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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**

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Stacey Marie Jurss,

Respondent,

v.

Liam Aloysha Mooney,

Appellant.

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**Reply Brief of Appellant**

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## **1. Introduction**

On New Years Eve 2009-10, 18-year-old Mooney's 26-year-old landlord, Jurss, invited him to a party after he had just broken up with his girlfriend. At the party, Jurss supplied him with alcohol. They both returned home drunk. Jurss invited Mooney into her bedroom, and they had sex. From Mooney's perspective it was consensual. The trial court found (nearly 10 years later) that the evidence established more likely than not (but **not** clear and convincing) that Jurss was legally incapable of consenting that night due to her intoxication. The trial court's finding of incapacity does not change the fact that the encounter was peaceful and without coercion, force, or violence.

Jurss' response brief is based entirely on hyperbole, including the premise that because she was legally incapable of consent, that somehow transformed the encounter into "an extremely violent act causing profound harm to her physical safety." *E.g.*, Br. of Resp. at 41. Mooney does not deny that the encounter has had profound consequences, but the encounter itself was not violent and does not give rise to a conclusion that Mooney is likely to be violent in the future. Mooney poses no ongoing danger of domestic violence toward Jurss or the child. This Court should reverse and vacate the erroneous portions of the trial court's overreaching orders.

## **2. Reply to Jurss' Statement of the Case**

Much of Jurss' statement of the case repeats Jurss' own conclusory testimony, without recounting any facts to support Jurss' conclusions. *E.g.*, Br. of Resp. at 5 (“Mooney is a ‘dangerous person’”), 6 (“she determined that he was doing this to harass her”), 8 (“has continued to harass her”), 10 (“harassed her continually”), 11 (“harassed her continually”). The trial court rejected these conclusory statements—for example, it **did not find** that Mooney harassed or stalked Jurss. 1 CP 476-79.

Because the trial court did not find harassment or stalking, Jurss' description of the ThurstonTalk email as a “harassing message” is both irrelevant and misleading. Mooney had used ThurstonTalk for many years as a way to keep in touch with his hometown community. 1 CP 532, 570-71. After Jurss got a job with ThurstonTalk, the child told Mooney “all the time” that Jurss' new job was to run the social media there. 1 CP 532, 533. At some point, Mooney realized that he had been blocked from ThurstonTalk's Instagram posts. 1 CP 92-93, 532-33.

In response to this discovery, Mooney sent an email to the general information email address at ThurstonTalk, seeking to be unblocked. 1 CP 92-93, 533. He told the unknown recipient that he suspected that Jurss had blocked him for personal reasons, due to their rocky relationship. 1 CP 92-93. He expressed the opinion that their personal relationship should

have no bearing on his ability to access ThurstonTalk. 1 CP 92-93. He requested resolution of the matter. 1 CP 93. Mooney had no intention of causing problems for Jurss, only wanting to restore his access. 1 CP 570-71. The trial court **did not find** this email to be harassment or stalking. *See* 1 CP 476-79.

Along similar lines, Jurss' description of Mooney's attempt to change the child's last name to Jurss-Mooney is also irrelevant and misleading. Mooney had asked Jurss if they could change the child's legal last name to reflect both parents' last names. 1 CP 289. Jurss did not agree. 1 CP 289. Mooney filed a petition to change the child's legal name, but his petition was denied because Jurss would not consent to the change. 1 CP 289.

Mooney continued to personally refer to the child by the last name of Jurss-Mooney. *See* 1 CP 572-73. Mooney explained to the trial court that he does not use it as the child's legal name, but only "like a nickname or other term of endearment." 1 CP 572. He further explained, "she does associate with that name and finds that name important to her." 1 CP 573.

There was no evidence that Mooney ever directed his use of the name "Jurss-Mooney" toward Jurss. Jurss presented two examples of school books with "Jurss-Mooney" written on them, but provided no evidence that Mooney was responsible for the name being written that way. *See* 1 CP 82, 136. The trial court

**did not find** that Mooney’s use of the name “Jurss-Mooney” was harassment. *See* 1 CP 476-79.

Jurss’ mention of an allegedly harassing incident in the court parking lot is also irrelevant and misleading. Jurss’ petition alleged that after a court hearing, Mooney and his father followed her to her car while verbally harassing her. 1 CP 6. Jurss did not testify to this alleged incident during the hearing. Mooney testified, “Ms. Jurss and I were nearby each other and walked out of the courthouse and to our respective cars, which were in different parts of the parking lot. We had – we had no interaction.” 1 CP 526. The trial court **did not find** that the alleged incident in the parking lot ever occurred. *See* 1 CP 476-79. The trial court **did not find** that the alleged incident was harassment. *See* 1 CP 476-79.

### **3. Reply 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. This Court should reverse and vacate the erroneous portions of the trial court orders.

#### **3.1 The trial court abused its discretion in granting relief not requested in the petition.**

In his opening brief, Mooney argued that the trial court should not be permitted to grant relief that was not requested in

the petition. Br. of App. at 13-15. Mooney’s argument was based on the DVPO statute and on principles of due process and fair notice embodied in the Civil Rules. Br. of App. at 13 (citing, *e.g.*, **RCW 26.50.060(5)**, **CR 8(a)**, **CR 7(b)(1)**).

Jurss points out that a trial court has broad discretion under **RCW 26.50.060(1)(f)** to grant “other relief as it deems necessary,” but the very same statute, in **RCW 26.50.060(5)** restricts that discretion: “No order for protection shall grant relief to any party except upon notice to the respondent and hearing pursuant to a petition.” Principles of due process and fair notice require that a respondent receive notice of the issues that will be litigated at the hearing.

*Hough v. Stockbridge*, 150 Wn.2d 234, 76 P.3d 216 (2003), an **anti-harassment** case, does not resolve the question of the limits of the trial court’s authority under the **DVPO** statute, **RCW 26.50.060**. In *Hough*, the court held that a district court could issue mutual anti-harassment protection orders even when only one side had filed a petition. *Hough*, 150 Wn.2d at 236. The court found this authority in the district court’s equitable powers and the broad discretion granted under the anti-harassment order statute, **RCW 10.14.080**, “to grant such relief as the court deems proper.” *Hough*, 150 Wn.2d at 236. However, the DVPO statute at issue here contains a limitation that the anti-harassment statute does not—namely, **RCW**

**26.50.060(5)**, which requires that a protection order can only “grant relief ... upon notice to the respondent and hearing pursuant to a petition.” Because such a limitation is absent from the anti-harassment statute, *Hough* does not resolve the question of the trial court’s authority under the DVPO statute.

**3.1.1 Firearm restrictions were not requested, were not litigated, and are not supported by substantial evidence in the record.**

Firearm restrictions require the trial court to make some specific “findings,” including that the respondent “represents a credible threat to the physical safety of the intimate partner or child,” or that “possession of a firearm [by the respondent] presents a serious and imminent threat to public health or safety, or to the health or safety of any individual.” **RCW 9.41.800(3); RCW 9.41.800(5)**. Neither of these issues was raised in the petition or actually litigated in the hearing.

There was no evidence or testimony at the hearing that Mooney posed any threat to anyone’s physical safety. In the ten years since their non-violent sexual encounter, Mooney has never assaulted or threatened Jurss with physical harm. No evidence was presented that he is likely to do so in the future. Nothing about the long-ago sexual encounter suggests that Mooney would attempt to have sex with Jurss again or ever assault her in any way.

Jurss' hyperbolic rhetoric about rape as a violent act rings hollow when compared to the actual evidence of what occurred in this case. The only reason the non-violent sexual encounter was found to be domestic violence was because Jurss was too drunk to legally consent. And even that was a close call, as the trial court explained:

When the Court issued the order in the DV case, I took it under advisement. I took it under advisement not just because I believed it was important to issue a written order with clear findings but because the Court was very, very torn. I do believe in the DV case that Ms. Jurss met her burden of proof for a preponderance of evidence. I do not believe in this matter she has met her burden of proof for clear, cogent, and convincing evidence that there was a sexual assault.

CP 494.<sup>1</sup>

Aside from the evidence of the non-violent sexual encounter—which does not itself suggest “a credible threat” to the safety of Jurss or the child—no other evidence was presented to suggest that Mooney was a “credible threat” to anyone. Without any supporting evidence, the “credible threat” finding should be reversed.

The same holds true of the issue of whether Mooney's possession of a firearm would present a serious and imminent

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<sup>1</sup> In making this second decision (in the consolidated case), the trial court considered the testimony and documents from this case. CP 494.

threat to the safety of Jurss, the child, or the public. There was no testimony presented regarding whether Mooney possessed or had access to any firearms or even had any desire to possess firearms. There was no testimony to suggest that Mooney would have any disposition to harm anyone with a firearm. There was no evidence that Mooney had ever caused or threatened to cause physical injury to anyone. The issues central to the firearm restrictions were never raised in the petition and were not actually litigated at the hearing. The trial court should not be permitted to enter such restrictions without notice and an opportunity to be heard. The trial court's findings were not supported by substantial evidence and should be reversed.

Jurss' arguments are merely grasping at straws. Jurss points to the sexual encounter and asks this Court to conclude that because she and Mooney had drunken sex, that is reason to believe that there is a "serious and imminent" or "credible" threat that Mooney will obtain a firearm and shoot her.<sup>2</sup> *See* Br. of Resp. at 26. There is simply no rational connection between drunken sex and firearm violence.

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<sup>2</sup> The statutory language 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)**, suggests that the threat must arise from use of the firearm or other dangerous weapon to cause harm.

Jurss continues to grasp at straws when she points to the ThurstonTalk email,<sup>3</sup> the use of “Jurss-Mooney,” and the courthouse parking lot allegation. Br. of Resp. at 26-27. As noted in Part 2, above, the trial court **did not find** any of these events to be harassment or stalking. *See* 1 CP 476-79. “The absence of an express finding of fact gives rise to a presumption the party having the burden of proof has failed to sustain that burden.” *SSG Corp. v. Cunningham*, 74 Wn. App. 708, 714, 875 P.2d 16 (1994). The trial court’s care in entering its findings, CP 494, supports this presumption. Jurss failed to convince the trial court that Mooney harassed or stalked her.

Jurss would have this Court believe that because Mooney sent an email to resolve a customer service issue, privately calls his daughter by a name that is meaningful to her, and may or may not have had a heated conversation in a parking lot (without any evidence of what was said), he is somehow likely to obtain a firearm and shoot her. None of these incidents bear any rational connection to a “serious and imminent threat” of firearm violence. Because the firearm issues were not raised in the petition and not actually litigated, the trial court did not have authority under RCW 26.50.060(5) to order that relief.

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<sup>3</sup> Jurss mischaracterizes this singular email as “repeatedly contacting her workplace.” Br. of Resp. at 26. There is no evidence of repeated contacts—only this one email.

Because the “findings” are not supported by substantial evidence, they should be reversed.

**3.1.2 The restraint against committing domestic violence against the child was not requested, was not litigated, and is not supported by substantial evidence in the record.**

The story is the same when it comes to the restraint against committing domestic violence against the child. The petition only requested the DV restraint to protect Jurss, not the child. 1 CP 2. The issue was not actually litigated at the hearing, either. There was no evidence presented at the hearing that Mooney had ever committed or threatened domestic violence against the child or in her presence. There was no evidence that Mooney posed a future danger of doing so.

Jurss again grasps at straws: she argues that there were “multiple examples” of Mooney “plac[ing] their daughter at the center of their conflict.” Br. of Resp. at 27. Jurss does not explain what she means by this, but the record pages she cites to relate to the school books with “Jurss-Mooney” (1 CP 81-82, 135-36, 233-34), the name change petition (1 CP 233-34, 577), and the ThurstonTalk email (1 CP 533). None of these examples involve acts of domestic violence. None of these examples was witnessed by the child. It is again of note that the trial court **did not find** any of these events to be harassment or stalking. *See* 1 CP 476-

79; *SSG Corp.*, 74 Wn. App. at 714 (presumption that the party failed to sustain its burden). Because the issue of DV protections for the child was not raised in the petition and not actually litigated, the trial court did not have authority under RCW 26.50.060(5) to order that relief. Because the restraint is not supported by substantial evidence, it should be reversed.

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

Mooney’s brief argued that the trial court abused its discretion in entering an order for a duration longer than one year. Br. of App. at 15-18. To enter a DVPO longer than one year, the statute requires the court to first find that the respondent “is likely to resume acts of domestic violence ... when the order expires.” RCW 26.50.060(2). Mooney argued 1) that the trial court did not make a finding that he was likely to resume acts of domestic violence and 2) that there was no evidence in the record to support such a finding. Br. of App. at 15.

Mooney demonstrated that there was no evidence to support a finding that he was likely to commit any acts of domestic violence in the future. Br. of App. at 16. He explained that Jurss’ fear of him is not the kind of fear contemplated by the definition of domestic violence. Br. of App. at 17. Under the trial court’s Finding 15, Jurss does not fear “imminent physical

harm, bodily injury, or assault”—rather, she fears being triggered by ordinary interactions with Mooney. 1 CP 478, 594.

Jurss’ brief, in nine pages of argument on this issue, fails to acknowledge that the trial court made no finding that Mooney was likely to resume acts of domestic violence. This alone is fatal to her position. Without the statutorily required finding that Mooney is likely to resume acts of domestic violence, the trial court did not have authority to enter a protection order lasting more than one year. This Court should reverse.

Jurss’ brief also fails to recognize the distinction between her fear of her PTSD being triggered—which is the fear the trial court found—and the kind of fear that is necessary for a finding of domestic violence. Domestic violence requires that the respondent has placed the petitioner in fear “of imminent physical harm, bodily injury, or assault.” **RCW 26.50.010**. According to Jurss’ own testimony, she is not in fear of physical harm, bodily injury, or assault—she is in fear of being triggered by ordinary contacts with Mooney. 1 CP 478, 594. There is no evidence that Mooney has **placed her** in such fear by any misconduct. Rather, Jurss’ fear is triggered by ordinary, non-offensive contacts. Jurss’ fear of ordinary contact does not support a finding that Mooney is likely to commit acts of domestic violence in the future.

Contrary to Jurss' arguments, the trial court did not base its decision on her fear of being triggered. The court observed, "I understand that lots of things can be triggering, but the statute doesn't talk about triggering language. It talks about threatening language." 1 CP 593. Jurss responded by saying, "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. The trial court expressed its skepticism of this argument: "You have joint decision making regarding the child, and you're saying that if he contacts you about the child's education, it's triggering, therefore, threatening and a base to issue an order." 1 CP 594. The trial court did not base its decision on Jurss' fear of being triggered.

The trial court also did not find any harassment or stalking. *See* 1 CP 476-79. Yet Jurss' brief continues to rely on her hyperbolic misrepresentations of the ThurstonTalk email, the use of "Jurss-Mooney," and the courthouse parking lot allegation. Jurss fails to demonstrate how any of these events meets the statutory definitions of harassment or stalking. The trial court did not find that any of these events were harassment or stalking. The trial court did not find that any of these events were likely to recur.

Under the statutory definitions cited by Jurss, these events **were not** harassment or stalking. Jurss cites RCW

9A.46.020 for the definition of harassment. Br. of Resp. at 28. The elements of harassment are 1) without lawful authority, the person knowingly threatens to do one of four categories of malicious acts: a) cause bodily injury, b) cause physical damage to property, c) subject a person to confinement or restraint, or d) maliciously cause substantial harm to a person's physical or mental health or safety; and 2) by words or conduct place the person threatened in reasonable fear that the threat will be carried out. **RCW 9A.46.020.**

These elements require a **threat**. There is no evidence that Mooney ever threatened Jurss. Surely this is what the trial court was getting at when it told Jurss, "I understand that lots of things can be triggering, but the statute doesn't talk about triggering language. It talks about threatening language." 1 CP 593. Without any threat, the trial court could not find that Mooney had ever committed harassment or that he would be likely to do so in the future.

Similarly, the events referenced by Jurss were not stalking. Jurss cites RCW 9A.46.110 for the definition of stalking. Br. of Resp. at 28. The elements of stalking are 1) intentionally and repeatedly harassing or repeatedly following another person; 2) the person is placed in reasonable fear that the stalker intends to injure a person or property; **and** 3) the stalker either intends the result of fear or knows that fear

is the result even if not intended. **RCW 9A.46.110**. All three elements are required.

These elements are not met. We have already seen in the paragraphs immediately above that Mooney did not intentionally harass Jurss. There is no evidence that Mooney repeatedly followed Jurss at any time. The first element is not met. As discussed above at 12-13, Jurss did not fear that Mooney intended to injure any person or property. Rather, she feared the way contact with Mooney made her feel. She feared being triggered by ordinary contacts resulting from co-parenting. Although this may be difficult for her, it does not meet the second element of stalking, just as it does not meet the elements of the general definition of domestic violence. There is also no evidence of the third element of stalking. The trial court could not find that Mooney had committed stalking or that he was likely to do so in the future.

Jurss cites to “examples that show a risk of Mr. Mooney’s behavior recurring,” but fails to demonstrate how any of her examples show that Mooney is likely to commit acts of domestic violence. Br. of Resp. at 33. Her citations to the record do not help. 1 CP 88 does not describe any actions by Mooney or suggest that he might commit domestic violence. 1 CP 94-95 has nothing to do with Mooney at all. 1 CP 133-34 is a repeat of 1 CP 94-95. 1 CP 142-44 is similarly all about Jurss and does not

describe any actions by Mooney or suggest that he might commit domestic violence in the future.

Jurss misrepresents the context of the use of the name “Jurss-Mooney” on the school books. Br. of Resp. at 32-33. There is no evidence—only Jurss’ speculation—that Mooney was responsible for “Jurss-Mooney” being written on those school books. It is likely that the child herself wrote the name or told her teacher to write it. After all, as Mooney testified, the child “does associate with that name and finds that name important to her.” 1 CP 573. There is no evidence that Mooney mailed those books to Jurss’ house. Rather, Jurss testified only that the books “get sent to my house.” 1 CP 234. It is likely that the books were sent home with the child by the teacher or that the child chose to bring them home and that Mooney had nothing to do with it. This was not an act of domestic violence.

Jurss also misrepresents the ThurstonTalk email. She would have the Court believe that Mooney was looking for a way to harass her, interrogated the child until she disclosed Jurss’ place of employment, and then sent an email designed to get Jurss fired. None of this even remotely resembles the truth. Mooney had used ThurstonTalk for many years as a way to keep in touch with his hometown community. 1 CP 532, 570-71. After Jurss got a job with ThurstonTalk, the child told Mooney “all the time” that Jurss’ new job was to run the social media there. 1 CP

532, 533. At some point, Mooney realized that he had been blocked from ThurstonTalk’s Instagram. 1 CP 92-93, 532-33.

In response to this discovery, Mooney sent an email to the general information email address at ThurstonTalk, seeking to be unblocked. 1 CP 92-93, 533. There is no reason for Mooney to have thought that the recipient of the email would be a person with authority over Jurss’ employment. Mooney told the unknown recipient that he suspected that Jurss had blocked him for personal reasons, due to their rocky relationship. 1 CP 92-93. He correctly observed that their personal relationship should have no bearing on his ability to access the ThurstonTalk Instagram. 1 CP 92-93.

There is no evidence that Mooney had ever commented on the Instagram posts or used them as a way to contact Jurss. There was no business reason for Mooney to have been blocked. Jurss did not testify to the reason why Mooney was blocked. Mooney requested resolution of the matter. 1 CP 93. He did not suggest that any employment consequences should be brought to bear. Mooney had no intention of causing problems for Jurss, only wanting to restore his access. 1 CP 570-71. Again, the trial court **did not find** this email to be harassment or stalking. *See* 1 CP 476-79.

In the end, Jurss’ argument for the long-term order boils down to, “as long as Mooney and Jurss are co-parenting their

child, Jurss will have an ongoing fear that Mooney will continue to trigger her.” *See* Br. of Resp. at 36 (arguing that her fear, based on “escalating conflicts” is unlikely to end so long as they have to co-parent). But even if that is so, it does not justify a protection order of more than one year. As the trial court astutely observed, triggering is not a basis for a protective order. *Accord, In re Marriage of Cullen*, 189 Wn. App. 1018, No. 72209-3-I, 2015 WL 4611008, at \*8 (2015).<sup>4</sup>

*Marriage of Cullen* illustrates that the proper remedy for the kind of fear Jurss suffers is to modify the parenting plan, not impose an unfounded protection order. The trial court in that case observed, “While I believe that contacts that she’s had with the father may trigger or exacerbate her PTSD symptoms, that doesn’t mean that every contact is intended to cause that harm or to increase her level of anxiety.” *Cullen*, at \*8. The trial court found that this triggering was not grounds for a domestic violence protection order, but it **was** grounds for restrictions in the parenting plan tailored to eliminate all but necessary contact between the parents. *Id.* This Court affirmed the decision, agreeing that under the trial court’s findings, a protection order was unnecessary but the additional parenting plan restrictions were “wisely imposed” and in the best interests

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<sup>4</sup> This is an unpublished opinion, cited as persuasive authority under GR 14.1.

of the children. *Id.* Mooney is not opposed to parenting plan restrictions that limit contact between him and Jurss. An action to modify the parenting plan is still pending in the trial court.

Although the trial court found Jurss' fear of Mooney reasonable, that fear of being triggered is not fear of domestic violence. The trial court did not **and could not** find that Mooney was likely to commit acts of domestic violence after the protection order expires. Without this statutorily required finding, the trial court did not have authority to extend the term beyond 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.

### **3.3 The trial court abused its discretion in entering restraints to protect the child.**

Mooney's brief argued that the trial court abused its discretion in entering restraints to protect the child. Br. of App. at 18-20. While protections for a child are appropriate in cases where there is domestic violence directed at the child or where a petitioner has a reasonable fear of imminent harm to the child, Mooney argued that neither of those was true in this case. Br. of App. at 18 (citing *Rodriguez v. Zavala*, 188 Wn.2d 586, 591-92, 398 P.3d 1071 (2017)). Because there was no evidence of any reason to fear that Mooney would commit acts of domestic

violence against the child, it was an abuse of discretion to order restraints against acts of domestic violence against the child.<sup>5</sup> Br. of App. at 18-19.

Mooney also argued that the trial court abused its discretion in entering restraints against Mooney interfering with Jurss' physical or legal custody of the child and against removing the child from the state. Br. of App. at 19-20. There was no evidence that Mooney had ever interfered with Jurss' custody of the child—in fact, both parties were diligent in accomplishing visitation transfers at the proper times. Br. of App. at 19. Because there was no evidence of any danger of interference, the trial court abused its discretion in ordering this restraint. Br. of App. at 19.

Similarly, there was no evidence that Mooney had ever improperly taken the child out of state. Br. of App. at 19. In fact, the parenting plan allows the parents to take the child out of state on vacations. *See* 2 CP 22 (par. cc). This unfounded restraint in the DVPO needlessly interferes with the parenting plan. *But see* 1 CP 470 (“Nothing in this order prohibits Mr. Mooney from having contact with the child consistent with the terms of any parenting plan.”) Because there was no evidence of

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<sup>5</sup> Mooney noted in his opening brief, and reiterates here, that he is not suggesting he should be free to commit such acts, only that there is no need or justification for special protections in this case.

any danger of absconding with the child, the trial court abused its discretion in ordering this restraint. Br. of App at 19-20.

Jurss' response entirely fails to address these latter two restraints, apparently conceding that Mooney's arguments are correct. Jurss does not point to any evidence that would suggest a need to restrain Mooney from interfering with custody or removing the child from the state. Because there is no evidence to support these restraints, the trial court abused its discretion, and this Court should reverse and vacate these restraints.

As to the DV restraints for the child, Jurss' reliance on *Rodriguez* is misplaced. In *Rodriguez*, the father had committed numerous violent acts over a long history, culminating in breaking into the house and choking the mother, telling her he would "end what he started," all while the child was present. *Rodriguez*, 188 Wn.2d at 589. There was clear reason to believe that the child could become a victim again, either directly or by witnessing further violent acts. But here there was no evidence of the types of domestic violence contemplated in *Rodriguez*.

Jurss fails to point to any such evidence. She argues only that the restraint protects the child from "being placed in the center of any further acts of domestic violence," Br. of Resp. at 38, and yet does not point to any evidence of any act of domestic violence committed in the presence of the child. As explained above, the ThurstonTalk email and the use of "Jurss-Mooney"

were not acts of domestic violence. The trial court found only one act of domestic violence in this case: the long-ago, drunken sexual encounter. There is no chance that act will be repeated. There is no reason to believe that act represents any threat to the child, especially after Mooney has been a successful parent to the child for the past five years. Because there was no evidence of any danger to the child, the trial court abused its discretion in entering restraints to protect the child. This Court should reverse and vacate those restraints.

### **3.4 The trial court abused its discretion in ordering firearm restrictions against Mooney.**

Mooney's brief argued that the trial court abused its discretion in ordering firearm restrictions against Mooney without any supporting evidence in the record. Br. of App. at 20-23. The arguments presented in Part 3.1, above, apply here. There was no evidence in the record to support the trial court's conclusions that Mooney "represents a credible threat to the physical safety of the intimate partner or child," **RCW 9.41.800(3)**, or that Mooney presents a serious and imminent threat to public health or safety if he were to possess a firearm or other weapon, **RCW 9.41.800(5)**. Because there is no evidence that Mooney poses a danger to anyone's physical safety, the trial court abused its discretion in ordering firearm restrictions.

Regarding the standard of review on this issue, Jurss agrees with Mooney that the required “findings” are actually conclusions of law. Br. of Resp. at 41 (citing *Goodwin v. Hollis*, No. 52019-2-II, slip op. at 17 (Jan. 7, 2020)<sup>6</sup>). Therefore this Court must determine first whether the trial court’s actual findings of fact are supported by substantial evidence and then determine, de novo, whether the findings support the conclusion that Mooney presents a threat to the physical safety of others were he to possess a firearm. See *In re Welfare of A.L.C.*, 8 Wn. App. 2d 864, 871-72, 439 P.3d 694 (2019) (noting the distinction between findings and conclusions and that conclusions of law are reviewed de novo to determine whether the findings support the conclusions).

As in *Goodwin*, there is no indication here of which factual findings the trial court relied on to reach these conclusions. Jurss’ attempt to come up with some findings and supporting evidence suffers from the same infirmities as all of her other arguments. Rather than citing to evidence of actual facts, she cites to her speculation, her triggered reactions, and her hyperbolic rhetoric. Jurss overplays the connotations of “rape” as a violent act, hoping the Court will ignore the actual

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<sup>6</sup> *Goodwin* is an unpublished opinion, cited as persuasive authority under GR 14.1. The parties agree that *Goodwin* sets forth the appropriate standard of review on this issue.

facts of what happened that night ten years ago. There was no violence, no forcible compulsion, and no physical injury. The only reason the event was an assault at all was that Jurss was legally incapable of consent, and even then, only by a preponderance of evidence, not by clear and convincing evidence.

Jurss would have this Court conclude that because she and Mooney had drunken sex, that is in itself reason to believe that there is a “serious and imminent threat” that Mooney will obtain a firearm and shoot Jurss or the child. There is simply no rational connection between drunken sex and firearm violence. The trial court’s finding that Mooney sexually assaulted Jurss ten years ago because she was too drunk to consent does not support a conclusion that Mooney poses a threat of shooting someone.

Jurss attempts, again, to bolster her argument by citing to the “continued harassing behavior” of the ThurstonTalk email, the use of “Jurss-Mooney,” and the unproven parking lot allegation. But, as noted multiple times above, the trial court **did not find** that any of these were harassment or stalking. In fact, the trial court did not find any of these events relevant enough to enter any findings about them. These non-findings do not support the trial court’s conclusions on firearm restrictions.

Because there are no findings or evidence in the record to support the trial court’s conclusions on the firearm restrictions,

the trial court erred in ordering those restrictions. This Court should reverse.

#### **4. Conclusion**

Mooney's brief demonstrated there was not substantial evidence to support the trial court's imposition of certain, specific restrictions. Jurss' response relies entirely on hyperbolic rhetoric and misrepresentations. She fails to point to any factual evidence in the record to support the challenged restrictions.

The trial court overstepped its authority and abused its discretion in granting protections and restrictions that were not supported by statutorily required findings or by substantial evidence in the record. This Court should reverse and vacate those portions of the trial court orders challenged in Mooney's opening brief. 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 8<sup>th</sup> day of July, 2020.

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## **Certificate of Service**

I certify, under penalty of perjury under the laws of the State of Washington, that on July 8, 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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