

NO. 72299-9-I

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

B.W.,

Appellant.

---

---

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

The Honorable John M. Meyer, Judge

---

---

BRIEF OF APPELLANT

---

---

CHRISTOPHER H. GIBSON  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

Handwritten notes and initials, including a large 'W' and some illegible scribbles.

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENTS</u> .....	4
1. <u>THE JUVENILE COURT LACKED AUTHORITY TO FIND B.W. GUILTY OF AN UNCHARGED OFFENSE.</u> .....	4
a. <u>A juvenile court lacks authority to find a juvenile guilty of an uncharged offense.</u> .....	5
b. <u>Unlike for juveniles, the Legislature has authorized adults to be convicted of a lesser-included or attempt of the charged offense.</u> .....	8
c. <u>Because it constitutes manifest constitutional error, B.W.'s challenge to the attempted rape conviction maybe raised for the first time on appeal.</u> .....	11
2. <u>THE SEXUAL ASSAULT PROTECTION ORDERS EXCEED THE MAXIMUM ALLOWABLE TERM.</u> .....	12
D. <u>CONCLUSION</u> .....	14

**TABLE OF AUTHORITIES**

	Page
<u>WASHINGTON CASES</u>	
<u>In re Postsentence Review of Leach</u> 161 Wn.2d 180, 163 P.3d 782 (2007) .....	12
<u>State v. Adcock</u> 36 Wn. App. 699, 676 P.2d 1040 <u>review denied</u> , 102 Wn.2d 1018 (1984) .....	5
<u>State v. Armendariz</u> 160 Wn.2d 106, 156 P.3d 201 (2007) .....	12
<u>State v. Chavez</u> 163 Wash. 2d 262, 180 P.3d 1250 (2008) .....	6
<u>State v. G.A.H.</u> 133 Wn. App. 567, 137 P.3d 66 (2006) .....	5
<u>State v. Harris</u> 121 Wn.2d 317, 849 P.2d 1216 (1993) .....	10
<u>State v. Lamar</u> 180 Wn.2d 576, 327 P.3d (2014) .....	11
<u>State v. Lawley</u> 91 Wn.2d 654, 591 P.2d 772 (1979) .....	5
<u>State v. Pelkey</u> 109 Wn. 2d 484, 745 P.2d 854 (1987) .....	11
<u>State v. Peterson</u> 133 Wn.2d 885, 948 P.2d 381 (1997) .....	10
<u>State v. Schaaf</u> 109 Wn.2d 1, 743 P.2d 240 (1987) .....	5, 6
<u>State v. Schaffer</u> 120 Wn.2d 616, 845 P.2d 281 (1993) .....	11

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Smith</u>	
144 Wn.2d 665, 30 P.3d 1245, 39 P.3d 294 (2001) .....	12
<u>State v. Weber</u>	
159 Wn.2d 252, 149 P.3d 646 (2006).....	6
<u>United Parcel Serv., Inc. v. State, Dep't of Revenue</u>	
102 Wn.2d 355, 687 P.2d 186 (1984) .....	10

**RULES, STATUTES AND OTHER AUTHORITIES**

CrR 6.15 .....	8, 10
Juvenile Justice Act of 1977 .....	5
JuCR 7.11 .....	8
Laws 2006, ch. 138, § 16 .....	12
RAP 2.5 .....	11
RCW 7.90.150 .....	6
RCW 9.94A.030 .....	6
RCW 10.22 .....	4
RCW 10.58 .....	10
RCW 10.58.020 .....	9
RCW 10.61 .....	10
RCW 10.61.003 .....	9
RCW 10.61.006 .....	9
RCW 10.61.010 .....	9

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RCW 13.04.....	4
RCW 13.04.011.....	6
RCW 13.04.021.....	6
RCW 13.04.450.....	4, 5, 10
RCW 13.40.....	4, 5, 6, 10
RCW 13.40.020.....	6
RCW 13.40.070.....	7
RCW 13.40.130.....	7
RCW 13.40.140.....	7
Costn. art. 1, § 22 .....	1, 11

A. ASSIGNMENTS OF ERROR

1. The trial court erred by finding the juvenile appellant guilty of an uncharged crime.

2. The trial court erred in setting the expiration for a post-adjudication Sexual Assault Protection Order (SAPO). Supp. CP \_\_ (sub no. 61, Sexual Assault Protection Order, filed 8/7/14).

Issues Pertaining to Assignments of Error

1. Did the trial court violate Wash. Const. art. 1, section 22,<sup>1</sup> when it acquitted appellant of the charged crimes, but found him guilty of an attempt to commit one of the charged crimes, when juvenile court authority is limited to consideration of only charged offenses?<sup>2</sup>

2. The statute authorizing a SAPO permits the order to remain in effect for only two years following the expiration of the sentence. Did the trial court err by entering a SAPO that exceeded this term by decades?

B. STATEMENT OF THE CASE

On December 20, 2013, the Skagit County Prosecutor charged juvenile appellant B.W. (d.o.b. 8/18/2000) with two counts of first degree

---

<sup>1</sup> Wash. Const. art. 1, section 22, provides in relevant part: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, . . ."

<sup>2</sup> This appears to be an issue of first impression.

child rape (counts 1 & 2) and one count of first degree child molestation (count 3). CP 1-2. The prosecutor alleged that between June 1, 2013 and August 31, 2013, B.W. raped and molested A.J., a juvenile under the age of 12 and at least 24 months younger than B.W. Id.<sup>3</sup>

A fact-finding hearing was held July 23-24, 2014, before the Honorable John M. Meyer. 4RP-5RP.<sup>4</sup> At that hearing the prosecution was allowed to amend the charging period to include September through November 2013. 4RP 87-89; 5RP 4.

At the conclusion of the hearing the court acquitted B.W. of the child molestation charge (count 3) and one of the rape charges (count 2). 5RP 75. The court also acquitted B.W. of the remaining rape charge based on insufficient evidence of penetration, but concluded B.W. had the intent and took a substantial step towards committing that rape and therefore found him guilty of attempted rape. 5RP 77.

---

<sup>3</sup> For reasons not apparent from the record, an "Amended Information" was filed June 19, 2014, charging the same offenses during the same charging period against the same alleged victim. CP 8-9.

<sup>4</sup> There are six volumes of verbatim report of proceedings referenced as follows: 1RP - 3/6/14 (hearing to quash warrant); 2RP - 7/3/14 (hearing on admissibility of child hearsay); 3RP - 7/17/14 (scheduling hearing); 4RP - 7/23/14 (trial); 5RP - 7/24/14 (trial); and 6RP - 7/31/14 (sentencing).

A disposition hearing was held July 31, 2014. 6RP.<sup>5</sup> The prosecution recommended a standard range disposition of 15 to 36 weeks incarceration. 6RP 8. The court, however, granted B.W.'s counsel requested for a mitigated manifest injustice disposition and imposed 30 days of incarceration followed by 24 months of community supervision. CP 94-106; 6RP 10-18, 34-37. Subsequently, however, that sentence was rescinded by agreement and a standard range disposition imposed on January 16, 2015. Supp CP \_\_ (sub no. 87, Stipulation to Set Aside Manifest Injustice Sentence[sic], 01/16/15); Supp CP \_\_ (sub no. 88, Amended Order of Disposition, 01/16/15).

The court also entered a SAPO on August 7, 2014, seven days after the original sentencing hearing, precluding B.W. from having any contact with A.J. Supp CP \_\_ (sub no. 61) *supra*. The listed expiration date is "08/07/2099". *Id.*

B.W. appeals. CP 61-72.

---

<sup>5</sup> At this hearing the court also heard and denied defense counsel's motion to set aside the guilty verdict on the basis it violated separation of power principles. CP 82-85; 6RP 7.

C. ARGUMENTS

1. THE JUVENILE COURT LACKED AUTHORITY TO FIND B.W. GUILTY OF AN UNCHARGED OFFENSE.

Juvenile court authority is expressly limited to that provided by statute. RCW 13.04.450.<sup>6</sup> No statute, court rule, or case authority authorizes a juvenile court to find a juvenile offender guilty of committing an uncharged offense. Although statutes allow an adult to be convicted of an uncharged attempt or lesser included offense, the Legislature has provided no similar authority to convict juveniles of uncharged offenses.

The state charged B.W. with completed offenses, but the juvenile court found him guilty of an attempt. Because the state did not amend the information to charge an attempt, only to expand the charging period, and because the trial court lacked authority to find B.W. guilty of anything but the charged offenses, the court erred in finding B.W. guilty of attempted rape. This court should reverse.

---

<sup>6</sup> The provisions of chapters 13.04 and 13.40 RCW, as now or hereafter amended, shall be the exclusive authority for the adjudication and disposition of juvenile offenders except where otherwise expressly provided. Chapter 10.22 RCW does not apply to juvenile offender proceedings, including diversion, under chapter 13.40 RCW.

RCW 13.04.450 (emphasis added).

- a. A juvenile court lacks authority to find a juvenile guilty of an uncharged offense.

A juvenile court's authority to adjudicate alleged offenses is exclusively provided in Chapters 13.04 & 13.40 RCW, absent express authority to the contrary. RCW 13.04.450; State v. G.A.H., 133 Wn. App. 567, 577, 137 P.3d 66 (2006); State v. Adcock, 36 Wn. App. 699, 702, 676 P.2d 1040, review denied, 102 Wn.2d 1018 (1984). The Washington Supreme Court has recognized the state's long history of maintaining a separate criminal justice system for juveniles and adults.

For more than 70 years, this state has been trying to avoid accusing and convicting juveniles of crimes. While the Juvenile Justice Act of 1977 [JJA] placed more emphasis on a juvenile's criminal activity than did its 1913 counterpart, we observed in Lawley that this new emphasis may “[do] as much to rehabilitate, correct and direct an errant youth as does the prior philosophy of focusing upon the particular characteristics of the individual juvenile.” [State v. Lawley, 91 Wn.2d 654, 656-57, 591 P.2d 772, 772 (1979).] Even though the Legislature changed the methods of dealing with juvenile offenders, it did not thereby convert juvenile proceedings “into a criminal offense atmosphere totally comparable to an adult criminal offense scenario.” [Lawley at 659.]

State v. Schaaf, 109 Wn.2d 1, 15, 743 P.2d 240, 247 (1987).

The statutory schemes continue to have significant differences. For example, in the juvenile system there are no juries.<sup>7</sup> RCW 13.04.021(2). Another significant difference is that juveniles are not "convicted" of "crimes," but instead "adjudicated" of "offenses." RCW 13.04.011(1)<sup>8</sup>; RCW 13.40.020(21).<sup>9</sup>

---

<sup>7</sup> And since Schaaf, Washington courts have relied on the differences between the adult and juvenile systems to consistently deny juveniles the constitutional right to a jury trial. See e.g., State v. Chavez, 163 Wash. 2d 262, 267, 180 P.3d 1250, 1252 (2008); State v. Weber, 159 Wn.2d 252, 264–65, 149 P.3d 646 (2006); Monroe v. Soliz, 132 Wn.2d 414, 939 P.2d 205 (1997).

<sup>8</sup> "Adjudication" has the same meaning as "conviction" in RCW 9.94A.030, but only for the purposes of sentencing under chapter 9.94A RCW[.]

RCW 13.04.011(1) (emphasis added).

<sup>9</sup> "Offense" means an act designated a violation or a crime if committed by an adult under the law of this state, under any ordinance of any city or county of this state, under any federal law, or under the law of another state if the act occurred in that state[.]

RCW 13.40.020(21) (emphasis added).

Likewise, the juvenile statutes require a prosecutor to file an information that is "a plain, concise, and definite written statement of the essential facts constituting the offense charged." RCW 13.40.070(4) (emphasis added). Likewise, they require the juvenile respondent "be advised of the allegations in the information and shall be required to plead guilty or not guilty to the allegation(s)," that the prosecution bears the burden of proving "the allegations of the information beyond a reasonable doubt," and that "[i]f the respondent is found not guilty he or she shall be released from detention." RCW 13.40.130(1), (3) & (5) (emphasis added).

No juvenile statute authorizes conviction for an uncharged offense. As shown in section b, *infra*, this is unlike the adult system, where several statutes expressly allow juries and judges to convict adults for attempts and lesser included offenses.

The Juvenile Court Rules (JuCR) further support this conclusion.

**(a) Burden of Proof.** The court shall hold an adjudicatory hearing on the allegations in the information. The prosecution must prove the allegations in the information beyond a reasonable doubt.

**(b) Evidence.** The Rules of Evidence shall apply to the hearing, except to the extent modified by RCW 13.40.140(7) and (8). All parties to the hearing shall have the rights enumerated in RCW 13.40.140(7).

**(c) Decision on the Record.** The juvenile shall be found guilty or not guilty. The court shall state its findings of fact and enter its decision on the record. The findings shall include the evidence relied upon by the court in reaching its decision.

**(d) Written Findings and Conclusions on Appeal.** The court shall enter written findings and conclusions in a case that is appealed. . . .

JuCR 7.11(emphasis added).

Unlike the adult rules,<sup>10</sup> no juvenile rule allows a trial court to find a juvenile committed an uncharged attempt to commit the charged offense. To the contrary, JuCR 7.11 allows consideration of only "the allegations in the information" and requires the court to find the juvenile guilty or not guilty of that allegation. There is no reference to lesser included offenses or attempts.

- b. Unlike for juveniles, the Legislature has authorized adults to be convicted of a lesser-included or attempt of the charged offense.

Several statutes provide broad authority to convict adults of a lesser included or attempt of the charged offense. Four of these statutes set forth below make clear that an information or indictment charging an adult with a completed offense also notifies the adult of the possible conviction for an attempt or a lesser included offense.

---

<sup>10</sup> See CrR 6.15(g), discussed in note 5, *infra*.

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

RCW 10.61.003 (emphasis added).

In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information.

RCW 10.61.006.

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

RCW 10.61.010 (emphasis added).

Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt; and when an offense has been proved against him or her, and there exists a reasonable doubt as to which of two or more degrees he or she is guilty, he or she shall be convicted only of the lowest.

RCW 10.58.020.

Following this statutory authority, appellate courts have held that judges and juries may find an adult guilty of an inferior degree or attempt of the charged crime. See e.g., State v. Peterson, 133 Wn.2d 885, 892-893, 948 P.2d 381 (1997) (in a bench trial, the judge "may properly find defendant guilty of any inferior degree crime of the crimes included within the original information."); State v. Harris, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993) ("To find the accused guilty of a lesser included offense, the jury must, of course, be instructed on its elements.").<sup>11</sup> The absence of similar authority in juvenile statutes shows a clear difference in legislative intent. United Parcel Serv., Inc. v. State, Dep't of Revenue, 102 Wn.2d 355, 362, 687 P.2d 186 (1984).

A review of Chapters 13.04 & 13.40 RCW reveals no reference to any provision of Chapters 10.58 & 10.61 RCW, either express or implied. Because those statutes are not incorporated into the juvenile code, they do not apply to juveniles, and therefore the trial court lacked authority to find B.W. guilty of an uncharged attempt. RCW 13.04.450.

---

<sup>11</sup> See also, CrR 6.15(g), which provides:

The verdict forms for an offense charged or necessarily included in the offense charged or an attempt to commit either the offense charged or an offense necessarily included therein may be submitted to the jury.

- c. Because it constitutes manifest constitutional error, B.W.'s challenge to the attempted rape conviction maybe raised for the first time on appeal.<sup>12</sup>

"[M]anifest error affecting a constitutional right" may be raised for the first time on appeal. RAP 2.5(a)(3). An error qualifies as manifest error affecting a constitutional right when the error is constitutional and actually affected the defendant's rights at trial. State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d (2014). There must be "a plausible showing that the error resulted in actual prejudice, which means that the claimed error has practical and identifiable consequences in the trial." Id.

Under Wash. Const. art 1, section 22, "an accused person must be informed of the charge he or she is to meet at trial, and cannot be tried for an offense not charged." State v. Schaffer, 120 Wn.2d 616, 619-20, 845 P.2d 281 (1993); State v. Pelkey, 109 Wn. 2d 484, 487, 745 P.2d 854 (1987). By adjudicating B.W. guilty of an uncharged offense, the trial court violated B.W.'s rights under art. 1, section 22. Thus, the error is constitutional. And as shown above, the error had practical and identifiable consequences; it resulting in B.W.'s being adjudicated guilty of an uncharged offense and incarcerated as a result.

---

<sup>12</sup> B.W.'s counsel did challenge the attempted rape conviction post-adjudication, arguing it violated separation of power principles, but that was denied. CP 82-85; 6RP 7. The statutory based argument presented here, however, was not presented below.

This Court should therefore review B.W.'s claim, vacate B.W.'s conviction and dismiss.

2. THE SEXUAL ASSAULT PROTECTION ORDER EXCEEDS THE MAXIMUM ALLOWABLE TERM.

The trial court erred in setting an expiration date of "08/07/2099" for the SAPO because that date exceeds by decades the term allowed by statute. This Court should vacate the order and remand for entry of a lawful SAPO.

A trial court's authority to impose conditions of sentence is limited to the authority provided by statute. In re Post-sentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007); State v. Smith, 144 Wn.2d 665, 673-75, 30 P.3d 1245, 39 P.3d 294 (2001). Because this is a question of law, the reviewing court owes no deference to the trial court's decision. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). The statute authorizing a SAPO provides:

A final sexual assault protection order entered in conjunction with a criminal prosecution shall remain in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole.

RCW 7.90.150 (6)(c) (enacted by Laws 2006, ch. 138, § 16). As such, the expiration date for a SAPO is determined by the duration of the sentence imposed for the relevant offense.

Here, it is readily apparent the disposition court failed to heed the limitation on SAPOs expressed in RCW 7.90.150(6)(c). Under the original mitigated manifest injustice disposition, B.W. was to spend 30 days incarcerated, followed by 24 months of supervision. CP 94-106. Assuming B.W. had the entire sentence to serve beginning on July 31, 2014, he would complete it by October 1, 2016. Under that sentence, the SAPO should have expired no later October 1, 2018. Under the amended disposition of 15-36 weeks incarceration entered on January 16, 2015, however, the SAPO should expire even sooner as it is a much shorter disposition term, and will likely be completed by the summer of 2015, such that any associated SAPO should expire by no later than mid-2017.

The current SAPO has an expiration date of August 7, 2099. Even under the original disposition, the term of the SAPO is at least 80 years too long. Under the amended disposition it is equally in error. If this Court does not reverse B.W.'s adjudication of guilty based on argument 1, then remand to correct the term of the SAPO is warranted.

D. CONCLUSION

For the reasons stated, this Court should reverse B.W.'s adjudication of guilt and dismiss. In the alternative, this Court should vacate the SAPO and remand for imposition of one that comply with RCW 7.90.150 (6)(c).

DATED this 25th day of February, 2015.

Respectfully Submitted,  
NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, consisting of a large, stylized 'G' followed by a horizontal line extending to the right.

---

CHRISTOPHER H. GIBSON  
WSBA No. 25097  
Office ID No. 91051

Attorneys for Appellant

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

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72299-9-1
	)	
B.W.,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25<sup>TH</sup> DAY OF FEBRUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] SKAGIT COUNTY PROSECUTOR'S OFFICE  
COURTHOUSE ANNEX  
605 S. THIRD  
MOUNT VERNON, WA 98273  
[karenw@co.skagit.wa.us](mailto:karenw@co.skagit.wa.us)  
[skagitappeals@co.skagit.wa.us](mailto:skagitappeals@co.skagit.wa.us)

[X] B.W.  
ECHO GLEN CHILDREN'S CENTER  
33010 SE 99<sup>TH</sup> STREET  
SNOQUALMIE, WA 98065

**SIGNED** IN SEATTLE WASHINGTON, THIS 25<sup>TH</sup> DAY OF FEBRUARY 2015.

X *Patrick Mayovsky*

RECEIVED  
FEBRUARY 25 2015  
CLERK OF COURT  
DIVISION ONE  
COURT OF APPEALS  
STATE OF WASHINGTON