

FILED
Court of Appeals
Division III
State of Washington
4/6/2018 8:54 AM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35441-5-III

STATE OF WASHINGTON, Respondent,

v.

KEITH ALAN KIMBALL, Appellant.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Two Arrows, PLLC
PO Box 1241
Walla Walla, WA 99362
Phone: (509) 876-2106
Andrea@2arrows.net
Attorney for Appellant

TABLE OF CONTENTS

AUTHORITIES CITED.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

IV. STATEMENT OF THE CASE.....2

V. ARGUMENT.....5

A. Because Kimball was not prohibited from contacting Kara, but merely limited in the subjects and manner of communication, RCW 26.50.110 does not permit a criminal charge for a violation5

B. Because the protective order forbids Kimball’s speech before it occurs, it is a prior restraint that includes protected speech in its sweep and is therefore unconstitutional7

C. Because reasonable minds could differ as to the meaning of “relating to parenting issues,” the order of protection is too vague to permit enforcement15

D. Appellate costs should not be imposed if Kimball does not prevail18

VI. CONCLUSION.....19

CERTIFICATE OF SERVICE21

AUTHORITIES CITED

Federal Cases

Carroll v. President & Commissioners of Princess Anne, 393 U.S. 75, 89 S. Ct. 347, 21 L. Ed. 2d 325 (1968)10

Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).....15, 16

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995)8

Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931).....10

R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).....8

Terminiello v. City of Chicago, 337 U.S. 1, 69 S. Ct. 894, 93 L. Ed. 1131 (1949).....13

State Cases

City of Seattle v. May, 171 Wn.2d 847, 256 P.3d 1161 (2011).....14

City of Spokane v. Douglass, 115 Wn.2d 171, 795 P.2d 693 (1990).....16

In re Marriage of Caylor, 194 Wn. App. 1003 (2016)12

In re Marriage of Guthrie, 188 Wn. App. 1057 (2015)12

In re Marriage of Meredith, 148 Wn. App. 887, 201 P.3d 1056 (2009).....8, 10, 11 12

In re Marriage of Suggs, 152 Wn.2d 74, 93 P.3d 161 (2004).....5, 10, 11

In re Parmelee, 115 Wn. App. 273, 63 P.3d 800 (2003).....9

State v. Alphonse, 147 Wn. App. 891, 197 P.3d 1211 (2008).....9, 16

State v. Armendariz, 160 Wn.2d 106, 156 P.3d 201 (2007).....6

State v. Bunker, 169 Wn.2d 571, 238 P.3d 487 (2010).....5, 6

State v. Coria, 120 Wn.2d 156, 839 P.2d 890 (1992).....16

State v. Dejarlais, 136 Wn.2d 939, 969 P.2d 90 (1998).....7

State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004).....8, 9

State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016).....18

<i>State v. Stump</i> , 185 Wn.2d 454, 374 P.3d 89 (2016).....	19
<i>State v. Williams</i> , 144 Wn.2d 197, 26 P.3d 890 (2001).....	16
Statutes	
RCW 26.50.060(1)(h).....	7
RCW 26.50.110.....	5, 6, 7
Court Rules	
GR 14.1(a).....	12
RAP 14.2.....	18, 19
RAP 15.2(f).....	18
Other Sources	
<i>Black's Law Dictionary</i> (10th Ed. 2014).....	6

I. INTRODUCTION

The State charged Keith Alan Kimball with violating an order of protection on three occasions by sending text messages to his ex-wife, Kara Kimball.¹ The restriction he was accused of violating allowed him to contact Kara concerning “parenting plan logistics and parenting issues.” The text messages expressed Kimball’s frustration with Kara’s decisions about visitation with their daughters and his perception that Kara’s decisions were harmful to the girls and his relationship with them. Before trial, Kimball’s attorney argued that the restraint provision was unconstitutionally vague and amounted to a prior restraint on speech, and that RCW 26.50.110 did not criminalize the violation. The trial court denied his motion to dismiss, and Kimball was subsequently convicted of three counts of violating the order of protection. He now appeals and contends the restraint provision is not enforceable.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: RCW 26.50.110 does not criminalize a violation of a provision allowing, but limiting, communication.

¹ Because Keith and Kara Kimball share a last name, Kara Kimball shall be referenced in this brief as “Kara,” while references to “Kimball” shall denote Keith Kimball. These references are intended to provide clarity and do not reflect any lack of respect.

ASSIGNMENT OF ERROR NO. 2: The order imposes a prior restraint on Kimball's speech.

ASSIGNMENT OF ERROR NO. 3: The order is void for vagueness.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: When RCW 26.50.110 criminalizes a violation of a provision of a protective order that prohibits contact, may criminal sanctions be applied to a violation of a provision that does not prohibit contact?

ISSUE NO. 2: Does the protective order impose a content-based restriction on Kimball's speech that intrudes upon his First Amendment rights?

ISSUE NO. 3: Does the protective order fail to define a violation with sufficient definiteness to give advance notice of what constitutes a criminal offense and to prevent arbitrary and subjective enforcement?

IV. STATEMENT OF THE CASE

Keith and Kara Kimball married in 2005 and divorced in 2015. RP 33-34. They share two children, and their custodial arrangements are governed by a parenting plan. RP 33-34. Under the terms of a parenting plan, as well as a related order of protection issued in connection with the

dissolution action, Kimball was restrained from contacting or communicating with Kara except in written form and except for communications “relating to parenting issues or parenting plan logistics.” RP 36-38, CP 50.

In January and February 2017, Kimball sent Kara three text messages that the State alleged violated the restraint provisions of the protective order. CP 90-92. Those messages stated:

I have to cancel this Saturday visit. You have succeeded in completely ruining my life. Because you insist in continuing this lie I have not been able to get a job and am completely broke. I loved you and treated you with compassion. The girls love me. You are basically holding them hostage. How can you be so ungrateful and vindictive? I’m a good, compassionate father who deserves to be able to see my daughters.

(Sent Jan. 19, 2017)

Excuse me for thinking you might have a soul. I took enough abuse from you to last a lifetime. So I’m beyond giving a shit about your bs [sic]. I never threatened you and you are denying my daughters of a beautiful, loving family and father.

I offered you friendship and a respectful relationship because our daughters deserve you. I was wrong to call you Karl. He never hurt you the way you hurt our daughters. I care about your life and your right to be happy because Hannah and Olivia love you and your well-being is important to them. Your BS [sic] fantasies are extremely destructive. But you will never destroy the bond between the girls and I.

(Sent Feb. 4, 2017)

How evil are you? Olivia and Hannah just want there [sic] dad back. Fuck you and your bullshit. You are an abuser. Nothing will change that.

(Sent Feb. 12, 2017)

CP 52-59. Based upon these messages, as well as Kimball's prior convictions for violating an order of protection, the State charged Kimball with three counts of felony violation of an order of protection, contrary to RCW 26.50.110. CP 90-92.

Before trial, Kimball's attorney moved to dismiss the charges, arguing that RCW 26.50.110 did not authorize criminal prosecution for violating a limitation on communication rather than a prohibition, that the order constituted an unconstitutional prior restraint on Kimball's speech, and the terms of the limitation on Kimball's communication were unconstitutionally vague. CP 43-47. Following a hearing, the court denied Kimball's motion and entered an order finding that the restraint provision was not vague, that RCW 26.50.110 criminalized it, and the order did not constitute an unconstitutional prior restraint on speech. CP 69-70.

Subsequently, the matter proceeded to a trial, and a jury convicted Kimball of all three counts. RP 110-11, CP 112. Based upon an agreed score of "3," the trial court imposed a low-end sentence of 15 months'

incarceration and 12 months' community custody. RP 118, 134, CP 116. Kimball now appeals, and has been found indigent for that purpose. CP 121, 123.

V. ARGUMENT

On appeal, Kimball reasserts his arguments raised below that (1) the provision of the order of protection limiting, but not prohibiting, his communication with Kara is not criminalized by RCW 26.50.110; (2) the order constitutes an unlawful prior restraint on Kimball's speech; and (3) the restraint provisions are unconstitutionally vague. These errors concern questions of statutory and constitutional interpretation, which are reviewed *de novo* by this court. *State v. Bunker*, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010); *In re Marriage of Suggs*, 152 Wn.2d 74, 79, 93 P.3d 161 (2004).

- A. Because Kimball was not prohibited from contacting Kara, but merely limited in the subjects and manner of communication, RCW 26.50.110 does not permit a criminal charge for a violation.

The State charged Kimball with violating RCW 26.50.110. That statute reads, in pertinent part:

Whenever an order [of protection] is granted . . . and the respondent or person to be restrained knows of the order, a

violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:

(i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party.

RCW 26.50.110(1)(a). Because the statute does not criminalize a restraint provision in an order that merely limits the subjects of communication rather than prohibiting contact, the restraint provisions of the order in this case cannot be enforced through criminal sanctions.

The court interprets a statute to give effect to the legislature's intention, considering first the statute's plain language. *Bunker*, 169 Wn.2d at 577-78. If the plain language is unambiguous, then the inquiry ends and the court enforces the statute in accordance with its plain meaning. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Here, RCW 26.50.110(1)(a) does not criminalize the violation of all restraint provisions, but only specified ones. At issue here is its prohibition of "restraint provisions prohibiting contact with a protected party." The term "restraint provisions" is conditioned by the language "prohibiting contact with a protected party." The plain language meaning of "prohibit" is "To forbid by law." *Black's Law Dictionary* (10th Ed.

2014). Thus, under RCW 26.50.110(1)(a), it is a crime to violate restraint provisions that forbid the restrained party to contact the protected party.

In the present case, Kimball was not subject to a restraint provision that forbade him from contacting Kara. To the contrary, he was expressly allowed to contact her, and to discuss certain subjects with her. The restraint provision at issue is, therefore, not the kind of restraint that can be enforced through a criminal sanction under RCW 26.50.110(1)(a); instead, the provision is enforceable through the court's contempt power under RCW 26.50.110(3).

Because Kimball was not subject to nor accused of violating one of the specified types of restraints for which criminal sanctions are authorized, his conduct did not constitute a crime under RCW 26.50.110(1)(a). Accordingly, the conviction should be reversed.

B. Because the protective order forbids Kimball's speech before it occurs, it is a prior restraint that includes protected speech in its sweep and is therefore unconstitutional.

RCW 26.50.060(1)(h) allows the trial court to enter an order restraining the respondent from having any contact with the victim of domestic violence. Under *State v. Dejarlais*, 136 Wn.2d 939, 945, 969

P.2d 90 (1998), this provision does not require the court to prohibit all contact, but rather allows some contact, such as by telephone or through a third-party. However, when a restraining order permits contact but seeks to restrain the subjects of allowable communication, it runs the risk of infringing upon constitutionally protected speech. Because the order at issue here constitutes a prior restraint against Kimball's speech on the basis of its content, and because it reaches a substantial amount of constitutionally protected speech, the order violates Kimball's First Amendment rights.

“The First Amendment of the United States Constitution prohibits the government from interfering with a person's ‘freedom of speech.’” *In re Marriage of Meredith*, 148 Wn. App. 887, 896, 201 P.3d 1056 (2009). While laws may broadly restrain conduct, “the law ‘is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.’” *State v. Kilburn*, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004) (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 579, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995)).

Furthermore, content-based restrictions against speech are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112

S. Ct. 2538, 120 L. Ed. 2d 305 (1992). Certain categories of speech, however, may be prohibited. Generally, speech made with the intent to harass or threaten another is not protected if the speech rises to the level of a true threat. *See, e.g., Kilburn*, 151 Wn.2d at 43 (interpreting criminal harassment statute as prohibiting only true threats); *State v. Alphonse*, 147 Wn. App. 891, 902, 197 P.3d 1211 (2008); *In re Parmelee*, 115 Wn. App. 273, 288, 63 P.3d 800 (2003). A true threat is “a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person.” *Kilburn*, 151 Wn.2d at 43 (internal quotation marks omitted). Such speech does not receive constitutional protection because of an overriding governmental interest in protecting individuals from “the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.” *Kilburn*, 151 Wn.2d at 43. When domestic violence has occurred, it is reasonable, appropriate, and constitutionally permissible for courts to enter orders prohibiting fear-engendering harassing speech for these same reasons.

However, restrictions on the contents of one’s speech, as opposed to restrictions on conduct (such as coming within a certain distance of a protected person or contacting a protected person) must be strictly limited

to unprotected speech to avoid constitutional infirmity. Prior restraints, or governmental orders that forbid certain communications in advance of them occurring, “carry a heavy presumption of unconstitutionality.” *Suggs*, 152 Wn.2d 74, 81, 93 P.3d 161 (2004). This is because the line between protected and unprotected speech is often fine, so an order that is not tightly and narrowly crafted runs the risk of censoring protected speech. *See id.* at 82-83. Consequently, prior restraints are allowed only in the most exceptional circumstances, “such as war, obscenity, and ‘incitements to acts of violence and the overthrow by force of orderly government.’” *Id.* at 81 (*quoting Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716, 51 S. Ct. 625, 75 L. Ed. 1357 (1931)).

Since broad prohibitions intrude upon individual liberties, where prohibition of speech is concerned, the order “must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order.” *Suggs*, 152 Wn.2d at 83 (*quoting Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 75, 183, 89 S. Ct. 347, 21 L. Ed. 2d 325 (1968)). When an order uses indefinite wording, fails to specifically limit the scope of the prohibition to unprotected speech, or broadly intrudes upon protected speech, it constitutes an unlawful prior restraint. *Id.* at 84; *Meredith*, 148 Wn. App. at 898.

In both *Suggs* and *Meredith*, Washington courts struck down restraining orders that limited specific speech by the restrained party. In *Suggs*, the order forbade the respondent from “knowingly and willfully making invalid and unsubstantiated allegations or complaints to third parties which are designed for the purpose of annoying, harassing, vexing, or otherwise harming Andrew O. Hamilton and for no lawful purpose.” 152 Wn.2d at 83. Considering the language at issue, the *Suggs* Court observed that it could be interpreted to apply to libelous speech, harassing speech, and a hybrid of both. *Id.* As a result, the *Suggs* Court held the order was insufficiently specific because the wording left the court “unable to ascertain what speech the order actually prohibits.” *Id.* at 84. Moreover, language that appeared to *Suggs* to be valid and substantiated could be determined invalid and unsubstantiated by a court, leading *Suggs* to be hesitant to make any allegations, including ones she believed to be truthful. *Id.*

In *Meredith*, the order prohibited the respondent from contacting any agency about the petitioner’s immigration status without prior approval of the court. 148 Wn. App. at 895-96. There, the court concluded that the order went further than prohibiting libelous or harassing speech and made no distinction between protected or unprotected speech. *Id.* at 898. Because the order was “not specifically

crafted to prohibit only unprotected speech,” it amounted to an unconstitutional prior restraint. *Id.*²

The order at issue here is similarly infirm. It permits only communication “relating to parenting issues or parenting plan logistics,” but does not clearly define those terms or limit the restriction to constitutionally unprotected speech. RP 36-38, CP 50. It regulates the content of Kimball’s speech without specific delineation of what constitutes a “parenting issue” and what does not. Parenting children is fraught with emotional and moral risk, and differences in parenting styles and philosophies can frequently result in conflict between parents. Moreover, a parent may be concerned that the other parent’s choices and actions affecting the parental relationship are detrimental to the children. However, the order provides no guidance to navigate these precarious topics within the confines of the order, without chilling legitimate concerns about the Kimball children’s wellbeing. As in *Suggs*, what appears to be a “parenting issue” to one may appear to be personal criticism to another. As such, the scope of the order’s prohibition is

² Similar results have been reached in unpublished opinions in Washington. See, e.g., *In re Marriage of Guthrie*, 188 Wn. App. 1057 (2015); *In re Marriage of Caylor*, 194 Wn. App. 1003 (2016). Pursuant to GR 14.1(a), these authorities may be considered for persuasive value and are not binding authorities.

uncertain, and the boundary between permissible and impermissible communications nebulous.

Furthermore, the order is not plainly limited to unprotected true threats, nor is the speech for which Kimball was convicted plainly unprotected under the First Amendment. As in *Suggs* and *Meredith*, the order goes beyond the government's interest in protecting Kara Kimball from fear of violence and disruption and reaches speech that may be merely provocative or challenging. Indeed, speech "may best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 93 L. Ed. 1131 (1949). While the court's desire to protect Kara Kimball from distress is understandable, it may not constitutionally prohibit Kimball from speaking words or criticisms that may upset her. Having elected not to bar all contact, the court's regulation of the content of Kimball's communications must meet strict First Amendment requirements. Because the regulation of content here is presumptively unconstitutional, and because it is not clearly limited only to unprotected speech, it is an unlawful prior restraint and cannot be enforced.

Below, the State argued that Kimball was precluded from raising constitutional objections to the order because it constituted an impermissible collateral attack on the order. CP 62-63. But the State's own authority defeats the State's argument. In *City of Seattle v. May*, 171 Wn.2d 847, 852, 256 P.3d 1161 (2011), the Washington Supreme Court acknowledged that the collateral bar rule prohibits a party from challenging the validity of a court order in a violation proceeding unless the order is void due to an absence of jurisdiction to issue the type of order, to address the subject matter, or to bind the defendant. It therefore rejected the argument that failure to make required findings rendered the order unenforceable. *Id.* at 853. However, the *May* Court stated:

Today, we clarify that, in a proceeding for violation of a court order, the trial court's gate-keeping role includes excluding orders that are void, orders that are inapplicable to the crime charged (i.e., the order either does not apply to the defendant or does not apply to the charged conduct), **and orders that cannot be constitutionally applied to the charged conduct** (e.g., orders that fail to give the restrained party fair warning of the relevant prohibited conduct).

Id. at 854 (emphasis added).

Kimball's argument that the order constitutes an unlawful content-based prior restraint against his speech is squarely contemplated by the *May* Court as the type of challenge that may be brought in a violation

proceeding. Thus, the collateral bar rule did not preclude him from raising the unconstitutionality of the order in the criminal case.

Because the order fails to comport with the requirements of the First Amendment to limit the content of Kimball's speech, the trial court should have granted Kimball's motion to dismiss. Accordingly, the convictions premised upon the order must be reversed.

C. Because reasonable minds could differ as to the meaning of "relating to parenting issues," the order of protection is too vague to permit enforcement.

For similar reasons, the order's restriction fails to give adequate notice of which topics of conversation are allowed and which are forbidden. As a result of this vagueness, the order fails to provide ascertainable standards of guilt. Accordingly, under the due process clause of the Fourteenth Amendment, the restriction may not be enforced.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). A legal directive is unconstitutional if it "forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ

as to its application.” *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990). Vagueness in legal obligations traps the innocent by failing to provide fair warning of what is prohibited, invites arbitrary and discriminatory enforcement on an *ad hoc* and subjective basis, and when the First Amendment is implicated, inhibits the exercise of basic rights by causing the obligee to self-censor broadly lest he risk encroaching into forbidden territory. *Grayned*, 408 U.S. at 108-09.

Avoiding these evils does not require an absolute standard of precision in language. *Alphonse*, 147 Wn. App. at 907. But when a legal order employs inherently subjective language or invites an inordinate amount of police discretion, it is impermissibly vague. *State v. Coria*, 120 Wn.2d 156, 164, 839 P.2d 890 (1992). Although legal enactments are presumed constitutional and the burden rests with the challenger to show it is vague beyond a reasonable doubt, that burden is met when the order (1) fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. *State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001).

Here, the order prohibited Kimball from communicating with Kara except for “communications relating to parenting issues and parenting

plan logistics.” CP 50. The language permitting conversations about matters “relating to parenting issues” is incredibly broad and inherently subjective. What is a parenting issue to one may be an unrelated issue between parents to another. Moreover, as discussed above, parenting can be rife with conflict; but it is entirely unclear from the language of the order whether conversing about parental conflict would or would not be considered “relating to parenting issues” within the meaning of the order. If Kimball told Kara, “You’re a terrible person and it’s hurting our children,” would that violate the order? Would only the first portion violate the order? How could Kimball effectively communicate his concerns in the second portion without communicating the first portion? Must Kimball craft his language carefully to avoid compound observations? This example highlights not only how it is perfectly possible for reasonable people to reach different conclusions about the scope of the restriction based upon their subjective interpretations of the language, but also how vagueness in restricting the contents of one’s speech requires inordinate self-censorship at best, and mere silence at worst.

Because the prohibition against all communications except those “relating to parenting issues” is inherently subjective, it fails to define the criminal violation with sufficient definiteness to give advance notice of

what is prohibited, and invites enforcement on an arbitrary and *ad hoc* basis. Accordingly, the order is unconstitutionally vague and unenforceable, and Kimball's conviction should be reversed.

D. Appellate costs should not be imposed if Kimball does not prevail.

Pursuant to the General Court Order dated June 10, 2016 and Title 17 of the Rules on Appeal, Kimball respectfully requests that due to his continued indigency, the court should decline to impose appellate costs in the event he does not prevail. His report as to continued indigency is filed contemporaneously with this brief and shows that he lacks assets and income, carries substantial debt, has not held employment in the past three years, and suffers from a disorder that affects his ability to maintain employment.

Kimball was found indigent for purposes of appeal. CP 123. The presumption of indigence continues throughout review. RAP 15.2(f). The Court of Appeals has recognized that in the absence of information from the State showing a change in the appellant's financial circumstances, an award of appellate costs on an indigent appellant may not be appropriate. *State v. Sinclair*, 192 Wn. App. 380, 393, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016). The Supreme Court has additionally recognized that application of RAP 14.2 should "allocate appellate costs in a fair and

equitable manner depending on the realities of the case.” *State v. Stump*, 185 Wn.2d 454, 461, 374 P.3d 89 (2016).

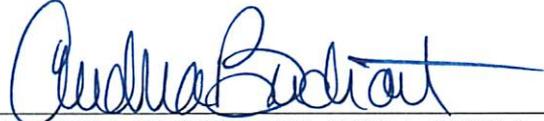
Finally, in recognition of the hardships imposed by large appellate cost awards, the Supreme Court has revised RAP 14.2 to provide that unless the Commissioner receives evidence of a substantial change in the appellant’s financial circumstances, the original determination that the appellant lacks the ability to pay should control and costs should not be imposed on indigent appellants.

Under these circumstances, this court should exercise its discretion under RAP 14.2 to decline to impose appellate costs. Kimball has been found indigent for appeal and has complied with this court’s General Order. Under the *Sinclair* standard as well as revised RAP 14.2, an appellate cost award is inappropriate in this case.

VI. CONCLUSION

For the foregoing reasons, Kimball respectfully requests that the court REVERSE and DISMISS his convictions for violating an order of protection.

RESPECTFULLY SUBMITTED this 6 day of April, 2018.

A handwritten signature in blue ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

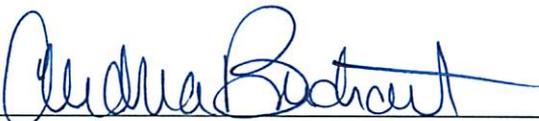
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Keith Kimball, DOC #400816
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

Denis Paul Tracy
Whitman Co. Prosecutor
PO Box 30
Colfax, WA 99111-0030

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 6 day of April, 2018 in Walla Walla, Washington.


Andrea Burkhardt

BURKHART & BURKHART, PLLC

April 06, 2018 - 8:54 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35441-5
Appellate Court Case Title: State of Washington v. Keith Alan Kimball
Superior Court Case Number: 17-1-00032-3

The following documents have been uploaded:

- 354415_Briefs_20180406085404D3550747_0101.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Appellants Brief.pdf
- 354415_Financial_20180406085404D3550747_4164.pdf
This File Contains:
Financial - Other
The Original File Name was Report as to Continued Indigency.pdf

A copy of the uploaded files will be sent to:

- amandap@co.whitman.wa.us
- denist@co.whitman.wa.us

Comments:

Sender Name: Andrea Burkhardt - Email: Andrea@2arrows.net
Address:
PO BOX 1241
WALLA WALLA, WA, 99362-0023
Phone: 509-876-2106

Note: The Filing Id is 20180406085404D3550747