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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

D.W.C., APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court exceeded its statutory sentencing authority when it ordered D.W.C.¹ to undergo drug and alcohol testing and comply with all recommended treatment where there is no indication in the record that D.W.C. has any drug or alcohol issues and no indication that drugs or alcohol played any role in the offense.
2. The Court of Appeals should decline to impose appellate costs should respondent substantially prevail and request such costs.

II. ISSUES PRESENTED

1. Whether a trial court may exercise the broad discretion contemplated by the Juvenile Rehabilitation Act to impose drug and alcohol testing and treatment as part of a juvenile disposition in order to address D.W.C.'s needs?
2. Whether this Court may impose appellate costs on juvenile defendants?

III. STATEMENT OF THE CASE

Background facts.²

D.W.C. and his family lived next door to the family of E.H. and B.D, and children from both families played together. CP 173. At the time of the incidents at issue, D.W.C. was 12 years old, while E.H. and B.D. were seven years old. CP 177-78. One day, E.H. and B.D. were in D.W.C.'s bedroom, and D.W.C. asked E.H. to suck his penis. CP 174. E.H. agreed to the request

¹ Pursuant to RAP 3.4, which went into effect September 1, 2018, the juvenile defendant is referred to by his initials.

² D.W.C. does not challenge the trial court's findings of fact, making them verities on appeal. *State v. Alvarez*, 105 Wn. App. 215, 220, 19 P.3d 485 (2001).

and D.W.C. grabbed his penis and put it into E.H.'s mouth. CP 174. D.W.C. also asked B.D. to suck his penis, but E.H. left the room and did not observe what happened. CP 174.

When Ms. Huett, E.H.'s mother and B.D.'s aunt, was giving B.D a bath, B.D. told her about the act that D.W.C. had made E.H. perform; however, he did not mention any act involving himself. CP 173. Ms. Huett relayed this information to her husband, Mr. Huett, and he spoke to E.H., who became very upset. CP 173-75. Because a prior behavioral issue had occurred a month earlier, Mr. Huett went to D.W.C.'s house to speak about the situation with his parents. CP 173, 176. After the discussion, he witnessed D.W.C. laughing about the entire event and decided to call law enforcement. CP 176.

Karen Winston is a retired child forensic interviewer; she interviewed E.H. and B.D. CP 176. In E.H.'s interview, he stated he was outside on the side of the house when D.W.C. made him "suck his thing." CP 176. After an investigation, the State charged D.W.C. with rape of a child in the first degree and child molestation in the first degree as to B.D., as well as two identical charges related to E.H. CP 1-2.

Procedure and disposition.

After a bench trial, the trial court found D.W.C. guilty on the one count of rape of a child in the first degree relating to E.H. CP 180, 192. The

court ordered a predisposition study for a special sex offender disposition alternative (SSODA) to be completed by Priscilla Hannon. CP 134-35. Although Ms. Hannon completed the predisposition study – as it was referred to in both the State’s sentencing memorandum and at the disposition hearing – the study was not provided as part of the record on appeal. CP 146-47; *see* RP 695-98, 703-05.

At the disposition hearing, community custody officer, Jeff Ward, recommended D.W.C. enter SSODA pursuant to Ms. Hannon’s study for 24 months. He also recommended a period of probation, with conditions of probation including a geographic restriction and:

no further law violations; school education program; report to probation counselor as directed; reside in placement as directed; curfew as directed by probation counselor; no possession of firearms or weapons; counseling classes, which could include ART and FFT, along with the sex offender treatment; alcohol and drug evaluation[,] treatment recommendations; no illegal use of substances; UAs as directed.

RP 687-88. D.W.C. asked the trial court to follow the recommendation of the probation officer and impose SSODA. RP 706. D.W.C. also asked the court to impose two years of community supervision after one year of SSODA, and specifically told the court the other conditions of supervision were appropriate. RP 707.

After hearing from each party, the court acknowledged the predisposition report of Ms. Hannon that identified D.W.C. as a “low moderate” risk. RP 714. The court also noted the “red flag” that D.W.C. did not admit that he committed the offense.³ RP 714. The court further clarified that usually individuals did not “offend sexually” because they are “egregious sex offenders,” but rather that they act out for many different reasons, including being “under the influence” of drugs or alcohol and that treatment can address these triggers. RP 714-15.

The court adopted D.W.C.’s request for SSODA and imposed 24 months of community supervision. CP 194-96. The court imposed the conditions of supervision requested by Mr. Ward and agreed to by D.W.C., including the condition that he obtain an evaluation for drug or alcohol dependency and participate in outpatient substance abuse treatment as directed by his probation officer. CP 197. D.W.C. now appeals. CP 190.

³ From the context, it appears the court was concerned D.W.C. did not make this admission to Ms. Hannon as part of the ordered predisposition study rather than before the bench trial and finding of guilt.

IV. ARGUMENT

A. D.W.C. CANNOT PREVAIL BECAUSE HE INVITED OR WAIVED THIS ERROR, HIS AUTHORITY DOES NOT STAND FOR THE PROPOSITION HE CLAIMS IT DOES, AND, IN THE ALTERNATIVE, THE RECORD BEFORE THIS COURT SUPPORTS THE CONDITION.

1. D.W.C. invited this claimed error.

D.W.C. invited this error by acknowledging that all the community custody conditions that probation asked for were appropriate, and asked the court to impose those requested conditions.

The invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). To determine whether the invited error doctrine is applicable to a case, this Court may consider whether the petitioner affirmatively assented to the error, materially contributed to it, or benefited from it. *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009). To be invited, the error must be the result of an affirmative, knowing, and voluntary act. *State v. Lucero*, 152 Wn. App. 287, 292, 217 P.3d 369 (2009), *rev'd on other grounds*, 168 Wn.2d 785, 230 P.3d 165 (2010). The State bears the burden of proving invited error. *State v. Mercado*, 181 Wn. App. 624, 630, 326 P.3d 154 (2014).

In this case, D.W.C. agreed with and urged the court to follow the recommendation of probation in two instances. During sentencing, D.W.C. discussed the goals of treatment and his hard work and adherence to release conditions at length before asking the court to “follow the recommendations of probation.” RP 706. Although at first glance, that statement appears to be in the context of recommended SSODA treatment, D.W.C. soon clarified, “[a]ll the other conditions would be appropriate.” RP 707. This situation is not simply the lack of an objection. D.W.C. acknowledged and affirmatively assented to the condition that he undergo a substance abuse evaluation and any follow-up treatment recommended by probation. Because D.W.C.’s assent was knowing and voluntary the State has met its burden of proving he invited the error. The invited error doctrine prohibits him from making this challenge.

2. D.W.C. waived review of this claimed error.

The record is incomplete, so this Court is unable to address D.W.C.’s challenge.

An appellant may challenge an erroneously imposed sentence for the first time on appeal. *State v. Munoz-Rivera*, 190 Wn. App. 191, 361 P.3d 182 (2015). However, a trial court’s decision is presumed correct and should be sustained absent an affirmative showing of error. *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012). The party

presenting an issue has the burden to ensure the record is adequate for review. *State v. Rienks*, 46 Wn. App. 537, 544-45, 731 P.2d 1116 (1987).

D.W.C. challenges the trial court's imposition of community custody conditions. The record reflects the trial court ordered a predisposition study to assist in its determination of an appropriate disposition for D.W.C. That study is not in the record. Presumably these types of studies discuss any susceptibility to drug or alcohol abuse a juvenile offender may have. The trial court did consider the study at the disposition hearing. Because the record is incomplete, this Court should deem the error waived as D.W.C. cannot rebut the presumption that the trial court exercised its discretion appropriately.

3. The authority D.W.C. cites does not require a nexus between the offense and the conditions of community supervision.

D.W.C.'s cited authority does not require a nexus between the offense and the conditions of community custody. This Court should not adopt such a requirement.

When a juvenile is adjudicated of an offense, a standard range disposition is determined according to RCW 13.40.0357. The juvenile court has broad discretion to fashion an individualized rehabilitative disposition that includes a broad range of community supervision conditions. *State v. D.H.*, 102 Wn. App. 620, 629, 9 P.3d 253 (2000). Under

RCW 13.40.020(5), community supervision is an individualized program comprised of one or more of the following:

- (a) Community-based sanctions;
- (b) Community-based rehabilitation;
- (c) Monitoring and reporting requirements;
- (d) Posting of a probation bond;
- (e) Residential treatment[.]

Community-based rehabilitation is broadly defined to include one or more of:

Employment; attendance of information classes; literacy classes; counseling, outpatient substance abuse treatment programs, outpatient mental health programs, anger management classes, education or outpatient treatment programs to prevent animal cruelty, or other services including, when appropriate, restorative justice programs; or attendance at school or other educational programs appropriate for the juvenile as determined by the school district.

RCW 13.40.020(2). Monitoring and reporting requirements are broadly defined to include:

Curfews; requirements to remain at home, school, work, or court-ordered treatment programs during specified hours; restrictions from leaving or entering specified geographical areas; requirements to report to the probation officer as directed and to remain under the probation officer's supervision; and other conditions or limitations as the court may require which may not include confinement[.]

RCW 13.40.020(20). The goals of the juvenile sentencing system differ from those of the adult criminal system. *State v. Rice*, 98 Wn.2d 384, 392-93, 655 P.2d 1145 (1982) (“because the juvenile system focuses on twin

goals of punishment and rehabilitation of juvenile offenders, it differs materially from the adult sentencing system in which punishment is the primary purpose”). Juvenile courts may design a specialized program for juvenile offenders based on their individual needs. *See State v. J.H.*, 96 Wn. App. 167, 180-81, 978 P.2d 1121 (1999).

D.W.C. relies on *State v. H.E.J.*, 102 Wn. App. 84, 87, 6 P.3d 58 (2000), to argue that there must be a nexus between the conditions of community supervision imposed by a juvenile court and the offense. In that case, H.E.J. exposed his erect penis during a class at his junior high school. *Id.* at 85. The State charged two counts of indecent exposure and the trial court found him guilty after a bench trial. *Id.* As part of the disposition, the court ordered: 12 months of community custody; a sexual deviancy evaluation; compliance with any treatment recommendation; and no unsupervised contact with persons younger than himself. *Id.* H.E.J. challenged the court’s authority to impose the deviancy evaluation because the definition for community based rehabilitation did not include sex offender treatment. *Id.* at 87. H.E.J. also challenged the court’s restriction on unsupervised conduct with children younger than himself for not being crime-related. *Id.* at 88.

The court noted H.E.J. did not cite any authority holding a court may order sexual deviancy evaluation only if a juvenile is convicted of a sex

offense, or only the treatments and evaluations specifically enumerated in the definition of rehabilitation. *Id.* However, the reviewing court did discuss the broad discretion trial courts enjoy when determining appropriate dispositions for juveniles. *Id.* The reviewing court emphasized juvenile courts retain “discretion to tailor the disposition to meet the needs of the juvenile and the rehabilitative and accountability goals of the juvenile code.” *Id.* The court determined the evaluation was an appropriate use of discretion when viewed through the lens of the purpose of the juvenile code. *Id.* at 87-88. The court also affirmed the juvenile court’s order restricting contact because, although certain prohibitions in *adult convictions* must be related to the circumstances of the offense, H.E.J. identified no authority requiring such in juvenile dispositions. *Id.* at 89.

Nowhere did the court in *H.E.J.* require a nexus between a community custody condition and the offense. Additionally, no published case cites *H.E.J.* as authority for that proposition. The opinion simply notes H.E.J. provided no authority and the condition is clearly appropriate. Courts have broad discretion to tailor dispositions to meet the needs of juveniles and the rehabilitative and accountability goals of the juvenile code. *H.E.J.*, 102 Wn. App. at 87. Such a requirement would be inconsistent with the goal of the juvenile system.

4. The record provides a basis for a drug/alcohol evaluation and subsequent treatment as a condition of the disposition.

The court imposed the condition that D.W.C. obtain an evaluation for drug or alcohol dependency and participate in outpatient substance abuse treatment as directed by his probation officer. Before doing so, the court considered that D.W.C. had still not taken responsibility for his actions. The court also considered that most sex offenders act out because of the triggers of drug or alcohol abuse.

The court's soliloquy establishes a nexus between a drug or alcohol evaluation and D.W.C.'s needs. As noted, the court had broad discretion to fashion a disposition that addresses the needs of the juvenile offender, and the court in this case considered that drug or alcohol abuse may be the reason for D.W.C.'s refusal to take responsibility for his conduct. The record contains a nexus between the condition at issue and the offense.

In the event this Court agrees with D.W.C., the State concurs with D.W.C.'s request to have the court simply strike the offending condition, rather than remand for resentencing.

B. D.W.C. IS A JUVENILE AND THEREFORE NO APPEAL COSTS ARE PERMITTED PURSUANT TO STATUTE.

Pursuant to RCW 10.73.160, courts may require *only* adult offenders to pay appellate costs. No costs should be awarded, nor will the State request any.

V. CONCLUSION

The State respectfully requests this Court affirm for the reasons stated. Alternatively, this court should strike the offending condition rather than remand for resentencing.

Dated this 17 day of October, 2018.

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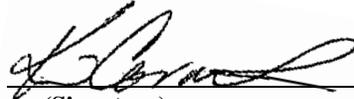
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I certify under penalty of perjury under the laws of the State of Washington, that on October 17, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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