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Supreme Court No. _____
(COA No. 78442-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

M.S.,

Appellant.

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

MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

M.S. moves this Court for discretionary review of the Court of Appeals decision in *State v. M.S.*, No. 78442-1-I. RAP 13.3(a)(1), (e), 13.4(b), 13.5(a), (c), 13.5A(a)(3), (b), (c). A copy of the ruling (filed November 26, 2018) and the order denying M.S.'s motion to modify the ruling (filed January 24, 2019) are attached at Appendix 1 and 2.

B. COURT OF APPEALS DECISION

M.S. appealed the juvenile court's imposition of the maximum permissible manifest injustice sentence for his single misdemeanor conviction. Despite the court's consideration of aggravating factors not authorized by the legislature and M.S.'s lack of notice of the aggravating factors on which the court based the manifest injustice disposition, the Court of Appeals affirmed the exceptional sentence.

In so holding, the Court of Appeals affirmed a sentence exceeding the court's statutory grant of authority, in violation of this Court's holding in *State v. Bacon*,[1] and affirmed a sentence based on aggravating factors of which M.S. never had notice, in violation of basic principles of due process and the deferred disposition statute. In addition, the Court of Appeals rejected M.S.'s claim that the maximum sentence – a sentence

[1] 190 Wn.2d 458, 415 P.3d 207 (2018).

twelve times the length of the standard range sentence established by our legislature as appropriate for this misdemeanor offense – was based on insufficient evidence and prohibited factors and was clearly excessive.

C. ISSUES PRESENTED FOR REVIEW

1. Juvenile courts derive their authority to sentence juvenile offenders exclusively from the Juvenile Justice Act (JJA), a fact this Court recently recognized in *Bacon*. The JJA presumes standard range sentences are appropriate and authorizes exceptional sentences only where a manifest injustice exists based on identified aggravating factors, and the JJA contains no provision permitting courts to consider other factors. Does the JJA prohibit courts from considering aggravating factors not itemized in the statute, and does a court exceed its statutory authority when it imposes an exceptional sentence based on aggravating factors not identified in the JJA?

2. The JJA and the state and federal constitutions provide juveniles with the right to notice of charges and due process of law. In adult proceedings, the Sentencing Reform Act and due process require the State to provide defendants with notice of aggravating factors used to enhance a sentence before the entry of a plea or the start of trial. In addition, the deferred disposition statute requires juveniles acknowledge the direct consequences of a disposition before entry of the deferral. Does

a court violate a juvenile's statutory and constitutional rights to notice and due process when it imposes a manifest injustice sentence based on aggravating factors of which the juvenile did not have notice at the time of the finding of guilt?

3. Standard range sentences established by our legislature are presumed sufficient to appropriately punish and treat juvenile offenders. The JJA permits exceptional sentences only where factors not already contemplated by the legislature make the standard range sentence inappropriate. Is the imposition of the maximum permissible manifest injustice sentence for a single misdemeanor clearly excessive and does it violate the spirit and goals of the JJA?[2]

4. A reviewing court must reverse an exceptional sentence where the reasons for the manifest injustice are not supported by clear and convincing evidence and where the reasons do not clearly and convincingly support the manifest injustice. In addition, the JJA prohibits courts from considering a juvenile's dependency status and the lack of facilities in the community in imposing a manifest injustice sentence. Can a manifest injustice be supported by clear and convincing evidence where

[2] A similar issue is currently before the Court in *State v. B.O.J.*, 95542-5 (oral arguments scheduled for March 12, 2019).

the court considered prohibited factors and insufficient evidence supports the sole statutory aggravating factor justifying the manifest injustice?

D. STATEMENT OF THE CASE

While living on the streets as a dependent child, 16-year-old M.S. was charged with assault for an incident with a county bus driver. CP 13-15. M.S., who had no prior criminal record, accepted a deferred disposition to resolve his case. RP 6-7; CP 7-20.

At the deferred disposition hearing, the court advised M.S. of the standard range sentence he faced and also told M.S. he could receive "a higher sentence" if the court found a manifest injustice.[3] RP 14. The court did not notify M.S. of the aggravating factors on which it would base a manifest injustice sentence, nor did the State notify M.S. of the aggravating factors on which it would seek such a sentence, should M.S. fail to succeed in the deferred disposition.

Under the terms of the deferral, the court found M.S. guilty of the gross misdemeanor of assault in the fourth degree and released M.S. to the Department of Health and Social Services (DSHS) for placement and

[3] RCW 9A.36.041, assault in the fourth degree, has a Juvenile Disposition Offense Category of D+. RCW 13.40.0357. Under Option A's Standard Range, an individual with no prior adjudications corresponds to a sentence of local sanctions. RCW 13.40.020(18) defines local sanctions as "one or more of the following: (a) 0-30 days of confinement; (b) 0-12 months of community supervision; (c) 0-150 hours of community restitution; or (d) $0-$500 fine."

compliance with community supervision. CP 7-8; RP 18-19, 24-25. DSHS struggled to find an appropriate placement for M.S., and M.S. struggled to succeed in the deferred disposition. On the State's motion, the court eventually held a joint revocation and sentencing hearing. RP 75-137.

After revoking the deferred disposition and based on the same evidence, the court found five aggravating factors justified a manifest injustice sentence: high risk to reoffend; lacks parental control; need for treatment and inability to get services and treatment in the community; failure to comply with court orders; and standard range is inappropriate. RP 154-56; CP 32; CP 40-44. M.S. did not have notice of any of these aggravating factors at the time he accepted the deferral, and four of the five factors do not appear in the statute identifying permissible aggravating factors.

M.S. objected to the manifest injustice sentence and argued insufficient evidence supported all of the aggravating factors. RP 150-52; CP 57-62. The court imposed the maximum possible manifest injustice sentence of 52 weeks on 16-year-old M.S., despite the absence of any prior criminal convictions, M.S.'s offender score of zero, and the standard range sentence of local sanctions. CP 31-34, 38-45; RP 152-56. Thus, 16-year-old M.S. received the same sentence that an adult offender, sentenced to the maximum permissible term of incarceration, would receive. RCW

9A.36.041 (defining assault in the fourth degree as a gross misdemeanor), 9A.20.021(2) (establishing maximum sentence for gross misdemeanor as 364 days). M.S. appealed.

The Court of Appeals acknowledged the juvenile court relied on nonstatutory aggravating factors and acknowledged M.S. did not receive notice of any of the aggravating factors at the time he agreed to the deferred disposition. However, the Court of Appeals affirmed the exceptional sentence, finding courts may rely on nonstatutory aggravating factors and that juveniles are not entitled to notice of aggravating factors. In addition, the Court of Appeals rejected M.S.'s claim that the sentence was clearly excessive and based on prohibited factors and insufficient evidence.

E. ARGUMENT

By affirming an exceptional sentence based on nonstatutory aggravating factors, the Court of Appeals' decision affirms a sentence imposed in excessive of the court's statutory authority and conflicts with this Court's decision in *Bacon*. RAP 13.4(b)(1). In addition, the Court of Appeals' decision that juveniles are not entitled to notice of aggravating factors violates the JJA and due process and presents a significant question of constitutional law. RAP 13.4(b)(3). Finally, whether imposing a maximum manifest injustice disposition for a minor misdemeanor offense

is clearly excessive and contrary to the spirit and intended goals of the JJA presents an issue of substantial public interest. RAP 13.4(b)(4). M.S. moves this Court to accept review and ultimately asks this Court to reverse the imposition of the manifest injustice sentence and remand for resentencing within the standard range. RAP 13.4(b); RCW 13.40.230.

1. The Court of Appeals decision misinterprets the Juvenile Justice Act and conflicts with this Court's decision in *Bacon*, which recognizes juvenile courts are bound by the sentencing schemes established by the legislature in the Act.

a. Juvenile courts are bound by the sentencing schemes established in the Juvenile Justice Act.

The juvenile court system is solely a legislative creation. The legislature confined a juvenile court's authority to act exclusively to the authority granted within Title 13 of the RCWs. RCW 13.04.450 ("The provisions of chapters 13.04 [the Basic Juvenile Courts Act] and 13.40 [the Juvenile Justice Act] RCW . . . shall be the exclusive authority for the adjudication and disposition of juvenile offenders."). Therefore, juvenile courts lack inherent authority to create their own sentencing schemes, and courts may only impose those particular sentences authorized by statute.

In *State v. Bacon*, this Court recognized that the JJA defines the parameters of permissible sentences and that juvenile courts are bound by the grant of authority in the JJA and limited to the sentencing scheme established by the legislature in that statute. 190 Wn.2d 458, 415 P.3d 207

(2018). In *Bacon*, a juvenile argued the sentencing court possessed the inherent authority to structure sentences and could grant a suspended sentence even where such a sentence was not explicitly authorized by statute if the court, within its discretion, found the sentence appropriate. *Id.* at 460. This Court rejected that argument and held the JJA permits courts to suspend sentences only in circumstances specifically identified by the sentencing scheme of the JJA. *Id.* at 463-64. *Bacon* confirmed the JJA prohibits juvenile courts from developing their own procedures and relying on their own reasons to impose sentences outside of the standard range and confines a court's authority to the parameters of the JJA's sentencing scheme. *Id.* at 468-69.

b. <u>The Juvenile Justice Act permits exceptional sentences only when a court finds a manifest injustice based on statutorily identified aggravating factors.</u>

The JJA's statutory scheme for sentencing juvenile offenders provides for four sentencing options: Option A (Standard Range), Option B (Suspended Disposition Alternative), Option C (Chemical Dependency/Mental Health Disposition Alternative), or Option D (Manifest Injustice). RCW 13.40.0357. The JJA presumes the imposition of a standard range sentence is appropriate and permits courts to impose an exceptional sentence only if the court finds the imposition of a standard range sentence would "effectuate a manifest injustice." RCW

13.40.160(2), 13.40.0357. A "manifest injustice" is "a serious, and clear danger to society in light of the purpose of [the JJA]." RCW 13.40.020(19). Courts may only impose manifest injustice sentences in those cases where extraordinary factors not already contemplated and addressed by the legislature within the standard sentencing scheme exist. *State v. Rhodes*, 92 Wn.2d 755, 760, 600 P.2d 1264 (1979), *overruled on other grounds by State v. Baldwin*, 150 Wn.2d 448, 78 P.3d 1005 (2003); *State v. Scott*, 72 Wn. App. 207, 213-14, 866 P.2d 1258 (1993) (holding aggravating factors are "legally adequate" where they were not considered in establishing standard range).

The JJA identifies eight permissible aggravating factors that may support a manifest injustice finding. RCW 13.40.150(3)(i). The statute contains no catchall provision permitting consideration of other factors the court may deem appropriate. Therefore, basic principles of statutory interpretation require courts to presume this list of aggravating factors is exclusive. "The first controlling rule of statutory interpretation in a situation like this is *'expressio unius est exclusion alterius'* – the express inclusion of specific items in a class impliedly excludes other such items that are not mentioned." *State v. Linville*, 191 Wn.2d 513, 520, 423 P.3d 842 (2018); *Bacon*, 190 Wn.2d at 466-67 (applying principle to hold failure to include in specific list "must be considered intentional").

c. The sentencing court imposed an exceptional sentence on M.S. based on aggravating factors not contained in the Juvenile Justice Act.

Here, the sentencing court relied on five aggravating factors in finding a manifest injustice. CP 40-43. Four of the five are not included as aggravating factors identified within the JJA. Therefore, the court imposed an exceptional sentence based on factors that the legislature did not designate as appropriate to justify such a sentence, and the court exceeded its sentencing authority.

d. The Court of Appeals misinterpreted *Bacon* as limited to suspended sentences.

The Court of Appeals rejected M.S.'s challenge to the nonstatutory aggravating factors, finding both he waived the argument and that *Bacon* applies only to suspended sentences. Ruling at 8-9.

First, the Court's conclusion M.S. waived the argument by agreeing to the propriety of nonstatutory aggravating factors is erroneous and unsupported by the record. At sentencing, M.S. acknowledged the cases cited by the State relied on nonstatutory aggravating factors. CP 57-61. He did not agree such factors may properly be considered by the court. In addition, the crux of M.S.'s argument is the court exceeded its sentencing authority in relying on aggravating factors not identified by the legislature as permissible factors and, in so doing, imposed an unlawful sentence. Appellants may never agree to an unlawful sentence in excess of

the court's authority and may raise this challenge for the first time on appeal. *See State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999).

Second, the Court of Appeals' decision misinterprets the JJA and this Court's decision in *Bacon*. The Court of Appeals acknowledged four of the five aggravating factors on which the court relied in finding a manifest injustice were nonstatutory. Ruling at 8. And the Court of Appeals acknowledged *Bacon* held courts could not suspend a disposition in circumstances outside of those specifically provided for by the statute. Ruling at 8-9. However, the Court of Appeals interpreted *Bacon*'s holding as limited to cases of suspended sentences and refused to apply its principle – that courts may not impose sentences inconsistent with the statutory grant of authority – to manifest injustice sentences because "That case did not involve consideration of non-statutory aggravating factors." Ruling at 8.

Citing *State v. J.V.*, 132 Wn. App. 533, 132 P.3d 1116 (2006), a decade-old case pre-dating *Bacon* in which the juvenile raised no challenge to the court's authority to rely on nonstatutory factors, the Court of Appeals found the juvenile court properly considered nonstatutory aggravating factors. Ruling at 8-9. However, the Court refused to acknowledge that the evolution of nonstatutory factors is solely a caselaw-based phenomenon in conflict with the clear language of the JJA, and that

all of the cases permitting such factors precede this Court's reiteration that the JJA defines the parameters of permissible sentences. *Bacon*, 190 Wn.2d at 468.

e. This Court should accept review to clarify that only statutorily identified aggravating factors may support a manifest injustice disposition.

A reviewing court may uphold a manifest injustice sentence only where the reasons for the manifest injustice are support by the record and the reasons clearly and convincingly support the manifest injustice. RCW 13.40.230(2). Clear and convincing evidence fails to support a manifest injustice disposition when the court relies on aggravating factors outside of those permitted by the legislature.

The Court of Appeals opinion misinterprets the JJA and conflicts with this Court's decision in *Bacon*. This Court should grant review. RAP 13.4(b)(1).

2. The Juvenile Justice Act and due process entitle a juvenile to notice of the aggravating factors on which a court will base an exceptional sentence before the adjudication of guilt.

This Court should also grant review because, contrary to the Court of Appeal's decision, a juvenile offender is entitled to notice of the aggravating factors upon which a court relies to impose a manifest injustice disposition at the time of the plea or the finding of guilt.

a. Due process requires juveniles receive notice of the aggravating factors supporting a manifest injustice sentence prior to the finding of guilt.

Our federal and state constitutions and the JJA guarantee juveniles the foundational rights of due process and notice. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; RCW 13.40.010(2)(e); *State v. S.S.*, 67 Wn. App. 800, 807, 840 P.2d 891 (1992) (acknowledging existence of "due process implications" when State seeks manifest injustice disposition and noting "juvenile disposition proceedings may not violate fundamental notions of due process" (internal quotations omitted)); *State v. Whittington*, 27 Wn. App. 422, 425, 618 P.2d 121 (1980) (acknowledging due process applies to juvenile offender sentencings). Juveniles are entitled to due process protections equivalent to those guaranteed to adults. *In re Winship*, 397 U.S. 358, 359, 90 S. Ct. 1068, 25 L. Ed. 2d. 368 (1970); *In re Gault*, 387 U.S. 1, 30, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); *State v. Poupart*, 54 Wn. App. 440, 445, 773 P.2d 893 (1989).

Due process requires that adults receive notice of aggravating factors permitting an exceptional sentence at the time of the finding of guilt. *Apprendi v. New Jersey*, 530 U.S. 466, 484, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *State v. Siers*, 174 Wn.2d 269, 276-77, 274 P.3d 358 (2012); *see also* RCW 9.94A.537(1). Therefore, due process

entitles juveniles to receive equivalent notice of aggravating factors justifying manifest injustice sentences at the time of the finding of guilt.

In *State v. Siers*, this Court acknowledged *Apprendi* and *Blakely* require notice of aggravating factors before the finding of guilt, although it rejected the claim that such notice must be contained in the information. 174 Wn.2d 269, 276-77, 274 P.3d 358 (2012). The constitutional right to due process requires such notice. In adult cases, those factors are then proven to a jury in a jury trial, but these rights are not exclusive to the jury trial setting. The same due process and notice rights apply where an adult defendant waives his right to a jury and is tried by the court, or here, where juveniles are tried by the court.

b. <u>The deferred disposition statute mandates juveniles have notice of the direct consequences of the disposition at the time of entry.</u>

In addition to the notice of aggravating factors required by due process, the deferred disposition statute specifically requires that juveniles "[a]cknowledge the direct consequences of being found guilty and the direct consequences that will happen if an order of disposition is entered." RCW 13.40.127(3)(d).

The maximum sentence for a crime is a direct consequence of which defendants must be informed prior to pleading guilty. *State v. Weyrich*, 163 Wn.2d 554, 556-57, 182 P.3d 965 (2008) (due process right

to voluntary plea requires defendant be informed of statutory maximum because it is direct consequence of plea); *State v. Morley*, 134 Wn.2d 588, 621, 952 P.2d 167 (1998) (courts must inform defendants of maximum sentence prior to entry of guilty plea); *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996) (finding defendant's plea involuntary where court did not inform him of direct consequence of mandatory community placement, in addition to maximum prison sentence).

The statute requires a juvenile expressly "[a]cknowledge" the "direct consequences." When direct consequences include an exceptional sentence based on aggravating factors, juveniles must be informed of this consequence at the outset of the deferred disposition. Because the court may impose such an exceptional sentence only on a finding of aggravating factors, RCW 13.40.127(3)(d) requires juveniles to acknowledge the aggravating factors supporting the manifest injustice sentence at the time of the deferral.

c. <u>At the time of the deferred disposition, M.S. had no notice of the aggravating factors on which the court would base its manifest injustice finding.</u>

At the time of the finding of guilt (which in this case was the entry of the deferred disposition), M.S. did not have notice of the aggravating factors on which the court would ultimately rely in imposing the enhanced sentence. The court informed M.S. of the general possibility of "a higher

sentence" that every juvenile faces by the mere existence of the statutory scheme. RP 14; CP 17. But neither the State nor the court informed M.S. of the specific aggravating factors on which it would rely to seek a manifest injustice sentence, should the deferral fail.

Neither the recitation of the statutory maximum in the statement of deferred disposition (CP 17) nor the court's general warnings about higher sentences (RP 14) were sufficient to provide M.S. with statutory or constitutional notice and due process. These did no more than alert M.S. to the general existence of the statute that permits exceptional sentences. They did not serve to notify M.S. of the State's intent to seek an exceptional sentence, nor did they notify M.S. of the identity of the aggravating factors on which such an exceptional sentence would be based.

Contrary to the Court of Appeals decision, *State v. Tai N.* does not compel a different result. Ruling at 13-14. *Tai N.* upheld the denial of the right of jury trials to juveniles and found the clear and convincing evidence standard required by the JJA is equivalent to the proof beyond a reasonable doubt standard compelled by due process. 127 Wn. App. 733, 740-42, 113 P.3d 19 (2005). Because the JJA already met the standard of proof required by due process, the court did not analyze the additional due process implications of *Apprendi*. Further, *Tai N.* does not hold juveniles

need not receive notice of aggravating factors, nor does it hold due process requirements do not apply to juveniles.

Further, to the extent the general existence of a manifest injustice sentencing scheme might serve to notify a juvenile of the aggravating factors on which a court may rely to impose such an enhanced sentence, it fails to do so here where the court relied on four aggravating factors not contained in the statute. The existence of a statute cannot provide general notice of something not contained in the statute.

The imposition of the manifest injustice sentence based on the court's finding of aggravating factors of which M.S. did not have notice at the time of the finding of guilt violated his due process and notice constitutional guarantees as well as the deferred disposition statute. This Court should grant review to address this significant issue of constitutional law. RAP 13.4(b)(3).

3. The imposition of a maximum manifest injustice disposition for a single gross misdemeanor is clearly excessive and violates the spirit and intended purpose of the Juvenile Justice Act.

M.S. was a 16-year-old child with no prior criminal record when the juvenile court sentenced him to a maximum manifest injustice sentence for a single gross misdemeanor offense. This sentence was twelve times the standard range set by our legislature for that offense and

was the same sentence an adult sentenced to the maximum possible jail term would receive. RCW 9A.20.021(2), 9A.36.041, 13.40.0357, 13.40.020(18). The court offered no justification for the specific length of the sentence. In addition, the court impermissibly considered M.S.'s dependency status and the absence of appropriate facilities in the community and relied on insufficient evidence in imposing the manifest injustice sentence.

Courts may not use the Juvenile Rehabilitation Administration (JRA) to house juveniles simply because the community lacks resources to house them and treat their needs or because they are dependent children. RCW 13.40.150(4)(e), (5). Nor may courts circumvent legislatively determined standard sentence ranges or impose exceptional sentences based on factors not identified by the legislature. Our legislature intended manifest injustice sentences for those circumstances where a standard range sentence failed to meet the goals of the JJA as evidenced by proof of particular aggravating factors demonstrating a serious and clear danger. It is the rare case that a misdemeanor offense would justify such an exception.

Imprisoning children in the JRA for minor offenses does not comport with the overarching goals of the JJA. In addition, imposing a

maximum manifest injustice sentence for a single misdemeanor sentence is clearly excessive.

4. The court relied on prohibited factors and insufficient evidence, and the manifest injustice disposition is not supported by clear and convincing evidence.

Not only did the court rely on nonstatutory aggravating factors and factors of which M.S. had no notice, but the court imposed a manifest injustice sentence based on prohibited factors and factors for which there was insufficient evidence. The court considered M.S.'s status as a dependent child, as well as the lack of facilities available in the community in imposing the manifest injustice sentence. CP 40-43; RP 92-94. The JJA expressly prohibits courts from considering these factors. RCW 13.40.150(4)(e), (5).

Disregarding nonstatutory and prohibited aggravating factors, the court relied on a single statutory aggravating factor: "The respondent . . . has failed to comply with conditions of a recent dispositional order or diversion agreement." RCW 13.40.150(3)(i)(iv); CP 42, 44; RP 155. However, the court misinterpreted this factor as a general failure to comply with any court order, as opposed to a failure to comply with the specific court order of either a dispositional order or diversion agreement. CP 32. Therefore, insufficient evidence supports this factor.

The court based this aggravating factor on its finding M.S. "violated the terms of his pretrial release on the current matter" and "violat[ed] [ ] the Court's Order on Deferred Disposition." CP 42. But this statutory aggravating factor is not a *general* failure to comply with *any* court order; it is a failure to comply with conditions of two *specific* kinds of court orders: dispositional orders and diversion agreements. Conduct occurring during the deferred disposition period is necessarily prior to the entry of the dispositional order. Such conduct cannot constitute a failure to comply with the conditions of a recent dispositional order under RCW 13.40.150(3)(i)(iv) because no disposition order has yet been entered.

F. CONCLUSION

For all these reasons, M.S. respectfully requests this Court grant review pursuant to RAP 13.4(b).

DATED this 25th day of February 2019.

Respectfully submitted,

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APPENDIX 1

Commissioner's Ruling Accelerating Review and Affirming Manifest Injustice Disposition

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

STATE OF WASHINGTON, Respondent, v. M.S., DOB: 08/28/01, Appellant.	)))))))))))	No. 78442-1-I COMMISSIONER'S RULING ACCELERATING REVIEW AND AFFIRMING MANIFEST INJUSTICE DISPOSITION

M.S. appeals from a "manifest injustice" above the standard range disposition of 52 to 52-week commitment to juvenile rehabilitation administration (JRA) for fourth degree assault. The trial court imposed the disposition after revoking his deferred disposition for violating the terms of the disposition order. As reasons for the manifest injustice disposition, the court additionally found that M.S. posed a high risk to reoffend, could not be controlled by those supervising him, and was unable to receive the drug and alcohol and other services he desperately needed in the community. The court found that each one of these reasons, standing alone, was sufficient to impose a manifest injustice disposition. M.S. argues that the trial court erred in imposing the disposition based on prohibited factors (his dependency status and lack of facilities) and non-statutory aggravating factors. He argues that insufficient evidence supports the reasons for the disposition, that the disposition is clearly excessive, and that he was not given notice of the specific aggravating factors when he entered the deferred disposition. As explained below, M.S. fails to show a reversible error in the trial court's decision to impose a manifest injustice disposition. Review is accelerated, and the disposition is affirmed.

FACTS

In November 2017, the State charged M.S., then 16 years old, with third degree assault against a metro bus driver in King County Superior Court. On the morning of November 1, 2017, he approached a metro bus on the driver's side. When the driver leaned out of the window to address him, M.S. threw urine from a bottle at him, and the liquid hit the driver all over his face. M.S. then threw the bottle at the driver, hitting him in the face. The driver's clothes, seat, dashboard, and control area got soaked with urine.

On January 3, 2018, M.S. requested a deferred disposition. Pursuant to plea negotiations, the State amended the charge from third to fourth degree assault, and M.S. stipulated to the admissibility of the facts stated in a police report for determining his guilt. The trial court granted his request and entered a deferred disposition order. The court found M.S. guilty of fourth degree assault based on the police report. The deferred disposition order required M.S. to comply with the terms of community supervision, including a requirement to attend and participate in case management process and all scheduled appointments with his juvenile probation counselor (JPC).[1] M.S. was a dependent child. The order required him to live in a placement approved by the Department of Social and Health Services (DSHS) in compliance with placement requirements and curfew restrictions.[2] The order required him to attend school or a G.E.D. program.[3] The order prohibited him from using, possessing, or consuming any controlled substance except by doctor's prescription and required him to submit to random urinalysis (UA) as directed by his JPC or treatment provider.[4]

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[1] CP 8.
[2] CP 8.
[3] CP 8.
[4] CP 8.

From the beginning, M.S. struggled to comply with the terms of his community supervision, resulting in a violation hearing in February and March 2018. After the hearings, the trial court found that M.S. willfully violated the conditions of his deferred disposition by failing to attend his scheduled appointments with his JPC, comply with curfew restrictions, attend school, and submit to random UAs to probation.[5] JPC Daryl Cerdino did not seek to revoke the deferred disposition then. Cerdino told the court M.S. "should be given opportunities not to get to that point."[6] On March 22, 2018, the court entered an order modifying the deferred disposition order and imposing a 10-day detention as sanctions with credit for two days already served.

M.S.'s behavioral problems persisted. He was placed in Cypress House, a therapeutic group home in Snohomish County designed to serve youths with behavioral issues needing services. He used alcohol and marijuana excessively and brought home drugs and drug paraphernalia.[7] He did not follow his curfew.[8] JPC Cerdino had difficulty reaching him because M.S. would leave early in the morning, spend his entire day running the streets in downtown Seattle with his "street family" using drugs, and would come home late at night past Cerdino's work hours.[9] He would come home intoxicated and under the influence of marijuana to the point he threw up in his bed, room, and bathroom.[10] He threw up in the bathtub and refused to clean up.[11] Cerdino was unable to collect M.S.'s UAs because M.S. was absent for office appointments.[12] Recognizing M.S.'s "limited

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[5] CP 21.
[6] RP 55.
[7] CP 52; RP 105, 135.
[8] RP 105.
[9] CP 51-52; RP 118, 129.
[10] RP 104-105.
[11] RP 105.
[12] RP 131.

ability to follow the house rules," DSHS created modified, liberalized, and flexible rules for him, trying to help him succeed.[13] But he still did not follow the rules.

M.S.'s poor hygiene and refusal to receive any medical treatment posed serious health and safety concerns for him and the entire home.[14] When he got sick, he coughed up blood in his room and all over the home.[15] He refused medication.[16] He refused all services.[17] He testified that he had been vomiting recently because he did not know he had pneumonia and acknowledged that he did not follow through with or attend the medical appointments scheduled for him.[18] During his JRA detention, he received dental work, which revealed a need for 12 fillings and two root canals.[19] He received three fillings before his release and refused all dental treatment.[20]

M.S. also engaged in assaultive behavior. He brought weapons into Cypress House and threatened staff and peers there.[21] He assaulted his staff and peers, causing injuries.[22] He attempted to push a staff person down the stairs and tied a resident's and a staff person's hands together with a zip tie.[23] He threatened to beat up another resident and grabbed a staff chair.[24] He threatened his staff and peers with a blowtorch made from a lighter and an aerosol spray, turning on a gas stove with his lighter, thus threatening to set the entire house on fire.[25] Cypress House requested his immediate

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[13] RP 114-15.
[14] CP 52; RP 101, 104, 106.
[15] RP 104-105.
[16] CP 50.
[17] RP 114.
[18] RP 133-35.
[19] RP 112.
[20] RP 112.
[21] RP 105.
[22] RP 105.
[23] RP 108.
[24] RP 108.
[25] RP 105-106, 121.

removal.[26] In April 2018, M.S. was arrested and was charged with felony harassment.

In April 2018, JPC Cerdino filed a notice of revocation of deferred disposition for violations of the deferred disposition order. M.S.'s whereabouts were unknown, and Cerdino requested a warrant for his arrest. Cerdino submitted his confidential report to the court. The court conducted a hearing on April 30 and May 8, 2018 and heard testimony provided by JPC Cerdino, social worker assigned to M.S.'s dependency case, M.S.'s dependency counsel, and M.S. himself.

After the hearing, the trial court revoked M.S.'s deferred disposition by finding that M.S. violated the terms of the deferred disposition order by failing to participate in the case management process and comply with case management.[27] The court imposed a manifest injustice disposition upward of 52-52 weeks in JRA. The court explained that M.S. was at a high risk to reoffend, could not be controlled by those supervising him, was unable to obtain the services he needed if he remained in the community, and failed to comply with court orders.[28] The court further found that a standard range disposition of 30 days with credit for time served would not provide any meaningful opportunity for services or rehabilitation. The court pointed out that M.S. had not been successful in having his needs met while in the community since the entry of his deferred disposition in January 2018. The court found that M.S. was in need of "numerous services" and that the structured JRA setting was the only place he would be able to successfully access those services.[29] The court found that any one of these reasons, standing alone, was

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[26] RP 122.
[27] CP 24.
[28] CP 40-42; Finding of Fact (FF) 6, 7, 9, 10.
[29] CP 43; FF 11.

sufficient for the court to impose a manifest injustice disposition.[30]

DECISION

The juvenile justice act, chapter 13.40 RCW, provides for sentencing standards for juvenile offenders.[31] When a trial court finds that a standard range disposition would effectuate a "manifest injustice," it may impose a sentence outside the range.[32] "Manifest injustice" is a disposition that would either "impose an excessive penalty on the juvenile" or "impose a serious, and clear danger to society" in light of the act's purposes.[33] This Court will uphold a manifest injustice disposition if (1) substantial evidence supports the reasons given for the disposition, (2) the reasons clearly and convincingly support the disposition, and (3) the disposition is not clearly excessive.[34]

M.S. argues that the trial court erred in imposing a manifest injustice disposition based on aggravating factors expressly prohibited by the juvenile justice act. He argues that the court considered his dependency status and the lack of treatment facilities in the community in violation of RCW 13.40.150(4)(e) and (5), which provide as follows:

> (4) The following factors may not be considered in determining the punishment to be imposed:
>
> ***
>
> (e) Factors indicating that the respondent may be or is a dependent child within the meaning of this chapter.
>
> (5) A court may not commit a juvenile to a state institution solely because of the lack of facilities, including treatment facilities, existing in the community.

But M.S. fails to show that the trial court imposed a manifest injustice disposition

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[30] CP 43; FF 12.
[31] See RCW 13.40.0357.
[32] RCW 13.40.160(2).
[33] RCW 13.40.020(19).
[34] State v. J.V., 132 Wn. App. 533, 540, 132 P.3d 1116 (2006); RCW 13.40.230(2).

based on his dependency status or solely on the lack of facilities in the community. He points out Finding of Fact 7 as addressing his DSHS placement and work with his social worker and dependency attorney. But the finding does not show the court's consideration of his dependency *as a reason for imposing a manifest injustice disposition*. Rather, the finding reflects the court's assessment as to whether he could be controlled by those supervising him, a non-statutory aggravating factor:

> Despite the very hard work of many people on [M.S.'s] behalf, he has failed to meet his legal guardians halfway, and has consistently taken advantage of the freedoms provided to him by using drugs, running the streets, and putting himself in danger of exploitation. He does not follow the rules of his DSHS placement, even when that placement has modified the rules to make compliance easier for him. He refuses to care for his own physical safety and hygiene. He has declined to attend school or counseling as directed by the adults in his life, and essentially lives an emancipated, dangerous life. As a result, he puts himself and others in danger.[35]

M.S. also points out the court's questioning of his dependency attorney about "the pros and cons" of having him in "structured setting like JRA" as opposed to continuing to try to provide him with "services in the community."[36] The question does not appear to reflect the court's consideration of M.S.'s dependency status as a reason for imposing a manifest injustice disposition. Rather, it appears to reflect the court's assessment as to whether he was able to obtain services in the community, another aggravating factor.[37]

Nor did the trial court commit M.S. to JRA "solely because of the lack of facilities . . . existing in the community."[38] The court's findings reflect the court's concern not about the lack of facilities in the community but about M.S.'s refusal and inability to engage in

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[35] FF 7; State v. T.E.H., 91 Wn. App. 908, 917-18, 960 P.2d 441 (1998) ("serious lack of family control" may be an aggravating factor).

[36] RP 92.

[37] See J.V., 132 Wn. App. at 541 ("need for treatment" may be an aggravating factor).

[38] RCW 13.40.150(5).

any services existing in the community.

M.S. argues that the trial court erred in considering non-statutory aggravating factors. But he did not raise this argument below. In his brief submitted to the trial court, he acknowledged that a high risk to reoffend and a lack of parental control could be a basis to impose a manifest injustice disposition.[39] He has waived this argument.[40]

In any event, this Court has held that a trial court "may consider both statutory and nonstatutory factors."[41] For example, it is "proper for a trial court to consider a juvenile's need for treatment in considering a manifest injustice determination."[42] Also, a "high risk that a juvenile will reoffend is a valid ground for a manifest injustice disposition."[43] A "serious lack of family control" has also been "recognized as an aggravating factor where the inability to control the child is related to the degree of risk to society where the juvenile's behavior itself constitutes such a risk."[44]

M.S.'s reliance on State v. Bacon[45] is misplaced. That case did not involve consideration of non-statutory aggravating factors. It involved a juvenile court's lack of authority to suspend a disposition as prohibited by RCW 13.40.160(10), which provides: "*Except as provided* under subsection (3), (4), (5), or (6) of this section, or option B of RCW 13.40.0357, or RCW 13.40.127, the court *shall not* suspend or defer the imposition or the execution of the disposition."[46] The Supreme Court held that the juvenile court could not suspend a disposition under subsection (2) because it was not included in the

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[39] CP 58-59.
[40] See RAP 2.5(a).
[41] J.V., 132 Wn. App. at 540-41.
[42] Id. at 541.
[43] T.E.H., 91 Wn. App. at 918.
[44] Id.
[45] 190 Wn.2d 458, 415 P.3d 207 (2018).
[46] RCW 13.40.160(10) (emphasis added).

statutory exceptions to the ban on suspended dispositions.[47] Unlike RCW 13.40.160(10), which prohibits a court from suspending a disposition except under certain specified circumstances, RCW 13.40.150(3)(i) lists certain aggravating factors the court must consider but does not prohibit consideration of other factors. If a court is prohibited from considering factors other than those listed in subsection (3)(i), as M.S. argues, subsection (4) that expressly prohibits consideration of certain specified factors (e.g., dependency and lack of facilities) would be superfluous.

M.S. argues that insufficient evidence supports the findings of statutory and non-statutory aggravating factors. He does not really challenge the underlying facts that form the bases for the aggravating factors. Rather, he argues that the facts are insufficient to support the findings of the aggravating factors. He argues that he had no criminal record, that he complied with certain rules, and that there was insufficient evidence that he needed specific treatment and was unable to receive it in the community. But the record supports the findings that he posed a high risk to reoffend, lacked parental control, and was unable to obtain the services he needed if he remained in the community.

M.S. had two recent criminal matters from 2017 that were sent to diversion programs. He was arrested in April 2018 for a felony harassment charge. He engaged in assaultive conduct against his peers and staff at Cypress House. He brought weapons into the home and threatened staff and peers.[48] He attempted to push a staff person down the stairs and tied a resident's and a staff person's hands together with a zip tie.[49] He threatened to beat up another resident and grabbed a staff chair.[50] He threatened his

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[47] See Bacon, 190 Wn.2d at 466.
[48] RP 105.
[49] RP 108.
[50] RP 108.

peers and staff with a blowtorch made from a lighter and an aerosol spray in front of a gas stove.[51] He did not follow his curfew.[52] He would leave home early, spend his entire day running the streets using drugs, and come home late at night, intoxicated and high on drug.[53] He refused recommended medical, dental, and mental health treatment and all services in the community.[54] He had a treatment plan, including a DBT program for his hyperactive and defiant behavior.[55] He needed an assessment and treatment to address his alcohol and marijuana addictions.[56] His refusal to receive any services and poor hygiene posed serious health and safety concerns for himself and the entire home.[57] When he was sick, he coughed up blood in his room and all over his house.[58] He would throw up in his bed, his room, and his bathroom.[59] He threw up in the bathtub and refused to clean up.[60] Efforts to stabilize and keep him off the streets had failed.[61]

An "extended period of structured residential care and specialized treatment may be appropriate where a juvenile is considered a high risk to reoffend."[62] In N.E., this Court upheld the finding that in light of a juvenile's "untreated, long-term alcohol and drug abuse, as well as the lack of parental control, [she presented] a high risk to reoffend, as evidenced by her recent and frequent criminal history, her failure to comply with recent disposition orders, and running away from community-based treatment."[63] This Court

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[51] RP 105-106.
[52] RP 105.
[53] RP 129; CP 51-52.
[54] RP 101, 104, 106, 112, 114.
[55] CP 72.
[56] CP 72.
[57] CP 52, 71.
[58] RP 104-105.
[59] RP 104-105.
[60] RP 105.
[61] CP 71.
[62] J.V., 132 Wn. App. at 541.
[63] State v. N.E., 70 Wn. App. 602, 606-607, 854 P.2d 672 (1993).

held that the trial court properly imposed a manifest injustice disposition "in order to provide [the juvenile offender] with "much needed treatment for the problems that underlie[d] her criminal behavior, without which she pose[d] a high risk to reoffend."[64]

Here, the trial court found that without the structure of JRA, M.S. would not get an education, would not be physically safe, would not receive alcohol and drug treatment he desperately needed, would not be medically safe, and would likely commit new offenses and hurt other people.[65] The record supports this finding.

M.S. argues that his violation of the deferred disposition order does not constitute a failure to "comply with conditions of a recent dispositional order or diversion agreement," a statutory aggravating factor under RCW 13.40.150(3)(i)(iv). The State does not address this argument. The trial court explained that a failure to comply with court orders was "not a huge factor in the Court's decision to impose a manifest injustice."[66] The court made an express finding that any one of the aggravating factors, standing alone, was sufficient to impose a manifest injustice disposition.[67] Because substantial evidence supports the findings of M.S.'s high risk to reoffend, lack of parental control, and need for treatment, and these findings clearly and convincingly (beyond a reasonable doubt) support the trial court's decision to impose a manifest injustice disposition, I need not address M.S.'s argument with respect to the statutory aggravating factor.

M.S. argues that the 52 to 52-week disposition is clearly excessive. The length of the manifest injustice disposition is within the "broad discretion" of the trial court and may

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[64] N.E., 70 Wn. App. at 607.
[65] FF 11.
[66] RP 155.
[67] FF 12.

not be disturbed absent a showing of an abuse of discretion.[68] M.S. argues that the trial court made no specific findings as to the necessary treatment, length of treatment programs, or availability of such services. But there is "no specific criteria for choosing the length of a disposition," and a disposition is clearly excessive "only when it is not justified by any reasonable view of the record."[69] In view of his high risk to reoffend and refusal to engage in any of the services he was found to need in the community, including medical, dental, substance abuse, and mental health treatment, M.S. fails to show that the length of the disposition is clearly excessive.

M.S. argues that the trial court failed to give him notice of the aggravating factors when he entered a deferred disposition. But he did not make this argument below. Even if he could raise this issue for the first time on appeal, he fails to show a reversible error.

The deferred disposition statute requires that a juvenile "[a]cknowledge the direct consequences of being found guilty and the direct consequences that will happen if an order of disposition is entered."[70] Here, the record shows M.S.'s acknowledgment of the direct consequences pursuant to the statute. In a signed statement, he acknowledged, among other things, that if he did not comply with any term of his community supervision, the trial court would revoke his deferred disposition and could then impose any sentence authorized by law.[71] In a colloquy, the court informed him that if it found aggravating factors, it could impose a manifest injustice disposition, and M.S. stated he understood:

> Court: I'd be required to sentence you within that standard range unless I found special circumstances or what we call aggravating factors that made that standard range sentence what we call a manifest injustice, do you understand that?

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[68] State v. M.L., 134 Wn.2d 657, 660, 952 P.2d 187 (1998).
[69] State v. Moro, 117 Wn. App. 913, 923, 73 P.3d 1029 (2003) (citation omitted).
[70] RCW 13.40.127(3)(d).
[71] CP 17.

M.S.: Yes.[72]

M.S.'s counsel confirmed that he had reviewed the paperwork with M.S. and "gone over a variety of options in this case."[73] Counsel confirmed M.S.'s knowing, intelligent, and voluntary decision to enter the deferred disposition.[74]

Citing State v. Siers,[75] M.S. argues that due process and Sixth Amendment rights include the right to notice of aggravating circumstances for exceptional sentences. There, our Supreme Court held that "so long as a defendant receives constitutionally adequate notice of the essential elements of a charge, 'the absence of an allegation of aggravating circumstances in the information does not violate the defendant's rights under article I, section 22 of the Washington Constitution, the Sixth Amendment to the United States Constitution, or due process."[76] Siers is inapposite and does not require notice of potentially applicable aggravating factors when a juvenile enters a deferred disposition.

M.S. cites no authority requiring a juvenile court, when granting a deferred disposition, to identify the specific aggravating factors it could potentially consider for a manifest injustice disposition if the deferred disposition is revoked. Neither Apprendi v. New Jersey[77] nor Blackey v. Washington[78] appears to support such a proposition. Both cases "involved the application to certain adult criminal sentencing procedures of the Sixth Amendment jury trial right and the Fourteenth Amendment due process guaranty of proof beyond a reasonable doubt," and in "*this context*, the United States Constitution

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[72] RP 14.
[73] RP 18.
[74] RP 18.
[75] 174 Wn.2d 269, 274 P.3d 358 (2012).
[76] Siers, 174 Wn.2d at 276-77.
[77] 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).
[78] 542 U.S. 296, 124 S. Ct. 2351, 159 L. Ed. 2d 403 (2004).

requires that any fact that increases the penalty for a crime beyond that authorized by the verdict alone, other than the fact of a prior conviction, be submitted to a jury and proved beyond a reasonable doubt."[79] As this Court explained in Tai N., our juvenile justice act "already provides this guaranty" by requiring clear and cogent evidence, which has been interpreted to require proof beyond a reasonable doubt, of the reasons for a manifest injustice disposition.[80] This Court explained the "critical distinction" between an adult exceptional sentence and a manifest injustice disposition, namely the "policy of responding to the needs of offenders" underlying the latter.[81] "The juvenile court must necessarily focus on the offender's circumstances, and must consider numerous factors that may not be relevant to adult sentencing."[82]

Here, the trial court concluded that a manifest injustice disposition was necessary for M.S. to have "any meaningful opportunity for services or rehabilitation."[83] Substantial evidence supports the trial court's reasons for the disposition, and the reasons clearly and convincingly support the disposition. When M.S. entered a deferred disposition, he acknowledged the direct consequences that would happen if a deferred disposition order was entered. M.S. fails to show a statutory or due process violation.

M.S. argues that the trial court exceeded its authority by imposing a sentence greater than the statutory maximum for fourth degree assault, a gross misdemeanor. He points out that the statutory maximum is a term of imprisonment up to 364 days. Here, the trial court imposed a manifest injustice disposition of 52 to 52 weeks (i.e., 364 days).

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[79] State v. Tai N., 127 Wn. App. 733, 740, 113 P.3d 19 (2005) (emphasis added).
[80] Tai N., 127 Wn. App. at 742.
[81] Id. at 744.
[82] Id.
[83] FF 11.

The disposition does not exceed the statutory maximum. M.S. fails to show that the trial court exceeded its authority in imposing the manifest injustice disposition.

CONCLUSION

M.S. fails to show a reversible error in the manifest injustice disposition. Therefore, it is

ORDERED that review is accelerated, and the manifest injustice disposition is affirmed.

Done this 26th day of November, 2018.

Mareko Hanazawa
Court Commissioner

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APPENDIX 2

Order Denying Motion to Modify

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

STATE OF WASHINGTON, Respondent, v. M.S., DOB: 08/28/01, Appellant.	)	No. 78442-1-I ORDER DENYING MOTION TO MODIFY

Appellant M.S. has moved to modify the commissioner's November 26, 2018 ruling affirming his manifest injustice disposition. The State of Washington has not filed an answer. We have considered the motion under RAP 17.7, and have determined that it should be denied. Now, therefore, it is hereby

ORDERED that the motion to modify is denied.

Done this 24th day of January 2019.

Andrus, J.

Leach, J.

Appelwick, C.J.

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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document **Motion for Discretionary Review** to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court under Court of Appeals No. 78442-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Claire Thornton
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☒ appellant /petitioner

☐ Attorney for other party

MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: February 25, 2019

WASHINGTON APPELLATE PROJECT

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