

FILED  
Court of Appeals  
Division II  
State of Washington  
3/5/2018 1:48 PM

NO. 50637-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

D.P.,

Appellant.

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

The Honorable Keith C. Harper, Judge

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BRIEF OF APPELLANT

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A. INTRODUCTION

D.P., a student at Chimacum Middle School, was found truant by the Jefferson County Juvenile Court. It is undisputed D.P.'s family was experiencing a housing crisis. The record also shows the school and State failed to conduct the statutorily-required Washington Assessment of the Risks and Needs of Students (WARNS assessment) at the required time (prior to the filing of the petition), and later conducted it mere hours before the contested hearing. This case presents the issue of whether the school met its statutory obligations to take data-informed steps to address the attendance problems before petitioning the court to intervene.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding the school had met its burden to address D.P.'s absences under RCW 28A.225.020, and that court intervention was necessary to ensure attendance. CP 12 (Finding 1.5); see also RP 34-35.

2. The trial court erred in suppressing evidence of the content of the WARNS assessment conducted mere hours before the hearing.

Issues Pertaining to Assignments of Error.

1. Where the school unilaterally selected conference dates and failed to request a convenient time for D.P.'s mother C.P. to attend, did the

school fail to meet its statutory requirement to schedule a parent/school conference at a time reasonably convenient for all parties?

2. Where the school failed to hold a WARNS assessment at the time required by statute and failed to utilize the results of the WARNS assessment to take any action, did the school fail to meet its statutory requirement to take data-informed actions to address D.P.'s attendance prior to petitioning the court for intervention?

3. Where the last-minute WARNS assessment was relevant to two critical issues before the court, including whether the school had met its statutory obligations and whether and how it would be necessary for the court to intervene, did the juvenile court err in excluding testimony of the WARNS assessment results? If yes, did the error result in prejudice requiring reversal?

C. STATEMENT OF THE CASE

1. Truancy Petition

On December 13, 2016, the State, through the public school Chimacum Middle School, filed a truancy petition, requesting that the Jefferson County Juvenile Court assume jurisdiction over student D.P. and his mother C.P. in order to improve D.P.'s attendance. CP 1.

The petition alleged D.P. was 13 years old and had "unexcused absences contradictory to state law and/or district policy." CP 1. The

petition did not specify the number of unexcused absences. CP 1. Instead, the petition incorporated attendance records using various codes such as “U-UN,” “E-NO,” “L-UN,” and others. CP 5. No key for the codes is provided and so the number of unexcused absences is unclear from the petition and attached records. See CP 5. An attached letter sent to C.P. is also unclear regarding the number of unexcused absences, stating only that D.P. had “two or more” unexcused absences as of 9/29/16. CP 3.

The petition also alleged that the school had taken the following actions to address D.P.’s unexcused absences. The school sent two letters to C.P. (9/29/16 & 10/20/16). CP 2; see also CP 3-4 (copies of letters). Principal David Carthum met with D.P. on 11/3/16, though there was no clear allegation that the school had met with C.P. CP 2. The petition also asserted that “phone calls” were made, but did not provide further details as to who made the calls, who received the calls, or what was discussed during the calls. CP 2.

Regarding the phone call, an attached student discipline form contained a note, documented as entered on 1/25/16 by principal Carthum, noting “Phone call from [C.P.] to schedule apt, scheduled Monday 10/31. No show.” CP 6. The second letter to C.P. requested that C.P. call the school within 10 days to schedule an attendance conference. CP 4.

## 2. Hearing Testimony

After multiple review hearings beginning January 2017, the court held a contested hearing on April 13, 2017 to address the allegations and request in the petition. RP 1.<sup>1</sup> The State called one witness, Principal Carthum, who testified (consistent with the Petition) that the school had sent letters to D.P.'s home on September 29<sup>th</sup> and October 20<sup>th</sup> notifying his mother of attendance problems. RP 11, 20. Carthum did not receive a response to the first letter. RP 11. In response to the second letter, Carthum testified that C.P. called and scheduled an appointment for October 31, but failed to attend. RP 9, 11. Meanwhile, Carthum met formally with D.P. on October 10 and October 25 to inform him that if he reached ten unexcused absences in a school year, a truancy petition could be filed. RP 8-9. Carthum spoke with C.P. several times between October 2016 and January 2017, but these meetings were informal and undocumented. RP 9-10.

Carthum testified that D.P.'s living situation was difficult, but he was not aware of any bullying or problems with teachers that had contributed to attendance issues. RP 12-13. In addition he did not recall or document having taken any actions in response to his conversations with

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<sup>1</sup> Previous review hearings were also held. RP 3 (Kurt Munich, State-employed Truancy Coordinator, asserting that the parties had been in court several times since January 2017 on this matter); 15 (Carthum has been in court on matter of D.P.'s truancy on prior occasions, and heard the court admonish D.P. to improve his attendance); 34 (court noting it has heard testimony from Principal Carthum before).

D.P. or his guardian, such as creating an IEP (Individualized Education Program), moving him out of a particular classroom, or changing his schedule. RP 12. Carthum had spoken to D.P. and C.P. several times before filing the truancy petition, to warn them that attendance needed improvement or else court proceedings would be initiated. See RP 8, 12. Despite these conversations, D.P. accumulated just over 10 unexcused absences for the school year by December 2016, prompting Carthum to file a truancy petition. RP 10, 14. As of April 2017, D.P. had accrued a total of 26.4 unexcused absences. RP 14. Carthum also testified that he had been in court several times since then to address the truancy petition, and had heard the judge or commissioner admonish D.P. to improve his school attendance. RP 15.

Carthum also testified to the following regarding issues with D.P. Carthum was aware D.P. was having issues with his math teacher, Mr. Shipley, but he had “no knowledge” of how D.P. was doing in math or in his math class. RP 17. Carthum was aware D.P. had issues with reading, but had taken no action in response. RP 18. He explained that if there was a problem, C.P. could call “Special Services and talk to the Special Ed director.” RP 18. After sending the initial letter, Carthum became aware that D.P.’s address had changed around September or October 2016. RP 16-17. Carthum also knew that D.P. and his family had been living in a

trailer and that this situation had been “stressful” to D.P. RP 19. Carthum agreed the school had an obligation to offer services to D.P. if he was facing potential homelessness and stated, “I am unaware” regarding whether anyone at the school had reached out to D.P. or his family to offer any relevant services. RP 20.

D.P. and his mother were present and represented by counsel. The defense called two witnesses: Kurt Munich, a State-employed Truancy Coordinator, and C.P.

Munich testified to the following. He was a truancy coordinator. RP 21. He had performed a WARNS assessment on D.P. that same afternoon before the court hearing. RP 21. The WARNS assessment consists of questions designed to inform decision-makers on truancy issues including “Aggression, Defiance, Depression and Anxiety, Substance Abuse, Peer Deviance, Family Environment and School Engagement.” RP 22. The purpose of the WARNS assessment is to understand the underlying causes of a child’s truancy. RP 22. Defense counsel asked, “what sort of issues were causing school engagement to be a problem?” RP 23. Munich refused to answer, and instead asserted his opinion that the WARNS assessment was not supposed to be discussed in court and “just doesn’t seem relevant to me.” RP 23.

The State's attorney then objected on relevance grounds, arguing the assessment had been done after the truancy petition had been filed and so had no bearing on D.P.'s absences between September and December 2016 or on any findings necessary for the court at the present hearing. RP 24. Defense counsel argued that Munich's testimony on the WARNS assessment results was relevant to the hearing because it was necessary to inform the court of the underlying causes of D.P.'s truancy, and aid the court in determining if the school had met its burden to address these underlying issues. RP 24.

The court sustained the objection "with respect to referencing the [WARNS] evaluation," and adopted the argument of the State, reasoning "this isn't happening now. Questions that are relevant to the time period we're discussing about, actual efforts that were made, are certainly germane." RP 24.

Defense counsel then attempted to limit discussion of the WARNS assessment to the time period before the petition had been filed, asking, "Okay. And so my questions are, what in the student's school year have led him to not be able to engage with the school? Were you able to glean that from the assessment that -- ." RP 24-25 (emphasis added). Before Munich responded, the State objected with "the same objection." RP 25. The court simply ruled by stating "[s]ustained." RP 25. The State then asserted, "Just

further on the grounds, too, that we didn't rely on that in any way in supporting [the] school's efforts." RP 25. No further questions were asked of Munich by either party. RP 25.

C.P. testified to the following. She had spoken with clerical staff about D.P.'s truancy issues after she received a voicemail stating Carthum had scheduled a conference with her on November 3, 2016. RP 26. No one at the school had spoken with her before scheduling this conference about what date or time would work for her. RP 26. C.P. works full time at Custom Auto Craft, and her job is very important to her because she is a single mother and needs to be able to provide a living space for her two children. RP 26-27. Around September or October of 2016, housing was a concern for the family because their home was unexpectedly sold and demolished. RP 27. This caused the family great stress because they "didn't have a clue where we were going." RP 27.

C.P. agreed she had received both letters sent by the school, and that she received a second voicemail stating a parent/school conference had been scheduled for October 31, 2016. RP 29. She agreed she did not ask the school to reschedule the November 3<sup>rd</sup> conference to a different day. RP 29. She also stated she did not call the school to reschedule the October 31<sup>st</sup> conference, explaining, "No. There was no chance to do it. Halloween was on a Friday." RP 29.

### 3. Closing Arguments

The State argued Principal Carthum had been “very hands-on,” was aware of D.P.’s housing problems, and there was nothing further the school could have done. RP 31. D.P. and his mother were aware of his attendance problems and had been admonished by the court on prior occasions to improve, but the attendance issues persisted. RP 31. The State reasoned the evidence was sufficient to establish truancy. RP 31.

The defense argued the school was informed of D.P.’s housing issues and potential homelessness, and that these issues contributed to his inability to concentrate in school and his poor attendance. RP 32-33. Yet, the school had done nothing to reach out to D.P. and his family to address or assist with the housing situation. RP 32-33. In addition, the school acknowledged D.P. had a reading problem, but had failed to address this issue either. RP 33. Finally, the school had an obligation to schedule a conference with the parent at a mutually convenient time. RP 33-34. The evidence showed the school had not done this, but rather had simply selected a time convenient to the school and informed C.P. of the time and date. RP 33-34.

### 4. Truancy Finding & Appeal

The trial court orally found that “it is obvious that [the principal] is making an effort with his students in general, and with this student in

particular, to deal with whatever needs to be dealt with.” RP 34. The court also found D.P. had ten unexcused absences at the time of the filing of the Petition (in December 2016), and 26.4 total unexcused absences by the time of the hearing, which did not demonstrate “huge improvement.” RP 34. The court reasoned that despite multiple review hearings, “there have continued to be absences.” RP 35. The court also reasoned “there is only so much a school can do and so much an individual can do.” RP 35. The court then found “the school has met their obligations to do the best they can to accommodate Mr. [D.P.]” and that absences had continued despite these efforts. RP 35. The court concluded by determining court intervention was necessary to improve attendance and found D.P. truant. RP 35.

In keeping with its oral ruling, the court found D.P. truant in its written order, and further found the school had “informed the student’s parent ... to analyze the causes of absences and has taken steps to eliminate or reduce the child’s absences pursuant to RCW 28A.225.020.” CP 12 (Finding 1.5). The court ordered D.P. and C.P. “to use reasonable diligence” to ensure D.P.’s future attendance at school. CP 13 (Order 2.6); see also CP 14, 15 (continuing orders).

At a subsequent hearing on May 25, 2017, the court found D.P.’s absences had continued despite the court’s previous order. CP 23-25. The

court found D.P. and C.P. in contempt and ordered them to participate in family therapy to purge the contempt. CP 24.

D.P. timely appeals the truancy and contempt orders. CP 16.

D. ARGUMENT

1. THE STATE FAILED TO MEET ITS STATUTORY OBLIGATIONS TO TAKE DATA-BASED ACTIONS TO ADDRESS D.P.'S ABSENCES.

The juvenile court's factual findings that the school had met its statutory obligations to analyze and address D.P.'s absences must be stricken for lack of substantial evidence. See RP 35; CP 12 (Finding 1.5). The court's finding that court jurisdiction was necessary to ensure D.P.'s attendance must also be stricken. See RP 35. Without these factual findings, the finding of truancy and subsequent contempt orders cannot stand.

A court's factual findings that are challenged on appeal must be stricken where they are not supported by "substantial evidence" in the record. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." Id.

RCW 28A.225.010(1) generally requires children between eight and eighteen years old to attend school.

The school's "duties upon [a] child's failure to attend school" include the following specific obligations:

- (a) inform the parent in writing or by phone of the after the first unexcused absence in any month, and notify the parent of the potential consequences of continued absences,
- (b) schedule a conference with the parent, student and school "at a time reasonably convenient for all persons," and
- (c) "after the second and before the fifth unexcused absence, take data-informed steps to eliminate or reduce the child's absences."

RCW 28A.225.020 (emphasis added).

The statute expressly provides that "[i]n middle school" the data-informed steps taken by the school under part (c) "must include application of the Washington assessment of the risks and needs of students (WARNS) or other assessment by a school district's designee under RCW 28A.225.026." RCW 28A.225.020(c)(i) (emphasis added).

Washington law states that if the child is under 17 years of age, and if a school has taken these statutorily required action, but such action has not been successful in "substantially improving" the student's absences, then the school must file a truancy petition no later than a child's tenth unexcused absence in a school year. RCW 28A.225.030(1) (citing actions required under RCW 28A.225.020).<sup>2</sup>

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<sup>2</sup> The statute defines certain types of absences that "shall" be excused by the school, leaving room for a school to define additional types of excused absences. RCW 28A.225.010(1)(d).

The petition must allege (a) the child has unexcused absences during the current school year, (b) “[a]ctions taken by the school district have not been successful in substantially reducing the child’s absences from school,” and (c) court intervention is necessary to assist in reducing the child’s absences. RCW 28A.225.035(1). The petition must also set forth the facts supporting the allegations. RCW 28A.225.035(3).

The statute provides the following, to encourage resolution of the child’s attendance problems short of a formal hearing before a juvenile court:

a hearing shall not be required if other actions by the court would substantially reduce the child’s unexcused absences. Such actions may include referral to an existing community truancy board, use of the Washington assessment of risks and needs of students (WARNS) or other assessment tools to identify the specific needs of individual children, the provision of community-based services, and the provision of evidence-based treatments that have been found to be effective in supporting at-risk youth and their families.

RCW 28A.225.035(7)(a) (emphasis added).

The State, as the petitioning party, bears the burden to establish the allegations in the petition by a preponderance of the evidence. See RCW 28A.225.035(12). If after a hearing, the court determines the State has met its burden, the court must grant the petition and assume jurisdiction for a period of time most likely to cause the juvenile to attend school as required. RCW 28A.225.035(12).

Here, the undisputed facts established at the hearing show that the State failed to meet its statutory obligations for three reasons: (i) the school failed to schedule a conference at a time reasonably convenient to C.P., (ii) the school failed to conduct a WARNS assessment at the required time (i.e. prior to the petition), and (iii) the school failed even to attempt any action in response to the last-minute WARNS assessment conducted the afternoon of the hearing before asking the court to intervene.

- i. The school failed to schedule a conference at a time reasonably convenient to C.P.*

The school had a statutory obligation to schedule a conference with the parent, student and school “at a time reasonably convenient for all persons.” RCW 28A.225.020(b). Here, the record shows the school never consulted C.P. regarding times and dates that would be reasonably convenient for her.

The petition alleged the following with respect to the school’s efforts to schedule a conference with C.P. First, the petition noted two letters sent to C.P. regarding D.P.’s attendance. CP 2. Copies of the letters were attached to the petition. CP 3-4. The first letter makes no reference to the need to schedule a parent/school conference. CP 3. The second letter requested C.P. call the school within 10 days to schedule a conference. CP 4.

The petition also alleged “phone calls” but did not specify the contents, timing or parties involved in such calls. CP 2. In an attachment to the petition, a student discipline form contained an entry, allegedly entered on 1/25/16 by principal Carthum, stating “Phone call from [C.P.] to schedule apt, scheduled Monday 10/31. No show.” CP 6.

C.P. testified that the school had sent her two automated voicemails, both of which informed her of conferences that had already been scheduled for specific dates and times, during working hours later that same week, and without consulting her prior to scheduling. RP 26, 28. She also testified that she responded to the second letter and first voicemail that informed her of the conference on November 3, 2016, by calling the school and informing them that she would be unable to attend that time and date due to her work schedule. RP 26. She also testified that she did not respond to the second voicemail, a voicemail that informed her a conference had been scheduled on October 31, 2016. RP 28. Her testimony strongly suggests she did not call because she was not able to; the school had scheduled the conference for later that same week, she worked full time, and was unable to call the school before the conference time. RP 28-29.

The petition also stated “Attendance conferences with the child and Parent/Guardian on the following dates: Mr. Carthum met with [D.P.] on Nov[.] 3, 2016 discussed attendance at school.” CP 2. However, Carthum

testified no meeting ever occurred on November 3rd, and the petition's note did not match his own records. RP 15. He also testified that typically, such meetings were scheduled in response to a parent phone call, and that such scheduling goes through him directly, not a secretary or other staff member, because only he knows his own schedule. RP 16.

Carthum also testified that the school sent two letters to C.P. and that he did not receive a response to the first letter. RP 11. However, a copy of the letter attached to the petition shows that the school did not request any response or note a need for a conference or other discussion in the first letter. CP 3. The second letter does request a phone call from C.P. to schedule a conference. CP 4. Carthum testified that C.P. called the school in response to the second letter and scheduled a conference but then failed to attend. RP 11. Carthum testified that he was only aware of one scheduled conference, that of October 31, 2016; he never testified to more specific knowledge. See RP 9, 11, 15. Instead, he appears to assume that C.P. called the school and selected October 31, 2016 as the date for the conference. C.f. RP 9, 11, 15.

However, taken together, C.P.'s and Carthum's testimony establishes the following as the most likely chain of events. The school sent C.P. a letter requesting a phone call to schedule a conference. The school also left C.P. a voicemail scheduling the conference for November 3, 2016.

C.P. called the school to inform them that she was unable to attend that date and time. The school then left C.P. another voicemail, again unilaterally selecting a date for the conference, this time October 31, 2016. C.P. did not attend the conference because she was unable to, and did not call the school to reschedule because she did not have time before the conference time to do so.

The trial court never found specifically that the school had scheduled a conference at a mutually convenient time. See RP 34-35; see also CP 12 (Finding 1.5). Rather the court found only that the principal was “making an effort ... in general,” and that the school had “met their obligation” under RCW 28A.225.020. RP 35; CP 12. However, the record shows the school never asked C.P. for input on what specific times and dates would be convenient for her. Instead the school unilaterally selected dates and times, informed C.P. after the fact and with little advance notice, and then ticked the box on the petition that it had met its obligations under the statute. This shows that the school failed to meet its obligation under RCW 28A.225.020, specifically subsection (c), to schedule a conference at a mutually convenient time. Thus, the court’s findings that the State met its statutory obligations must be stricken for lack of substantial evidence. Hill, 123 Wn.2d at 647.

ii. *The school failed to conduct a WARNS assessment prior to the petition.*

The school had a statutory obligation to conduct a WARNS assessment prior to the filing of the petition. RCW 28A.225.020(c)(i), .030(1). Undisputed testimony establishes that the only WARNS assessment conducted occurred months after the petition was filed. RP 21. Thus, the State failed to meet its statutory burden.

RCW 28A.225.030(1) states that if the school has taken actions required under RCW 28A.225.020, and if those actions are not successful, then the school must file a petition. RCW 28A.225.020(c) further defines what actions a school must requires and when it must take them. The school is required to “take data-informed steps to eliminate or reduce the child’s absence” “after the second and before the fifth unexcused absence.” RCW 28A.225.020(c). In the case of a middle school, such as D.P.’s, the required data-informed steps “must include” a (WARNS) assessment or other comparable assessment by the school district’s designee. RCW 28A.225.020(c)(i) (emphasis added).

Undisputed testimony established that the school filed the truancy petition in December 2016. RP 10; see also CP 1 (stamp indicating petition was filed on December 13, 2016). Undisputed testimony also established that the WARNS assessment was conducted on April 13, 2017, mere hours

before the contested hearing, and four months after the petition was filed. RP 1 (transcript indicating hearing began at 4:10 P.M.), 21 (Munich testifying assessment conducted that afternoon). The State's own witness, Principal Cartham, testified, again in uncontroverted testimony, that D.P. had just over ten unexcused absences at the time of the petition. RP 14.

There is no evidence in the record of any comparable assessment. In compliance with RCW 28A.225.035(3), which requires the petition to allege supporting facts, the petition states "In relation to the above named child, the following actions have been taken" and lists two letters sent to C.P. and a conference between D.P. and Cartham. CP 2. The petition also states "Steps taken to eliminate or reduce the child's absences have included the following: Letters, home, phone calls, and met with Mr. Cartham regarding excessive number of absences." CP 2. The petition makes no mention of any assessment. CP 2. There was also no testimony at the hearing of any assessment other than the WARNS assessment conducted the day of the hearing.

Thus, the school failed to conduct a WARNS assessment before the fifth unexcused absence, as required by RCW 28A.225.020. The trial court's oral finding that the school "met their obligations" and its written finding that the school "analyze[d] the causes of absences and has taken steps to eliminate or reduce the child's absences pursuant to RCW

28A.225.020” are both conclusively established as errors, based on undisputed evidence in the record. RP 35; CP 12 (emphasis added) (Finding 1.5). These findings must be stricken for want of substantial evidence. Hill, 123 Wn.2d at 647.

*iii. The school failed to act on the WARNS assessment prior to the hearing.*

The State may argue that the failure to conduct a WARNS assessment at the required time was remedied by the assessment conducted just prior to the hearing. However, under the facts of this case, such reasoning is unpersuasive.

The structure of the statute makes clear that the Legislature’s intent was for the school to use the WARNS assessment to identify the specific underlying causes of the student and to take data-informed action to address those needs. The statute requires schools to take data-informed actions to address a student’s absences. RCW 28A.225.020(c). The statute further defines data-informed actions to necessarily include a WARNS assessment. RCW 28A.225.020(c)(i). The statute establishes that the petition should not be filed until after such steps are taken. See RCW 28A.225.030(1) (required actions), .035(1) (petition requirements). Specifically, the WARNS assessment is required before the fifth absence, whereas the petition must be filed by the tenth absence. RCW 28A.225.020, .030(1). The petition

must assert that the school has taken the required actions, yet those actions have failed to resolve attendance problems. RCW 28A.225.035(1)(b). The petition must also assert that court intervention is necessary to resolve the attendance problems. RCW 28A.225.035(1)(c). All of these statutory requirements show that the intent of the Legislature was not merely for the schools to go through the motions of completing a WARNS assessment, but to use the WARNS assessment to take data-informed actions to address each student's individual attendance needs.

Uncontroverted testimony by Munich also supports that the purpose of the WARNS assessment is to inform truancy decision-makers regarding the underlying causes of a student's absences. RP 22.

However, the WARNS assessment here was conducted mere hours before the contested hearing. RP 21. The State presented no evidence that the school had taken any action in response to the WARNS assessment. In fact, Principal Carthum testified that the WARNS assessment had not been conducted by the school, but rather had been conducted by the truancy officer, Munich. RP 18. Carthum further testified that he had not even been present during the assessment. RP 18. Thus, it is unlikely Carthum had any knowledge of what had been discussed during the assessment, and if he did have information, could only have acquired it second hand. The Petition and Carthum's previous testimony established that he was the main

coordinator and acting agent regarding the school's efforts to address D.P.'s absences; all actions taken on behalf of the school to address absences as listed on the petition were taken either directly by Carthum or under his supervision. Compare RP 7-12 (Carthum describing his and school's actions); with CP 2 (petition listing meetings, phone calls, and letters); see also RP 16 (Carthum asserting that all parent/school conferences are scheduled through him directly). In the addition, the State's attorney specifically asserted that the State had not relied on the WARNS assessment to support its argument that it had met its statutory obligations to take data-informed actions. RP 25.

Thus, the record strongly supports the school took no substantive action, likely could not have taken any such action, and even argued it had not taken any action in response to the WARNS assessment prior to the hearing. Also, given the late hour of the assessment, it was impossible for the school to have taken any meaningful data-informed actions to remedy D.P.'s absences or to determine whether such actions had been helpful, as intended by the statute. Any argument that the failure to conduct the WARNS assessment at the proper time was later remedied by the assessment conducted mere hours before the contested hearing, is unpersuasive.

The fact the school failed to timely conduct a WARNS assessment, and entirely failed to take any action in response, also undermines the court's finding that the school generally met its obligations or that the court's intervention was necessary to address D.P.'s absences. RP 35.

The State may argue that there is no evidence the WARNS assessment resulted in any actionable information. However, as discussed below, where the State's own unsubstantiated objections, aided by the court's erroneous ruling, prevented development of the record, the State may not now benefit from its own failure to timely comply with the statutory WARNS assessment requirements.

2. THE TRIAL COURT'S RULING TO SUPPRESS DISCUSSION OF THE WARNS ASSESSMENT WAS IN ERROR.

The trial court twice sustained the State's relevance objection and ruled that Munich's testimony regarding the content of the WARNS assessment was inadmissible. RP 24, 25. This ruling was in error and requires reversal.

On appeal, evidentiary rulings are reviewed for abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). Discretion is abused where an evidentiary ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (quoting State ex rel.

Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). Reversal is required where there is a reasonable probability an evidentiary error would have materially affected the outcome of the proceeding. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

Here, the excluded WARNS assessment testimony was relevant to two critical questions: whether the school had met its obligations to take evidence-based steps to address D.P.'s absences; and what intervention by the court was necessary to ensure future attendance.

As discussed above, the relevant statute, and uncontroverted testimony from Munich establishes that the primary purpose of the WARNS assessment is to inform the school of a child's underlying problems, and allow the school to take data-informed actions to correct these problems before involving the court. See RCW 28A.225.020(c), 030(1), .035(1); RP 22.

The statute also establishes a secondary purpose of the WARNS assessment: to inform and enable juvenile courts to take necessary actions, short of formal hearings, to address a student's attendance problems. RCW 28A.225.035(7)(a); see also RCW 28A.225.035(1) (petition must allege court intervention is necessary). The statute expressly clarifies that a hearing on the petition need not be held if the juvenile court is able to utilize

the WARNS assessment to take other action to address poor attendance. RCW 28A.225.035(7)(a).

Munich testified that the purpose of the WARNS assessment is to inform truancy decision-makers. RP 22. Where the court is asked to intervene and assume jurisdiction in a truancy matter, and is empowered to impose a wide range of conditions—such as the family therapy and contempt orders ultimately imposed in this case—the court is undisputedly a truancy decision-maker. CP 23-25 (contempt orders).

Munich also testified that he believed the WARNS assessment was not intended to be used in court and was not relevant to the proceedings at hand. RP 23. However, he cites no authority, there is no indication he is a qualified legal expert, and relevance and admissibility is a legal question for the judge to determine. See RP 23. This testimony is properly viewed as unsupported argument, or if it truly testimony, than it is an unqualified legal opinion not entitled to any weight. State v. Olmedo, 112 Wn. App. 525, 532, 49 P.3d 960 (2002) (even “[e]xperts may not offer opinions of law in the guise of expert testimony”) (citing Stenger v. State, 104 Wn. App. 393, 407, 16 P.3d 655, review denied, 144 Wn.2d 1006, 29 P.3d 719 (2001)); ER 701 (lay witness opinion limited to inferences not based on specialized knowledge). In addition, Munich’s unsupported argument is in direct contravention of RCW 28A.225.035(7)(a) discussed above, which

specifically contemplates that a juvenile court can and should utilize the results of a WARNS assessment in decision-making.

The juvenile court ruled in D.P.'s case that evidence of the WARNS assessment was not relevant because the assessment occurred that day and the issues before the court involved only the events up until December of 2016, four months earlier. RP 24-25. This ruling was in error. First, the evidence showed D.P. had continued to accrue unexcused absences from December 2016 up until the date of the hearing. RP 10, 14. It is very likely the same underlying causes of D.P.'s absences continued up until the hearing and would be revealed by the WARNS assessment. Second, even if the WARNS assessment showed D.P.'s issues were different, or had been resolved, this information was critical to the court successfully assuming jurisdiction, intervening, imposing appropriate conditions, and assisting to resolve D.P.'s attendance problems, which is the purpose of court intervention in truancy matters. See RCW 28A.225.035(1) (court intervention must be necessary); see also RCW 28A.225.035(7)(a) (formal hearing not required if court can utilize WARNS assessment to intervene in other ways).

By excluding evidence of the WARNS assessment, the court excluded the very information it needed to exercise its discretion, i.e. to make an assessment of whether the State had met its burden to take action

to resolve the issue, and to make an assessment of whether and how the court should intervene to address D.P.'s absences. Thus, the court's ruling to exclude this critical evidence was an abuse of discretion because it was based on untenable grounds and for untenable reasons. Downing, 151 Wn.2d at 272.

Furthermore, reversal is required because the evidence was highly relevant to the issues before the court and there is more than a reasonable probability the evidence would have affected the outcome of the proceeding: either by showing the State had failed to address D.P.'s underlying issues present from fall 2016 through the date of the hearing, by showing the court need not intervene because D.P.'s issues were resolved, or by establishing what steps the court should take to address D.P.'s absences. See Cunningham, 93 Wn.2d at 831.

The State may argue that the defense cannot meet its burden to establish that the WARNS assessment testimony would have made a difference at the hearing. However, such reasoning is unpersuasive because it was the State's own objection, aided by the juvenile court's erroneous ruling, which prevented development of the record. RP 24-25. Defense counsel objected, and attempted to elicit the information more than once, but was overruled. RP 24-25. In addition, it was clear from the testimony that the WARNS assessment had occurred mere hours before. RP 21. It

was unlikely defense counsel had advance or alternative access to the content of the WARNS assessment – his client, a middle-school child, likely did not know Munich’s conclusions, and likely also would not have been able to provide the level of detail necessary to make a more thorough offer of proof to the court of the relevance of the WARNS assessment results.

The State’s objections take on the unsavory taint of a discovery violation – wherein the State prevented the defense from gaining access through the only readily available means to relevant and potentially beneficial information. In addition, as a matter of equity, the State should not be permitted to fail to conduct a WARNS assessment in a timely manner, attempt to remedy the issue at the last minute, prevent the defense from gaining convenient access to that information, and then profit from its own failures by reasoning that the record is not sufficiently developed.

As it did so at the hearing, the State may argue that evidence of the WARNS assessment was not relevant, because it may have resulted in no actionable information or because it was much later in time in relation to the ten unexcused absences noted by the petition. As discussed above, this argument is factually incorrect. D.P.’s underlying issues likely had not changed, and even if the WARNS assessment showed the issues were now resolved or the school was unable to resolve the issues, this information

would still have been critical to the court's determination of whether the school had met its burden and whether and how the court should intervene.

In the alternative, should this Court agree with the State's reasoning, then the State could not possibly have met its statutory burden. If the WARNS assessment was conducted too late to be relevant to the issues before the court, then the failure to timely conduct the WARNS assessment as required by statute was not remedied. The State thus failed to meet its obligations under the statute and the court's findings to the contrary must be stricken – both as a matter of law and as a factual finding not supported by substantial evidence.

The State cannot have it both ways. Either the last-minute WARNS assessment was untimely, irrelevant and therefore the initial failure was never remedied; or the last-minute WARNS assessment was late but still timely, therefore highly relevant, and should have been admitted.

For the reasons discussed above, the juvenile court's ruling to exclude evidence of the WARNS assessment was in error and requires reversal.

E. CONCLUSION

The State failed to meet its statutory obligations to schedule a parent/school conference with C.P. at a mutually convenient time, to conduct a WARNS assessment at the time required by the statute, and to

take data-based action on the basis of the WARNS assessment prior to the contested hearing. In addition, the juvenile court's ruling to exclude evidence of the last-minute WARNS assessment on the basis of the State's relevance objection was in error and requires reversal.

In the alternative, should this Court conclude the court's ruling was not in error and the WARNS assessment was not relevant, then as a matter of logic, then the last-minute WARNS assessment could not have remedied the State's earlier failure to conduct and act upon the assessment in a timely manner as required by statute.

D.P. respectfully requests that this Court reverse the juvenile court's finding of truancy and subsequent contempt orders, and remand for a rehearing.

DATED this 5<sup>th</sup> day of March, 2018.

Respectfully submitted,

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**March 05, 2018 - 1:48 PM**

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**Appellate Court Case Number:** 50637-8  
**Appellate Court Case Title:** Chimacum School District, Respondent v Dawson Paden, Appellant  
**Superior Court Case Number:** 16-7-00039-5

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