Supreme Court No.: 95755-0
Court of Appeals No.: 48093-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

D.J.M. (D.O.B. 3/19/00),

Appellant.

PETITION FOR REVIEW

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decision

U.S. Supreme Court Decisions

Decisions of Other Courts

Constitutional Provisions

Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Destiny M., the petitioner here and juvenile defendant below, asks this Court to grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals in *State v. D.J.M., L.D.M., L.K.M.*, No. 48093-0-II, filed February 21, 2018. A copy of the opinion is attached as Appendix A. Destiny's motion to reconsider was denied on March 30, 2018. A copy of the order is attached as Appendix B.

B. ISSUES PRESENTED FOR REVIEW

1. Whether a 15-year-old and her juvenile twin brothers, who were jointly charged with assault as accomplices for a school cafeteria altercation, executed valid, fully informed waivers of the potential conflict of interest resulting from joint representation by a single attorney where there was only a cursory explanation of the potential for conflict, no information was provided about the right to appointed, independent counsel, and Destiny had no prior experience in the criminal justice system.? RAP 13.4(b)(3), (4).

2. Whether Destiny was entitled to act in self-defense from the perspective of a reasonable juvenile where C.H. had verbally bullied her for years, including the weekend leading up to the cafeteria altercation, and then smirked at Destiny as if he wanted to "start something"? RAP 13.4(b).

3. Whether the Court should accept review and hold juveniles have a due process right to a jury trial under the state and federal constitutions? RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

1. Years of bullying led to a physical fight one morning at school.

A member of the Lakewood Crips (a.k.a the 10-8) gang, C.H., bullied the younger Destiny for years. RP 47, 249-50, 289-93, 300-01.[1] Starting when Destiny was in seventh grade, C.H. called her profanities and made fun of her skin color. RP 289-90.[2] "Like say if I walked past him or something like that, he will be like, look at this black female dog, and then he said I was the color of his -- the bottom of his shoe and stuff like that." RP 290-91. C.H. continuously demeaned her for her skin color, her hair, and for being poor. RP 291-93. By the time Destiny was in ninth grade, C.H. was harassing her online as well. RP 292-95.

[1] The verbatim report of proceedings is numbered sequentially beginning with trial on August 18, 2015; the two volumes from April 7 and June 30 are referred to by date.

[2] Destiny was a good student, who got to school on time and did not get in trouble. RP 42, 128-30. Her twin brothers, L.K.M. and L.D.M., are two years older than she is. RP 164, 285.

One weekend, C.H. tagged Destiny in a Facebook post that called Destiny's mother "a bitch" and asked Destiny to tell her twin brothers to "line that up" for a fight "today @4." Exhibit 9; RP 17, 84, 86.

The following Monday morning in the school cafeteria, C.H. smirked at Destiny "like he was trying to start something." RP 288-89, 294-95, 323-24. Destiny punched C.H. and he fell from his seat to the floor. RP 167-71, 297. Destiny and C.H. then moved away from each other; Destiny started "to walk around the cafeteria." RP 99-101, 102, 171, 297, 348; Ex. 1 at 7:01:27-38.

But C.H. did not stop moving when directed by the school security officer. RP 127, 133. He kept moving towards Destiny and threw his backpack down, signaling he was ready to fight. RP 173, 178, 283, 297-98; Ex. 2 at 00:09-12; Ex. 1 at 7:01:27-46. In a loud and angry voice, C.H. shouted, "I fight bitches" in close proximity to Destiny's face. RP 179-80, 254-55, 281-82, 299. L.K.M. "ran to protect my sister," and a second fight erupted. RP 173, 180-83, 188-89, 301-02. L.D.M. also became involved to protect his brother. RP 340-42. C.H. and his friend hit L.K.M. RP 182-83, 186-87, 304. C.H. also hit Destiny. RP 309. C.H.'s teeth were damaged in the second fight. RP 47, 67-68, 73.

2. A single attorney represented the three children charged with assault in the second degree under an accomplice theory.

The State charged Destiny with assault in the second degree for the second fight, alleging intentional assault of C.H. and reckless infliction of substantial bodily harm. CP 1-3 (RCW 9A.36.021(1)(a)). Her twin brothers, L.K.M. and L.D.M., were charged with the same crime. CP 24 (finding IV). The State argued the three siblings acted as accomplices, without proving how C.H.'s mouth became injured. RP 386-87, 393, 407-08, 425-26.

That same day, counsel was appointed to represent Destiny. CP 81. A few days later, Hester Mallonnee filed a notice of substitution and, eventually, a motion for joint representation of all three children. CP 4-17.[3]

The day before her 15th birthday, Destiny—along with her parents and twin brothers—signed a form consenting to joint representation. CP 19-20, [4] 23 (listing date of birth as March 19, 2000). After a short hearing

[3] Hester Mallonnee's legal license is now "suspended." WSBA, Legal Directory, https://www.mywsba.org/PersonifyEbusiness/LegalDirectory/LegalProfile.aspx?Usr_ID=000000011896 (Apr. 25, 2018) ("Reason for Suspension: No Insurance Form, No Trust Account Form, Non Payment of fees").

[4] The signed form is attached as Appendix C.

and colloquy, the court agreed to the joint representation. RP (4/7/15) 3-11;[5] CP 18.

On the first morning of trial, the prosecutor asked the children to waive again any potential conflict presented by the joint representation on the record. RP 9. Destiny said she did not understand. RP 9. After joint counsel talked with her off the record, all three children gave their oral consent. RP 10-11.

At trial, C.H. testified he did not remember what encounters he had with Destiny, did not want to talk about Facebook contact or did not have any, and did not remember or did not want to talk about the fight or his injuries. RP 22-33. He also did not want to talk about his involvement with a gang or a t-shirt he is wearing in a photograph that says "Gang or no gang?" Ex. 10; RP 34-39.

Destiny and her two brothers all testified and were more forthcoming than C.H. RP 163, 284, 332. The juvenile court also received two videos of the incident, Exhibits 1 and 2, and testimony from school administrators, C.H.'s mother and the respondents' mother. The children's joint counsel argued the children acted in self-defense/defense of others. RP 394-406, 414.

[5] A transcript of the hearing is attached as Appendix D.

The juvenile court found the three siblings guilty of assault in the second degree and ordered them confined for 15 to 36 weeks. CP 23-29, 66-74; RP 628-31. Destiny apologized to the court, C.H., and her family for getting physical and for hurting C.H. RP 583-90.

D. ARGUMENT

1. The Court should grant review and hold Destiny's waiver of conflict-free counsel in a single trial with her twin, codefendant brothers for assault based on accomplice liability was not made knowingly or intelligently.

The Court should accept review and hold Destiny was denied her constitutional right to conflict-free counsel because she did not knowingly or intelligently waive this right and joint counsel proceeded to represent her and her juvenile, co-defendant, twin brothers in an assault by accomplice liability trial.

Every reasonable presumption is indulged against the waiver of rights to protect fundamental constitutional guarantees. *Glasser v. United States*, 315 U.S. 60, 70, 62 S. Ct. 457, 86 L. Ed. 680 (1942) (citing *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 57 S. Ct. 809, 81 L. Ed. 1177 (1937); *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1937)).

Juveniles' fundamental rights are entitled to even stronger protection against involuntary and unknowing waivers than that of adults.

J.D.B. v. North Carolina, 564 U.S. 261, 272, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). "[C]hildren cannot be viewed simply as miniature adults." *Id*. at 274. Children "generally are less mature and responsible than adults," they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," and they "are more vulnerable or susceptible to . . . outside pressures" than adults. *Id*. at 272 (internal quotations omitted).

The opinion below does not discuss the effect of these differences between children and adults in the context of waiving the fundamental constitutional right to conflict-free counsel.

Destiny's waiver of the right to independent counsel was insufficient because it was not "fully informed." RCW 13.40.140(10). Before asking each child if she or he consented to the joint representation, the court briefly summarized the situation:

> Assault in the second degree is a very, very serious crime, it's a strike offense. And where there is an assault that takes place allegedly with the participation of three individuals; there is, I believe, a huge potential for there being conflict as between the respondents because one might see it slightly differently than another, and one might say I didn't do it but I saw this. And that's where the conflict comes in. So I want to be very clear with each one of you that you understand that potential conflict and you're waiving the conflict and you wish to go forward with joint representation.

RP (4/7/15) 6 (also available at Appendix D). Destiny, together with her parents and brothers, also signed a two-page "waiver of conflict of interest and consent to joint representation." CP 19-20 (also available at Appendix C). That form states:

> 1) That s/he believes that his/her interests and those of this/her siblings are consistent; so that it is suitable for all three defendants to be represented by one attorney.
>
> 2) That s/he is aware that there is always a potential for conflict of interest where codefendants are represented by the same attorney.
>
> 3) That nonetheless, each Defendant and all of them jointly have determined that is in their individual and mutual interests to have a single attorney represent them, for reasons including but not limited to efficient investigation and preparation of their cases and effective presentation of their cases at trial.
>
> 4) Defendants and their parents are signing three originals of this document, one per file.

CP 19-20.

The court authorized the joint representation, however, without providing Destiny with complete information. Even though the children's attorney and the court reviewed relevant case law before allowing the representation to proceed, both reviewed standards applicable to adult defendants. CP 5-17; RP (4/7/15) 4-5. No one considered or suggested that 15-year-old Destiny might need more protection, guidance, and information before being able to effectuate a knowing, intelligent, and

voluntary waiver. Moreover, a review of the case law does not relate to what information Destiny had to effectively waive her right to an independent attorney. *Cf.* RP 9 (at start of trial, Destiny is confused about the waiver and joint representation).

Destiny had no experience with the criminal justice system, and the record contains no reason to suggest she had any previous experience with counsel. *See State v. Saenz*, 175 Wn.2d 167, 283 P.3d 1094 (2012) (record insufficient to show valid waiver of juvenile court jurisdiction where juvenile had never been in adult court and record lacked other indicia of intelligent waiver). The record lacks any hint that Destiny was informed of her constitutional right to court-appointed, independent counsel. U.S. Const. amend. VI; *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). This information is critical because was likely under implicit or explicit pressure to share the cost of a single attorney with her brothers (the co-defendants). CP 19-20 (parents and brothers sign written waiver); *see Gault*, 387 U.S. at 41 (holding "the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child"). The presumption against waiver counsels that this information should have been provided Destiny, yet it was not.

By sharing counsel, moreover, Destiny lost out on privileged and confidential communications with her attorney, as all information could be jointly shared among co-defendants and any one of her co-defendants could waive the attorney-client privilege. *See* RPC 1.6; Debra Lyn Bassett, *Three's a Crowd: A Proposal to Abolish Joint Representation*, 32 Rutgers L.J. 387, 434-35 & n.204-05 (Winter 2001). Her attorney's independent professional judgment and loyalty "will almost always" be comprised by the task of representing three individuals in one proceeding. Ross Barr & Brian Friedman, *Joint Representation of Criminal Codefendants: A Proposal to Breathe Life into Section 4-3.5(C) of the ABA Standards Relating to the Administration of Criminal Justice*, 15 Geo. J. Legal Ethics 635, 635 & n.3 (Summer 2002); *Three's a Crowd*, 32 Rutgers L.J. at 391, 411-12. These consequences of the joint representation were not explained to Destiny.

Another unexplored danger was that joint counsel may not be able to effectively negotiate, pursue, or advise on a proffered plea bargain. *Holloway v. Arkansas*, 435 U.S. 475, 489-90, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) ("Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. . . . [A] conflict may . . . prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from

arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another.").

Additionally, an actual conflict existed because, at sentencing, joint counsel lacked the ability to argue individually for her clients. *See Holloway*, 435 U.S. at 490 (actual conflict can occur at sentencing). Instead, counsel filed a single sentencing brief in the three respondents' individual cases and the brief rarely identifies the respondents individually. CP 43-58. At the sentencing hearing, counsel's approach similarly promoted a single viewpoint for the common good. RP 485 ("the gravamen of our presentation is that there are very significant mental health difficulties experienced by the youngsters"), 516-17 (witness advocates for equal punishments among respondents), 615-20 (counsel discusses three clients as a single group). This hampered, for example, counsel's ability to argue the relative culpability of her clients because promoting one client's lesser accountability would have indicated her other clients' greater culpability. The duty to all three clients prevented counsel from singling out and promoting Destiny's case. Counsel was also prevented from discussing relationships among the siblings and the influence Destiny's brothers might have had on her, because counsel also represented those brothers.

These are merely examples of the actual conflict that existed. Joint counsel pursued a joint defense of self-defense for the three respondents, charged as accomplices. But independent counsel may have elected to try the case differently for her or his individual client.

Like in *Saenz* and *State v. Bailey*, a case applying *Saenz,* the narrow information provided Destiny was insufficient to show she was "fully informed" and "intelligently" waived her right to independent counsel. *Saenz*, 175 Wn.2d at 174-77; *State v. Bailey*, 179 Wn. App. 433, 440-42, 335 P.3d 942 (2014) (insufficient decline waiver where juvenile "was not advised that a strike conviction could later be used to sentence him to life without parole or the significant protections he would forever lose by exiting the juvenile court system"). The Court should grant review.

2. The Court should accept review and hold Destiny had the right to act in self-defense because C.H. was the first aggressor through a combination of words and conduct.

Destiny had the right to act in self-defense if she had a good faith belief there is apparent danger to herself or another person. *State v. Carter*, 15 Wash. 121, 123, 45 P. 745 (1896). In assessing Destiny's good faith belief, the factfinder stands "in [her] shoes." *State v. Ellis*, 30 Wash. 369, 373, 70 P. 963 (1902); *accord State v. Wanrow*, 88 Wn.2d 221, 234-26, 559 P.2d 548 (1977); *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d

1064 (1983); *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The factfinder's focus must be on Destiny's subjective belief; she does not need to be in actual danger to act in lawful self-defense. *Riley*, 137 Wn.2d at 909.

The juvenile court incorrectly determined that C.H.'s conduct was merely verbal and, therefore, did not trigger Destiny's to right to act in self-defense. RP 441-42; CP 32-33, 35 (FF VI, XIV; CL II). While words alone cannot give rise to a reasonable apprehension of bodily harm, even the State recognizes that C.H. did more than speak—he smirked at Destiny "like he was trying to start something with [her]." *Compare Riley*, 137 Wn.2d at 911-12 (there must be some conduct to trigger right to self-defense) *with* RP 288-89; Resp. Br. at 7, 34-35 (acknowledging Destiny reacted to C.H. smirking at her but disputing effect of the smirk).

The Court of Appeals concludes "if words alone cannot support a self-defense claim, it stands to reason that a facial expression made by someone sitting and eating at a table, cannot create a reasonable apprehension of great bodily harm." Slip Op. at 16. This broad holding understates the evidence in the case and should be reviewed by this Court.

The evidence here showed C.H. did more than sit and eat at a table and make a facial expression. Destiny testified that C.H. turned towards and smirked at her "like he was trying to start something with [her]." RP

288-89; Resp. Br. at 7, 34-35 (acknowledging Destiny reacted to C.H. smirking at her but disputing effect of the smirk). Additionally, C.H., bullied the younger Destiny for years, online and in person, and was a member of the Lakewood Crips (a.k.a the 10-8) gang. RP 47, 249-50, 289-93, 300-01. Just the weekend before the incident at issue here, C.H. tagged Destiny in a Facebook post that called Destiny's mother "a bitch" and asked Destiny to tell her twin brothers to "line that up" for a fight "today @4." Ex. 9; RP 17, 84, 86.

C.H.'s smirk "like he was trying to start something" must be viewed in the context of years of bullying and the recent comment that Destiny's brothers should be prepared to fight him that day. Under our self-defense laws, if Destiny reasonably believed C.H. was about to physically attack her, she had the right to respond with reasonable force. *Riley*, 137 Wn.2d at 909 (defendant need not wait for actual danger to act in self-defense).

The Court should accept review and hold Destiny was not obligated to let C.H. attack her.

3. The Court should accept review and juveniles like Destiny have the right to be tried by a jury who can assess the reasonableness of her self-defense claim.

Because the consequences of juvenile adjudications make them look much more like adult convictions than they did when the right to a

jury trial was suspended, the Court should grant review and hold due process requires juvenile respondents be afforded the opportunity to be tried by a jury.

Children charged with crimes in Washington historically were afforded the right to a jury trial. Ch. 18, § 2, 1905 Wash. Laws (repealed, 1937). This right was taken away in the late 1970s when the Legislature determined the primary purpose of juvenile court was rehabilitation and the primary purpose of adult court was accountability. *See* Chapter 13.40 RCW (Juvenile Justice Act of 1977). Our courts have noted that should the juvenile system become sufficiently like the adult criminal system, the right to a jury for juveniles should be restored. *See, e.g.*, *State v. Lawley*, 91 Wn.2d 654, 591 P.2d 772 (1979); *Monroe v. Soliz*, 132 Wn.2d 414, 939 P.2d 205 (1997).

Increasingly, the distinction between the adult and juvenile criminal justice systems has eroded.

The Sixth Amendment makes no distinction between adults and juveniles. In fact, when the amendment was drafted, there was no such distinction.

> Our common criminal law did not differentiate between the adult and the minor who had reached the age of criminal responsibility, ... The majesty and dignity of the state demanded vindication for infractions from both alike. The fundamental thought in our criminal jurisprudence was not,

> and in most jurisdictions is not, reformation of the criminal, but punishment; punishment as expiation for the wrong, punishment as a warning to other possible wrongdoers. The child was arrested, put into prison, indicted by the grand jury, tried by a petit jury, under all the forms and technicalities of our criminal law, with the aim of ascertaining whether it had done the specific act -- nothing else -- and if it had, then of visiting the punishment of the state upon it.

Julian Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 106 (1909).

The intent of the framers and the emphasis of recent United States Supreme Court show that the same right to a jury must be provided to adult and juveniles alike. The actual language of the Sixth Amendment made no distinction between adults and juveniles in regard to the right to a jury trial. And we know from the commentators that, at the time, all persons over the age of seven and charged with criminal activity were tried by a jury. 23 Harv. L. Rev. at 106. Thus, no matter what rationale or label is applied to avoid the constitutional guarantee, where a person is charged with an act that results in imprisonment the only proper safeguard envisioned by the framers is a jury trial.

Our State constitution also provides juveniles with the right to a jury. The Washington Constitution provides the right to a jury trial shall remain "inviolate." Const. art. I, § 21. It also guarantees that "In criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury of the county in which the offense is charged to

have been committed." Const. art. I, § 22. This Court has recognized that the right to a jury trial may be broader under Washington's Constitution than under the federal constitution. *State v. Smith*, 150 Wn.2d 135, 156, 75 P.3d 934 (2003) (applying the factors in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)).

Smith clarified that the scope of the jury-trial right must be determined based on the right as it existed at the time the Constitution was adopted. 150 Wn.2d at 153.

At the time the Washington Constitution was adopted, there was no differentiation between juveniles and adults with regard to the provision of a jury. Even after the juvenile courts' inception, juveniles were statutorily entitled to trial by jury from 1905 until 1937, when the Legislature struck the right to a jury trial in juvenile court. Ch. 65, § 1, 1937 Wash. Laws at 211. The original juvenile court statute in Washington State provided that "[i]n all trials under this act any person interested therein may demand a jury trial, or the Judge, of his own motion, may order a jury to try the case." Ch. 18, § 2, 1905 Wash. Laws (repealed, 1937). Thus, juveniles were entitled to jury trials at the time the Washington Constitution was adopted in 1889 and for more than 40 years thereafter–until the Juvenile Justice Act was amended to delete that right.

In *State v. Schaaf*, the Court concluded the absence of a separate juvenile court at the time of the adoption of the Constitution did not lead to the conclusion that juveniles were now entitled to a jury trial. 109 Wn.2d 1, 14, 743 P.2d 240 (1987). *Schaaf* concluded that even though the right to a jury trial existed at all points prior to 1938, the framers of the Washington Constitution could not know of later efforts to legislate away the right, and thus could not have intended to provide the right in the first place or intended to foreclose its denial in the future. The effort in *Schaaf* to limit the framers' intent based on legislation that came decades later is directly at odds with *Smith*. 150 Wn.2d at 153. Because a juvenile in 1889 had the right to a jury, a juvenile in 2016 has the right to a jury trial.

Accordingly, the time has come to restore the right to a jury trial to juvenile respondents like Destiny. *In re L.M.*, 286 Kan. 460, 460, 186 P.3d 164 (Kan. 2008) ("Because the Kansas Juvenile Justice Code has become more akin to an adult criminal prosecution, it is held that juveniles henceforth have a constitutional right to a jury trial under the Sixth and Fourteenth Amendments.").

4. Destiny adopts the issues presented in the petitions for review filed by her codefendants.

Pursuant to RAP 10.1(g), Destiny adopts and incorporates the issues and arguments raised in the petitions for review filed by her codefendant siblings.

E. CONCLUSION

The Court should grant review to determine these important issues, including a juvenile's effective waiver of the right to independent counsel at a joint trial with her codefendant, twin brothers, whether a bully's words and conduct combined to enable Destiny to act in self-defense, and whether juveniles like Destiny should be entitled to trial by a jury.

DATED this 26th day of April, 2018.

Respectfully submitted,

s/ Marla L. Zink
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Washington Appellate Project
Attorney for Petitioner

APPENDIX

Document	Appendix
Court of Appeals Opinion, Feb. 21, 2018	A
Order Denying Motion to Reconsider	B
Defendants' Waiver of Conflict of Interest & Consent to Joint Representation	C
Transcript of April 5, 2017 hearing	D

APPENDIX

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

February 21, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. D. J. M., Appellant.	No. 48093-0-II (Cons. w/ Nos. 48096-4-II & 48103-1-II) UNPUBLISHED OPINION

STATE OF WASHINGTON, Respondent, v. L. D. M., Appellants	48096-4-II UNPUBLISHED OPINION

No. 48093-0-II
(Cons. w/ Nos. 48096-4-II
and 48103-1-II)

STATE OF WASHINGTON, Respondent, v. L. K. M., Appellant.	No. 48103-1-II UNPUBLISHED OPINION

SUTTON, J. — Three siblings, DJM,[1] LDM, and LKM were adjudicated guilty of second degree assault after a fight at their high school with another student, CH.[2] DJM, LKM, and LDM appeal, arguing that (1) they did not validly waive the conflict of interest resulting from joint representation, (2) the juvenile court misapplied the doctrines of self-defense and the defense of others, (3) they were constitutionally entitled to a jury trial, and (4) the juvenile court improperly imposed additional terms of disposition including no-contact orders. We affirm the juvenile adjudications but remand to the juvenile court to strike the additional conditions of disposition.[3]

[1] Per ruling of April 25, 2016, we refer to the appellants by their initials.

[2] We use initials for the victim and the witnesses to provide anonymity.

[3] The appellants also ask us to exercise our discretion and not impose appellate costs. Under RAP 14.2, a commissioner or clerk of this court has the ability to determine whether appellate costs should be imposed based on the appellants' ability to pay and prior determinations regarding indigency. If the State decides to pursue costs for this appeal, a commissioner will make a determination as to whether costs should be imposed.

FACTS

On February 23, 2015, DJM and her brothers, LKM and LDM, arrived at Washington High School. All three siblings entered the school cafeteria to have breakfast before school started. CH was already in the cafeteria sitting at a table eating breakfast with his friends, DH and JB. DJM walked up to CH and punched him several times, knocking CH out of his chair and onto the floor. As CH got up and walked around the other end of the table, LKM joined his sister. Then, LDM joined his siblings. At the same time, the school security officer, Jim Wiedow, attempted to intervene by putting himself between CH and DJM, LKM, and LDM. However, LKM and LDM continued trying to get past Wiedow in order to get to CH.

As the fight between LKM, DJM, and CH escalated, LDM engaged in a second, separate fight with CH's friend, DH, to prevent DH from intervening in the fight. Wiedow continued his efforts to separate DJM and LKM from CH. After a few minutes, Wiedow was able to successfully intervene and stop the fight. After the fight, CH had a swollen lip and several broken teeth.

The next day the State charged DJM, LKM, and LDM with second degree assault.

I. JOINT REPRESENTATION

Before trial, the juvenile court heard a motion to waive conflict of interest and consent to joint representation for all three siblings. The juvenile court expressed concern about the joint representation:

> [A]ssuming that each one of the. . . respondents wishes to go forward with joint representation, I need that confirmation on the record from each one of you. And again, I will tell you that it would not be my choice to have you go forward with the same counsel because where it's one event, which in this case it's one event, and-help me here, what is the exact charge?

. . . .

> Assault in the second degree is a very, very serious crime, it's a strike offense. And where there is an assault that takes place allegedly with the participation of three individuals; there is, I believe, a huge potential for there being conflict as between the respondents because one might see it slightly differently than another, and one might say I didn't do it but I saw this. And that's where the conflict comes in. So I want to be very clear with each one of you that you understand that potential conflict and you're waiving the conflict and you wish to go forward with joint representation.

Verbatim Report of Proceedings (VRP) at 6. However, all the siblings told the juvenile court that they wanted to be represented by the same attorney, that they waived any conflict of interest, and that they consented to joint representation. The juvenile court agreed to allow the joint representation. Each of the siblings also entered written waivers of the conflict of interest.

On the day of trial, the juvenile court confirmed that the siblings waived the potential conflict of interest and wanted to proceed with joint representation at trial:

> [COURT]: DJM, you are aware that potential conflicts could arise with respect to yourself and the other respondents in this case. Is it still your desire to waive any conflict and proceed with one attorney?
>
> [DEFENSE ATTORNEY]: Do you understand?
>
> [DJM]: No, I don't.
>
> [DEFENSE ATTORNEY]: This is the same—this is the same issue we had the briefing about before.
>
> . . . .
>
> [DEFENSE ATTORNEY]: Your Honor, may I have the Court's permission to sort of translate?
>
> [COURT]: Yes.
>
> . . . .
>
> [COURT]: . . . . So having now had a chance to discuss the matter once again with your attorney, and it is the same motion that Judge Serko previously ruled upon, is it your wish, DJM, to waive any potential conflict of interest with the

other two respondents and proceed to trial with all three of you using the same lawyer?

[DJM]: Yes, Your Honor.

[COURT]: And LKM?

[LKM]: Yes, Your Honor.

. . . .

[COURT]: Do you have the same answer as DJM, that you wish to waive any potential conflict and use the same lawyer?

[LKM]: Yes, Your Honor.

[COURT]: And LDM, do you wish to waive any actual or potential conflict of interest and use the same lawyer?

[LDM]: Yes, Your Honor.

VRP at 9-11.

II. TRIAL TESTIMONY

CH testified at trial. CH was generally obtrusive and unforthcoming. CH stated on multiple occasions that he did not want to talk about the events on February 23 and refused to answer the State's questions. However, CH did testify that the pictures of his broken teeth and swollen lip accurately represented his condition after the fight. And CH testified that neither his teeth nor his lip were in that condition that morning when he arrived at school.

Rebecca Patterson is a paraeducator who was assigned to monitor breakfast in the cafeteria on February 23. Patterson testified that she saw DJM walk up to CH, punch him, and knock him down. CH got up and started to walk away from DJM. While the fight was going on, Patterson noticed a second fight going on in the cafeteria. She attempted to keep other students from getting involved in that fight or starting any additional fights.

Wiedow testified that he was also monitoring the cafeteria the morning of February 23. He had been talking to Patterson when he saw DJM walk up to CH, hit him on the head, and knock CH out of his chair and onto the ground. Wiedow saw CH walk around the other end of the table and move toward the cafeteria exit. Wiedow attempted to shield CH in order to prevent any further conflict. However, Wiedow testified that LKM and LDM were attempting to push past him to reach CH. While Wiedow was attempting to shield CH from LKM, DJM continued to assault CH.

The State introduced several different videos showing the fight. The first video is from the school's surveillance camera and shows both fights. Wiedow reviewed the surveillance video and explained what was happening in the video. The surveillance video is consistent with Wiedow's trial testimony. The State also introduced a surveillance video showing DJM immediately after the fight. In the video, DJM is jumping around and laughing with friends. The State also introduced two cell phone videos of the fight. The first video shows DJM walk up to CH while he is eating breakfast. It also shows DJM hit CH and knock him out of his chair. The second cell phone video shows CH walk around the end of the table where he is confronted by DJM, LKM, and LDM. The video also shows Wiedow attempting to intervene and stop the fight.

DJM, LKM, and LDM testified at trial. DJM testified that CH had been harassing her both verbally and on Facebook. And she testified that on the morning of February 23, CH made a face "like a smirk" at her. VRP at 289. When CH smirked at DJM, she "just got angry." VRP at 296. DJM stated that after she hit CH and knocked him out of the chair, she just stood there waiting to see what would happen. LKM testified that he saw DJM hit CH and then he moved in front of DJM in order to protect her. LDM testified that he was getting his breakfast when he saw DJM

start fighting CH, and then he saw CH fall out of his chair. When LDM saw DJM and LKM engage in the continued confrontation with CH, he intervened by confronting CH's friend, DH, in order to prevent DH from aiding CH.

III. JUVENILE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

After the trial, the juvenile court entered findings of fact and conclusions of law. The juvenile court found Wiedow's and Patterson's testimony credible. The juvenile court also found that, when CH got up from getting knocked out of the chair, he walked around the table in order to move toward the exit. The juvenile court concluded that both DJM and LKM were aggressors in the fight and neither one of them could claim self-defense.

The juvenile court also found that CH did not respond to DJM's initial assault and instead moved away from her. And when Wiedow attempted to intervene and keep the parties separated, DJM, LKM, and LDM ignored him and continued to pursue CH. The juvenile court also found that CH was not an aggressor in the fight and thus, he was entitled to use self-defense.

The juvenile court found that LDM engaged in a fight with DH specifically to prevent DH from interfering in DJM's and LKM's assault on CH. And the juvenile court found that LDM could not reasonably have believed that his siblings were innocent aggressors in the fight.[4] Therefore, defense of others was not available to LDM as a defense.

Based on its findings of fact, the juvenile court concluded that DJM, LKM, and LDM were guilty beyond a reasonable doubt of second degree assault.

IV. SENTENCING AND DISPOSITION

At sentencing, the State argued that DJM, LDM, and LKM should receive standard range sentences. DJM, LDM, and LKM requested that they be granted a manifest injustice sentence below the standard range. Each sibling presented a mental health evaluation that demonstrated each had mental health issues, such as anxiety and depression, which contributed to the assault on CH. Each also presented a comprehensive plan of mental health treatment and mentorship that would treat their mental health issues and help them build skills to deal effectively with problems and confrontations.

The juvenile court found that DJM, LKM, and LDM did not meet the criteria for a manifest injustice sentence below the standard range. The juvenile court imposed a standard range sentence of 15-36 weeks confinement for each sibling. The juvenile court also ordered additional conditions of disposition as to each, including prohibiting contact with CH.

[4] The trial court's findings of fact regarding the availability of defense of others for LDM were entered after we remanded to the trial court to make supplemental findings of fact.

DJM, LKM, and LDM appeal. In the interests of justice, we consider all arguments as if they had been adopted by each co-appellant. RAP 1.2.

ANALYSIS

I. JOINT REPRESENTATION

DJM argues that she did not execute a valid, fully informed waiver of the potential conflict of interest created by the joint representation. Criminal defendants have a Sixth Amendment right to conflict-free counsel. *State v. Dhaliwal*, 113 Wn. App. 226, 232, 53 P.3d 65 (2002). Here, DJM, LKM, and LDM waived their right to conflict-free counsel. Accordingly, we affirm their convictions.

A. WAIVER

DJM argues that her waiver of the potential conflict of interest arising from joint representation was invalid because it was not "fully informed," as required by RCW 13.40.140(10). Br. of Appellant at 11. We disagree.

A juvenile has the right to be represented by counsel at all critical stages of the proceedings. RCW 13.40.140(2). The right to counsel includes the right to conflict-free counsel. *Dhaliwal*, 113 Wn. App. at 232. RCW 13.40.140(10) provides that a juvenile's waiver of the right to counsel "must be an express waiver intelligently made by the juvenile after the juvenile has been fully informed of the right being waived."

DJM argues that, because of a juvenile's immaturity and lack of experience, perspective, and judgment, juveniles must be given extensive information in order to be fully informed of their rights before waiving them. According to DJM, the juvenile court's limited explanation of the

potential conflict involved was insufficient because it did not educate DJM as to all aspects of potential conflict that could arise. Specifically, DJM asserts that, to have been fully informed regarding the potential conflict, the juvenile court was required to inform her that there was a potential for conflict to arise in investigation, presentation of evidence, cross-examination, presentation of defenses, objections, and pretrial motions. She also asserts that she should have been informed that she no longer had completely privileged and confidential communications with her attorney because information could be shared with her siblings. And she should have been informed that a conflict could arise regarding negotiation of a plea agreement.

DJM supports her argument by relying on *Saenz* and *Bailey*. *State v. Saenz*, 175 Wn.2d 167, 283 P.3d 1094 (2012); *State v. Bailey*, 179 Wn. App. 433, 335 P.3d 942 (2014). In *Saenz*, our Supreme Court held that a juvenile who waived juvenile court jurisdiction was not fully informed because there was no record of what the juvenile actually knew about the protection of the juvenile justice system at the time of the waiver. 175 Wn.2d at 177. And, in *Bailey*, Division Three of this court held that a juvenile was not fully informed regarding his decision to waive juvenile jurisdiction because he was not informed of the specific statutory rights and protections of the juvenile justice system. 179 Wn. App. at 440-41. Here, however, the meaning of being "fully informed" for the purposes of waiving juvenile court jurisdiction does not inform our analysis.

Saenz and *Bailey* enumerate the multitude of rights and protections available to juveniles in the juvenile justice system. It makes sense that to be fully informed regarding the waiver of these rights and protections, a juvenile must be informed of each right and protection. But in the

context of waiving a potential conflict of interest, similar concrete rights and protections do not exist. Because the issue is whether DJM waived the potential conflict of interest, the relevant inquiry is whether DJM was fully informed that the potential for a conflict of interest existed before she waived it.

DJM was repeatedly informed that there were concerns about joint representation because of the potential for a conflict of interest to arise. And the juvenile court illustrated the potential conflict of interest with the example of what might happen if the siblings began developing slightly different explanations about what happened. The juvenile court also warned DJM that additional conflicts might arise as the case developed, resulting in the issue of being raised again later. Together these warnings demonstrate that DJM was fully informed about the potential for a conflict of interest to arise and that she intelligently waived that risk. Because the juvenile court followed the same waiver process with LKM and LDM, and they were fully informed about the potential for a conflict of interest to arise, their waivers were also fully informed. Accordingly, we affirm the juvenile court's decision to allow joint representation for DJM, LKM, and LDM.

B. ACTUAL CONFLICT OF INTEREST

Although DJM, LKM, and LDM executed a valid waiver of their right to conflict-free counsel, we note that, because they fail to establish an actual conflict of interest supported by the record, they would not be entitled to reversal regardless of whether the waiver was valid. Even when the potential conflict of interest was not properly waived, joint representation is not a per se constitutional violation of the right to conflict-free counsel. *State v. Byrd*, 30 Wn. App. 794, 798, 638 P.2d 601 (1981). To be entitled to reversal, the appellant must show an actual conflict of interest adversely affecting the lawyer's performance. *Dhaliwal*, 113 Wn. App. at 234-35.

The appellant bears the burden of demonstrating that an actual, as opposed to a potential, conflict of interest exists. *Dhaliwal*, 113 Wn. App. at 237. The actual conflict of interest must be readily apparent on the record. *Dhaliwal*, 113 Wn. App. at 237. An actual conflict of interest exists if "'the defendants' interests diverge with respect to a material factual or legal issue or to a course of action'" or "'where counsel must slight the defense of one defendant to protect another.'" *Dhaliwal*, 113 Wn. App. at 237 (quoting *State v. Robinson*, 79 Wn. App. 386, 394, 902 P.2d 652 (1995)); *State v. James*, 48 Wn. App. 353, 369, 739 P.2d 1161 (1987).

DJM presents two examples of the alleged actual conflict of interest present in her case. First, she claims that actual prejudice existed because the attorney jointly representing the children could not negotiate a plea deal for her. Second, she claims that, at sentencing, the attorney could not argue that some of the siblings were less culpable than others because that would indicate higher culpability for another child.

Although DJM's allegations demonstrate *potential* conflicts of interest that could have arisen in the joint representation, she does not point to anything in the record to support her claims. There is nothing in the record that supports the allegation that, but for the joint representation, DJM could or would have negotiated a plea deal.

Nor can DJM demonstrate an actual conflict in regards to sentencing. DJM alleges that an actual conflict existed at sentencing because her attorney was precluded from arguing relative culpability among the siblings. She also alleges broadly that trial counsel was unable to argue individually for each appellant. The record belies the assertion that an actual conflict existed at sentencing. First, there was no conflict regarding relative culpability. Each juvenile was faced with standard range sentences.[5] Accordingly, the siblings' attorney argued for a manifest injustice disposition below the standard range.[6]

A "manifest injustice" is "a disposition that would either impose an excessive penalty on the juvenile or would impose a serious, and clear danger to society in light of the purposes of this chapter." Former RCW 13.40.020 (2014). The "relative culpability" of the siblings regarding the same fight has no bearing on the statutory criteria for imposing a manifest injustice sentence below

[5] Former RCW 13.40.0357 (2013) sets the standard range sentences for juvenile offenses. In some situations, the juvenile court has the discretion to impose "option B" (suspended confinement) or "option C" (mental health/chemical dependency treatment) alternatives to confinement. However, because the siblings were all adjudicated of second degree assault, none of them were eligible for any sentencing alternatives.

[6] RCW 13.40.160(6).

the standard range. Accordingly, there can be no actual conflict based on the failure to argue something that does not apply to the siblings' sentencing.

Although DJM has alleged two *potential* conflicts of interest, she has failed to point to specific areas of the record that demonstrate an actual conflict of interest. LKM and LDM do not assert any other argument supporting actual prejudice. Accordingly, the siblings' joint representation did not violate their right to conflict free counsel.

II. SELF-DEFENSE AND DEFENSE OF OTHERS

At trial, all three siblings alleged some form of self-defense or the defense of others. DJM alleged that she was acting in self-defense because she feared CH due to bullying and harassment. LKM alleged that he began fighting to protect DJM. And LDM alleged that he began fighting with CH's friend, DH, to protect his siblings by preventing DH from intervening in the fight between DJM, LKM, and CH.

A. LEGAL STANDARDS

There are three elements to self-defense: (1) the defendant subjectively feared imminent danger of bodily harm, (2) the defendant's belief was objectively reasonable, and (3) the defendant exercised no more force than reasonably necessary. *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). The defendant's belief is not objectively reasonable if the apprehension of great bodily harm is based on words alone. *State v. Riley*, 137 Wn.2d 904, 912, 976 P.2d 624 (1999).

> [I]n general, the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, unless he or she in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action.

Riley, 137 Wn.2d at 909.

> An individual who acts in defense of another person, reasonably believing him to be the innocent party and in danger, is justified in using force necessary to protect that person even if, in fact, the party whom he is defending was the aggressor.

State v. Bernardy, 25 Wn. App. 146, 148, 605 P.2d 791 (1980).

B. DJM'S SELF-DEFENSE CLAIM

On appeal, DJM argues that the juvenile court erred by concluding that she was the primary aggressor because the combination of bullying and smirking was sufficient provocation to make CH the primary aggressor. DJM also argues that she was entitled to self-defense because, even if she was the primary aggressor, she withdrew from the conflict. Both of these arguments fail. The juvenile court properly concluded that DJM was not entitled to assert self-defense.[7]

It is undisputed that, on the day of the fight, CH was sitting down at a table eating breakfast when DJM walked up to him, punched him in the back of the head, and knocked him from his chair to the floor. However, DJM claims that CH was the aggressor because he had repeatedly harassed DJM. And on the day of the fight, DJM claims that CH smirked at her. Neither of these allegations support a self-defense claim.

[7] We note that DJM assigns error to findings of fact VI, VII, X, XIV, and XXVI. However, DJM does not argue that those findings are not supported by substantial evidence. We do not consider assignments of error unsupported by argument and authority. RAP 10.3(a)(6).

First, DJM claims that CH had repeatedly harassed her by making fun of her skin color and insulting her. DJM does not claim that any of CH's harassment resulted in physical violence toward her. In general, harassment that is purely verbal in nature cannot justify the use of force because mere words alone do not create a reasonable apprehension of great bodily harm. *Riley*, 137 Wn.2d at 912. Moreover, if words alone cannot support a self-defense claim, it stands to reason that a facial expression made by someone sitting and eating at a table, cannot create a reasonable apprehension of great bodily harm.

DJM also claims that the juvenile court erred by concluding that she did not act in self-defense because she had withdrawn from the fight after knocking CH out of the chair. In order to have withdrawn from the conflict, DJM must have acted in a manner that let CH know that she was withdrawing or intended to withdraw from the confrontation. But all the evidence establishes that after DJM punched CH and knocked him out of the chair, she just stood there. She did not say anything and she did not walk away. None of the facts, including her own testimony, establish that DJM took any action that would indicate she was withdrawing from the conflict. Accordingly, DJM cannot claim that she was entitled to use self-defense because she withdrew from the conflict after she initiated it.

C. LKM'S CLAIMS

LKM adopted the arguments in DJM's brief without additional argument or briefing. The juvenile court found that both DJM and LKM were aggressors against CH and, as a result, self-defense was not available to either of them. However, LKM testified that he began fighting CH because he wanted to protect his sister. DJM's self-defense argument relies on two assertions: (1)

that CH provoked the conflict through a pattern of harassment and smirking at her, and (2) that she withdrew from the conflict. Neither of these arguments apply to LKM. Nothing in the record establishes that CH had a history of harassing LKM. Nor was there any evidence that CH was smirking at LKM. In addition, there was not any evidence that LKM attempted to withdraw from the fight after engaging CH.

Because LKM has failed to present any argument or authority regarding the juvenile court's application of self-defense or the defense of others to his specific case, we decline to address it any further. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (we do not consider grounds unsupported by argument or citation to authority).

D. LDM'S CLAIMS

LDM argues that there is insufficient evidence to support his adjudication because the State did not prove that LDM did not act in defense of others. Because LDM does not argue that the superior court erred by concluding that he was not entitled to raise a defense of others claim, his argument fails.

LDM argues that there is insufficient evidence to support his adjudication because the State did not prove that LDM did not act in defense of others. LDM assigns error to the juvenile court's findings of fact VIII, IX, X, XII, XIII, XVI, XIX, XX, and XXIX. However, LDM presents arguments only regarding finding of fact XX. Finding of fact XX states,

> Given Mr. Wiedow's directions and actions being ignored by his siblings, LDM could not reasonable (*sic*) believe either of his siblings were innocent parties in the altercation with CH.

Clerk's Papers at 99. Thus, we review only the challenge to finding of fact XX. RAP 10.3(a)(6). We review whether substantial evidence supports the juvenile court's findings of fact and, in turn, whether the findings support the conclusions of law. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014), *as corrected*, 191 Wn. App. 759 (2016).

LDM argues that this finding is unsupported because there was no evidence demonstrating that LDM knew what Wiedow had concluded about who was the initial aggressor in the fight. But this finding of fact does not impute Wiedow's conclusions to LDM. Instead, it is based on LDM's reactions to what LDM observed—specifically his siblings refusing to comply with instructions to stop fighting and resisting Wiedow's attempts to break up the altercation. Wiedow testified that DJM and LKM continued the altercation after he intervened and tried to break up the fight. Therefore, finding of fact XX is supported by substantial evidence.

LDM also argues that, legally, finding of fact XX does not support the conclusion that LDM was not acting in defense of his siblings. We disagree. To have been acting in defense of his siblings, LDM had to have had a reasonable belief that his siblings were innocent parties and in danger. *Bernardy*, 25 Wn. App. at 148. Here, DJM's and LKM's refusal to comply with Wiedow's attempts to stop the fight makes it unreasonable to believe that they were innocent parties because innocent parties to a fight would not attempt to continue the fight after security intervenes. Therefore, the juvenile court properly concluded that, based on observing DJM and LKM repeatedly refusing to comply with Wiedow's attempts to intervene and stop the fight, LDM

did not reasonably believe that DJM and LKM were innocent parties in the fight. Thus, the juvenile court's findings of fact supports the court's conclusion that LDM was not acting in defense of his sibling.

III. RIGHT TO JURY TRIAL

DJM argues that "the time has come" to grant juvenile defendants the right to a jury trial. Br. of Appellant at 21-22. DJM urges us to declare RCW 13.04.021(2) unconstitutional because juvenile adjudications are now indistinguishable from adult adjudications. RCW 13.04.021(2) explicitly states that "[c]ases in juvenile court shall be tried without a jury."

Whether RCW 13.04.021(2) is unconstitutional because juveniles are entitled to a jury trial is a question of law that we review de novo. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). Our Supreme Court resolved this issue in *State v. Chavez*, 163 Wn.2d 262, 272, 180 P.3d 1250 (2008). In *Chavez*, our Supreme Court unequivocally rejected the argument that juveniles are entitled to a jury trial under the Sixth Amendment of the United States Constitution and under article 1, sections 21 and 22 of the Washington Constitution. 163 Wn.2d at 272, 274. *Chavez* controls here, therefore, DJM's argument fails.

IV. CONDITIONS OF DISPOSITION

LKM argues the juvenile court erred by entering indefinite no-contact orders protecting CH as conditions of his disposition. The State concedes that the juvenile court exceeded its authority under the Juvenile Justice Act, chapter 13.40 RCW, by imposing the no-contact orders. The State's concession is proper. Accordingly, we reverse the juvenile court's imposition of a no-contact order as a condition of disposition and remand for the juvenile court to strike it.

RCW 13.40.185 governs how a juvenile court designates confinement in a disposition order. And former RCW 13.40.190 (2014) allows the juvenile court to impose restitution in a disposition order. Only RCW 13.40.210 addresses imposing additional conditions on juveniles following a disposition. RCW 13.40.210(3)(b) states:

> The secretary [of the Department of Social and Health Services] shall, for the period of parole, facilitate the juvenile's reintegration into his or her community and to further this goal shall require the juvenile to refrain from possessing a firearm or using a deadly weapon and refrain from committing new offenses and may require the juvenile to: (i) Undergo available medical, psychiatric, drug and alcohol, sex offender, mental health, and other offense-related treatment services; . . . (ix) refrain from contact with specific individuals or a specified class of individuals; (x) meet other conditions determined by the parole officer to further enhance the juvenile's reintegration into the community.

Here, the relevant statutes provide the secretary of the Department of Social and Health Services, not the juvenile court, the authority to impose additional conditions following release from confinement. Accordingly, the juvenile court exceeded its authority by imposing additional conditions of disposition on DJM, LKM, and LDM. We reverse the juvenile court's imposition of additional conditions of disposition on DJM, LKM, and LDM and remand to strike the conditions.

We affirm DJM's, LKM's, and LDM's adjudications for second degree assault, but reverse the juvenile court's additional conditions of disposition. We remand for further

proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

We concur:

Worswick, J.

Maxa, A.C.J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

March 30, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. D. J. M., Appellant.	No. 48093-0-II (Cons. w/ Nos. 48096-4-II & 48103-1-II) ORDER DENYING MOTION FOR RECONSIDERATION
STATE OF WASHINGTON, Respondent, v. L. D. M., Appellants	48096-4-II ORDER DENYING MOTION FOR RECONSIDERATION
STATE OF WASHINGTON, Respondent, v. L. K. M., Appellant.	No. 48103-1-II ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE MOTION FOR RECONSIDERATION AND ORDER DENYING MOTION FOR RECONSIDERATION

Appellant LKM moves for an extension of time to file his motion for reconsideration in this case. Upon consideration, the court grants appellant LKM a one day extension to March 14,

2018. Because appellant LKM's motion for reconsideration was received by that date, it is accepted for filing. Accordingly, it is

SO ORDERED.

Co-appellants DJM, LDM, and LKM, jointly move for reconsideration of the Court's February 21, 2018 Opinion. Upon consideration, the Court denies the motions. According it is

SO ORDERED

PANEL: Jj. MAXA, WORSWICK, SUTTON

FOR THE COURT:

Sutton, J.
JUDGE

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY, JUVENILE DIVISION

STATE OF WASHINGTON, Plaintiff, vs. DESTINY JA'TERIA MATTHEWS, Defendant. JUVIS # 932615-15R006225	No. 15-8-00173-3 DEFENDANTS' WAIVER OF CONFLICT OF INTEREST AND CONSENT TO JOINT REPRESENTATION

TO: Clerk of the Court

AND TO: Prosecuting Attorney:

In the cases of State of Washington v. LaFabian Detrail Matthews, No. 15-8-00174-1, State of Washington v. LaTrevian Ketrail Matthews, No. 15-8-00175-0, and State of Washington v. Destiny Ja'teria Matthews, No. 15-8-00173-3, Defendants and his/her siblings, with the consent of their parent(s) belowsigned, each states as follows:

1) That s/he believes that his/her interests and those of his/her siblings are consistent; so that it is suitable for all three defendants to be represented by one attorney.

Hester C Mallonee
Attorney at Law
35525 28th Ave So
Federal Way, WA 98003
253-350-2328

2) That s/he is aware that there is always a potential for conflict of interest where codefendants are represented by the same attorney.

3) That nonetheless, each Defendant and all of them jointly have determined that is in their individual and mutual interests to have a single attorney represent them, for reasons including but not limited to efficient investigation and preparation of their cases and effective presentation of their cases at trial.

4) Defendants and their parents are signing three originals of this document, one per file.

LaFabian D. Matthews Lafabian Matthews Date 3/18/15

LaTrevian K. Matthews Latrevian Matthews Date 3/18/15

Destiny J. Matthews Destiny J Matthews Date 3/18/15

The above-noted representation occurs at our request and with our consent:

Renata Gardner _____ Date_____

Jabulani Gardner Jabulani Gardner Date 3-18-15

Presented by _____
Dated

Hester C. Mallonee

WSBA 11986
Attorney for Defendant(s)

Hester C Mallonee
Attorney at Law
35525 28th Ave So
Federal Way, WA 98003
253-350-2328

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff,	)	
vs.	)	
D.J.M.,	)	Superior Court No. 15-8-00173-3
L.M.,	)	No. 15-8-00174-1
L.K.M.,	)	No. 15-8-00175-0
Respondents.	)	Court of Appeals No. 48093-0-II

VERBATIM TRANSCRIPT OF PROCEEDINGS

April 7, 2015
Pierce County Courthouse
Tacoma, Washington
Before the
Honorable Susan K. Serko

A P P E A R A N C E S

For the State of Washington:
DIANE CLARKSON
DEPUTY PROSECUTING ATTORNEY

For the Respondent:
HESTER MALLONEE
ATTORNEY AT LAW

Lanre Adebayo, CCR
Official Court Reporter
Department 14 Superior Court
(253) 798-2977

TABLE OF CONTENTS

EXHIBIT

EXHIBIT	DESCRIPTION	MARKED/ADMITTED	PAGE

(No exhibits marked or admitted.)

BE IT REMEMBERED that on TUESDAY, APRIL 7, 2015, the above-captioned cause came on duly for hearing before the **HONORABLE SUSAN K. SERKO**, Judge of the Superior Court in and for the County of Pierce, State of Washington; the following proceedings were had, to wit:

<<<<<< >>>>>>

MS. CLARKSON: We have State of Washington v. Destiny Matthews, Cause Number 15-8-00173-3; we have Latrevian Matthews, Cause Number 15-8-00175-0; and State of Washington v. Lafabian Matthews, Cause Number 15-8-00174-1. Respondents are all present in court, they're represented by Ms. Hester Mallonee. Diane Clarkson representing the State of Washington. Your Honor, we're on the docket I believe; one, for the motion as to the issue of conflict of interest or potential conflict of interest. I believe we -- do we have pretrial conference as well?

MS. MALLONEE: We do; although as it turns out, the young people have an interview potentially with the high school that may allow them to reenter school tomorrow. If that's the case, that would affect the decision about when to set the trial date. So -- actually, I just found that out and I would like to defer at least that part in the pretrial discussion until we know whether they're going to be able to

get back in school because we devoutly hope that they will.

THE COURT: Okay. That's between the two of you, I don't need to hear about that. This case comes on for the conflict issue and I appreciate receiving the briefing from Ms. Mallonee. I also did my own research which frankly didn't turn up these Washington cases, although I did have one Washington case that I looked at. The case that I thought was most applicable in this case was State v. Peyton, 29 Wn. App. 701, a 1981 case. And I pulled out what I thought -- I read the case and I pulled out what I thought was the pertinent language. The case was a murder case before Judge Don Thompson -- whom I knew quite well and tried cases in front of -- and the ultimate one of the appellate arguments was that it was ineffective assistance of counsel to have two of the three defense lawyers representing more than one defendant.

And the trial judge went through with the defendants -- those who would be identified as respondents in a juvenile setting -- and I'll quote, "the potential hazards of joint representation". And he did that on more than one occasion; he gave them time to consider the matter and then he inquired separately of each of them if he or she still wanted joint representation. All declared that they did. Ultimately, I'm assuming, although I don't think I saw it anywhere in the case; but ultimately, there was no need to call a codefendant

in order to testify and potentially be testifying against another one of the defendants in that case. That's where the conflict arises.

If one of, in this case respondents, is put on the stand and has testimony against another one of the respondents and/or counsel chooses not to put on let's say Destiny -- and I apologize for using your first name but it makes it easier since your last names are all the same. Ms. Mallonee chooses not to put on Destiny and testify about her defense because potentially that would hurt Lafabian; that's where a conflict comes up. And I'm being assured by Ms. Mallonee that the defense of all of the respondents will be consistent and will not require testimony of one against another; or stated another way, there is no testimony by one respondent that might be in conflict to another one of the respondents. I think State v. Peyton allows this case to go forward, frankly.

I don't know if the State had a chance to review it, and I agree with Ms. Mallonee not that the State necessarily has standing to object or pose a conflict, although I know regularly I have heard defense -- or excuse me, State's counsel occasionally raise the issue of conflict when I've been downtown in adult court. But I think Peyton is on point and I think so long as each one of the respondents states on the record in questioning by me that they have no objection

to going forward with joint counsel, then I think we can go forward.

So I don't need argument. I've read these cases and I don't need argument but I do need for -- assuming that each one of the Matthews respondents wishes to go forward with joint representation, I need that confirmation on the record from each one of you. And again, I will tell you that it would not be my choice to have you go forward with the same counsel because where it's one event, which in this case it's one event, and -- help me here, what is the exact charge?

MS. CLARKSON: Assault in the second degree.

THE COURT: Assault in the second degree is a very, very serious crime, it's a strike offense. And where there is an assault that takes place allegedly with the participation of three individuals; there is, I believe, a huge potential for there being conflict as between the respondents because one might see it slightly differently than another, and one might say I didn't do it but I saw this. And that's where the conflict comes in. So I want to be very clear with each one of you that you understand that potential conflict and you're waiving the conflict and you wish to go forward with joint representation.

I'm going to start with Latrevian. Mr. Matthews?

THE RESPONDENT LATREVIAN MATTHEWS: Your Honor, I do --

THE COURT: And you're not to say anything about the case, the facts, or your discussions with Ms. Mallonee; only that you understand this potential conflict and you still want to go forward with one lawyer among the three of you.

THE RESPONDENT LATREVIAN MATTHEWS: Yes, Your Honor. I do believe that we can all go forward with one lawyer.

THE COURT: Thank you very much. Ms. Trinity Matthews, I have the same questions for you.

MS. MALLONEE: Destiny.

THE COURT: I'm sorry, what did I call you?

MS. MALLONEE: Trinity.

THE COURT: I'm sorry, Destiny.

THE RESPONDENT DESTINY MATTHEWS: Yes, Your Honor. I do wish for it to go on with Ms. Hester --

THE COURT: One lawyer, recognizing that there is a potential conflict there. I'm not saying there is a conflict, I'm just saying there is the potential for conflict.

THE RESPONDENT DESTINY MATTHEWS: Yes, Your Honor.

THE COURT: Okay, thank you. Mr. Lafabian Matthews.

THE RESPONDENT LAFABIAN MATTHEWS: Your Honor, I have no objection. I believe we can all go forward --

THE COURT: Speak up just a little louder.

THE RESPONDENT LAFABIAN MATTHEWS: I believe we can go forward with one attorney, Your Honor.

THE COURT: Okay, thank you.

Now this issue is not necessarily going to go away completely with what we've just done. I'm not going to revisit the issue but if this case were to get into trial, it has the potential of coming up again and Ms. Mallonee might recognize it and might at that point say, oh, wait, I have an issue. I don't know what your strategy is, I don't know who you intend to call, what witnesses are going to come up, but each case takes on a life of its own once a case gets into trial and it has the potential for coming up again. So I wouldn't be surprised to hear a trial judge go through this same exercise. I'm just saying that, I don't know whether it will or not, but it has that potential.

And obviously in this case, in the Peyton case, it didn't come up just once. Judge Thompson went through it a number of times, so it has the potential of coming up again. That's all I'm going to say.

MS. CLARKSON: Thank you, Your Honor.

MS. MALLONEE: Thank you, Your Honor.

THE COURT: All right. And --

THE JUDICIAL ASSISTANT: We need orders.

MS. CLARKSON: We'll deal with the pretrial. Did you say we need orders?

THE JUDICIAL ASSISTANT: Order on the motion.

MS. CLARKSON: On the motion for the joint

representation?

THE COURT: Yes --

MS. CLARKSON: I could prepare one.

THE COURT: -- and I would probably put that burden on Ms. Mallonee. We have blank forms if you didn't come armed with one.

MS. MALLONEE: I can prepare one, Your Honor, and bring it to you shortly for your signature.

THE COURT: Okay. And by shortly, you mean today?

MS. MALLONEE: I do.

THE COURT: Sometime this morning?

MS. MALLONEE: I do. As long as there's a blank form in the office. I simply didn't prepare one because I was --

THE JUDICIAL ASSISTANT: I'm printing one for each case.

MS. MALLONEE: Yes, absolutely. And I do have originals actually of the brief for each file, and I will hand those actually to the clerk at this time. Thank you very much.

THE COURT: So you all have a pretrial conference on each one of these cases scheduled for today which you're about to go forward on outside of the courtroom setting. And is that to set a trial date then?

MS. CLARKSON: It'll be beginning our negotiations.

If you're prepared to set a trial date, you could, but I believe we'll be dealing with the issues in pretrial.

MS. MALLONEE: Yeah, I think it's probably more productive for counsel and me just to pick it up outside the courtroom and take it from there.

THE COURT: Anything else on this case then?

MS. CLARKSON: Nothing further, Your Honor.

THE COURT: Okay.

MS. CLARKSON: And we'll try to -- we can maybe get those orders done while we are in pretrial.

THE COURT: Good. And Candy's going to print some blank orders for you so you can just handwrite them.

MS. MALLONEE: Oh. Thank you kindly, Your Honor.

THE COURT: All right. Thank you all. We'll see you again, I'm sure.

THE JUDICIAL ASSISTANT: All rise. Court's at recess.

(Proceedings concluded at 10:21 a.m.)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff,	)	
vs.	)	
D.J.M.,	)	Superior Court No. 15-8-00173-3
L.M.,	)	No. 15-8-00174-1
L.K.M.,	)	No. 15-8-00175-0
Respondents.	)	Court of Appeals No. 48093-0-II

REPORTER'S CERTIFICATE

STATE OF WASHINGTON)
) ss
COUNTY OF PIERCE)

I, Lanre G. Adebayo, Official Court Reporter in the State of Washington, County of Pierce, do hereby certify that the foregoing transcript is a full, true, and accurate transcript of the proceedings and testimony taken in the matter of the above-entitled cause.

Dated this 22nd day of February, 2016.

LANRE G. ADEBAYO, CCR
Official Court Reporter
CCR #2964

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 48093-0-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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