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NO. 37267-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

J. C. M-O,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes one assignment of error with several sub-issues . These can be summarized as follows;

1. The court erred in failing to fully and meaningfully consider the mitigating factor of you when sentencing J. C. M-O.
A There should be a new judge assigned if this matter is
2. Alternatively, defense counsel was ineffective for failing to request an exceptional sentence downward or citing to the relevant authority regarding youth as a mitigating factor.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The State firmly believes that the case law cited by Appellant is not applicable to a juvenile sentencing. However, the State believes the best uses of the scarce resources of the State and this Court can be done by remanding this case to allow the appellant to place on the record that which he believes would be applicable to the state of his mind at the time he committed these crimes.
2. Counsel was not ineffective. Further, this issue is moot given the States agreement that the case should be remanded for resentencing.
3. The appellant has not met his burden to have the original sentencing court removed from addressing this case when it comes back down from this court.

II. STATEMENT OF THE CASE

Appellant has only challenged the sentencing portion of this case. The State shall set forth a brief recitation of the facts regarding the underlying conviction.

Early in morning hours of July 9, 2019, the victim sent a message via Snapchat C, about selling a cellphone. RP 80-82, 97-98. C, who was thirteen years old, said he was going to steal his mother's car and to come over to J.L.-H.'s house to look at and buy a cellphone. RP 82. When C arrived at the house at around 2:00 a.m., he parked about five houses away from J.L.-H.'s home and so he walked down to that location. RP 81-82. The victim was surprised to see two other people in the car with C RP 82-85, 99-101. J.L.-H. had never seen the other two boys before, but C referred to one of them as J. RP 83, 100-01. When the victim asked what the Appellant looked like he stated "[h]e had black hair and brown eyes...and he had a gun aimed at my face." The victim then positively identified the Appellant who was seated in the courtroom. RP 84. The victim also testified that there was another person in the Jeep, whom he identified as R. The victim showed C the cellphone and showing Appellant and C that the phone worked and explaining to them about the phone. RP 85. The Appellant then told the victim that he was going to go grab the money for the phone. The Appellant walked around to the driver's side of the Jeep and grabbed something. When he returned, he told the victim to give him everything that he had. Initially the victim refused and then Appellant pulled a gun. RP 86. The victim described the gun that was pointed at him and told the court that "[he] saw a bullet in

the chamber.” The victim testified that he was scared. He gave the Appellant his phone, belt, pants, sweatshirt, shoes, and money. RP 88-89, 104. After the victim gave the Appellant all of his belongings the Appellant punched him in the face which broke the victim’s braces. The Appellant told the victim after punching him in the face telling the victim “...not to snitch or he was going to kill me or something.” RP 90

The victim was afraid of the Appellant carrying out the threat that they would hurt him so he ran several blocks in his underwear to his grandparents’ home where he rang the doorbell until his grandmother came out and opened the door. RP 90-91

His grandmother called 911 telling the police that the victim had been robbed at gunpoint. RP 107. When speaking to the police the victim told the officers the names of the three people who had robbed him. They were C, the Appellant and R. RP 30-32, 46-47, 57. Police knew C from prior contacts. Using their data bases, they were able to determine that C’s mother was the registered owner of a vehicle that matched the description of the one involved in this robbery. RP 57-58, 64, 74. Police went to C’s residence and located a Jeep that matched the robbery vehicle. The police observed a sweatshirt inside that matched the one stolen from the victim. RP 32-33 48-49, 58-59, 64, 66-67, 91-93. No additional forensic evidence was taken from this vehicle. RP 49, 75.

C told police of his involvement in the robbery but did not implicate anyone else. so involved in the incident. RP 71, 74.

The day after his son was robbed the victim's father started to search Facebook to see if he could identify those involved. He searched for the appellant and R RP 111-12. He was able to locate some pictures from profiles he found on Facebook and he showed these to his son. RP 112-13, 115, 120. The victim identified pictures of the Appellant and R. RP 95-96, 102-03, 105. The victim's father shared these pictures with the police. RP 114-15.

The appellant testified and denied knowing C or the victim. He denied going with C to rob the victim and stated that he had not and does not carry a gun and did not point a gun at the victim. RP 137-38, 141.

After trial, the appellant was found guilty of first- degree robbery. The trial court ruled there was insufficient evidence to support the allegation that the firearm used was an actual firearm for the enhancement. Findings were entered. RP 121-32, 134, 154-59, 162, 165-66; CP 26-34.

The appellant was sentence to a standard range sentence of 129 to 260 weeks in a juvenile detention facility. CP 11-18; RP 171.

III. ARGUMENT.

The State firmly disputes that the line of cases and the line of

reasoning addressing the mental maturity of “juvenile” offenders is applicable to cases which are being litigated in the Juvenile Department of the Superior Court.

Appellant cites absolutely no authority from this state or any other jurisdiction where the analysis of those cited cases have been extended to cases which arise from and remain in Juvenile court. Appellant cites to literally no authority other than one line from one case which he asserts if it is read in a broad fashion it would support his allegation on appeal.

Further, the State disputes that the trial court or any of the attorneys in this case were ineffective. The court can’t abuse its discretion and counsel are not and cannot be ineffective for not take an action that is not applicable to the case at bar.

Additionally, Appellant’s claim that this court must order the original sentencing judge off this case is not supported by fact or law.

With that said, the State believes that remand for resentencing is appropriate so the parties can make a more meaningful record regarding the individual characteristics of the juvenile respondent. In so doing the sentencing judge can utilize its discretion to consider whether a manifest injustice sentence is appropriate with the respondent’s specific rehabilitative needs in mind. This will enable any reviewing court to address any future claims that the sentencing hearing was not adequately

tailored specifically to the respondent with the sentencing court fully aware of its authority to deviate from the standard range when the interests of justice and the needs of the individual juvenile so necessitate.

As this court is aware the Juvenile Justice Act (JJA) is very dissimilar to the Sentencing Reform Act under which all of the defendant's sentenced in the cases cited by Appellant were sentenced. In State v. Sledge, 133 Wn.2d 828, 947 P.2d 1199 (1997), this court acknowledged that "the Juvenile Justice Act retains treatment, in addition to punishment, as one of its express goals." Id. at 844 n.8, 947 P.2d 1199 The purpose of the Juvenile Justice Act of 1977 (JJA), ch. 13.40 RCW, is to help juveniles while simultaneously protecting society.

The JJA contains very specific sentencing standards. This includes RCW 13.40.0357, a sentencing schedule, which declares, "This schedule must be used for juvenile offenders. The court may select sentencing option A, B, C, or D."

The JJA is designed to " [p]rovide for punishment commensurate with the age, crime, and criminal history of the juvenile offender" RCW 13.40.010(2)(d), and to " [p]rovide for the handling of juvenile offenders by communities whenever consistent with public safety." RCW 13.40.010(2)(h).

State v. Brestoff, 1 Wn.App.2d 923, 407 P.3d 1195 (2018):

The legislature enacted the JJA, as a comprehensive statutory scheme designed to "respond[] to the needs to youthful offenders" due to their age while ensuring that juveniles are "accountable for their offenses." RCW 13.40.010(2); Laws of 1977, ch. 291, § 55(2). Juveniles are not to be subjected to "adult criminal proceedings and punishments." State v. S.J.C., 183 Wn.2d 408, 413, 352 P.3d 749 (2015). The intent of the JJA, includes, among other goals, (1) protecting the public from criminal behavior, (2) holding juveniles accountable for their criminal behavior, (3) providing punishment commensurate with the juvenile's age, crime, and criminal history, (4) providing rehabilitation and reintegration of juvenile offenders, and (5) providing for necessary treatment, supervision and custody. RCW 13.40.010(2). The intent of the legislation is further evidenced by the requirement that the State must elect between imposing sanctions for violations or bringing new charges thus indicating the legislature's decision to balance these interests. RCW 13.40.070(3).

It was upon this statutory and precedential authority that the trial court acted. These actions clearly were what the court was mandated to do.

Again, with this basis in law, the State believes that in the interests of justice and judicial economy this court should remand this case and let all parties address sentencing again. This litigant needs to be well aware a resentencing allows ALL parties to start fresh and inform the trial court of any and all information that party believes is needed for the court to complete its job.

Recusal

The trial court's actions were not such that there is any basis for the original sentencing judge to be removed from the case.

All parties informed the trial court that the standard range was what the court was bound to impose.

THE STATE: ...After looking into this further, I realized that Juan was 16 years and eight months on the violation date, making him Robbery 1 at age 16 or 17, which is an A-plus-plus crime, so his standard range would actually be 129 to 260 weeks.

THE COURT: Anything else we need to discuss there. I mean, obviously Juan made a decision not to -- that he wanted to go to trial, he got his trial, and I don't think that affects the range that the court is--

MS. DALAN: Oh. I -- I do not think that it affects the range that the court is bound to give...I agree that the court is still bound by 129 to 260."

The court concurred.

Appellant does not cite to a single portion of the record in arguing that this jurist must be removed. He does not cite to the record because nothing done by this jurist at sentencing that was objectionable.

He proposes a theory that has never been the law in this State. He acknowledges trial counsel did not propose the use of this line of reasoning and he, again, does not cite a single case from any other juvenile matter that has adopted this novel theory and yet he posits that "[t]he discretionary nature of a trial court's decision heightens appearance of fairness concerns." App's brief at 17.

If this court forced the recusal of each and every judge who made a discretionary ruling which was remanded to be reviewed there would be few jurists who could hear any case which was reviewed by this court and remanded.

Appellant states this discretionary ruling should force out a sitting jurist but the standard regarding discretionary actions as set forth in State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) makes it clear that any other jurist would have come to the same conclusion.

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. *State ex rel. Clark v. Hogan*, 49 Wash.2d 457, 303 P.2d 290 (1956). Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *MacKay v. MacKay*, 55 Wash.2d 344, 347 P.2d 1062 (1959); *State ex rel. Nielsen v. Superior Court*, 7 Wash.2d 562, 110 P.2d 645, 115 P.2d 142 (1941).

Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.

A party alleging judicial bias **must** present evidence of actual or potential bias. In re. Guardianship of Wells, 150 Wn.App. 491, 503, 208

P.3d 1126 (2009). Without evidence of actual or potential bias, a claim of judicial bias is without merit. State v. Post, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992). There has been no showing of ANY bias on the part of the trial court.

A case decided by this court, Tatham v. Rogers, 170 Wn.App. 76, 79, 283 P.3d 583 (Div. 3 2012) addressed this issue “Washington's appearance of fairness doctrine not only requires a judge to be impartial, it also requires that the judge appear to be impartial. State v. Finch, 137 Wn.2d 792, 808, 975 P.2d 967 (1999).”

Tatham states:

It is unusual to require a judge to recuse himself or herself from ruling on a motion for a new trial even where the motion is based on grounds that are critical of the trial judge. The trial judge is fully informed and is presumed to perform his or her functions regularly and properly without bias or prejudice. *See, e.g., Wolfkill*, 103 Wash.App. at 841, 14 P.3d 877. A different rule could reward groundless tactical attacks. Ordinarily, [t]he nonmoving party has the right to have the trial judge make the decision [on the new trial motion] and the moving party should not be able to force the judge to recuse himself in ruling on such a motion by including allegations directed at the trial judge himself. Jones v. Halvorson-Berg, 69 Wn.App. 117, 129, 847 P.2d 945 (1993).

As was further set forth in Tatham;

Beginning with State v. Post, 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599 (1992), the Supreme Court has characterized a judge's failure to recuse himself or

herself when required to do so by the judicial canons as a violation of the appearance of fairness doctrine.^[4] The court also narrowed the scope of the appearance of fairness doctrine from one under which a party could challenge whether decision-making *procedures* created an appearance of unfairness to a reformulated threshold: whether there is "evidence of a judge's or decision maker's actual or potential bias." 118 Wn.2d at 619 n. 9, 826 P.2d 172, 837 P.2d 599."

If anything, the sentencing court was very supportive of the

Appellant:

My only hope for you, Juan, and -- and you'll either use this beneficially or you won't. That's up to you... So there is going to be opportunities for you, to get -- Because you will be 18; you're turning 18 this coming year anyway. And so juvenile court was running out of -- any options we had to, you know, bring resources and services to help you get on the road to adulthood in -- in good shape. But this will give you that final opportunity... when you come out you could very well be able to get a job, support yourself, and move forward from this... Best case scenario, you got, you put your head down, you get after it, you take advantage of what you can, you're going to be out at 129.... And Juan, I do mean this sincerely when I say, I really do wish you good luck. I've said this all along. I think you are -- a very capable young man. But you've got to make some different choices.
RP 168-9

Appellant has clearly not met his burden. The State has agreed to have this matter returned to the trial court there is no need for some other jurist to hear this matter on remand. Judge Ruekauf did what any reasonable jurist would have done at this sentencing.

Ineffective assistance of counsel.

The State will briefly address the alternative claim from J.C. M-O that his trial counsel was also ineffective for not proposing that the trial court follow this unsupported sentencing scheme. The standard for ineffective assistance is set forth in innumerable cases. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) counsel's failure to move for suppression of drugs abandoned in vehicle after defendant was unlawfully seized was both deficient and prejudicial. Defense counsel's conduct is deficient if it falls below an objective standard of reasonableness.

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

"The reasonableness of counsel's performance is to be evaluated

from counsel's perspective at the time of the alleged error and in light of all the circumstances." Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) A court asked to review the performance of a trial attorney must evaluate counsel's overall performance, because otherwise it is "all too easy" for a court to conclude that a particular act or omission of counsel was deficient performance. Strickland, 466 U.S. at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689

Here trial counsel's performance was not deficient for this alleged failure to raise a theory at sentencing which has, to the best of the State's knowledge, never been litigated in a court of review in this State. If the standard of review for ineffective assistance of counsel was a failure to raise any theoretical argument all trial counsel would be ineffective.

In re Nichols, 151 Wn.App. 262, 211 P.3d 462 (2009) addressed an ineffective assistance claim regarding a novel theory:

At the time of Nichols' trial, no case had addressed whether information in a motel registry was a private affair that was entitled to privacy protection under article 1, § 7. Nichols argues that despite the lack of a case

directly on point, trial and appellate counsel should have spotted the issue because it was well established that article 1, § 7 is stronger in its protection of privacy than the Fourth Amendment. See, e.g., State v. Gunwall, 106 Wn.2d 65, 720 P.2d 808 (1986) (telephone records and telephone line protected); State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990) (trash containers outside house protected); and State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999) (personal belongings of passenger not subject to search when driver arrested).

As with this Appellant's claim that the original jurist must be removed, there is no need for new counsel when this case is remanded. Appellant's counsel was effective, she successfully presented J.C. M-O's case in such a manner that the aggravator was not found by the trial court. Counsels representation was effective.

V. CONCLUSION

In the interest of justice and judicial economy this court should remand this case to the trial court to allow Appellant to present what information he believes will support is claim. The State will also be allowed to present any and all information to support its original position or any other sentence it believes appropriate in this resentencing, a hearing which opens this litigant to any and all possible sentences.

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Respectfully submitted this 16th day of September 2020,

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DECLARATION OF SERVICE

I, David B. Trefry state that on September 16, 2020 emailed a copy of the Respondent's Brief, Jared Berkeley Steed - Nielsen Koch, PLLC at Sloanej@nwattorney.net

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of September, 2020 at Spokane, Washington.

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YAKIMA COUNTY PROSECUTORS OFFICE

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