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NO. 35242-1

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TREY JORDAN MICHEL, a minor,

Appellant.

Appeal from Yakima County Superior Court
Honorable Ruth Reukauf
No. 16-8-00531-39

BRIEF OF APPELLANT

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I. INTRODUCTION

Defendant appeals a sentence he received for Child Molestation where the sentencing court failed to find his three prior Felony Harassment Threat to Kill convictions from 2015 constituted the same criminal conduct in calculating his offender score. Defendant also appeals the sentencing court's failure to consider mitigating factors for a manifest injustice downward deviation from a standard range sentence, including the court's failure to read a lengthy 2016 Supreme Court decision concerning the Defendant.

In 2015, Defendant expressed to his therapist in private that he would kill three bullies at his school. Later he told law enforcement the same, in a single interview, at the same time and place, and with the same intent. Law enforcement then informed others, and eventually, through levels of hearsay, the subject bullies somehow became "victims." Defendant never threatened the bullies directly. In the context of Defendant's request for a downward deviation in his sentence, the sentencing court failed to consider a 2016 Supreme Court decision where both the majority and dissent addressed the unique situation and needs of Defendant. The court failed to consider any of this critical information by not reading the opinion. Furthermore, the sentencing court failed to recognize that the victim of the three threats was the public, not the three bullies, and therefore all of the factors of "same criminal conduct" had been met.

II. ASSIGNMENTS OF ERROR

1. The sentencing court erred when it did not find that Defendant's three prior crimes of Felony Harassment Threat to Kill were the same course of conduct.

2. The sentencing court erred when it failed to exercise its discretion and consider mitigating factors for a manifest injustice downward deviation from the standard range.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Whether a juvenile's expression to law enforcement in a single interview, with the same intent, and at the same time and place that he would kill three bullies was the same course of criminal conduct?

Whether the public constituted the "same victim" requirement for same course of conduct or if each individual juvenile was a different victim?

Whether a trial court fails to exercise its discretion or properly consider mitigating factors at sentencing if it does not read a proffered and clearly relevant prior Supreme Court case regarding the specific juvenile?

IV. STATEMENT OF CASE

Defendant was sentenced on April 28 and May 4, 2017, for one count of Child Molestation after a plea of guilty was entered on February 10, 2017. At sentencing, over defense objection, defendant's offender score was counted as three priors due to his criminal history from 2015. The sentencing court also denied a manifest injustice downward deviation for Defendant. Defendant appeals those two errors.

Defendant was convicted of three counts of Felony Harassment Threat to Kill (RCW 9A.46.020(1)(a)) in 2015 when law enforcement coaxed him into admitting he told his therapist he wanted to harm three bullies at the school. *See* Findings of Fact and Conclusions of Law, Yakima County Juvenile Court #14-8-00667-6 (April 10, 2015); *State v Trey M.*, 186 Wash.2d 884, 909; 383 P.3d 474 (2016). Law enforcement apparently informed either the parents or the school of the “threats” and, through a series of the hearsay, the subject children eventually found out and suddenly became “victims.” *Id.* Defendant at no time directly threatened any of the three bullies. *Id.*

Defendant’s case was eventually appealed to the Washington State Supreme Court, with amicus curiæ briefing by the ACLU in support of defendant. *Id.* The decision was quite lengthy and contained an in-depth analysis of Trey as an individual. Among other places, the majority wrote:

Finally, while the affirmance of Trey's convictions is compelled for the reasons discussed herein, we acknowledge that this case demonstrates the need to explore how our criminal justice system responds to juveniles with mental health issues. Knowing what we know about adolescent brain development, we must find alternative means for managing their behavior and providing therapeutic treatment, instead of criminal prosecution. Trey M. is a juvenile in crisis, and our criminal justice system must find ways to provide serious mental health care for such persons while holding them accountable rather than simply placing them inside our revolving door criminal justice system.

Id. at 908.

The majority upheld the three convictions, but did not address a same course of criminal conduct analysis for purposes of calculating his offender score. *Id.* and VRP 49.

The opinion was followed by a lengthy and powerful dissent by Justice McCloud, which begins:

A troubled and bullied young high school student was in counseling to address trauma stemming from his childhood of abuse and neglect. Following coaxing from his therapist to discuss his angry thoughts and plans, and in the context of the therapist-patient relationship, he disclosed his desire to violently harm three other students. Thereafter, a deputy sheriff asked the young man to repeat what he had previously disclosed to the therapist. The young man—Trey M.—did as he was told. There was no evidence that Trey M. ever volunteered these statements without being coaxed by adults in positions of authority; there was no evidence that Trey M. ever actually communicated these statements to the three students directly; and there was no evidence that Trey M. intended, desired, or knew that his coaxed disclosures of these statements to responsible adults would be communicated to those three other students indirectly.[...]

Id. at 909.

At sentencing in this matter, defense counsel made a likewise lengthy and passionate plea with the juvenile sentencing court to find that Trey’s three priors were all the same conduct and should count as one. VRP 11-105. Counsel also repeatedly requested a manifest injustice downward deviation. *Id.*

The sentencing court denied both requests, despite explicitly admitting that it “did not have time” to read the proffered 2016 Supreme Court opinion which addressed Trey [emphasis added]:

THE COURT: So on that, if I understood the issue correctly that sent it through to the Washington State Supreme Court

was, again, whether the objective person standard should be changed to a subjective person standard. **Because I wasn't able to get time to look at the decision from the State Supreme Court** then, was the same course -- I'm assuming the same course of conduct -- was it addressed in any of these appeals or --

MR. KLEIN: I don't believe so. Ms. Emmans has actually looked at it closer than I did.

MS. EMMANS: The State Supreme Court didn't deal with that. [emphasis added.]

See VRP 49.

The defendant received an indeterminate sentence of 103-129 weeks because his three priors were not combined; had they been his sentence would have been roughly 30-40 weeks. VRP 58.

The trial court thus failed to exercise its discretion and consider mitigating factors as required by the Juvenile Justice Act. Defendant appeals.

V. ARGUMENT

A. **The sentencing court erred when it did not find that Defendant's three prior crimes of Felony Harassment Threat to Kill were the same course of conduct.**

1. LAW

a) *Mootness*

If a defendant has already served their time on a sentence, an appeal concerning the calculation of their offender score may be moot. “A case is moot if a court can no longer provide effective relief.” *State v. Ross*, 152 Wash.2d 220, 228, 95 P.3d 1225 (2004) (quoting *State v. Gentry*, 125 Wash.2d 570, 616; 888 P.2d 1105 (1995)).

“However, if a case presents an issue of continuing and substantial public interest and that issue will likely reoccur, we may still reach a determination on the merits to provide guidance to lower courts.” *State v. Ross*, 152 Wash.2d 220, 228; 95 P.3d 1225 (2004) (citing *State v. Blilie*, 132 Wash.2d 484, 488 n. 1, 939 P.2d 691 (1997)). There is a continuing and substantial public interest in ensuring that offenders are sentenced with the correct offender score. See RCW 9.94A.525(22).

b) Same Course of Conduct

RCW 13.40.020 states in relevant part (emphasis added):

(8) “Criminal history” includes all criminal complaints against the respondent for which, prior to the commission of a current offense:

(a) The allegations were found correct by a court. If a respondent is convicted of two or more charges arising out of the **same course of conduct**, only the highest charge from among these shall count as an offense for the purposes of this chapter; [...]

“Same course of conduct” is not defined in the Juvenile Justice Act (JJA), and so courts look to the adult sentencing laws to help define that term. *State v. Contreras*, 124 Wn.2d 741, 748, 880 P.2d 1000 (1994). The Sentencing Reform Act (SRA) defines “same criminal conduct” as multiple crimes which “require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a).

c) Statutory interpretation

An appellate court’s primary duty in interpreting any statute is to discern and implement the intent of the legislature. *Nat’l Elec. Contractors Ass’n v. Riveland*, 138 Wash.2d 9, 19; 978 P.2d 481 (1999). The starting

point must always be “the statute’s plain language and ordinary meaning.”
Id. When the plain language is unambiguous—that is, when the statutory language admits of only one meaning—the legislative intent is apparent, and we will not construe the statute otherwise. *State v. Wilson*, 125 Wash.2d 212, 217; 883 P.2d 320 (1994).

d) Ambiguous Definition of “Victim”

The SRA defines a “victim” as:

“Victim” means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.

See RCW 9.94A.030(54).

Despite the use of the word “person,” the Washington Supreme Court has extended the meaning of “victim” for purposes of the SRA to the “general public” or even a “city”:

In our view, the victim of the offense of unlawful possession of a firearm is the general public.

See State v. Haddock, 141 Wash.2d 103, 111, 3 P.3d 733 (2000)..

Although the City is not the immediate victim of the assault, the City is within the statutory definition.

See State v. Davison, 116 Wash.2d 917, 921, 809 P.2d 1374 (1991).

Because the term victim is thus ambiguous as to whether it means an individual human or to larger amorphous bodies, the rule of lenity applies to its interpretation:

If after applying rules of statutory construction we conclude that a statute is ambiguous, “the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary.” *Jacobs*, 154 Wash.2d at 601, 115 P.3d 281 (citing *In re Post Sentencing Review of*

Charles, 135 Wash.2d 239, 249, 955 P.2d 798 (1998)). The rule states that an ambiguous criminal statute cannot be interpreted to increase the penalty imposed.

See *State v. Adlington–Kelly*, 95 Wash.2d 917, 920–21, 631 P.2d 954 (1981).

2. ANALYSIS

First, if by the time a decision in this appeal is made Defendant has served his time, his offender score should still be recalculated on remand because of public interest and the Defendant’s interest in having a proper offender score calculated should he be charged with a crime in the future; it may also have effects on his probation.

Defendant’s criminal history was improperly calculated at three priors rather than combined. Defendant’s three prior felony harassments were the same course of conduct because they all were all made in one statement, to one person, at the same place and time, and had the same “victim.”

The State argued at sentencing in this matter that the Supreme Court upheld the conviction for three counts of felony harassment in their 2016 decision. VRP 51. Presumably, the State will argue that a plain reading of the statute only allows a finding of “same criminal conduct” if there is one victim, and not, as they will likely allege here, three different individual juvenile victims.

This argument ignores the fact that Washington courts have expanded the definition of “victim” well beyond the strict literal sense of an individual person. *Supra*. It also ignores the extremely unique

circumstances of this case which demand that the rule of lenity be applied to this defendant regarding this ambiguous term.

Here, Defendant never communicated a threat to kill directly or intentionally any of the “victims.” As the dissent in the 2016 Supreme Court decision correctly stated, “there was no evidence that *State v. Trey M.* ever actually communicated these statements to the three students directly.” *State v. Trey M.* at 909. It was law enforcement that communicated the threat to the victims, not Defendant. Defendant was, as the dissented stated, “coaxed” into telling law enforcement his thoughts, and then, through several layers of hearsay, the “victims” apparently eventually found out about Defendant’s ideation.

While the Supreme Court majority may have upheld the convictions for three counts, that does not mean that they made any finding about “same criminal conduct.” The SRA allows defendants to be convicted of multiple counts but still seek a same course of conduct analysis for purposes of calculating their offender score in later cases. RCW 13.40.020(8)(a).

One can easily imagine bizarre outcomes if a strict literal reading of “victim” is done in this case. If Defendant had told the officer that he wanted to kill “the whole school,” would he then be charged with hundreds of counts of felony harassment, with each individual pupil as the “victim”? In such a scenario should he be deprived from seeking a same course of conduct consolidation despite the fact that he uttered only one statement?

Defendant, in a single interview, at a single time and place, and with the same intent, expressed an ideation to kill. The “victim” at that point was

the public, and that's where the crime stopped. It was only through law enforcement's later actions and the subsequent spreading of rumors that three *individual* "victims" were allegedly created.

Defendant's single act constituted the same course of conduct and this matter should be remanded for re-sentencing with a correct offender score calculation.

B. The sentencing court erred when it failed to exercise its discretion and consider mitigating factors for a manifest injustice downward deviation from the standard range.

1. LAW

A juvenile court may enter an exceptional disposition below the standard range if it finds a manifest injustice would occur should a standard range sentence be imposed. RCW 13.40.160.

A juvenile disposition is appealable in the same manner as a criminal sentence. RCW 13.04.033(1); *State v. J.W.*, 84 Wn. App. 808, 811, 929 P.2d 1197 (1997). A standard range disposition is appealable only if the trial court failed to follow required procedure. *State v. M.L.*, 114 Wn. App. 358, 361, 57 P.3d 644 (2002). Review is limited to circumstances where the trial court relied on an impermissible basis for refusing to impose a mitigated sentence or refused to exercise its discretion at all. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998). Simply arguing that the trial court abused its discretion does not raise an appealable issue. *J.W.*, at 811.

Before imposing a juvenile disposition, the trial court is required to consider on the record any aggravating or mitigating factors presented. RCW 13.40.150(3)(h); *M.L.*, at 363.

2. ANALYSIS

Here, defense counsel made a passionate and lengthy plea to the court for a manifest injustice downward departure based on the excessive offender score calculation and on Defendant's special needs. Most importantly, defense counsel noted that the Supreme Court addressed the special needs of *this specific defendant*. Unfortunately, the juvenile court never read this material. The juvenile court admitted as such. VRP 49. It is unconscionable that a juvenile court, upon a plea for a manifest injustice downward deviation, would not read what our own Supreme Court has personally stated about the specific juvenile in question. This is an obvious failure to exercise its discretion and failure to consider a mitigating factor as required by RCW 13.40.150(3)(h) and *M.L.*, at 363. Had the juvenile court read the above excerpts, among others, and the powerful dissent, it may very well have done something beyond "simply placing [him] in our revolving door criminal justice system." *Trey M.*, at 909.

VI. CONCLUSION

This matter should be remanded for re-sentencing so the juvenile court can properly consider *State v Trey M.* and so Defendant's offender score can be correctly calculated as argued above.

Respectfully submitted this 13th day of December, 2017.

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CERTIFICATE OF SERVICE

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