

**NO. 44368-6-II**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOSHUA EMANUEL HOWARD, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Vicki Hogan

No. 12-1-03251-5

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**BRIEF OF RESPONDENT**

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

1. When defendant was convicted of attempting to murder his wife in front of their children, was the court's subsequent no-contact order reasonably necessary to achieve the compelling State interest in protecting children from witnessing domestic violence?

2. Has defendant failed to show a double jeopardy violation when the judgment and sentence makes no reference to the vacated conviction?

B. STATEMENT OF THE CASE.

1. Procedure

On August 28, 2012, the State charged Joshua Howard, defendant, with one count of attempted murder in the second degree and one count of unlawful possession of a firearm in the second degree. CP 1-2. Charges were later amended to one count of attempted murder in the first degree, one count of assault in the first degree, and one count of unlawful possession of a firearm in the second degree. CP 5-7. The attempted murder and assault charges both included a firearm enhancement and a domestic violence aggravating factor. CP 5-7.

Defendant's jury trial, held before the Honorable Vicki Hogan, began on December 12, 2012. RP 40. Defendant was found guilty as charged. RP 448-450. The jury also returned a special verdict to the domestic violence aggravating factor, finding beyond a reasonable doubt that the crime was one of domestic violence that occurred within sight or sound of the minor children. RP 488-450. On January 4, 2012, the sentencing court granted the State's motion to merge defendant's lesser conviction of assault in the first degree into the greater conviction of attempted murder in the first degree, on the condition that it could be reinstated should the greater crime be overturned on appeal. RP 457-459. The court then imposed an exceptional sentence totaling 420 months in confinement. CP 105; RP 466-467.

Defendant timely filed a Notice of Appeal on January 9, 2013. CP 114-129.

## 2. Facts

Having met in 2006, defendant and Mrs. Howard married in 2008. RP 45. Mrs. Howard characterized their relationship as "off and on." RP 46-47. She also testified that it was "off" at the time of the crime, and that she and her children were living separately from defendant. RP 46-47. Mrs. Howard had nine children between the ages of 14 and 10 months old.

RP 43, 46-47. The youngest four children, who were 5, 4, 2 and 10 months old, were defendant's biological children. RP 45.

On July 4, 2012, Mrs. Howard allowed defendant to spend the night at her apartment with the expectation that he leave the next day. RP 50. Mrs. Howard became concerned when defendant did not leave the following day and appeared to be staying another night. RP 54-55. Worried, she had all of the children sleep with her in her room and told them that they would leave if defendant was still there in the morning. RP 54-56.

Defendant was still there the next day, so Mrs. Howard prepared the children to leave, gathering them on the porch. RP 57-59. As she got the children ready to leave, defendant argued with her while pacing back and forth. RP 57-59. As Mrs. Howard walked out of the bedroom, defendant told her, "I love you, but you have to die." RP 60. When she looked back, she saw defendant pointing a gun at her, so she started to run. RP 60-62. A shot was fired as Mrs. Howard ran down the stairs. RP 63. Mrs. Howard ran out of the house and through the yard, leading defendant away from the children who were scared and crying on the front porch. RP 64-66.

As she ran through the yard, Mrs. Howard fell to the ground when she realized she couldn't get away. RP 67. Defendant walked up to Mrs.

Howard, held the gun two feet from her face, and pulled the trigger. RP 67-68. The gun misfired and did not discharge. RP 69. Mrs. Howard grabbed the gun and managed to get it away from defendant, who then ran off. RP 69-73.

Mrs. Howard removed the bullets from the gun, wrapped them in a jacket, and called the police. RP 79. Mrs. Howard gave the bullets to the police when they arrived. RP 80. Forensics later recovered a bullet lodged in the stairwell. RP 211.

At trial, two the of children, D.R. age 12 and N.D age 8, testified that they heard the gunshot following an argument then screamed in fear as their mother ran out of the house. RP 104-108, 128-130. They also witnessed their father attempt to shoot their mother in the yard. RP 104-108, 128-130. N.R. age 11, testified that she was holding her ten month old sister when she saw defendant pull out a gun in the stairwell. RP 140-142. She also testified that she heard the gun cocked and fired before her mother ran out of the house. RP 142. All of the children testified that they and their siblings were scared and either screaming or crying as this occurred. RP 108, 128, 146.

C. ARGUMENT.

1. BECAUSE DEFENDANT ATTEMPTED TO MURDER HIS WIFE IN FRONT OF THEIR CHILDREN, THE NO-CONTACT ORDER WAS REASONABLY NECESSARY TO ACHIEVE THE STATE'S COMPELLING INTEREST IN PROTECTING CHILDREN FROM WITNESSING DOMESTIC VIOLENCE.

The court may impose crime-related prohibitions such as no-contact orders pursuant to RCW 9.94A.505(8). A crime-related prohibition is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). A no-contact order is a crime-related prohibition. *In re Personal Restraint of Rainey*, 168 Wn.2d 367, 376, 229 P.3d 686 (2010). Such sentencing conditions must be "sensitively imposed" so that they are "reasonably necessary to accomplish the essential needs of the State and public order." *Id.* at 374, 229, P.3d 686 quoting *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

While parents have a fundamental right to raise their children without state interference, *see In re Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21 (1998) (a parent's right to rear his children without state interference is a constitutionally-protected fundamental liberty interest); *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), these "[p]arental rights are not absolute, however, and may be

subject to reasonable regulation." *City of Summer v. Walsh*, 148 Wn.2d 490, 526, 61 P.3d 1111 (2003). The sentencing court may limit fundamental rights when reasonably necessary to accomplish the essential needs of the State. *State v. Letourneau*, 100 Wn. App. 424, 438, 997 P.2d 436 (2000). This includes restrictions on the right to parent if the condition is reasonably necessary to prevent harm to the children. *Id.*

The State has a recognized interest in protecting children from witnessing domestic violence. *State v. Ancira*, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001). The legislature has made a finding that

"[t]he collective costs to the community for domestic violence include the systematic destruction of individuals and their families, lost lives, lost productivity, and increased health care, criminal justice, and social service costs. Children growing up in violent homes are deeply affected by the violence as it happens and could be the next generation of batterers and victims."

Laws of 1991, ch. 10, § 99.

The trial court's imposition of crime-related prohibitions such as no contact orders is fact-specific and therefore reviewed for an abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). An abuse of discretion occurs when a decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Ancira*, 107 Wn. App. at 653. Further, "the interplay of sentencing conditions and

fundamental rights is delicate and fact-specific, not lending itself to broad statements and bright-line rules." *Rainey*, 168, Wn.2d at 377.

In *In re Personal Restraint of Rainey*, the defendant challenged the no-contact order with his child as violative of his fundamental right to parent. *Id* at 377. Following a bitter divorce, the defendant kidnapped his daughter to Mexico and demanded full custody of the child, L.R., from his ex-wife Kimberly. *Id.* at 371. After he was apprehended, defendant sent letters while in custody to L.R. blaming her mother for keeping the family apart. *Id.* at 371-372. He was convicted for telephone harassment and first-degree kidnapping, and the court imposed a lifetime no-contact order with his L.R. *Id.* at 371. On appeal, the court found that the no-contact order did not violate his fundamental right to parent and was appropriate given that he used L.R. to inflict emotional stress on her mother. *Id.* at 382. Nonetheless, the court remanded because the record was insufficient for the reviewing court to determine whether the *duration* of the lifetime no-contact order was reasonably necessary to achieve the State's interests in protecting children from witnessing domestic violence. *Id.* at 382.

Here, defendant challenges the lifetime no-contact orders claiming that they violate his constitutional right to parent. Brief of Appellant at 17. Specifically, he argues that the court abused its discretion because it did not present any facts or arguments that the order was "reasonably

necessary to serve the State's interest in [his children's] safety." *Id.*

Defendant's claim fails as the court is not required to articulate its reasons for entering a no-contact order and the record shows that the orders were reasonably necessary to achieve a compelling state interest.

There is no requirement for the court to articulate its reason for prohibiting contact between a defendant and his children. *Rainey* does not set forth a bright-line rule requiring trial courts to expressly justify the conditions and duration of no-contact orders under the "reasonably necessary" standard. Rather, *Rainey* requires reviewing courts to analyze the scope and duration of the orders independently in light of the facts in the record. Remand is only required when a reviewing court is unable to determine whether a specific provision or term is reasonably necessary. *Id.* at 381-82. In *Rainey*, the Supreme Court was unable to determine whether, in the absence of any express justification by the trial court, a lifetime no-contact order was reasonably necessary to achieve the State's interest in protecting a child from her father. *Id.* Furthermore, the *Rainey* court concluded that the trial court should have addressed Mr. Rainey's argument that a no-contact order would be detrimental to his daughter's interests before pronouncing sentence. *Id.* at 382. Thus, the *Rainey* court had no choice but to remand for resentencing.

This case is distinguishable from *Rainey* as there is ample evidence in the record that the no-contact orders were reasonably necessary to achieve the State's compelling interest in protecting children from witnessing domestic violence. *Ancira*, 107 Wn. App. at 654. Three of the children testified about the traumatic experience of witnessing their father attempt to kill their mother in front of them. D.R. overheard the argument between his parents as well as the gunshot fired in the stairwell. RP 99-102. He testified that he and his siblings screamed in fear as their mother ran out of the house screaming. RP 104-106. He also witnessed his father calmly follow his mother out of the house, hold the gun to her face, and pull the trigger as his mother repeatedly pleaded "no." RP 106-108. He testified to the emotional impact that all of this had on him. RP 108.

N.D. also witnessed her father attempt to kill her mother, testifying that "[defendant] tried to shoot my mom." RP 121. She testified that she and her siblings screamed in fear as they watched their mother run from their father. RP 128. N.D. also testified that she was worried that her mother was going to die as she watched defendant pulled the trigger. RP 130-132.

N.R. witnessed defendant pull the gun out in the stairwell, and heard it being cocked. RP 141-142. N.R. was holding her ten month old sister and screaming in fear as her mother ran out of the house. RP 143.

N.R. testified that she hid behind garbage cans before deciding to drop her sister and run to the neighbor's house to for help. RP 144. She testified that her mother was scared as well. RP 153.

The record also shows that the trial court expressly considered the facts of the case, as well as the domestic violence aggravating factor, in finding that the order was reasonably necessary to prevent future harm to the children. At sentencing, the court heard arguments from both parties regarding the trauma experienced by the children. The State argued the following:

"the jury also returned a... special verdict finding domestic violence aggravating factor... [d]efendant tried to kill Lorrie Howard that day. He didn't try just once, he tried twice. He had chased her out to the front yard and in full view of eight kids, four being his own, whom he showed absolutely no regard for, he tried to murder her in front of his kids and her kids."

RP 461-462.

Defense counsel even stated that, "20 years...I believe is appropriate and fair and would protect the public and protect the victim and the victim's family who, were also victims of this because I'm sure they were traumatized." RP 465. The court then stated the following:

"The jury did return a domestic violence aggravating factor, which gives the Court permission to go outside the standard range. The Court is cognizant, not only of the argument that your attorney made and should consider whether or not there is excessive punishment for any individual who lost

his temper, but also the *Court must balance the impact to eight children who were on the porch when the weapon was discharged.*"

RP 466 (emphasis added).

As the court is not required to expressly justify its reasons for prohibiting contact from defendant's children and the record shows that the orders were reasonably necessary to achieve the State's compelling interest in protecting children from witnessing domestic violence, the court did not abuse its discretion. As such, the Court should dismiss defendant's claim because the no-contact orders were sensitively imposed and were not manifestly unreasonable or imposed on untenable grounds.

2. DOUBLE JEOPARDY IS NOT VIOLATED BECAUSE THE JUDGMENT AND SENTENCE MAKES NO REFERENCE TO THE VACATED CONVICTION, BUT THE WRITTEN ORDER SHOULD BE STRICKEN AS IT RECOGNIZES THE VALIDITY OF THE LESSER CONVICTION.

The double jeopardy clause of our constitution "prohibits the imposition of multiple punishments for the same criminal conduct." *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010). The trial court does not violate double jeopardy principles if it enters a judgment and sentence referring only to the greater charge where a jury finds a defendant guilty of multiple counts, or of alternative means of committing a single count,

for the same offense. *State v. Fuller*, 169 Wn. App. 797, 833, 282 P.3d 126 (2012). Issues pertaining to double jeopardy are reviewed *de novo*. *Id.* at 832.

A sentencing court does not violate double jeopardy when the judgment and sentence refers only to a single conviction that results from the merger of multiple convictions. *Fuller*, 169 Wn. App. at 835. In *Fuller*, the court merged Fuller's two first-degree murder convictions as well as the deadly weapon sentencing enhancements. *Id.* at 834. The court then entered a written judgment and sentence stating that Fuller was convicted of one count of first-degree murder. *Id.* at 835. On appeal, Fuller claimed that in order to comport with double jeopardy, the trial court was required to permanently dismiss all lesser or alternative guilty findings. *Id.* at 834. The court disagreed, holding that double jeopardy was not violated where the sentencing court effectively merged his convictions and entered a written judgment and sentence stating that he was convicted of only one count of first-degree murder. *Id.* at 835. The court further noted that notwithstanding an effective merger, double jeopardy would not have been violated because the judgment and sentence referenced only one conviction. *Id.* The court stated the following:

“Moreover, even if the sentencing did not effectively merge both murder convictions, it did not violate double jeopardy guarantees under *Turner* and *Womac*. The sentencing court

entered a judgment stating that Fuller was found guilty of one count of first-degree murder and sentenced Fuller on only one count of first-degree murder. Although filed the same day as the judgment and sentence, *the sentencing court did not append to the judgment and sentence, the order merging the counts into a single conviction.*”

*Fuller*, 169 Wn. App. at 835 (emphasis added)

In *Turner*, the court consolidated the appeals of Guy Turner and Faulolua Faagata who both claimed that double jeopardy required the permanent unconditional vacation their lesser convictions. *Turner*, 169 Wn.2d at 453-54. The trial court vacated Turner's lesser conviction and entered a written order, appended to the judgment and sentence, recognizing that it was "nevertheless a valid conviction" for which Turner could be sentenced if his remaining robbery conviction did not survive appeal. *Id.* at 452-53. Similarly, the court in *Faagata* vacated defendant's lesser convictions stating that "[w]e have a jury that entered a conviction, and I don't think that the jury's finding should be a nullity. I think it's entitled to some weight. So I'm going to dismiss it conditionally with the understanding that should Count I be reversed... it can be reinstated." *Id.* at 454. The court found that both the conditional written order appended to Turner's judgment and sentence and the court's language at Faagata's sentencing openly recognized the validity of the vacated lesser convictions and thus violated double jeopardy. *Id.* at 456. The court then held that a

trial court does not violate double jeopardy if (1) it enters a judgment and sentence on only one conviction; (2) its judgment and sentence, including any appended order, does not include any reference to any lesser convictions; and (3) it does not reference any lesser convictions are sentencing. *Id.* at 464-465.

Here, defendant claims that the written order vacating his lesser conviction violates double jeopardy. Brief of Appellant at 9. Defendant's claim fails as the court entered a judgment and sentence without any reference to the vacated conviction.

At sentencing, the State motioned to merge defendant's conviction on Count II for the lesser included offense of assault in the first degree into his conviction on Count I of attempted murder in the first degree in order to avoid double jeopardy. RP 459. The court signed the motion stating the following:

"...the Assault First Degree with a firearm sentencing enhancement, and domestic violence aggravating factor merge into the Attempted Murder in the First Degree, which also has a firearm sentencing enhancement and domestic violence aggravating factor, would vacate that count, which is Count II, and in the event that the Attempted murder as set out is vacated by a higher court, then that count would be reinstated and Mr. Howard would be sentenced on that count only."

RP 460.

The court then entered a written order stating that the lesser conviction was conditionally vacated yet valid. CP 92. The written order was not appended to the judgment and sentence, and the judgment and sentence does not reference the vacated conviction. CP 100-109.

As the judgment and sentence does not reference defendant's vacated conviction, double jeopardy issues are not implicated in the instant case. Like *Fuller*, the sentencing court effectively merged the lesser conviction of first-degree assault into the greater conviction of first degree attempted murder, and properly entered a judgment and sentence only for the greater crime without any reference to the vacated crime. Notwithstanding the effective merger, double jeopardy was not violated because similar to *Fuller*, the written order vacating the lesser conviction was not appended to the judgment and sentence as it was in *Turner*. As such, double jeopardy is not violated because the judgment and sentence neither recognizes the validity of the vacated conviction nor references it in any way. The court has not held that double jeopardy issues are implicated when a written order recognizes the validity of a conditionally vacated conviction. However, it has been recognized that a trial court "may violate double jeopardy either by reducing to judgment both the greater and the lesser of two convictions for the same offense or by conditionally vacating the lesser conviction while directing, in some form

or another, that the conviction nonetheless remains valid.” *Turner*, 169 Wn.2d at 464. To avoid the possibility of implicating any double jeopardy issues, the written order referencing the validity of the vacated sentence should be vacated. As remand for resentencing is not necessary to vacate the written order, the State respectfully requests that this Court dismiss defendant’s claim.

D. CONCLUSION.

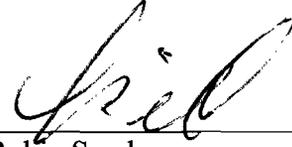
The trial court did not abuse its discretion by imposing the lifetime no-contact orders. The court is not required to do so, and the record shows that the orders were reasonably necessary to achieve the State's compelling interest in protecting children from witnessing domestic violence. Further, the sentencing court did not violate double jeopardy because it entered a written judgment and sentence only for the greater conviction without any reference to the vacated conviction. However, to avoid implicating any double jeopardy issues in the future, the written

order should be stricken. For the foregoing reasons, the State asks that this Court dismiss defendant's claims and vacate the written order.

DATED: JUNE 14, 2013

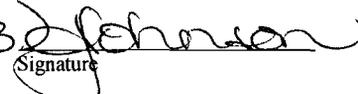
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Certificate of Service:

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

6/14/13   
Date Signature

# PIERCE COUNTY PROSECUTOR

**June 14, 2013 - 11:23 AM**

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