

66021-7

66021-7

NO. 66021-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

K.K.,

Appellant.

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DIVISION I

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY I. YU

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**BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

MONIQUE COHEN  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

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**A. ISSUES PRESENTED**

1. Is accelerated review of a manifest injustice disposition and sufficiency of the evidence mandated by the Rules of Appellate Procedure and authorized by statute?

2. K.K. initiated contact with S.S., repeatedly demanded money, grabbed at S.S.'s pockets and then surrounded S.S. with other individuals. S.S. was punched and his property forcibly taken from him. Viewed in the light most favorable to the State, was the evidence sufficient to allow any rational trier of fact to find the elements of Robbery in the Second Degree beyond a reasonable doubt?

3. The court found the imposition of the standard range would affect a manifest injustice. Did the trial court abuse its discretion in imposing the disposition because the imposition of a standard range sentence would affect a manifest injustice?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

On April 2, 2010, the State charged K.K. with one count of Robbery in the Second Degree, pursuant to RCW 9A.56.210<sup>1</sup> and 9A.56.190.<sup>2</sup> CP 1. On August 11, 2010 and August 16, 2010, the court held pretrial and adjudication proceedings in a bench trial. See 1RP<sup>3</sup> and 2RP. On August 16, 2010, the court found the juvenile appellant K.K. guilty of Robbery in the Second Degree. 2RP 90.

On August 27, 2010, the court held a disposition hearing and imposed a manifest injustice upward. See 3RP. On October 1, 2010, the court entered written Findings of Fact and Conclusions of Law. CP 95-97, 108-14.

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<sup>1</sup> RCW 9A.56.210 reads: (1) A person is guilty of robbery in the second degree if he commits robbery. (2) Robbery in the second degree is a class B felony.

<sup>2</sup> RCW 9A.56.190 reads: A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

<sup>3</sup> The verbatim report of proceedings will be referred to as follows: 1RP (8/11/10); 2RP (8/12/10); 3RP (8/16/10); 4RP (8/27/10); 5RP (10/1/10). This is consistent with the Brief of the Appellant.

## 2. SUBSTANTIVE FACTS

On January 22, 2010, at approximately 3:00PM, S.S. entered the Garfield Teen Life Center located at 428 23<sup>rd</sup> Avenue in Seattle, King County, Washington to get his photograph taken for his identification card. CP 109 (FF 1); 1RP 44-45. Shortly after entering the Teen Life Center, S.S. was approached by a former classmate, the appellant, K.K. CP 109 (FF 2); 1RP 42-43. K.K. then asked S.S. for five dollars, two or three times. CP 109 (FF2); 1RP 46. S.S. said "I don't have five dollars." CP 109 (FF2); 1RP 47. K.K. then tried to reach into S.S.'s pocket by grabbing the exterior of his pants. CP 109 (FF2); 1RP 47-48, 52. S.S. moved away from K.K. 1RP 48.

Video of the incident showed K.K. talking with a second unidentified male (Individual 2), wearing a black hoodie and dark blue jeans, also standing at the front desk near S.S. CP 109 (FF3); Ex. 1. S.S. observed K.K. and Individual 2 whispering, but S.S. could not hear what they were saying. CP 109 (FF3); 1RP 52. After communicating with Individual 2 for a few seconds, K.K. again approached S.S. and grabbed the exterior of his pocket. In response, S.S. moved his hip away and stepped backward in an effort to move away from K.K. CP 109 (FF4); 1RP 54; Ex. 1.

However, K.K. was face to face with S.S. and followed him around the lobby of the Teen Life Center until S.S. went to the end of the front desk. CP 109 (FF4); Ex. 1.

A third male, later identified as B.J.C., entered the Teen Life Center lobby and approached K.K. and S.S. CP 10 (FF 5); 2RP 44, 210. B.J.C. walked up and stood next to K.K., just to S.S.'s right, and bent forward to look at S.S.'s right pant pocket. CP 110 (FF 5); RP 54; Ex. 1. Individual 2 walked away from S.S. for a few seconds, then approached him from behind and grabbed S.S.'s left pocket. CP 110 (FF 6); RP 54; Ex. 1. B.J.C. also approached S.S. and grabbed his right pocket saying something to the effect of, "it looks like he has an iPod in his pocket." CP 110 (FF 7); 1RP 54. Simultaneously, K.K. grabbed S.S.'s left pocket and S.S. realized that K.K. was not joking. CP 110 (FF 7).

Moments later, Teen Life Center worker, Buck Buchanan, told S.S. that the camera was not operable and that he would have to have his photo taken on a different date. CP 110 (FF 8); 1RP 55; Ex. 1. Buchanan told K.K. and the other males to leave because they were "messing" with S.S. CP 110 (FF 8); 2RP 209-11. Buchanan then told S.S. to wait in the community center for a few

minutes because he was afraid that the males would "mess" with S.S. once he was outside.

S.S. told Buchanan that he was okay and then exited the community center through the front entrance. CP 110 (FF 9); 2RP 209. S.S. walked out of the front door, immediately followed by B.J.C. and K.K. CP 110 (FF 9); RP 55; Ex. 1.

Seconds after exiting the community center, K.K. approached S.S. again and demanded five dollars, saying "give me five dollars." CP 110 (FF 10); 1RP 55; 2RP 74. Concurrently, a group of 8 to 10 males surrounded S.S., all of them standing within two feet of S.S. CP 110-11 (FF10). K.K. was standing closer than the rest of the group, as he was one foot away from S.S. CP 110 (FF 10); 1RP 61.

K.K., B.J.C., and Individual 2 were among the group of males that surrounded S.S., and as they surrounded him, one reached into S.S.'s pants pocket and took his wallet or MP3 player. CP 111 (FF 11); 1RP 55, 61. When S.S. turned to see who grabbed his left pocket, another person punched S.S. in his mouth, causing his lip to bruise and bleed. CP 111 (FF 11); 1RP 55. Then another male in the group reached into S.S.'s other pocket and took his MP3 player or wallet. CP 111 (FF 11); 1RP 55. K.K. was not the

individual who took S.S.'s wallet or MP3 player, nor did he strike S.S. in the lip. CP 111 (FF 11). The male who took S.S.'s wallet, threatened to throw it on the roof of the Teen Life Center. CP 111 (FF11); 2RP 57.

Immediately following the robbery, S.S. glanced at K.K. as K.K. walked back into the Teen Life Center with a smile on his face. CP 111 (FF 12); 2RP 91; Ex. 1. K.K. was the first to walk back into the lobby of the teen center, immediately followed by B.J.C., Individual 2, and another male. CP 111 (FF 13); Ex. 1. The four males reconvened at the front desk and appeared to briefly converse with one another. CP 111 (FF 13); Ex. 1.

S.S. re-entered the teen center and approached the group of males. CP 111 (FF 14); 1RP 67. S.S. believed that K.K. took his property and was hiding it beneath his baseball cap, so he reached for his cap tipping the brim. CP 111 (FF 14); 1RP 67; 2RP 64. K.K. removed his hat from his head, showing no hidden property. CP 111 (FF 14); 2RP 64.

John Frazier, another worker at the Teen Life Center, overheard the commotion and intervened. CP 112 (FF 15); 1RP 68; 2RP 185. He told K.K. and the other males to leave the Teen Life Center. CP 112 (FF 15); 1RP 68. S.S. told Mr. Frazier that they

could not leave because they just took his wallet. CP 112 (FF 15); 1RP 68. Mr. Frazier told S.S. that the only thing he can do is call the police. CP 112 (FF 15); 1RP 68; 2RP 186. S.S. then used the phone at the front desk of the Teen Life Center to call 9-11. CP 112 (FF 16); 1RP 69, 73. While S.S. was on the phone with the police, K.K. and the three other males walked down a back hallway and exited the teen center prior to the police arriving. CP 112 (FF 16); 2RP 213.

A few days later, Mr. Buchanan received a phone call from a male who stated that S.S.'s wallet was on top of the roof. CP 112 (FF 17); 1RP 78; 3RP 7-8, 21. The wallet was recovered and returned to S.S. The court found that K.K. was guilty as an accomplice to robbery in the second degree. CP 112 (CL II(a)).

At a disposition hearing held on August 27, 2010, the same court having presided over the fact-finding imposed a manifest injustice of 27 to 36 weeks. CP 95-97; see generally 4RP. The Juvenile Probation Counselor (JPC) recommended a manifest injustice disposition of 27 to 36 weeks confinement followed by 12 months probation. 4RP 24; Report at 12. The State recommended a manifest injustice disposition of 52 to 65 weeks. CP 116; 4RP 28. Defense counsel asked for a manifest injustice

disposition downward of 15 to 19 weeks confinement and 12 months of community supervision. CP 17, 30; 4RP 45. The court imposed a manifest injustice disposition of 27 to 36 weeks confinement followed by 12 months of supervision. CP 96-97. The court based its disposition on protecting the public, rehabilitating K.K., rapid recidivism, and behavior modifications while in detention.

**C. ARGUMENT**

- 1. ACCELERATED REVIEW OF A MANIFEST INJUSTICE IMPOSITION IS MANDATED BY THE RULES OF APPELLATE PROCEDURE AND AUTHORIZED BY STATUTE. SUFFICIENCY OF THE EVIDENCE IS NOT ENTITLED TO ACCELERATED REVIEW.**

The State acknowledges that RAP 18.13 mandates accelerated review of a juvenile disposition outside the standard range. The State further notes that RCW 13.40.230 authorizes accelerated review of manifest injustice dispositions.

Appellant seeks accelerated review, pursuant to RCW 13.40.230 and RAP 18.13, of the manifest injustice disposition imposed by the Honorable Mary I. Yu on August 27, 2010. Upon further review, appellant seeks reversal and vacation of the

adjudication against him, or in the alternative, reversal of the imposition of a manifest injustice disposition and remand of the case for the entry of a standard range disposition.

The appellant is not entitled to accelerated review on the sufficiency of the evidence. The respondent, the State of Washington, objects to appellant's inclusion in his motion for accelerated review his argument on the sufficiency of the evidence. RAP 18.13. In particular, appellant raises issues of statutory interpretation, which once resolved by the Court of Appeals are likely to have precedential value. Therefore, it would be appropriate for a panel of judges to hear argument on the interpretation of the statute and the sufficiency of the evidence. See generally RCW 2.06.040. However, because it is customary for this Court to hear the motion for the accelerated review at the same time it hears the actual substantive argument regarding the imposition of a manifest injustice disposition, appellant has provided the respondent with a Hobson's choice: If the respondent does not file a timely response, it is subject to sanctions, which could include dismissal; or file a timely response in its response to the appellant's improper motion. RAP 18.9. Accordingly, the State, without waiving its objection, will respond to the appellant's substantive arguments.

2. **K.K. INITIATED CONTACT WITH S.S., REPEATEDLY DEMANDED MONEY, GRABBED AT S.S.'S POCKETS AND THEN SURROUNDED S.S. WITH OTHER INDIVIDUALS. S.S. WAS PUNCHED AND HIS PROPERTY FORCIBLY TAKEN FROM HIM. VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE WAS SUFFICIENT TO ALLOW ANY RATIONAL TRIER OF FACT TO FIND THE ELEMENT OF THE ROBBERY IN THE SECOND DEGREE BEYOND A REASONABLE DOUBT.**

On appeal, K.K. challenges the sufficiency of the evidence of his robbery in the second degree conviction and argues that the State failed to prove beyond a reasonable doubt that K.K. had knowledge that someone was going to take S.S.'s property by force. K.K. argues that there is insufficient evidence to support his conviction for robbery in the second degree on an accomplice liability theory. However, when the evidence is viewed in the light most favorable to the State, and all reasonable inferences are drawn in the State's favor, there is sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that K.K. acted as an accomplice and that he committed the crime of robbery in the second degree.

RCW 9A.56.190 states, "A person is guilty of robbery in the second degree when he unlawfully takes personal property from the person of another or in his presence against his will by the use

or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear." A person is an accomplice of another person in the commission of a crime if (a) with knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it. RCW 9A.08.020(3).

Accomplice liability represents a legislative decision that one who participates in a crime is guilty as a principal, regardless as to the degree of participation. State v. Hoffman, 116 Wn.2d 51, 104, 804 P.2d 577 (1991). An accomplice need not have specific knowledge of every element of the crime committed by the principal, provided that he has general knowledge of that specific crime. State v. Roberts, 142 Wn.2d 471, 512, 14 P.3d 713 (2000).

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. State v. McDaniel, 155 Wn. App. 829, 863-64, 230 P.3d 245 (2010); WPIC 10.51. In an accomplice liability case, the jury is free to disbelieve the principal's testimony that the defendant did not assist him and was not even aware of the criminal activities. State v. Gallagher, 112 Wn. App. 601, 614, 51 P.3d 100 (2002).

At trial, the State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." Id. at 201. All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Id. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

K.K. challenges the sufficiency of the State's evidence only on the element accomplice liability of whether K.K. had knowledge another was going to commit robbery. Essentially, K.K. argues that the State produced insufficient evidence for the court to find him guilty of forcefully taking property from S.S. However, criminal liability is equal for a principal and an accomplice. State v. Rodriguez, 78 Wn. App. 769, 772-73, 898 P.2d 871 (1995).

Here, there is sufficient evidence to support the conviction, particularly when the evidence is viewed in the light most favorable to the State and all reasonable inferences are interpreted most strongly against K.K. K.K. approached S.S. and asked him for \$5.00. Seconds later, K.K. grabbed the exterior of S.S.'s pocket. K.K. started whispering to a second male, but S.S. could not discern what was being said. After K.K. communicated with the other male, K.K. again approached S.S. and grabbed the exterior of

his pocket. S.S. stepped backwards to move away from K.K. K.K. followed S.S. A third male approached, stood next to K.K. and near S.S. He then bent forward to look at S.S.'s pocket. The second male appeared as if he was going to exit the teen center, but then again approached S.S. from behind and grabbed his left pocket. A third male then approached S.S. and grabbed his right pocket and said something to the effect of "it looks like he has an iPod in his pocket." Simultaneously, K.K. grabbed S.S.'s left pocket. The males were asked to leave the center because they were messing with S.S. S.S. was told to wait in the community center for a few minutes by witness, Buchanan, because he was afraid the males would "mess" with S.S. once he was outside. S.S. walked out of the center, and Individual 3 followed him. K.K. was immediately behind S.S. K.K. approached S.S. again and demanded \$5.00. Concurrently, a group of 8-10 males circled S.S. and surrounded him. K.K. was standing closer to S.S. than the rest of the group. K.K. was still next to S.S. when someone reached into S.S.'s pocket and took his wallet; someone punched S.S. Then someone else took S.S.'s MP3 player. Immediately following the robbery, K.K. walked back into the teen center lobby with a smile on his face and was followed by the other males, including Individual 2 and 3.

Based on this evidence, any rational trier of fact could find that K.K. aided others in the commission of the robbery by orchestrating and encouraging the conduct, which led to the taking of S.S.'s MP3 player or wallet against his will. Any rational trier of fact could also find that K.K. was ready and willing to assist and did assist in the robbery. The trier of fact considered these facts and concluded that K.K. was guilty as an accomplice of robbery in the second degree.

In this case, the trier of fact weighed all of the evidence, determined the credibility of S.S. and all other witnesses, and concluded that K.K. acted as an accomplice in the commission of the robbery. The trial court, when considering K.K.'s motion to dismiss at the close of the State's case, indicated that the video alone was overwhelming evidence of facts the court found to be true. The trial court indicated that "a picture is worth more than a thousand words, and in this case the video entered into evidence leads this court to conclude that without a doubt K.K. is guilty as charged." 3RP 90. The video clearly depicts the respondent not only initiating this contact but orchestrating contacts made by others which directly led to the assault and robbery that occurred outside of the teen center. Id. Deference must be given to the trier

of fact, and the court should not disregard the verdict simply because K.K. disagrees with the trial court's conclusion.

**3. THIS COURT SHOULD AFFIRM THE DISPOSITION BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT IMPOSED A MANIFEST INJUSTICE.**

This Court reviews the imposition of a sentence outside the standard range under the abuse of discretion standard. State v. Tauala, 54 Wn. App. 81, 86, 771 P.2d 1188, review denied, 113 Wn.2d 1007 (1989). A trial court abuses its discretion only if its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A decision is manifestly unreasonable if it falls outside the range of acceptable choices, given the facts and the applicable legal standard; if the record does not support the factual findings; or if the court misapplies the law. Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 136 (1997); State v. Olivera-Avila, 89 Wn. App. 313, 949 P.2d 824 (1997).

A trial court's finding of a manifest injustice under RCW 13.40.160(1) must be clearly and convincingly supported in

the record. State v. S.S., 67 Wn. App. 800, 812, 840 P.2d 891.

Such a finding is reviewed to determine if (1) the reasons given by the trial court are supported by the record, (2) the reasons clearly and convincingly support a disposition outside the standard range, and (3) the disposition is either too excessive or too lenient. Id. at 813; RCW 13.40.230(2).

A court may impose a disposition outside the standard range if it concludes that a standard range disposition would “effectuate a manifest injustice.” RCW 13.40.160. “Manifest injustice” means a disposition that would either “impose an excessive penalty on the juvenile or would impose a serious and clear danger to society.” Dispositions are considered in light of the purposes of the Juvenile Justice Act of 1977 (“JJA”), which are to:

- (a) protect the citizenry from criminal behavior;
- ...
- (b) make the juvenile offender accountable for his or her criminal behavior; and
- ...
- (c) provide the necessary treatment, supervision and custody for juvenile offenders.

A dispositional court’s finding of a manifest injustice is subject to appellate review under the standard set forth in RCW 13.40.230(2). That statute provides, in pertinent part:

- (2) To uphold a disposition outside the standard range, . . . the court of appeals must find (a) the ... reasons supplied by the disposition judge are supported by the record which was before the judge and that those reasons clearly and convincingly support the conclusion that a disposition within the standard range, . . . would constitute a manifest injustice, and (b) that the sentence imposed was neither clearly excessive nor clearly too lenient.

The standard from RCW 13.40.230(2) has been characterized as a three part test:

- (1) the reasons given by the trial court must be supported by the record;
- (2) those reasons must clearly and convincingly support the disposition; and
- (3) this disposition cannot be too excessive or too lenient.

State v. P., 37 Wn. App. 773, 777, 686 P.2d 488 (1984) (quoting State v. Rhodes, 92 Wn.2d 755, 760, 600 P.2d 1264 (1979)).

While a manifest injustice disposition must pass all three parts of this test under RCW 13.40.230(3), it is not necessary for all three factors from which the court based its decision to be recognized or upheld on appeal. State v. Johnson, 45 Wn. App. 716, 719, 726 P.2d 1042 (1986). Even one remaining aggravating factor may be sufficient. State v. Fisher, 108 Wn.2d 419, 739 P.2d 683 (1987) (court upheld an exceptional sentence when only one factor out of four cited by the trial court was affirmed).

In the present case, the record supports the court's findings. The disposition court acknowledged that it had received and reviewed the following: The state's brief in support of a manifest injustice sentence, the defense brief opposing a manifest injustice, and the probation counselor's report. 4RP 22, 28; CP 116-41; see RCW 13.40.150. The court also listened to argument by all parties. See generally 4RP 21-56; RCW 13.40.150(3)(b). The court then articulated the following aggravating factors, under RCW 13.40.150(3), in support of its finding, all of which are clearly supported by the record and clearly and convincingly support the disposition: (1) the appellant's lack of mitigating circumstances; (2) the appellant committed the crime six months after release from his prior conviction; (3) the appellant's three modification hearings while held on this matter; and (4) the appellant's drug and alcohol issues as outlined by the Juvenile Probation Counselor's report. 4RP 59-60. Based on these factors and concerns, the court's disposition of 27 to 36 weeks in custody, followed by 12 months probation is neither too harsh nor too lenient in terms of achieving policy goals of the Juvenile Justice Act.

There are several statutory aggravating and mitigating factors that a court must consider prior to imposition of a

disposition. RCW 13.40.150 et. seq. The court did not acknowledge the existence of any mitigating factors present in this case, but found several statutory and non-statutory aggravating factors were present in this case. 4RP 59; CP 95-97; see 13.40.150(h) and (i).

Appellant urges this court to overturn the manifest injustice disposition essentially because there is no basis for not finding the statutory mitigating factor. However, the court in State v. T.C., 99 Wn. App. 701, 707, 995 P.2d 98 (2000) noted that "it would be illogical to exclude uncharged crimes from consideration at juvenile disposition hearings since the probation officer considers and discusses them in making his or her report and recommendation to the court."

In this case, the record is replete with the factual basis for imposition of a sentence outside the standard range, and the trial court referred carefully to each factor relied upon. See generally, 4RP 59-60. Clearly the court's imposition of an upward manifest injustice has a tenable basis, is supported by the record and was not an abuse of discretion.

Appellant argues that the sentence must be overturned because the court considered the respondent's prior manslaughter

conviction and behavior of the appellant that resulted in modifications, but not convictions. The court clearly articulated its understanding that these were allegations that had not resulted in convictions. The court is statutorily instructed to consider pre-dispositional reports prepared when imposing a sentence. RCW 13.40.150(3)(c). All relevant and material evidence including police contacts which were not part of a juvenile's written criminal history could be considered in disposition order. State v. Strong, 23 Wn. App. 789, 599 P.2d 20 (1979). Therefore, consideration of the JPC's sentencing report to the court was not an abuse of discretion and the sentence should be affirmed.

In this case, the respondent re-offended within six months after his release from JRA, and had three program modifications during the period he was held in the juvenile detention facility on the current matter, and the court determined that the standard range disposition was too lenient considering the seriousness of appellant's prior adjudications. All of which are statutory aggravating factors. RCW 13.40.150(3)(i)(iv)(viii). Although a year and a half had passed since the appellant committed the manslaughter offense, much of the time was spent in detention awaiting trial and then at JRA. 4RP 30. Even if this court finds that

appellant is prejudiced by the sentencing court's reliance on the probation report, appellant has waived any objection by stipulating to the accuracy of the report at sentencing. A party can stipulate to prior convictions, and such stipulation eliminates the possibility of challenging their accuracy later. State v. McCorkle, 88 Wn. App. 485, 503 (1997), 945 P.2d 736, aff'd, 137 Wn.2d 490, 493 (1999). In response to the two "assaults" while the appellant was in juvenile detention, appellant's counsel indicated that "these were fights that happened while he was in detention." 4RP 41. This affirmative indication that the assertion of prior criminal conduct would not be challenged is binding on K.K. and precludes revisitation of the issue.

Even if this court finds that K.K.'s statements at sentencing do not constitute a stipulation, this court has ruled that failure to object to the calculation of criminal history at sentencing waives all future challenges to its accuracy. State v. J.A.B., 98 Wn. App. 662, 663, 991 P.2d 98 (2000). Appellant also raises, without discussion, a hearsay objection to the use of the criminal history in the probation report. App. Br. at 24. First, this objection was waived by failing to object at sentencing. J.A.B., 98 Wn. App. at 666. Second, every written probation report is hearsay. A criminal history

compiled by one counselor and reviewed by the court is in fact double hearsay: once when the counselor views documents indicating criminal history, and once when the judge reads the probation report. The addition of a third layer does not in and of itself bar admissibility, and J.A.B.'s best evidence rule comments regarding reliability apply as strongly to a hearsay argument. J.A.B., 98 Wn. App. at 667 n.4; ER 805.

Furthermore, the sentencing court was correct in finding that no mitigating factor existed when the juvenile's "conduct neither caused nor threatened serious bodily injury or the respondent did not contemplate that his or her conduct would cause or threaten serious bodily injury." RCW 13.40.150.(3)(h)(i). The deputy prosecuting attorney noted that if there "had been serious injury we would be here on a robbery in the first degree charge." 4RP 29. In addition, inherent in the elements of robbery in the second degree and the facts here is the threat and real risk of serious bodily injury.

One aggravating factor is whether the appellant has a recent criminal history or has failed to comply with conditions of a recent dispositional order or diversion agreement. RCW 13.40.150(3)(i)(iv). The sentencing court found both of these factors present, relying on the prior adjudication of

(1) Manslaughter in the First Degree from January 22, 2010 and  
(2) committing this offense within six months after release from  
his prior conviction. The court noted that K.K.'s criminal history is  
a factor, but not something that the court considers alone. See  
4RP 60. The court also considered the fact that there were three  
program modifications and concerns about drug and/or alcohol  
issues. 4RP 59. The court's imposition of an upward manifest  
injustice was not an abuse of discretion; it has a tenable basis  
supported by statutory aggravating factors supported by the  
record and should be affirmed.

Appellant urges this court to overturn the manifest injustice  
disposition essentially because no evidence exists that the length of  
sentence imposed will fulfill the court's desire for the appellant to  
receive adequate or appropriate treatment.

The court did not impose a sentence above the standard  
range for the sole purpose of treatment. In contrast to the court in  
State v. P., 37 Wn. App. 773 (1984), which imposed a sentence  
above the standard range for the *sole purpose* of treatment  
(emphasis added), and the duration of sentence imposed was  
clearly above that which treatment professionals suggested was  
necessary. However, this case is similar to State v. E.J.H., because

the manifest injustice sentence here was not imposed solely for rehabilitation. State v. E.J.H., 65 Wn. App. 771, 777, 830 P.2d 375 (1992).

This appellant was given a manifest injustice sentence for the purpose of protecting the public and to adequately serve the goal of rehabilitating the respondent. CP 96 (CL1). Treatment was not the sole purpose of the sentence. The court also recognized other factors which supported a manifest injustice upward sentence. Those other factors included protecting the public, rehabilitating the appellant, rapid recidivism, and behavior modifications while in detention.

Appellant argues that the duration imposed here was not based on any length of specific recommended treatment, thus making it excessive. However, the disposition in this case was based on the probation counselor's recommendation and other considerations.

A disposition does not come "out of thin air" when it is based on a probation counselor's recommendation. State v. B.E.W., 65 Wn. App. 370, 376, 828 P.2d 87 (1992). To the appellant's

benefit, however, the court imposed the low end of what was recommended and imposed the recommendation by the probation counselor. The State recommended a manifest injustice upward sentence of 52 to 65 weeks and the probation counselor recommended a 27 to 36 weeks manifest injustice sentence, yet the court only imposed a 27 to 36 weeks sentence. 4RP 61. The court clearly had a basis for coming to the conclusion that a 27 to 36 weeks sentence was appropriate.

**D. CONCLUSION**

Drawing all reasonable inferences in the State's favor, the evidence supports the trial court's conclusion that K.K. was an accomplice to robbery in the second degree. The trial court's verdict should not be disregarded simply because K.K. disagrees with the outcome of the trial.

In addition, K.K. has failed to show that the trial court abused its discretion by imposing a manifest injustice disposition upward outside of the standard range, because the reasons are clearly and

convincingly supported by the record. The State respectfully requests that the trial court be affirmed.

DATED this 17<sup>TH</sup> day of February, 2011.

Respectfully submitted,

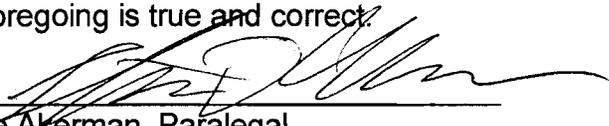
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
MONIQUE COHEN, WSBA #42129  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman Koch, 1908 East Madison Street, Seattle WA 98122, containing a copy of the Brief of Respondent in State v. K.K., Cause No. 66021-7-I in the Court of Appeals for the State of Washington.

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

  
\_\_\_\_\_  
Steve Akerman, Paralegal

Done in Seattle Washington February 17, 2011