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

NO. 46588-4-II

CLALLAM COUNTY CAUSE NO. 14-8-00083-3

STATE OF WASHINGTON,

Respondent,

vs.

G.C.,

Appellant.

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

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When the evidence shows the youth's father smelled alcohol on his son's breath and saw his son's eyes were glassy in the public skate park, and an officer interviewed G.C. over an hour later and G.C.'s eyes were still glassy, is it clear the evidence is more than substantial beyond a reasonable doubt to prove Minor Exhibiting?

ISSUE TWO

When the judge enters a disposition outside the standard range the reasons must be supported by the record and clearly and convincingly support the conclusion that a manifest injustice was appropriate. When a Judge reviewed a psychological evaluation provided by G.C. and after review provides reasons based on that psychological evaluation why a manifest injustice disposition is appropriate is that a sufficient record to support the manifest injustice?

ISSUE THREE

When the sentencing record does not show when G.C. and his counsel became aware that the State was seeking a manifest injustice, when the record does not show that G.C. or his counsel objected when he received notice the State would seek a manifest injustice sentence, when G.C.'s counsel made cogent arguments in opposition to a manifest injustice finding, can it be said (1) any error occurred; (2) any error was waived; or (3) any error was harmless?

II. STATEMENT OF THE CASE

On August 7, 2014, fact finding was held in State of Washington v. Respondent, G.C., on an information dated June 26, 2014 that charged G.C. with Minor in a Public Place Exhibiting the Effects of Liquor occurring on June 17, 2014. CP 36.

Testimony was taken from Brian Collins, G.C.'s father and Corporal Powless of Port Angeles Police Department.

Testimony taken was as follows: G.C. was born on September 26, 1999. RP 5. On June 17, 2014, Brian Collins, G.C.'s father, tracked G.C. down at the local skate park. RP 6. When Brian Collins located G.C. he could smell alcohol on G.C.'s breath and he appeared mildly intoxicated. RP 6, 7. G.C. had glassy eyes and he admitted to his father that he had been drinking. RP 6, 9. Brian Collins then took G.C. to his mother's home. Corporal Powless was on duty June 17, 2014 when he was dispatched to G.C.'s residence on a report of G.C. being intoxicated and missed an IOP appointment. RP 17. Court held a 3.5 hearing and ruled that G.C.'s statements made were admissible. RP 18-22, CP 33-35. Corporal Powless was dispatched almost an hour after the call was received by dispatch. RP 18. Corporal Powless arrived spoke with G.C. inside the residence, he was coming up the stairs fresh from the shower.

RP 17. Corporal Powless told G.C. about the complaint and asked him if he had been drinking alcohol and G.C. confirmed to Corporal Powless he had been drinking alcohol. RP 17-18. G.C. also confirmed he missed an IOP (intensive outpatient treatment) session. RP 18. The conversation between Corporal Powless and G.C. occurred in the entryway staircase and they were approximately ten to fifteen feet apart during the entire exchange. RP 20. Corporal Powless observed that G.C. had glassy eyes when he was speaking with him. RP 24.

G.C. moved for dismissal based on insufficient evidence. RP 25. Court denied that motion. Court found G.C. guilty of minor exhibiting the effect in a public place. VP 32-34, CP 30-32. State was prepared to proceed to sentencing but G.C. asked to continue sentencing one week to prepare. VP 34.

On August 14, 2014 the Court entered Findings of Fact and Conclusions of Law on 3.5 hearing and Findings of Fact and Conclusions of Law on Fact Finding. CP 30-35. After entry of the Findings of Fact and Conclusions of Law the trial court proceeded to sentencing. The State specifically references G.C.'s psychological report, by Dr. McBride, in supporting the sentence requested by the State. VP 39-40, CP 16-28. This psychological report by Dr. McBride was prepared in April 2014, two months prior to the G.C. committing this new offense. CP 16-28. The

Court specifically questions the availability of co-occurring counseling at Echo Glenn a Juvenile Rehabilitation Administration facility, as is recommended by the evaluation. VP 41. G.C.'s father specifically refers to the psychological report and the recommendation of G.C.'s own expert and the recommendation for treatment at a lockdown facility and the request that the facility be Echo Glenn. VP 43-45. After hearing from the State and G.C.'s father with regards to sentencing based on G.C.'s experts report the Trial Court imposed a disposition based on G.C.'s expert. VP 49-53, CP 29.

The Court imposed a manifest injustice sentenced of maximum possible penalty, 90 days. CP 7-15. The Trial Judge found that G.C. had exhausted all local resources that he required treatment in a secure setting, and the he was highly likely to reoffend without the opportunity at treatment in a secure environment. VP 49-53, CP 7-15, 29.

G.C. appealed. CP 5.

III. ARGUMENT

ISSUE ONE

SUMMARY OF ARGUMENT

G.C.'s father testified he smelled alcohol on his son's breath at the public skate park and observed his son's glassy eyes. RP 6-9. When he asked his son if he had been drinking, his son said "yes." RP 9, 18, 22. Over an hour later, a police officer who never stood closer than ten feet from G.C. also testified he saw G.C.'s glassy eyes. RP 18, 24. G.C. admitted to him he had been drinking. RP 9, 18, 22. CP 33-36. There is evidence beyond a reasonable doubt for the conviction.

Standard of Review

"The standard of review for a challenge to the sufficiency of the evidence" is whether, viewing the evidence "in a light most favorable to the State, 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *State v. Sweany,* 174 Wn.2d 909, 914, 281 P.3d 305 (2012), quoting *State v. Randhawa,* 133 Wn.2d 67, 73, 941 P.2d 661 (1997) (sufficiency of evidence is standard of review even in alternate means crimes).

Analysis

RCW 66.44.270 (2)(b), commonly known as "Minor Exhibiting,"

has the following elements:

1. Must prove the perpetrator is under age 21;
2. That the exhibition of effects occurred in a public place;
3. The perpetrator has the odor of liquor on his or her breath; and either:
   a. Is in possession of or close proximity to liquor; or
   b. by exhibiting one of the following, exhibits he or she is under the influence of liquor:
      i. speech;
      ii. manner;
      iii. appearance;
      iv. behavior;
      v. lack of coordination;
      vi. or otherwise
4. Exhibits that he or she is under the influence of liquor.

Viewing the evidence in the light most favorable to the prosecution, each element was proved beyond a reasonable doubt:

1. Age is 14; RP 5.

2. Exhibiting effects was in a public place; RP 6.

3. He had the odor of alcohol on his breath; RP 6, 7.

3b. He had glassy eyes, an appearance of alcohol consumption. RP 6, 24.

G.C. argues the evidence is not conclusive because glassy eyes can be a sign of other forms of intoxicants. It could be, but that's not the point. When the glassy eyes are combined with the smell of alcohol and the admission that G.C. consumed alcohol, the State has met its burden. RP 6-9, 18, 22. When the officer noted he had glassy eyes an hour later

and G.C. again confessed he had been consuming alcohol, the proof became even stronger. RP 6-9, 18, 22, 24. The evidence was sufficient to convict G.C. of "Minor Exhibiting."

ISSUE TWO

SUMMARY OF ARGUMENT

The reasons supplied by the court for the manifest injustice are supported by the record. The reasons supplied by the court for the manifest injustice originate from the information provided by the psychological evaluation that the Court relied upon that G.C. provided. The psychological evaluation provided clear and convincing reasons that the manifest injustice was appropriate and not excessive. CP 16-28.

Standard of Review

To uphold a disposition outside the standard range, the Court of Appeals must find (a) that the reasons supplied by the disposition judge are supported by the record which was before the judge that those reasons clearly and convincingly support the conclusion that a disposition within the range would constitute a manifest injustice, and (b) that the sentence imposed was neither clearly excessive nor clearly too lenient. *RCW* 13.40.230 (2), *State v. P.B.T.,* 67 Wn.App. 292, 301, 834 P.2d 1051 (1992), review denied 120 Wn.2d 1021, 844 P.2d 1017 (1993), citing *State*

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

Although reason given by court for imposing sentence outside standard range in a juvenile case must support a determination that sentence within standard range would effectuate manifest injustice beyond a reasonable doubt, reason itself need only be supported by substantial evidence in the record. *State v. P.B.T.*, 67 Wn.App. 292 (1992).

In reviewing manifest injustice disposition of juvenile offender, appellate court is authorized to review whole record including trial court's oral ruling. *State v. E.J.H.*, 65 Wn.App. 771, 830 P.2d 375 (1992).

Once manifest injustice is found, length of juvenile's sentence is reviewed for manifest abuse of discretion. *State v. B.E.W.*, 65 Wn.App. 370, 375, 828 P.2d 87 (1992); citing *State v. P.*, at 778-779.

Analysis

The Trial Court found three reasons to support a manifest injustice. CP 29. The Trial Court relied heavily on the Psychological Report of Dr. Michael McBride dated April 17, 2014. CP 16-28. The Court should note that the psychological report was dated and conducted and completed approximately six to eight weeks prior to G.C. being charged with "Minor Exhibiting". CP 36. The evaluation was done at the request of G.C. and provided to the Trial Court and the State by G.C. CP 16. The evaluator

provided information regarding the documents he reviewed prior completing his evaluation. CP 17. Those included the multiple arrest records and case reports of G.C., communication with physicians, emails with Defense and Prosecuting Attorney and treatment providers from 2013 and 2014. CP 17. The evaluation discussed G.C.'s educational experiences which included several suspensions for anger related aggression problems and possession of marijuana from school. CP 19. G.C. and G.C.'s father provided the evaluator a list of G.C. arrests and criminal history as part of the evaluation. CP 20. Under history of violence section there is specific reference to G.C. being expelled from inpatient treatment program because of his destruction of their property. CP 20. G.C. reports to the evaluator that he has been using alcohol and marijuana since age twelve and he currently has a $40 day marijuana habit, in addition he speak of using prescription medications, methadone, hydrocodone, and oxycodone. CP 21. G.C. performed a number of psychological tests as part of the evaluation and the results indicated that G.C. has aggressive tendencies, co occurring disorder and because of these issues may intentionally or carelessly violate the legal code. CP 22-23. The evaluator notes that unless G.C. addresses his chemical dependency issues in a lock down facility that success for G.C. is not likely to occur. This is based on his history, failure to want to engage in local

opportunities and inpatient treatment facilities. CP 25-27. This is acknowledged by G.C. when the during argument for sentencing G.C. argues that this particular charge is not the case to send him to long term lockdown setting because it is not long enough and there will be other cases that will come along that will match the intent of G.C.'s experts recommendations. RP 47.

When the trial court entered disposition for G.C. it specifically addressed the information it was provided by G.C. through the evaluation, the co occurring disorder issue, the substance abuse treatment needed, the mental health counseling, and opportunity for treatment desperately needed. R.P. 49-51, VP 50 -52. The reasons given for the manifest were supported by the record. VP 50-53. A "record" made by the psychological report supplied by G.C. The reasons were supported by G.C.'s own evaluator's recommendation which provide a clear and convincing support for the sentence the court imposed and the sentence imposed was clearly not excessive considering the evaluations recommendation for long term treatment. The imposition of the sentence was clearly not excessive considering the information that G.C. had provided the trial court. The evaluation provided the substantial evidence to support the factors the trial court found to support the manifest injustice.

ISSUE THREE

SUMMARY OF ARGUMENT

There is nothing in the record to show when G.C. was advised about the State's choice to request a manifest injustice, or any objection on his part to late notice, or any error arising from late notice.

Standard of Review

A constitutional issue may be raised for the first time on appeal. RAP 2.5 (a)(3). Review is *de novo*. *State v. Vance,* 168 Wn.2d 754, 759, 230 P.3d 1055 (2010)

Analysis

There is nothing in the record to support the assertion that G.C. was denied a constitutional sentencing right. G.C.'S STATEMENT OF FACTS AND PRIOR PROCEEDINGS correctly includes all the facts of the trial and sentencing. Nothing in the statement indicates G.C. was not given proper notice of an intent to seek a manifest injustice. Further, nothing in the court record supports the assertion, either.

When a defendant raises a constitutional issue for the first time on appeal, he or she must prove the error is manifest and that any error requires appellate review. *State v. Trebilcock,* ___ Wn. App. ___, p. 6, WL 6679162 (November 25, 2014), citing to *State v. O'Hara,* 167 Wn.2d 91,

98, 217 P.3d 756 (2009). An error is manifest if it is "so obvious on the record" as to invite review. *State v. O'Hara,* 167 Wn.2d at 98, 217 P.3d 756.

First, G.C. has not carried his burden to show any error occurred. To simply say he was not given "proper notice" begs the question. Second, when G.C. presented his arguments, he obviously understood the State's position – it intended to seek a manifest injustice and to send him somewhere out of county. RP 45-47. Third, as earlier indicate, G.C. seemed to agree that a manifest injustice was appropriate but wanted to wait for a conviction with a longer sentence so he could get longer treatment. RP 47. That shows he understood the State's request. A defendant may waive even a constitutional issue, if the record established "a personal expression by the defendant of an intent to waive, or an informed acquiescence." *State v. Trebilcock,* ___ Wn. App. ___, p. 6, WL 6679162 (November 25, 2014). In this case, there is no proof a constitutional error occurred, let alone so clear that it invites appellate scrutiny.

IV. CONCLUSION

Viewing the evidence in the light most favorable to the State each element of the offense was proved beyond a reasonable doubt. Therefore, the State respectfully requests that the Court affirm the Trial Court's

finding the G.C. committed the offense of "Minor Exhibiting".

Secondly, the reason supplied by the Trial Court for imposing a manifest injustice was supported by the record beyond a reasonable doubt. Reliance on G.C. expert's report was substantial evidence for the Court to impose the manifest injustice. Therefore, the State respectfully requests the Court affirm the disposition imposed by the Trial Court.

Finally, there is nothing to support the assertion that G.C. was denied a constitutional sentencing right. G.C. did not object to the fact the State requested a manifest injustice based on notice. G.C. simply believed that this was not appropriate case to seek the manifest injustice. G.C. failed to carry his burden show any error occurred.

Respectfully submitted this January 22, 2015.

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CERTIFICATE OF DELIVERY

I certify that on today's date:
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I filed the Brief of Respondent electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Port Angeles, Washington on January 22, 2015.

MARK B. NICHOLS, Prosecutor

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