74233-7

No. 74233-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Appellant,

v.

E.B. (DOB 3/3/2000),

Respondent.

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

The Honorable John P. Erlick

BRIEF OF RESPONDENT

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A. SUMMARY OF ARGUMENT

Fifteen year old E.B. pleaded guilty in juvenile court to one count of second degree robbery for grabbing a woman's purse. Over the State's objection, the juvenile court imposed a manifest injustice below the standard range, finding the statutory mitigating factor that E.B. did not inflict, or intend to inflict, serious bodily injury. The court knew E.B. from prior matters and noted that he had improved substantially because of the community services put into place as part of a prior disposition. This Court should affirm the manifest injustice disposition.

B. ISSUES PRESENTED

1. Whether the juvenile court had authority to impose a suspended sentence as a manifest injustice disposition below the standard range where decisions of the courts have plainly stated that once a decision is made to impose a manifest injustice disposition, the determinate sentencing scheme no longer applies and the court has discretion to craft the appropriate disposition?

2. Whether the statutory mitigating factor amply supported the manifest injustice disposition and negated the State's argument that E.B. inflicted, or intended to inflict, serious bodily injury?

3. Whether the juvenile court's reasons for imposing a manifest injustice disposition were sufficient where the court's goal was to give E.B. the opportunity to continue progressing in the community by accessing supportive services specifically designed to benefit him?

C. STATEMENT OF THE CASE

E.B. pleaded guilty to one count of second degree robbery. CP 31-39. E.B. admitted he grabbed a woman's purse, and then struggled with the woman when she tried to keep it. CP 36; 10/14/2015RP 12-20.

At the disposition hearing, the probation counselor described E.B. for the court:

> [E.B.] is a great kid. He just is really, has struggled with his behavior. [E.B.] is smart. He's funny. He's engaging. He has the qualities to be successful. He just needs the tools. He attempted to get the tools from the community and that didn't work. When he went to JRA, even though it was for a short time, he got his minimum, which is another plus. He got his minimum, not his maximum. It just wasn't long enough to give him all the tools that he needs, as well as time to practice those tools.
>
> This is a young man who's 15 years old, that his behavioral habits have been going on for a long time. You're not going to fix them in 15 weeks; less than 15 weeks. But I did want you to know that I think he's a great kid and that he can do this. He was insightful when I first went down to talk to him in looking at the silver lining, if you will, regarding this, that he could go about, he could get his GED at JRA. He acknowledged that he did need more skills that are decision-making skills, the ability to say no to others, and some aggression, anger

> management. So he's fairly insightful about what his needs are.

10/14/2015RP 24.[1]

Counsel for E.B. noted that E.B. has started to learn and apply some of things he has been taught in the programs which had been put in place as a result of a prior disposition. 10/14/2015RP 25.

> [E.B.] has services set up in the community. He is involved in SeaMar Community Health Centers. He has an individual counselor, CJ Elsworth, who he sees regularly. Ms. Ellsworth also provides individual counseling to [E.B.'s mother], and family counseling to both of them. He attends Boys and Girls Club after school and [his mother] has regular work hours so she is able to be home with [E.B.] when he is not in school or attending other activities.
>
> [E.B.] continues to work with David Humeryager of Team Child to address his specific school concerns. Last year the Bellevue School District agreed to do a comprehensive evaluation of [E.B.'s] needs. Based on this, [E.B.] has been placed at Bellevue High School to address his academic, emotional, and behavioral concerns. Until he was taken into custody for this charge, [E.B.] attended school and did not have any behavioral sanctions. This is a significant improvement over last year when [E.B.] reports he only attended 3 days.
> . . .
> [A]llowing [E.B.] to remain in the community will allow him to continue to implement the skills he has learned with the assistance of services that are already in place . .

[1] In her conclusion as to the appropriate disposition, the counselor did recommend a standard range which included a JRA commitment. 10/14/2015RP 24-25.

> . Community supervision will provide structure to the court's conditions and will hold [E.B.] accountable.

CP 13-14.

Attached to E.B.'s sentencing memorandum was a report from Team Child addressing the issues facing E.B. and the community programs that had been put into place to address those issues. CP 17-21. Finally, E.B.'s mother strongly urged a manifest injustice disposition below the standard range, noting that her and E.B.'s relationship had improved significantly since the programs had been implemented. CP 79.

The State urged the court to impose a standard range disposition of 52-65 weeks of detention for E.B. CP 10; 10/14/2015RP 20-23.

The court wrestled with the appropriate disposition, noting that there were substantial risks to the community and to E.B. 10/14/2015RP 45. Ultimately, the court imposed a manifest injustice disposition below the standard range, finding that E.B. did not cause, nor contemplate that his actions would cause, serious bodily injury. CP 23, 79.

> One of the things that may be different is that school is now an anchor for [E.B.]. And I know that that can truly turn around youth. [E.B.] is bright. [E.B.] is charming. [E.B.] has some real skills. And [E.B.] is also a threat to the community. And we need to address it long term.

> I looked at the file and my concern was that [E.B.'s] just going to continue to do the same thing over and over unless we address it now. He did well at Echo Glen. On the other hand, I think our system has a preference, if possible, to keep youth in the community. He will still end up at Echo Glen if he messes up, but I will grant a manifest injustice.
>
> I'm imposing 52 to 65 weeks at JRA, and I am suspending that for a period of 12 months. And I will empower [E.B.] to stay out of JRA. Any criminal offense whatsoever will result in revocation. Even if it's an MIP or a theft 3, it's getting revoked. I need [E.B.] to attend at school. I need you to stay at home. You can't run. You can't be gone. So that is going to be the disposition of the court.

10/14/2015RP 45-46. Thus, the court concluded that "[s]uspending the time allows the respondent to utilize the community services that are currently in place." CP 80.

The State has appealed the manifest injustice disposition. CP 69.

D. ARGUMENT

The juvenile court had ample authority to impose a manifest justice disposition below the standard range, including a suspended disposition.

1. *A court may impose a disposition below the standard range where it finds a standard range disposition would effectuate a manifest injustice.*

A court may impose a disposition outside the standard range for a juvenile offender if it determines that a disposition within the standard range would "effectuate a manifest injustice." RCW 13.40.160(2); *State v. Beaver*, 148 Wn.2d 338, 345, 60 P.3d 586 (2002). "'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 in light of the purposes of the [Juvenile Justice Act of 1977, ch. 13.40 RCW]." RCW 13.40.020(19); *State v. M.L.*, 134 Wn.2d 657, 660, 952 P.2d 187 (1998). The purposes of the Juvenile Justice Act (JJA) include protecting the citizenry from criminal behavior; making the juvenile accountable for his or her criminal behavior; providing for punishment commensurate with the age, crime, and criminal history of the juvenile; and providing necessary treatment, supervision, and custody of juvenile offenders. RCW 13.40.010(2)(a)-(f).

To uphold a disposition outside the standard range, this Court need only find that (1) the reasons supplied by the disposition judge are supported by the record before the judge, (2) those reasons clearly and convincingly support the conclusion that a disposition within the standard range would constitute a manifest injustice, and (3) the sentence imposed was neither clearly excessive nor clearly too lenient. RCW 13.40.230(2); *M.L.*, 134 Wn.2d at 660. A disposition is clearly excessive "'only when it cannot be justified by any reasonable view which may be taken of the record.'" *State v. T.E.C.*, 122 Wn.App. 9, 17, 92 P.3d 263 (2004) (internal quotation marks omitted), *quoting State v. Tauala*, 54 Wn.App. 81, 87, 771 P.2d 1188, *review denied*, 113 Wn.2d 1007 (1989). In determining the appropriate disposition, a trial court may consider both statutory and nonstatutory aggravating factors. *State v. J.V.*, 132 Wn.App. 533, 540–41, 132 P.3d 1116 (2006).

2. *Once a court decides to impose a manifest injustice, the court may craft any disposition as the determinate sentencing scheme no longer applies.*

Once a juvenile court concludes that a disposition within the standard range would effectuate a manifest injustice, the determinate sentencing scheme no longer applies, and the juvenile court is vested with broad discretion in determining the appropriate disposition. *M.L.*, 134 Wn.2d at 660; *J.V.*, 132 Wn.App. at 545. The court abuses its discretion only if its decision cannot be justified by any reasonable view of the record. *Tauala*, 54 Wn.App. at 86-87 (stating the court has broad discretion to impose any sentence it chooses once it decides to depart from the standard range based on a manifest injustice finding). *See also State v. Strong*, 23 Wn.App. 789, 794, 599 P.2d 20 (1979) (once a juvenile court has concluded that a disposition within the standard range would effectuate a manifest injustice, the court is vested with broad discretion in crafting the appropriate sentence to impose).

The majority of the decisions finding that, once the juvenile court concludes a standard range sentence would effectuate a manifest injustice thus the standard range is inapplicable, arise out of manifest justice dispositions above the standard range where the argument was that the sentence was clearly too excessive. *See e.g.*, *M.L.*, 134 Wn.2d

at 660-61 (manifest injustice above the standard range affirmed but 523 weeks clearly excessive where standard range was 30-40 weeks); *J.V.*, 132 Wn.App. at 545 (30-40 week manifest injustice disposition not clearly excessive where standard range was 30 days); *State v. Duncan*, 90 Wn.App. 808, 815, 960 P.2d 941 (1998) (manifest injustice disposition above the standard range affirmed but length of 535 weeks reversed where court improperly speculated about earned early release); *Tauala*, 54 Wn.App. at 86-88 (commitment for over four years until juvenile turned 21 years of age not clearly excessive where standard range was 103-129 weeks). In choosing the length of the disposition, the standard range by definition is inapplicable and the juvenile court is left to fashion its own disposition as long as that disposition is supported by the record.

But this doctrine has also been authorized where the manifest disposition was below the standard range as well. *See State v. Crabtree*, 116 Wn.App. 536, 545-46, 66 P.3d 695 (2003) (Chemical Dependency Disposition Alternative disposition affirmed where juvenile not eligible under the standard range but allowed where disposition was outside the standard range); *State v. K.E.*, 97 Wn.App. 273, 279-87, 982 P.2d 1212 (1999) (consolidated appeals of manifest injustice dispositions below

the standard range of 30 days and 12 months of community supervision where the standard range was 103-129 weeks. One disposition affirmed the other reversed where the court considered an improper mitigating factor and remanded for court to reconsider its disposition in light of the remaining mitigating factor).

Thus, it seems clear, and it makes logical sense, that once the court decides to impose a manifest injustice disposition, the standard range is inapplicable. The State's argument to the contrary would necessarily require the State to meet the rules regarding determinate sentencing when arguing for a manifest injustice disposition above the standard range. One would suspect this is not an outcome the State necessarily desires.

Here, the court was not required to follow the determinate sentencing scheme in crafting the disposition regarding E.B. The court had authority to suspend the sentence it imposed.

3. *The statutory mitigating factor found by the juvenile court was properly applied.*

In determining the appropriate disposition, a trial court may consider both statutory and nonstatutory aggravating factors. *J.V.*, 132 Wn.App. at 540-41.

Here, the juvenile court found that E.B. did not inflict or contemplate that his conduct would cause, or threaten to cause, serious bodily injury. CP 78 (Finding of Fact 3). This particular factor is specifically delineated by statute as a mitigating factor that the Legislature has expressly authorized courts to consider in determining the appropriate disposition. RCW 13.40.150(3)(h)(i).[2]

Here, the court weighed this mitigating factor against two aggravating factors to determine the disposition appropriate to E.B.'s case. The State's complaint is that the court could not consider the mitigating factor because second degree robbery does not require proof of any injury. Brief of Appellant at 17. While it is true that courts

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[2] RCW 13.40.150(3) states in relevant part:

(3) Before entering a dispositional order as to a respondent found to have committed an offense, the court shall hold a disposition hearing, at which the court shall:

. . .

(h) Consider whether or not any of the following mitigating factors exist:

(i) The respondent'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;

cannot consider aggravating factors when these factors were necessarily considered by the Legislature in defining the crime itself, *State v. E.A.J.*, 116 Wn.App. 777, 789, 67 P.3d 518 (2003), the opposite is not necessary true.

In *S.H.*, the juvenile was convicted of first degree rape of a child. The juvenile court imposed a manifest justice disposition above the standard range, finding among other aggravating factors, the juvenile could have inflicted serious bodily injury. The appellate court invalidated this factor, concluding the supposition "*could have*" was an insufficient basis for finding the aggravating factor. *State v. S.H.*, 75 Wn.App. 1, 11, 877 P.2d 205 (1994), *review denied*, 125 1016 (1995), *abrogated on different grounds, State v. Sledge*, 83 Wn.App. 639, 922 P.2d 832 (1996). The appellate court also rejected the juvenile's argument that the court failed to consider the corollary mitigating factor, that he did not cause, or threaten to cause, serious bodily injury, concluding that the finding of the aggravating factor necessarily invalidated this mitigating factor. *Id.* at 13. But, this ruling implicitly found that the mitigating factor could apply even where infliction of

injury is not an element of the offense, as infliction of injury is not an element of child rape.[3]

This conclusion also makes logical sense. Had E.B. inflicted serious bodily injury, he would have been charged with first degree robbery. *See* RCW 9A.56.200(1)(a)(iii). Thus this factor will most likely be applicable only where the infliction of injury is not an element, such as here. Otherwise, it would have necessarily have been considered by the Legislature in adopting the offense and would be inapplicable.

Finally, although bodily injury is not element of second degree robbery, the State, both before the juvenile court and now on appeal, has continually argued E.B. inflicted serious injuries to the woman. The statutory mitigating factor found by the juvenile court here necessarily negates that claim.

4. *Sufficient evidence supported the court's finding that E.B. did not inflict or intend to inflict serious bodily injury.*

The court's findings of fact are reviewed under a clearly erroneous standard and will be reversed only if "'no substantial

[3] First degree rape of a child does not require proof of any injury. See RCW 9A.44.073(1) ("A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim").

evidence supports its conclusion.'" *State v. J.N.*, 64 Wn.App. 112, 114, 823 P.2d 1128 (1992), *quoting State v. Grewe*, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991). Substantial evidence is "defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012), *quoting Sunnyside Valley Irrigation Dist. v. Dickie,* 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

The State's recitation of the facts surrounding the incident is without citation to anything in the record and omits a substantial amount of contextual detail. Brief of Appellant at 20-21. In the Affidavit of Probable Cause, the woman told police that she was at the library and standing at the printer. CP 5. While waiting, she placed her purse on the floor next to her. CP 5. She said E.B. came up from behind, took the purse from the floor and ran towards the emergency exit. CP 5. The woman ran after E.B. and caught him near the elevator. CP 5. She grabbed E.B.'s backpack, and E.B. reacted by trying to get away. CP 5. E.B. pulled the woman towards the exit, and while being dragged, the woman was able to grab her purse. CP 5. The two struggled over the purse and E.B. struck the woman in the head with his hand, causing her to fall down. CP 5.

Thus, the juvenile court's conclusion that this was a "theft gone bad" was an accurate assessment of this case. 10/14/2015RP 10. The juvenile court correctly resolved that E.B. was merely trying to hold onto the purse and also hold onto his own backpack, not that he intended to seriously harm the woman. The State's overwrought conclusion is just not supported by what the police learned at the scene.

The juvenile court's finding that E.B. did not inflict, or intend to inflict, serious bodily injury was amply supported by the record and should be affirmed.

5. *E.B's need for continued treatment and support in the community provided support for the manifest injustice disposition.*

A "juvenile court may enter a manifest injustice finding and impose a downward exceptional disposition where the juvenile court finds by clear and convincing evidence that a standard range disposition would be detrimental to the goal of rehabilitating the juvenile offender, and such a disposition would not endanger the public." *K.E.*, 97 Wn.App. at 282-83. A juvenile court's determination that a standard range disposition would effectuate a manifest injustice is reviewed for an abuse of discretion. *State v. Sledge,* 133 Wn.2d 828, 844, 947 P.2d 1199 (1997). At the disposition hearing "all relevant and

material evidence ... may be received by the court." *J.V.*, 132 Wn.App. at 541. RCW 13.40.150(1) indicates that at a disposition hearing, evidence may be received even though it may not be admissible in a hearing on the information. Further, ER 1101(c)(3) specifically exempts juvenile disposition hearings from the rules of evidence. *State v. Beard*, 39 Wn.App. 601, 607 n. 4, 694 P.2d 692, *review denied*, 103 Wn.2d 1032 (1985). In considering a disposition, a court may rely on all relevant and material evidence, including oral and written reports and the arguments of the parties, during a disposition hearing. RCW 13.40.150(1), (3).

In enacting the JJA, the Legislature's intent was, in part, to "respond[ ] to the needs of youthful offenders" by providing "necessary treatment." RCW 13.40.010(2); *Duncan*, 90 Wn.App. at 812 ("purposes [of JJA] include protection of the citizenry and provision of necessary treatment, supervision and custody for juvenile offenders"). It was proper for the juvenile court to consider E.B.'s need for treatment in considering the manifest injustice disposition. *S.H.*, 75 Wn.App. at 12 ("Responding to a need for treatment is an appropriate basis for a manifest injustice disposition and is determined by the specific needs of the particular defendant."); *Tauala*, 54 Wn.App. at 87.

On appeal, the court reviews the entire record, including the oral opinion of the disposition judge. *State v. E.J.H.*, 65 Wn.App. 771, 775, 830 P.2d 375 (1992).

The juvenile court here based part of its findings on its previous experience with E.B. 10/14/2015RP 5. In addition, the court noted that numerous and substantial supportive services had been put into place in the community to support E.B. including Functional Family Parole and Functional Family Therapy. CP 78 (Finding of Fact 8).

The juvenile court incorporated Team Child's report into the record before it as well as E.B.'s school records. 10/14/2015RP 51. Team Child noted that E.B. is receiving special education through Bellevue High School, and based on a new independent evaluation obtained by E.B.'s mother, new insights into E.B.'s behavioral problems have been gained and a new plan put into place to deal with those problems. 10/14/2015RP 41-42. The court also continued E.B.'s mental health treatment through SeaMar. *Id.* at 51.

The court emphasized that it wanted E.B. to have the opportunity to continue to build on the skills that he gained from the various programs in the community. CP 78 (Finding of Fact 6). Suspending the sentence the court concluded, "allows [E.B.] to utilize

the community services that are currently in place." CP 80 (Conclusion of Law 7).

Finally, counsel for E.B. provided substantial information about the various services that had been provided, or would be provided and E.B.'s progress in utilizing those services. CP 13-21.

The court noted why it chose to suspend E.B.'s sentence:

> The fact that those services are now set up in the community, That [E.B.] has had the benefit of some treatment and programming at JRA, and that he has the strong support of his mother, and that he has an extraordinarily long JRA sentence hanging over his head and will be highly motivated to engage in treatment because if he does not, he'll go to JRA. That's the purpose of the suspended sentence.

11/3/2015RP 96.

It is evident that the court's findings were amply supported by the record before it and that clear and convincing evidence supports the court's manifest injustice determination. *See T.E.C.*, 122 Wn.App. at 20-21. The manifest injustice disposition should be affirmed.

E. CONCLUSION

For the reasons stated, E.B. asks this Court to reject the State's arguments and affirm the manifest injustice disposition below the standard range.

DATED this 17th day of June 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN THE COUNTY OF KING, JUVENILE DIVISION

STATE OF WASHINGTON *Plaintiff,* v. E' B. D.O.B. 3/3/00 *Respondent.*	CAUSE NO. 15-8-01386-8 FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR MANIFEST INJUSTICE DISPOSITION

This matter came before the undersigned Judge of the above-entitled court on October 14, 2015, and the Court having considered the legal memoranda submitted by the Defense, as well as the disposition report submitted by the Juvenile Probation Counselor Kelly DePhelps, the letter from Bellevue High School Special Education Teacher Brittany Craig, and having considered oral argument by Deputy Prosecuting Attorney Benjamin Carr, Defense Counsel Jennifer Beard, and having further considered the records and files in this case now, furthermore, the Court hereby makes the following findings of fact and conclusions of law.

a specific program to address his needs for this school year. The respondent was showing improvement in his attendance and behavior this year. School is now an anchor for respondent to provide stability in his community behaviors.

10. Team Child assisted the Respondent and his family is setting up an appropriate education program and will continue to be available to assist respondent in these matters.

11. A referral can be made for a wrap team to provide additional support for the respondent and his family.

12. The Respondent has resources in place upon his release to protect the community and continue his progress in his behavioral improvement.

13. The Respondent's conduct during this offense neither caused nor threatened serious bodily injury or the Respondent did not contemplate that his conduct would cause or threaten serious bodily injury pursuant to RCW 13.40.150(3)(h)(i),

14. The respondent has a recent criminal history or has failed to comply with conditions of a recent dispositional order or diversion agreement pursuant to RCW 13.40.150(3)(i)(iv).

15. The Respondent historically has had significant conflict with his mother Stacie. Since his release from JRA, the relationship has improved significantly and Given's mother is strongly supportive of his receiving a disposition of manifest injustice downward.

II. CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action.

2. That imposition of a standard range sentence would effectuate a manifest injustice.

3. A disposition of 65-65 weeks with the time suspended is the appropriate disposition to protect ~~society~~ the community.

Sentence and disposition should be entered in accordance with these findings of fact and conclusions of law, which also incorporate by reference the briefing and supporting documents provided by the respective parties and the oral findings of the Court.

DONE IN OPEN COURT THIS 23RD day of ~~October~~ November, 2015.

for The Honorable Judge John Erlick

Presented by:

Jennifer Beard WSBA 19753
Attorney for Respondent

Approved for entry by:

Benjamin Carr WSBA 40778
Attorney for the State

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the respondent, Washington Appellate Project at wapofficemail@washapp.org, containing a copy of the Brief of Appellant, in STATE V. E. B., DOB: 3/3/2000, Cause No. 74233-7-I, in the Court of Appeals, Division I, 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.

C Brame
Name

3/1/16
Date 3/1/16

Done in Seattle, Washington

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

STATE OF WASHINGTON,	)	
	)	
Appellant,	)	
	)	NO. 74233-7-I
v.	)	
	)	
E.B.,	)	
	)	
Juvenile Respondent.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF JUNE, 2016.

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