plead claim. *Id.* Additionally, any application to the court for an order “shall set forth the relief or order sought.” CR 7(b)(1). A court may only grant forms of relief that are requested in a proper motion with notice to the other party. *See Winters v. Ingersoll*, ___ Wn. App. 2d ___, No. 50959-8-II, slip op. at 12 (Jan 23, 2020).

Although the statute provides a trial court broad discretion to craft relief in a DVPO, that discretion is limited by the notice requirement of RCW 26.50.060(5): The trial court

cannot grant relief “except upon notice to the respondent ... pursuant to a petition.” The petition must set forth the relief being sought, and the trial court should not be permitted to go beyond it.

For example, here the petition did not request any firearm restrictions. 1 CP 4. Because firearm restrictions were not requested in the petition, neither party presented any evidence in the hearings that would be relevant to the necessary factual determination to support such relief. Mooney had no notice or opportunity to defend himself from such restrictions. It was patently unreasonable for the trial court to grant firearm restrictions that were neither requested in the petition nor litigated in the DVPO hearings.

Similarly, the petition did not request any restraints designed to protect the child from domestic violence, stalking, or other contact with Mooney. 1 CP 2-3. The parties did not present any evidence or argument regarding the need for any such protection of the child. The entire proceedings were focused on whether there was a need for protection of Jurss herself. It was patently unreasonable for the trial court to impose restraints designed to protect the child when no such protection was requested in the petition or litigated in the DVPO hearings.

Because firearm restrictions and protection of the child were not requested in the petition, this Court should reverse

those provisions of the trial court orders. In addition, once protection of the child is removed, the expiration date of the order—the child’s 18th birthday—is based on untenable grounds and should also be reversed.

4.2 The trial court abused its discretion in entering an order for a duration longer than one year.

RCW 26.50.060(2) permits a court to grant a long-term or permanent protection order only if “the court finds that the respondent is likely to resume acts of domestic violence ... when the order expires.” The trial court made no such finding in this case, and there is no evidence to support such a finding. By ordering a fixed duration over one year without the required statutory finding, the trial court abused its discretion based on untenable reasons. By ordering a fixed duration over one year without any evidence to support the statutory finding, the trial court abused its discretion on untenable grounds.

Both the Order of Protection and the Findings of Fact and Conclusions of law are devoid of any finding that Mooney is likely to resume acts of domestic violence. 1 CP 468-73, 476-79. The statutory language, “likely to resume,” implies that the court must find that the respondent is likely to commit acts of a similar nature to those already found to have been committed. The only act of domestic violence Mooney was found to have

committed was the drunken sexual encounter between himself and Jurss ten years ago, which was only a sexual assault because Jurss lacked the capacity to consent. There is nothing in the record to suggest any likelihood of Mooney repeating such an act so many years later. Indeed, it would seem impossible, given the current circumstances. The trial court did not find that Mooney was likely to resume similar acts of domestic violence, and there is no evidence to support such a finding.

Even if “likely to resume” were construed to include all forms of “domestic violence” in the statutory definition, there is still nothing in the record to suggest that Mooney is likely to commit any of them. “Domestic violence” is defined to mean, “Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, sexual assault, or stalking.” RCW 26.50.010(3). There is no evidence in the record that would suggest that Mooney is likely to inflict physical harm, bodily injury, or ordinary assault on any other person. There is no evidence in the record that would suggest that Mooney is likely to inflict fear of imminent physical harm, bodily injury, or assault on any other person. The trial court did not find that Mooney had committed stalking or harassment or that he was likely to do so in the future. The trial court did not find that Mooney was likely to resume any acts of domestic violence under the statutory definition.

The closest the trial court came to such a finding was when it found, “Ms. Jurss has an ongoing, reasonable fear of Mr. Mooney.” 1 CP 478 (finding/conclusion 15). But this does not meet the statutorily required finding. Finding 15 says only that Jurss is afraid of Mooney, not that Mooney has placed her in “fear of imminent physical harm, bodily injury, or assault.” There is a material difference between the two. Jurss’ fear is not based on imminent physical harm. The rest of Finding 15 demonstrates that Jurss’ fear of Mooney is based on “the trauma of the event,” such that “[e]ven courtesy interactions with Mr. Mooney place her in fear.” 1 CP 478. This finding arises from Jurss’ testimony about how she is affected when her PTSD is triggered by ordinary contacts with Mooney: “Each time he even messages me at all results in my feeling threatened. It doesn’t have to be mean. It doesn’t have to be aggressive.” 1 CP 594.

Jurss’ fear is not a fear of imminent physical harm; it is a fear of being triggered. And, as the trial court astutely observed, “The statute doesn’t talk about triggering language. It talks about threatening language.” 1 CP 593. Nothing in the record suggests that Mooney ever used threatening language toward Jurss or otherwise placed her in fear of imminent harm, or that he is likely to do so after the DVPO expires. Finding 15 does not meet the statutory requirements to justify a duration of over one year. Even to the extent Finding 15 might be construed to meet

the statutory requirement, it is not supported by substantial evidence.

The trial court abused its discretion on untenable grounds and untenable reasons when it ordered a DVPO duration of over one year. This Court should reverse and vacate the fixed expiration date of the order, and order that the DVPO expires one year after the date it was entered.

4.3 The trial court abused its discretion in entering restraints to protect the child.

RCW 26.50.060(1) permits a court to grant relief necessary for the protection of the petitioner and other family members sought to be protected. Protection of a child is warranted when there is domestic violence directed at the child or when the petitioner has reasonable fear of imminent harm to the child. *Rodriquez*, 188 Wn.2d at 591-92. In other words, the statutory definition of “domestic violence” “includes a mother’s fear of harm to her child by that child’s father.” *Id.* at 592.

But even this broader definition does not justify protection of the child in this case. Nothing in the record suggests that Jurss has any fear of imminent physical harm to the child by Mooney. The trial court did not find any danger of imminent physical harm to the child. In the absence of any danger to the child, it was patently unreasonable for the trial

court to order restraints designed to protect the child. Where there is no threat of harm, Mooney's liberty interest should prevail. This Court should reverse the restraint against acts of domestic violence against the child.³

There is also no evidence in the record that Mooney ever interfered with Jurss' physical or legal custody of the child. There is no evidence in the record to suggest that he ever would. In fact, the record demonstrates that both parties have been vigilant in accomplishing visitation transfers at the appropriate times in accordance with the parenting plan. The trial court made no finding of any risk of this kind of harm. Because there is no justification for this restraint, the trial court abused its discretion in ordering it. This Court should reverse the restraint against interfering with Jurss' physical or legal custody of the child.⁴

Likewise, there is no evidence in the record that Mooney ever did or would improperly remove the child from the state. The trial court made no finding relating to such a risk. Because there is no justification for this restraint, the trial court abused

³ To be clear, Mooney is not suggesting that he should be free to commit such acts. Domestic violence against a child is abhorrent and should be prosecuted. Mooney is only arguing that there is no justification for a special prohibition in his case.

⁴ Again, Mooney is not suggesting he would be free to interfere; he is only arguing that there is no justification for a special prohibition.

its discretion in ordering it. This Court should reverse the restraint against removing the child from the state.⁵

Because there was no showing that the child was in need of any protection, the trial court abused its discretion when it ordered restrictions designed to protect the child. This Court should reverse those parts of the order that protect the child without any justification.

4.4 The trial court abused its discretion in ordering firearm restrictions against Mooney.

In entering a DVPO, the trial court is instructed to consider the provisions of RCW 9.41.800. RCW 26.50.060(1)(k). RCW 9.41.800 permits a court to restrict a respondent's right to possess firearms if the court makes specific findings of fact. The trial court made such pro forma, boilerplate findings in this case, but the findings are not supported by substantial evidence. When it ordered the firearm restrictions without any supporting evidence in the record, the trial court abused its discretion on untenable grounds.

“When the trial court issues a domestic violence protection order that meets certain statutory conditions, the court must also order the restrained person to surrender all

⁵ Mooney should be free to take the child out of state only as may be permitted under the parenting plan. There is no justification for a special prohibition.

firearms and other dangerous weapons.” *Braatz v. Braatz*, 2 Wn. App. 2d 889, 891, 413 P.3d 612 (2018). The statutory conditions are, 1) the DVPO was issued after a hearing with actual notice; 2) the DVPO “restrains the person from harassing, stalking, or threatening an intimate partner of the person ... or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child;” 3) the court finds that “the person represents a credible threat to the physical safety of the intimate partner or child;” and 4) the DVPO “explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.” RCW 9.41.800(3). All four conditions must be met before the court may order the firearm restrictions authorized by this section.

The first requirement is met. This DVPO was entered after a hearing with notice in which Mooney participated.

The second requirement is met through the restraint against committing domestic violence. 1 CP 469 (# 1).

The third requirement—a finding of credible threat—is met in form only, but not in substance. The trial court entered a “finding” that mimics the statutory language, concluding that Mooney represents a credible threat to the physical safety of Jurss and/or the child. 1 CP 468. Whether a respondent poses a credible threat to the physical safety of the person(s) protected

by the order is based not on history, but on present or future risks. *Goodwin v. Hollis*, No. 52019-2-II, slip op. at 17 (Jan. 7, 2020).⁶ This question requires the court to interpret the legal significance of the evidence and is therefore a conclusion of law subject to de novo review. *Id.*

As noted above, there are no findings and no evidence that Mooney is likely to commit any acts against the physical safety of either Jurss or the child. There was no testimony that Mooney's actions were likely to cause either Jurss or her child to suffer any physical harm. This Court can determine, de novo, that Mooney does not pose a credible threat to the physical safety of Jurss or the child.

That is sufficient to negate the imposition of firearm restrictions under RCW 9.41.800(3). However, the trial court **may** still order firearm restrictions "if it finds that the possession of a firearm or other dangerous weapon by any party presents a serious and imminent threat to public health or safety, or to the health or safety of any individual." RCW 9.41.800(5). Like the "credible threat" requirement, above, this "finding" reflects an interpretation of the legal significance of the evidence to determine a present or future risk of harm, and should be reviewed de novo.

⁶ This is an unpublished opinion, cited as persuasive authority under GR 14.1.

The trial court made the required finding in form only but not in substance. The trial court again entered a “finding” that mimics the statutory language, this time concluding that Mooney presents a serious and imminent threat to public health or safety if he were to possess a firearm or other weapon. But there is no evidence in the record to suggest that Mooney is likely to ever harm anyone with a firearm or weapon. He has no history of ordinary assault, with or without weapons. He does not own any firearms. 1 CP 482. Mooney has not threatened anyone with physical harm. He has not expressed a desire to obtain or use a firearm or weapon. There is simply no evidence from which to conclude that Mooney presents a “serious and imminent threat” to anyone, with or without a firearm.

The trial court’s “findings” relating to firearm restrictions are not supported by substantial evidence. The findings and the resulting firearm restrictions are an abuse of discretion. This Court should reverse the firearm restrictions.

4.5 The trial court erred in entering other findings not supported by substantial evidence.

A trial court’s findings of fact must be supported by substantial evidence. Many of the trial court’s findings here were not. Some of these findings have been addressed above. Others are addressed below. This Court should reverse all

findings/conclusions that are not supported by substantial evidence in the record.

Finding/Conclusion 12 is not supported by substantial evidence. It is based on the questionable premise that Mooney knew that Jurss did not have capacity to drive. There is no testimony that Mooney knew Jurss could not drive home that night. Rather, Mooney was the one who drove to the party (whether in his own truck or Jurss' van). Based on the testimony, either Mooney drove his own truck back or he decided that he, himself, could not drive home and enlisted the help of another coworker to drive both Mooney and Jurss home. Nothing about this testimony allows us to conclude that Mooney knew Jurss could not drive. The finding that Mooney "should have suspected" that Jurss could not consent is not supported by substantial evidence.

Finding/Conclusion 16 is not supported by substantial evidence, in particular that portion that reads, "Ms. Jurss is entitled to the order requested." As demonstrated above, Jurss was not entitled to the full relief requested in her petition or to the expanded relief granted by the trial court outside the scope of her petition. What Jurss was entitled to, at most, was a basic, one-year DVPO that protected her alone, not the child, and did not restrict Mooney's right to possess a firearm.

5. Conclusion

The trial court overstepped its authority under the DVPO statutes. The trial court erroneously granted relief not requested in the petition. The trial court abused its discretion in granting protections and restrictions that were not supported by statutorily required findings of fact or by substantial evidence in the record. This Court should reverse and vacate those portions of the trial court orders noted above. All that should remain is a basic, one-year DVPO, expiring on May 8, 2020, that protected Jurss alone, not the child, and did not restrict Mooney's right to possess a firearm.

Respectfully submitted this 9th day of March, 2020.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on March 9, 2020, I caused the foregoing document to be filed with the Court and served on counsel or parties listed below by way of the Washington State Appellate Courts' Portal.

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