

NO. 47408-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JASON RUZICKA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Phillip K. Sorenson, Judge

BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

| | Page |
|---|------|
| A. <u>ASSIGNMENTS OF ERROR</u> | 1 |
| <u>Issues Pertaining to Assignments of Error</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 1 |
| 1. <u>Charges, verdicts, and sentence</u> | 1 |
| 2. <u>Trial testimony</u> | 2 |
| C. <u>ARGUMENT</u> | 8 |
| THE ORDER PREVENTING ALL CONTACT BETWEEN RUZICKA AND HIS CHILDREN VIOLATES HIS FUNDAMENTAL RIGHT TO PARENT..... | 8 |
| D. <u>CONCLUSION</u> | 15 |

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Pers. Restraint of Rainey
168 Wn.2d 367, 229 P.3d 686 (2010)..... 9, 10, 14

State v. Ancira
107 Wn. App. 650, 27 P.3d 1246 (2001)..... 9, 10

State v. Armendariz
160 Wn.2d 106, 156 P.3d 201 (2007)..... 8

State v. Howard
182 Wn. App. 91, 328 P.3d 969 (2014)..... 14

State v. Iniguez
167 Wn.2d 273, 217 P.3d 768 (2009)..... 9, 14

State v. Kinneman
155 Wn.2d 272, 119 P.3d 350 (2005)..... 9

State v. Sanford
128 Wn. App. 280, 115 P.3d 368 (2005)..... 10

State v. Warren
165 Wn.2d 17, 195 P.3d 940 (2008)..... 8, 9, 14

FEDERAL CASES

Santosky v. Kramer
455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)..... 8

RULES, STATUTES AND OTHER AUTHORITIES

ER 404 5

RCW 9.68A.090 6

TABLE OF AUTHORITIES (CONT'D)

| | Page |
|---------------------|------|
| RCW 9.94A.030 | 8 |
| RCW 9.94A.505 | 8 |
| RCW 9.94A.701 | 2 |
| RCW 9.94A.703 | 8 |
| RCW 9A.44.079 | 2 |

A. ASSIGNMENTS OF ERROR

1. The court erred in entering a no-contact order prohibiting all contact between appellant and his children.

2. The order prohibiting all contact absent a showing of reasonable necessity violates the appellant's fundamental right to parent.

Issues Pertaining to Assignments of Error

1. The trial court entered a no-contact order prohibiting all contact, including by telephone, with the appellant's two children. Where the court's reasons for imposing the order as well as the facts of the case do not support a prohibition on all contact, and the all-encompassing order was not reasonably necessary to serve a compelling State interest, did the court abuse its discretion in imposing the order?

2. Should this Court remand for modification of the order?

B. STATEMENT OF THE CASE¹

1. Charges, verdicts, and sentence

The State charged Jason Ruzicka with third degree child rape² as to complainant J.K. The crime was alleged to have occurred between May 1, and September 30, 2011. CP 1.

¹ This brief refers to the verbatim reports as follows: 1RP – 12/3/14; 2RP – 12/9 & 12/10/14; 3RP – 12/11/14; 4RP – 12/15/14; 5RP – 12/16/14; 6RP – 12/17/14 & 3/6/15; and 7RP – 3/27/14 (modification hearing).

The case was tried approximately two and a half years after the charging period. A jury convicted Ruzicka as charged. CP 26. The court sentenced Ruzicka to a high-end standard range sentence of 20 months of confinement, as well as 36 months of community custody. CP 51, 54-55; 6RP 23; RCW 9.94A.701(1)(b). The court also ordered no contact with minors, but noted the applicability as to Ruzicka's own children was "pending further order of the court" and asked the parties to set a hearing on the matter. CP 54; 6RP 25.

After a separate hearing at which various witnesses addressed the court,³ the court entered an order prohibiting any and all contact between Ruzicka and his children. CP 70. The court stated it would reconsider the motion after Ruzicka obtained a psychosexual evaluation.⁴ CP 70.

2. Trial testimony

J.K., 18 years old at the time of trial, was 14 during the summer of 2011. 2RP 63, 67. She knew Ruzicka through her older cousin, Allisa,

² A person is guilty of third degree child rape when he or she has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and is not married to the person. The accused person must be at least forty-eight months older than the complainant. RCW 9A.44.079(1). Third degree child rape is a class C felony. RCW 9A.44.079(2).

³ The hearing testimony is summarized in the argument section below.

⁴ The court ordered that Ruzicka undergo such an evaluation. CP 54.

who was a friend of Ruzicka's significant other, Andrea D. 2RP 66, 79, 125. J.K. spent time at Ruzicka's Fife home with the cousin. She also spent time with Ruzicka and Andrea's daughter, S.D., who was about a year younger than J.K. 2RP 66.⁵

That summer, J.K. attended a number of all-ages rock-and-roll shows at Louie G's, a Fife concert venue. 2RP 68. After one such show, J.K. went to Ruzicka's home for a social gathering. 2RP 69. J.K.'s younger sister, C.K., Ruzicka and his family, and a number of other people were present. 2RP 69-70.

J.K. drank alcohol at the gathering. 2RP 70. It was not the first time J.K. had used alcohol. 2RP 71. Although she did not feel "super drunk," she felt "different." 2RP 71-72. J.K. did not recall from whom she obtained the drinks. 2RP 72.

At one point during the evening, Ruzicka took J.K. to the furnished trailer located beside the house. 2RP 72, 76. J.K. recalled lying on a bed and Ruzicka removing her pants. 2RP 73. She testified that Ruzicka licked her vagina. 2RP 74. J.K. also recalled that while she was in a standing position, Ruzicka rubbed his penis on her vagina in an apparent attempt to have sex with her. 2RP 75. At that point, J.K. told Ruzicka to

⁵ Ruzicka and Andrea also have a son, D.R., who was 11 at the time of trial and 12 at the time of the modification hearing. 2RP 125; 4RP 11.

stop. 2RP 75, 118. Ruzicka told J.K. later that night that the act was intended to be “friendly” and he did not want to harm her. But he also told J.K. not to tell anyone. 2RP 76-77.

J.K. was, nevertheless, “positive” that she told her sister C.K. what had happened that same night. 2RP 77. But J.K. did not tell anyone else, and she continued to spend time at Ruzicka’s residence and to socialize with Ruzicka’s daughter. 2RP 79. J.K. eventually told her friends, boyfriend, and mother, and the incident was reported to police. 2RP 79.

J.K. dated Andrea’s cousin Troy, also a frequent guest at Ruzicka’s home, although the relationship ended some time before J.K. reported the incident to police. 3RP 72, 88; 4RP 17. J.K. denied the breakup with Troy precipitated her allegations against Ruzicka. 2RP 81-82. J.K. also testified she stopped visiting Ruzicka’s residence because of an unrelated conflict between her family and Ruzicka’s family. 2RP 115. J.K.’s mother testified her children stopped frequenting Ruzicka’s home some time in 2012. 2RP 139.

J.K. gave her first statement to police in September of 2013. In the statement, she claimed she yelled for Ruzicka to stop earlier in the encounter than her trial testimony indicated. She also reported Ruzicka digitally penetrated her vagina. 2RP 88-89. By the time of trial, J.K. did not remember any of that occurring. 2RP 89-90, 105-08. She also told

police it was the first time she had consumed alcohol, which was not true. 2RP 105. Conversely, J.K.'s statement failed to indicate that Ruzicka had attempted to have penile-vaginal intercourse with her. 2RP 116-17.

J.K.'s sister, C.K., 16 years old at the time of trial, also testified. 2RP 123. C.K. vaguely remembered J.K. mentioning that something had occurred with Ruzicka, but J.K. offered no details. 2RP 133. C.K. did not recall when the disclosure occurred, but she was certain it was not the night of the gathering. 2RP 126.

Over defense objection,⁶ the State was permitted to introduce evidence of prior misconduct under ER 404(b). 1RP 4-26. Nineteen-year-old C.L. testified about an incident involving Ruzicka that was also alleged to have occurred during the summer of 2011. 2RP 143.

C.L. is developmentally disabled. 2RP 144. The night of her sixteenth birthday, she went to a concert with her "God-sister" Kylie and her half sister Erica. Andrea, Ruzicka's significant other, was Erica's aunt. Andrea attended the concert, as did Ruzicka's daughter, S.D. 2RP 151.

⁶ Before trial, the court found the indecent admissible under ER 404(b) as evidence of Ruzicka's common scheme or plan to have sexual contact with vulnerable (for varying reasons) young women who were guests at his home. 1RP 4-26.

After the concert, C.L. spent the night at Ruzicka and Andrea's home. 2RP 146. C.L. slept in a bedroom with Kylie. Some time during the night, Ruzicka entered the room and pulled down C.L.'s pants. 2RP 149. C.L. tried to wake Kylie but was unsuccessful. 2RP 149. Ruzicka eventually stopped what he was doing and left the room. 2RP 149.

Police interviewed Ruzicka about C.L.'s allegations. According to a testifying detective, Ruzicka initially denied contact with C.L., but he eventually said he was intoxicated when he went into the bedroom. 3RP 52. Ruzicka admitted to kissing C.L. on the hip and said it was "possible" he kissed her vagina. 3RP 53. However, because he was intoxicated, he thought C.L. was someone else. 3RP 61-62. In 2013, Ruzicka pleaded guilty to communication with a minor for immoral purposes, a gross misdemeanor,⁷ and third degree assault. 3RP 55-57; Exs. 24 and 25.⁸

As to the current charges, Ruzicka presented a number of witnesses in his defense including daughter S.D. S.D. said her parents did not condone underage drinking, but J.K.'s cousin Allisa may have given J.K. alcoholic drinks during gatherings at her parents' house. 3RP 70-71, 77-78; see also 4RP 25 (Andrea's testimony).

⁷ RCW 9.68A.090(1).

⁸ The court instructed the jury that the evidence of commission of a previous sex offense was admissible only in considering "common scheme or plan." CP 21 (Instruction 8).

S.D. testified J.K. and Troy were often together at her house and they appeared to be engaging in a romantic relationship. 3RP 72. Andrea testified that J.K. had lied that she was 16 years old when, in fact, she was 14 years old. After learning J.K.'s true age, Ruzicka warned Troy to stop dating J.K. 4RP 21-22.

According to S.D. and a number of witnesses, in 2012, an incident occurred at Ruzicka's house that angered J.K. 4RP 90. S.D. testified Ruzicka was talking to her about sex and sexual relationships in general. J.K., who was in the room at the time, became upset and left. 3RP 74. Brendan Ehliis, a family friend, had a slightly different memory of the incident. J.K. and S.D. were having the conversation. Overhearing the conversation, Ruzicka made a comment that caused J.K. to become angry. She stormed out of the house. 3RP 86-87.

J.K. never returned to Ruzicka's house after that incident. 4RP 22.

Ruzicka testified in his own defense. He denied inappropriate contact with J.K. 4RP 57-58. He testified that his comment during the 2012 incident was directed at his daughter, not J.K., but J.K. became angry. 4RP 74. After the incident, J.K.'s parents contacted him to express their displeasure, and contact between the families ceased. 4RP 62. Ruzicka also testified that he warned Troy about J.K.'s true age. 4RP 60-61.

Ruzicka denied providing alcohol to J.K. He acknowledged, however, that he had allowed alcohol in his home in the past. By the time of trial, Ruzicka testified, he no longer consumed alcohol. 4RP 69.

C. ARGUMENT

THE ORDER PREVENTING ALL CONTACT BETWEEN RUZICKA AND HIS CHILDREN VIOLATES HIS FUNDAMENTAL RIGHT TO PARENT.

As a condition of community custody, a sentencing court may order an offender to “[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals.” RCW 9.94A.703(3)(b). Under RCW 9.94A.505(9), the court may also impose “crime-related prohibitions” as a condition of sentence. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Such prohibitions may include “an order of a court prohibiting contact that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). No-contact orders may extend up to the statutory maximum for the crime in question. State v. Armendariz, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007).

Parents have a fundamental liberty interest in the “care, custody, and management” of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The imposition of crime-related prohibitions is generally reviewed for abuse of discretion. In re

Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). But appellate courts more carefully review conditions that interfere with a fundamental constitutional right. Id.

A sentencing court necessarily abuses its discretion by violating an accused's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A court also abuses its discretion when its decision is based on incorrect legal analysis or an erroneous view of the law. State v. Kinneman, 155 Wn.2d 272, 289, 119 P.3d 350 (2005).

State interference with the fundamental right to parent is subject to strict scrutiny. Warren, 165 Wn.2d at 34. “[C]onditions that interfere with fundamental rights must be sensitively imposed,” with “no reasonable alternative way to achieve the State’s interest.” Id. at 32, 35. Thus, a sentencing court may not impose a no-contact order between a defendant and his biological children as a matter of routine practice. Rainey, 168 Wn.2d at 377-82. Instead, the court must consider whether the order is reasonably necessary in scope and duration to prevent harm to the children. Id. Less restrictive alternatives such as indirect contact or supervised contact may not be prohibited unless there is a compelling State interest barring all contact. Warren, 165 Wn.2d at 32; State v. Ancira, 107 Wn. App. 650, 655, 27 P.3d 1246 (2001).

Prior case law guides this Court's decision and requires remand for modification of the order prohibiting all contact. For example, in Ancira, a man was charged with violating an order prohibiting contact with his wife. Ancira, 107 Wn. App. at 652. He drove away with his four-year old child, whom he refused to return until his wife agreed to talk with him. Id. Following conviction for violation of the original no-contact order, the court imposed another order that also prohibited contact with Ancira's children for five years. Id. at 652-53.

Division One of this Court held that the no-contact order violated Ancira's fundamental right to parent. Id. at 654. The State had a compelling interest in preventing children from witnessing domestic violence. But the State failed to demonstrate how supervised visitation without the mother's presence, or indirect contact by telephone or mail, would jeopardize this goal. Id. at 654-55.⁹

In Rainey, a man was convicted of kidnapping his three-year-old daughter. 168 Wn.2d at 371. In addition to kidnapping, Rainey attempted to use the daughter to harass the mother. Id. at 379-80. For example, he

⁹ See also State v. Sanford, 128 Wn. App. 280, 289, 115 P.3d 368 (2005) (where Sanford was convicted of misdemeanor assault of children's mother out of children's sight and hearing, and where there were no allegations he committed or threatened violence against the children, trial court erred in restricting Sanford to supervised visitation).

sent letters sent to his daughter from jail blaming the mother for breaking up the family. Id.

The sentencing court imposed a lifetime no-contact order with the child. Id. at 374. On review, the Supreme Court agreed the facts were sufficient to establish that some duration of no-contact order, including a prohibition on indirect and supervised contact, was reasonably necessary to protect the child. Id. at 380.

The Court nevertheless reversed the order because the State failed to show why the lifetime prohibition was reasonably necessary, and the sentencing court provided no justification, for the order's lifetime duration. Id. at 381-82. The Court therefore remanded for resentencing. Id. at 382.

The foregoing cases apply by analogy. The sentencing condition prohibiting all contact, including phone contact, implicates Ruzicka's fundamental right to parent. Any restriction on this fundamental right must be narrowly tailored. Thus, the State in this case was required to show why the "blanket" order prohibiting all contact was reasonably necessary. The State did not meet this burden.

Here, the Community Corrections Officer (CCO) who authored the presentence investigation report recommended no contact with minors, including Ruzicka's own children. CP 39, 68. The basis for the

recommendation appears to be that Ruzicka had sexual contact with minor girls of roughly his daughter's age, and also that he gave alcohol to one such girl, J.K. CP 68. "There is no guarantee he wouldn't do the same [to his daughter] and possibly his son, who is 12." PC 68. The report notes, moreover, that Ruzicka had been in a relationship with Andrea for 17 years, making her only 16 when the relationship began.¹⁰ CP 68. The report does not, however, mention the possibility of indirect contact with the children or explain how such contact would be harmful to the children.

At the modification hearing, set at the court's request, a number of interested parties addressed the court.

Addressing the court on Ruzicka's behalf, Andrea informed the court that the no-contact order had affected the children's school performance. She asked the court to, at a minimum, permit Ruzicka to have phone contact with her son to help with his math homework. 7RP 7.

Daughter S.D. told the court she missed her father, and she assured the court that he had never behaved inappropriately toward her. 7RP 9. She confirmed she wanted Ruzicka's help with her homework. 7RP 8.

¹⁰ The report (and the CCO's later argument to the court at the modification hearing) fails to note that Andrea is only two years younger than Ruzicka: At trial, Andrea testified she was 35 years old, 4RP 18, whereas Ruzicka was 37 at the time.

Son D.R. informed the court he missed his father and wanted to visit and talk with him on the phone. 7RP 10.

On the other hand, at the hearing the CCO reiterated his opposition to contact, although he did not specifically address indirect contact. He again asserted Ruzicka had a long history of involvement with young girls, as evidenced by the fact that Andrea would have been 16 when she and Ruzicka started dating. 7RP 16. Moreover, the CCO surmised, because Ruzicka had claimed he mistook the prior complainant for Andrea, S.D. was similarly at risk if he were allowed in the home. 7RP 17.

Ruzicka's counsel urged the court to at least permit Ruzicka to have phone contact with his children. 7RP 17-18.

The court made the following oral ruling:

It seems to me as though the . . . environment in the house has created a situation where young girls are present. Some are family members, some are not. Maybe there's alcohol, maybe there's not. . . . I am concerned that . . . Mr. Ruzicka's children are a lure for other kids to be at the house, and as a result, I am going to prohibit any contact between Mr. Ruzicka and his children.

7RP 19. The court entered a corresponding written order prohibiting all contact. CP 70.

The court's order does not meet constitutional muster. Although the State has a compelling interest in protecting children from harm, the State did not demonstrate, and the court did not explain, how prohibiting

all contact between Ruzicka and his children would serve that interest. Ruzicka's crime of conviction (and his prior convictions) involved physical contact with unrelated individuals and did not involve telephone harassment or luring children to his home by social media, letter, or phone call. It is difficult, if not impossible, to imagine the manner in which the court's concern, access to victims, could arise in the context of phone calls or letters to his children. There was, moreover, no evidence Ruzicka ever behaved inappropriately toward his own children such that indirect contact would be upsetting to them.

The State cannot demonstrate that the court's all-encompassing no-contact order was narrowly tailored or reasonably necessary to effectuate a compelling State interest. Warren, 165 Wn.2d at 32. The sentencing court therefore abused its discretion in entering the order. Iniguez, 167 Wn.2d at 280. As such, this Court should remand for resentencing and imposition of an appropriately tailored order. Rainey, 168 Wn.2d at 82; see also State v. Howard, 182 Wn. App. 91, 101, 328 P.3d 969 (2014) (remand required when a reviewing court is unable to determine whether a specific provision or term is reasonably necessary).

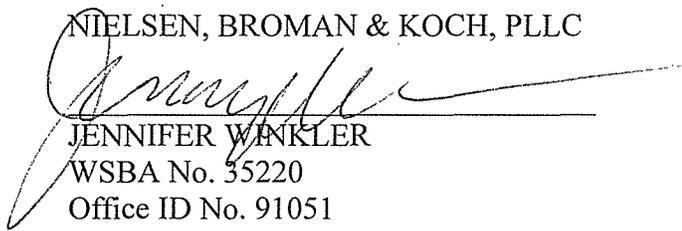
D. CONCLUSION

This court should remand for modification of the no-contact order.

DATED this 13TH day of October, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER

WSBA No. 35220

Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

| | | |
|---------------------|---|--------------------|
| STATE OF WASHINGTON |) | |
| |) | |
| Respondent, |) | |
| |) | |
| vs. |) | COA NO. 47408-5-II |
| |) | |
| JASON RUZICKA, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF OCTOBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JASON RUZICKA
DOC NO. 365685
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF OCTOBER 2015.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

October 13, 2015 - 3:59 PM

Transmittal Letter

Document Uploaded: 3-474085-Appellant's Brief.pdf

Case Name: Jason Ruzicka

Court of Appeals Case Number: 47408-5

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us