No. 46588-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

G.C.,

Appellant.

Clallam Cause No. 14-8-00083-3

The Honorable Judge Christopher Melly

Appellant's Reply Brief

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I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO FIND G.C. GUILTY.

A. Standard of Review.

Constitutional violations are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013).

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

Following a bench trial, review is limited to whether the court's unchallenged findings of fact support its conclusions of law. *State v. A.M.*, 163 Wn. App. 414, 419, 260 P.3d 229 (2011). Conclusions of law are reviewed *de novo*. *Id.*

B. No reasonable fact finder could have found beyond a reasonable doubt that G.C. exhibited the effects of alcohol.

The state cannot prove an element of an offense by presenting only evidence that could – but does not necessarily -- lead to the required factual conclusion. *See e.g. State v. Smith*, 155 Wn.2d 496, 504, 120 P.3d 559 (2005) (evidence that accused driver's license was revoked "in the first degree" insufficient to prove that it had been revoked because he was

a habitual traffic offender); *State v. DeVries*, 149 Wn.2d 842, 850, 72 P.3d 748 (2003) (juvenile's statement that pill "could mess you up" was insufficient to prove beyond a reasonable doubt that she knew the pill was a controlled substance); *State v. Colquitt*, 133 Wn. App. 789, 794, 137 P.3d 892 (2006) (officer testimony that a substance appeared to be cocaine insufficient to prove beyond a reasonable doubt that accused possessed a controlled substance).

Given only ambiguous evidence, no rational trier of fact could find that the state has proved an element beyond a reasonable doubt. *Id.* This is because "the existence of a fact cannot rest upon guess, speculation, or conjecture." *Colquitt*, 133 Wn. App. at 796.

Here, in order to find G.C. guilty, the state was required to prove beyond a reasonable doubt that he (1) had the odor of liquor on his breath, and (2) "by speech, manner, appearance, behavior, lack of coordination, or otherwise, exhibit[ted] that he or she [was] under the influence of liquor." RCW 66.44.270(2)(b).

The only evidence the state presented – and the only finding the court entered -- to meet this second element was testimony that G.C. had "glassy eyes." RP 11, 24; CP 30-32. But "glassy eyes" could be evidence that G.C. had used some other drug, was tired, was nervous, suffered from allergies or another medical condition, had been playing video games or

looking at a computer screen for a long time, had low blood sugar, or had been crying. The court's conclusion that G.C.'s "glassy eyes" demonstrated that he was under the influence of alcohol was based on "guess, speculation, or conjecture." *Colquitt*, 133 Wn. App. at 796. Accordingly, the court's "glassy eyes" finding is insufficient to establish beyond a reasonable doubt that G.C. exhibited the effects of liquor. *Id.; Smith*, 155 Wn.2d at 504; *DeVries*, 149 Wn.2d at 850.

The court attempted to cure this evidentiary shortcoming by pointing out that G.C. admitted to drinking. CP 32. But, in order to convict G.C., the state had to prove that he demonstrated the physical effects of alcohol consumption, not merely that he had been drinking. RCW 66.44.270(2)(b). Accordingly, G.C.'s admission was irrelevant to the elements of the offense.

The state presented evidence insufficient for a rational trier of fact to find beyond a reasonable doubt that G.C. exhibited the effects of liquor. *Colquitt*, 133 Wn. App. at 796; *Smith*, 155 Wn.2d at 504; *DeVries*, 149 Wn.2d at 850. His disposition must be reversed. *Id.*

II. THE RECORD DOES NOT SUPPORT A MANIFEST INJUSTICE DISPOSITION.

A. Standard of Review.

Whether factual findings support a departure from the standard sentencing range is a question of law reviewed *de novo*. *State v. T.E.C.*, 122 Wn. App. 9, 18, 92 P.3d 263 (2004).

In order to impose a manifest injustice disposition, a juvenile court "must find beyond a reasonable doubt that 'the defendant and the standard range for the offense presents a clear danger to society.'" *State v. Tai N.*, 127 Wn. App. 733, 741, 113 P.3d 19 (2005). Any facts supporting this finding must also be proved beyond a reasonable doubt. *Id.* Although review is for substantial evidence, the evidence must be stronger than would be sufficient to prove facts by a preponderance of the evidence.[1] *Id.; In re C.B.*, 61 Wn. App. 280, 285-86, 810 P.2d 518 (1991); RCW 13.40.230(2).

Because of this, a manifest injustice sentence must be reversed on appeal unless a rational trier of fact could (1) find the facts supporting the disposition beyond a reasonable doubt and (2) find that a standard range

[1] The nature of the substantial evidence analysis varies based on the burdens of proof and production in the lower court. *C.B.*, 61 Wn. App. at 285-86. Thus, where the burden is proof beyond a reasonable doubt, the state must introduce "evidence from which a rational trier of fact could find [the required facts] beyond a reasonable doubt." *Id.*, at 285.

sentence would effectuate a manifest injustice beyond a reasonable doubt. *Tai N.*, 127 Wn. App. at 741; *C.B.,* 61 Wn. App. at 285-86.

The court must specify the parts of the record that are material to the finding of manifest injustice. JuCR 7.12(e).

B. A disposition above the standard range must be based on facts proved beyond a reasonable doubt, and the sentencing court must find beyond a reasonable doubt that the standard range would effectuate a manifest injustice.

Generally, a standard range disposition is adequate to achieve the goals of the Juvenile Justice Act. *Tai N.,* 107 Wn. App. at 745. This includes rehabilitation of the juvenile offender. *Id.* A sentence above the standard range may only be imposed if disposition within the range "would effectuate a manifest injustice." RCW 13.40.160 (2).

Due process requires that factual allegations supporting a sentence beyond the standard range must be proven beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 313-14, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This standard is also required by statute. RCW 13.40.160(2); *Tai N.*, 127 Wn. App. at 740 (holding that the clear and convincing evidence standard is equivalent to the beyond a reasonable doubt standard required by *Apprendi*).

A juvenile court's reasons for imposing a manifest injustice sentence "must be clear on the record and must convincingly support the conclusion." *Tai N.*, 127 Wn. App. at 743. In reviewing a manifest injustice determination, the appellate court engages in a three-part inquiry. *Id.* First, the reasons given for the determination must be supported by substantial evidence from which a rational person could find the facts beyond a reasonable doubt. *Id; see also C.B.,* 61 Wn. App. at 285-86. Second, those reasons must support the determination of manifest injustice beyond a reasonable doubt. *Tai N.*, 127 Wn. App. at 743. Finally, the sentence must be neither clearly too excessive nor too lenient. *Id.*

Here, the state did not prove any of the facts supporting G.C.'s manifest injustice sentence beyond a reasonable doubt. Accordingly, the second and third steps of the analysis are superfluous.

C. The court's finding that G.C. required treatment in a secure facility was not supported by substantial evidence.

A psychologist evaluated G.C. prior to his sentencing hearing. CP 16-28. That expert recommended that G.C. be provided outpatient substance abuse and mental health treatment in the community. CP 27. He suggested that family therapy methods were the most likely to be successful for G.C. CP 27-28. The evaluator noted that G.C. should be admonished that failure to participate in such outpatient treatment would

result in his placement in a secure facility. CP 27. The state did not prevent any evidence or expert opinion to rebut the recommendation in G.C.'s psychological evaluation. RP 35-53; *See* CP *generally*.

Still, the court found that G.C. required treatment in a secured environment "per expert's opinion." CP 29[2], *See also* CP 8[3]. The court also found that there was a high likelihood that G.C. would reoffend unless treated in a secure facility. CP 8; CP 29. But those factual findings were not proved beyond a reasonable doubt at sentencing. *Tai N.*, 127 Wn. App. at 743. Indeed, the court's findings are not supported by any evidence at all. RP 35-53; *See* CP *generally*.

Substantial evidence does not support the court's findings that G.C. required treatment in a secure facility. *Tai N.*, 127 Wn. App. at 743. Those findings must be vacated and cannot provide the basis for the court's manifest injustice disposition. *Id.*

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[2] The court's order states that G.C. requires treatment in a secure facility "per expert's opinion agreement also (sic)." CP 29. But G.C. did not agree to that finding. Indeed, his attorney argued that he should be sentenced to credit for time served. RP 47.

[3] The court provided that "per expert recommendation that until [substance abuse] treatment is provided MH issues cannot be addressed." CP 8. But that claim is not included in the expert's report. CP 16-28. To the contrary, the psychologist opined that G.C. required contemporaneous treatment for his substance abuse and mental health issues. CP 26-27. The expert recommended that such treatment occur in the community. CP 27.

D. The court's findings that G.C. had been the subject of other complaints resulting in diversion or a plea of guilty, which are not included in his criminal history and that he had "exhausted all local resources" are not supported by substantial evidence.

A prosecutor's "bare allegations" to the court are not evidence "whether asserted orally or in a written document." *State v. Hunley*, 175 Wn.2d 901, 915, 287 P.3d 584 (2012).

Here, the court based its manifest injustice disposition in part on a finding that G.C. had exhausted local resources. CP 29. The court also found the aggravating factor that "there are other complaints which have resulted in diversion or a finding of a plea of guilty which are not included as criminal history." CP 8.

Those two findings are based exclusively on the prosecutor's "bare allegations" to the court during argument at G.C.'s sentencing hearing. RP 40-41. The state did not provide any evidence in support of those claims. RP 35-53.

The court's findings that G.C. had exhausted all local resources and had prior complaints that were not included in his criminal history are not supported by substantial evidence. *Tai N.*, 127 Wn. App. at 743. Actually, because those findings were based only on the prosecutor's remarks, they did not have any evidentiary foundation at all.[4] The court's

[4] Additionally, the court failed to specify the parts of the record upon which its findings were based, in violation of JuCR 7.12(e).

findings related to local resources and prior complaints cannot provide the basis for G.C.'s manifest injustice disposition. *Id.*

Because all of the court's findings supporting G.C.'s sentence must be vacated, the court's order does not establish—beyond a reasonable doubt—that a sentence within the standard range would effectuate a manifest injustice. *Tai N.*, 127 Wn. App. at 745. G.C.'s disposition must be reversed and his case remanded for sentencing within the standard range. *Id.*

III. G.C. WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO ADEQUATE NOTICE OF THE STATE'S INTENT TO SEEK A MANIFEST INJUSTICE DISPOSITION AND OF THE AGGRAVATING FACTORS THE PROSECUTION INTENDED TO PROVE IN SUPPORT OF SUCH A DISPOSITION.

A. Standard of Review.

Constitutional issues are reviewed *de novo*. *McDevitt v. Harbor View Med. Ctr.*, 179 Wn.2d 59, 64, 316 P.3d 469 (2013). Manifest error affecting a constitutional right may be raised for the first time on appeal.[5] RAP 2.5(a)(3).

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[5] An error is manifest if it "actually affected [the defendant's] rights at trial." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). To secure review, an appellant need only make "*a plausible* showing that the error resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial." *Id.* (emphasis added). The appellant must show that the trial judge could have foreseen and corrected the error and that the record contains sufficient facts to review the claim. *Id.*

B. Due process requires that a juvenile be given sufficient notice of the prosecution's intent to seek a manifest injustice disposition and the allegations supporting such a disposition.

Due process entitles juveniles to adequate notice of the charges against them. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22; *Application of Gault*, 387 U.S. 1, 34, 878 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012) *review denied,* 176 Wn.2d 1007, 297 P.3d 68 (2013).[6]

In the adult context, the sixth amendment right to "be informed of the nature and cause of the accusation" requires that the accused be given adequate notice of aggravating sentencing factors to prepare a defense. *State v. Siers*, 174 Wn.2d 269, 277, 274 P.3d 358 (2012) (interpreting *Apprendi* 530 U.S. 466. Adequate notice must be given prior to the proceeding at which the state seeks to prove the circumstances warranting a sentence above the standard range.[7] *Id.* Due process requires that such notice appear on the record.

Here, the state's failure to provide G.C. with notice of its intent to seek a manifest injustice disposition is of constitutional magnitude and is manifest on the record. No additional evidence is necessary to demonstrate that the state failed to give G.C. notice on the record. Additionally, the trial judge could have foreseen and corrected the error below. *Id.* Accordingly, G.C. may raise this issue for the first time on review. RAP 2.5(a)(3).

[6] Although *Rivas* addresses the adequacy of notice in the adult context, the U.S. Supreme Court explicitly extended the right to juveniles as well in *Gault*. 387 U.S. at 34.

[7] Division III has held that notice of the state's intent to seek a manifest injustice disposition is not required because it is a possibility in every case. *State v. Moro*, 117 Wn. App. 913, 923, 73 P.3d 1029 (2003). *Moro*, however, was decided before *Siers* and relied heavily on

A juvenile is entitled to sufficient notice of the state's intent to seek a manifest injustice disposition, and the factual foundation for such a disposition. Without adequate notice, a juvenile facing an aggravated sentence is denied the opportunity to "mount an adequate defense." *Siers*, 174 Wn.2d at 277. Notice must set forth the alleged misconduct with sufficient particularity to permit the juvenile a reasonable opportunity to prepare a defense. *Gault*, 387 U.S. at 33.

Here, the record does not demonstrate that G.C. was ever provided notice of the state's intent to seek a manifest injustice disposition or the aggravating circumstances on which it planned to rely. *See* RP, CP *generally*. Without advance notice, G.C. had no opportunity to consult with counsel about the factual allegations, or to prepare his defense against the allegations.

Because G.C. was not provided with adequate notice, his manifest injustice disposition violated his rights to due process and adequate notice. *Gault*, 387 U.S. at 33; *Siers*, 174 Wn.2d at 277. G.C. did not know the factual allegations against him, and was not given time to prepare his defense. *Siers*, 174 Wn.2d at 277. His sentence must be overturned and his case remanded for sentencing within the standard range. *Id.*

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the lack of any requirement of advance notice in the adult context. *Moro*, 117 Wn. App. at 920-23. *Moro* was effectively overruled *sub silento* by *Siers*. *Siers*, 174 Wn.2d at 277.

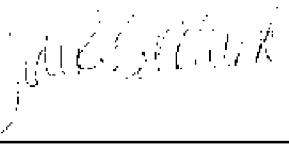
CONCLUSION

The state presented insufficient evidence for a rational trier of fact to find beyond a reasonable doubt that G.C. exhibited the effects of alcohol. G.C.'s adjudication must be reversed.

In the alternative, the state did not present evidence sufficient for the court to find beyond a reasonable doubt that a sentence within the standard range would effectuate a manifest injustice. G.C. was also denied his constitutional right to adequate notice of the state's intent to seek a manifest injustice disposition. G.C.'s case must be remanded for a sentence within the standard range.

Respectfully submitted on February 3, 2015.

BACKLUND AND MISTRY



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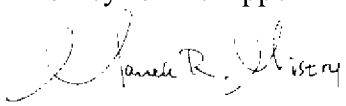

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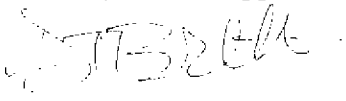

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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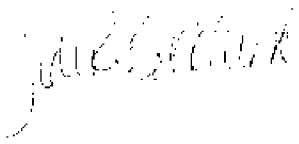

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