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You are hereby notified that the Court has entered the following opinion and order:

2015AP2563-CR

State of Wisconsin v. Randall A. Lee (L.C. # 2014CF1489)

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

Randall A. Lee appeals a judgment of conviction entered upon his guilty pleas to first-degree recklessly endangering safety by use of a dangerous weapon and possessing a firearm as a felon. He also appeals an order denying his postconviction motion. Lee challenges the circuit court's order prohibiting Lee from having contact with his daughter during his nine-year sentence. Based upon our review of the briefs and record, we conclude at conference that this

case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm.

Lee and D.P. were in a romantic relationship and shared a three-year-old daughter, K.P. The couple had problems over Lee becoming physically aggressive with D.P. and his taking her car without permission. D.P. was running errands with her friend, S.B., D.P.'s two young children, including K.P., and Lee's twelve-year-old brother. S.B. was driving them around, and D.P. asked to stop by her residence to make sure everything was normal. D.P. asked S.B. to park at a nearby store so Lee would not see the car. D.P. walked toward her residence. D.P. returned, heading quickly to the car. She got into the back driver-side seat and told S.B., "Quick, pull off, he's got a gun, he's trying to kill me." Lee appeared, and fired a bullet through the front driver-side window toward the back seat where D.P. sat with her five-year-old child and K.P. Lee's bullet struck the left arm of S.B.

The circuit court imposed an aggregate nine-year bifurcated sentence, with four years of initial confinement and five years of extended supervision. The court found that, for purposes of WIS. STAT. § 973.049(2), S.B., D.P., and D.P.'s two children were all victims and witnesses of Lee's crimes. Although S.B. suffered the gunshot wound, the court determined that D.P. and her children were also victims because Lee's conduct "was intended, at a minimum, to intimidate and to scare them and to control them." The court made a finding, under § 973.049(2), that "prohibiting Mr. Lee from contacting any of those people would be and will be in the interests of public protection," and ordered that Lee have no contact with S.B., D.P., or D.P.'s children,

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

including K.P., during the entirety of his nine-year sentence. In rejecting defense counsel's request to permit Lee to have contact with K.P., the court acknowledged that it was "an extreme step," but stated:

[G]iven the domestic violence circumstances, which I think I have – no doubt, were at play here – You were willing to – to threaten and intimidate the mother of – of the child, [D.P.]. You were willing to shoot a firearm in the direction of the mother of the child and in the direction of the children themselves. I think the community potential and the protection of [D.P.] and her children, at this point, require that no contact order.

Lee then filed a postconviction motion asking the circuit court to reconsider its decision and exempt K.P. from the no contact order. While conceding that his actions were fueled by the abusive and controlling nature of his relationship with D.P., Lee argued that he had no intent to harm K.P., and did not have the same toxic relationship with K.P. as he did with K.P.'s mother. The circuit court denied the motion, stating: "Even if the defendant's conduct was directed at [D.P.], it put *everyone* in that vehicle at risk of physical harm." On appeal, Lee challenges the no contact order with K.P. as (1) an erroneous exercise of discretion, and (2) an unlawful termination of Lee's parental rights without due process.

We conclude that the circuit court properly exercised its discretion in ordering Lee to have no contact with K.P. WISCONSIN STAT. § 973.049(2) authorizes a sentencing court to order a defendant to have no contact with a victim or witness during the defendant's entire sentence "if the court determines that the prohibition would be in the interest of public protection." It is within the discretion of the sentencing court to determine who is a victim of a crime considered at sentencing. See *State v. Campbell*, 2011 WI App 18, ¶¶23-24, 331 Wis. 2d 91, 794 N.W.2d 276 (WI App 2010). We will uphold a circuit court's discretionary decision as long as the court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated

rational process, reached a conclusion that a reasonable judge could reach.”” *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789 (quoted source omitted).

The circuit court properly determined that K.P. was not only a witness to but also a victim of Lee’s crime considered at sentencing. Regardless of whether Lee intended to physically harm K.P., his conduct endangered the safety of everyone in the car. Lee directed his violent, dangerous conduct toward D.P. and her family, including K.P., and the circuit court determined that Lee’s conduct served to scare, intimidate, and control K.P. K.P. further suffered harm by virtue of witnessing Lee’s violent conduct. See *Campbell*, 331 Wis. 2d 91, ¶¶26, 28 (concluding that Campbell’s son was a victim because of the “potential emotional harm associated with observing” his father’s sexual abuse of Campbell’s daughter).

The circuit court also acted well within its discretion in determining that the no contact order was “in the interest of public protection.” See WIS. STAT. § 973.049(2). The court repeatedly emphasized the domestic violence aspect of the shooting, and found that D.P.’s fear of Lee and her efforts to avoid him were “a very significant aggravating factor” in terms of Lee’s potential for future dangerousness. Prior to the shooting, D.P. was checking her home to make sure that Lee had not caused any damage or taken her car, and D.P. asked S.B. to park out of sight because she “was scared that if [Lee] saw them, or saw the car, that something bad might happen to her or her children.” In fact, D.P.’s fears were realized when, out of anger toward D.P., Lee recklessly shot into a car with five occupants, one of whom was K.P. Prohibiting contact with K.P. protects both D.P. and K.P. As explained in the circuit court’s order denying postconviction relief, the dynamic of domestic violence between Lee and D.P. extends to their

shared child, K.P. The circuit court applied the correct law to the facts of record and reached a reasonable result that we will not disturb.² See *LeMere*, 262 Wis. 2d 426, ¶13.

Next, we reject Lee’s argument that the no contact order with K.P. was unlawful because it was the “functional equivalent of [a] termination of parental rights without due process” (capitalization and bold face omitted). “Termination of parental rights’ means that, pursuant to a court order, all rights, powers, privileges, immunities, duties and obligations existing between parent and child are permanently severed.” WIS. STAT. § 48.40(2). Lee’s no contact order lasts for nine years and is temporary, distinguishing it from an order terminating parental rights. Further, the no contact order does not “permanently sever[] all legal rights and duties” between Lee and K.P. See WIS. STAT. § 48.43(2); see also § 48.40(2); cf. *J.J. v. R.J.*, 162 Wis. 2d 420, 425-26, 469 N.W.2d 877 (Ct. App. 1991) (holding that the denial or termination of visitation between a child and an alleged father in a divorce proceeding does not constitute and is not subject to the statutory procedure for the termination of parental rights; the prohibition on visitation did not permanently sever the rights and obligations between them). For example, the no contact order does not terminate any custodial rights or child support obligations Lee might have, or the legal right of inheritance between Lee and K.P. See *Black v. Pamanet*, 46 Wis. 2d 514, 516, 175 N.W.2d 234, *on reh’g*, 46 Wis. 2d 518, 177 N.W.2d 105 (1970) (a termination of parental rights ends a person’s right to inherit from his or her child under intestate succession).

² Because we conclude that the no contact order was valid under WIS. STAT. § 973.049(2), we need not address Lee’s argument that the order was not a “reasonable and appropriate” condition of extended supervision under WIS. STAT. § 973.01(5) and *State v. Koenig*, 2003 WI App 12, ¶7, 259 Wis. 2d 833, 656 N.W.2d 499 (WI App 2002). In *State v. Campbell*, 2011 WI App 18, ¶¶21, 22-29, 331 Wis. 2d 91, 794 N.W.2d 276 (WI App 2010), we concluded that Campbell’s no contact order was authorized under § 973.049, and therefore did not address Campbell’s contention that the no contact order was an invalid condition of extended supervision. Accordingly, § 973.01(5) does not restrict a circuit court’s authority to issue a no contact order under § 973.049(2).

Additionally, pursuant to WIS. STAT. § 302.113(7m)(a), Lee may later petition the court to modify the no contact condition. Because the no contact order did not permanently sever the legally recognized parent-child relationship between Lee and K.P., Lee was not entitled to the WIS. STAT. Ch. 48 due process protections afforded a parent in an action seeking to terminate parental rights.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals