

66021-7

66021-7

COA NO. 66021-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

K.K.,

Appellant.

REC'D  
JAN 18 2011  
King County Prosecutor  
Appellate Unit

COURT OF APPEALS  
STATE OF WASHINGTON  
JAN 18 2011

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

The Honorable Mary I. Yu, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports appellant's conviction for second degree robbery.

2. The court erred in entering finding of fact 11 and conclusions of law II (a), (b), (c), (d) and (e) in support of conviction. CP 111-13.<sup>1</sup>

3. The court erred in imposing a manifest injustice disposition.

4. The court erred in entering findings of fact 6, 8 and 9 and conclusions of law 1, 2 and 3 in support of the manifest injustice disposition.<sup>2</sup> CP 96-97.

Issues Pertaining To Assignments Of Error

1. Must appellant's robbery conviction under an accomplice liability theory be reversed because substantial evidence does not establish appellant knew another was going to commit robbery?

2. Must the manifest injustice disposition be reversed because the court (1) failed to find proper mitigating factors and (2) relied on improper aggravating factors?

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<sup>1</sup> The court's "Trial Findings of Fact and Conclusions of Law" are attached as appendix A.

<sup>2</sup> The court's "Findings of Fact and Conclusions of Law For Exceptional Sentence" are attached as Appendix B.

B. STATEMENT OF THE CASE

1. Procedural History

K.K. was charged and convicted in juvenile court of second degree robbery. CP 1; 112-13. The court imposed a manifest injustice disposition upward. CP 95-97. K.K. appeals the underlying adjudication of guilt and the disposition. CP 86-94.

2. Trial

On the afternoon of January 22, 2010, 17-year-old S.S. entered the Garfield Teen Life Center to get his photograph taken for his identification card. CP 109 (FF 1); 1RP<sup>3</sup> 37, 44-45. 16-year-old former classmate K.K. approached S.S. at the front desk and asked if S.S. remembered him. 1RP 42-43; 2RP 36-37, 209; CP 96 (FF 1). S.S. said yes, "from Madrona." 2RP 209. K.K. asked S.S. for five dollars in a normal tone of voice. CP 109 (FF 2); 1RP 46. S.S. replied he did not have five dollars. CP 109 (FF 2); 1RP 47. K.K. tried to reach into S.S.'s pant pocket. CP 109 (FF 2); 1RP 47-48, 52. S.S. pulled away. CP 109 (FF 2); 1RP 48. S.S. believed K.K. was joking. CP 109 (FF 2); 1RP 47-48; 2RP 41, 89. They were both laughing. CP 109 (FF 2); 2RP 38, 42-43.

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<sup>3</sup> The verbatim report of proceedings is referenced as follows: 1RP - 8/11/10; 2RP - 8/12/10; 3RP 8/16/10; 4RP - 8/27/10; 5RP - 10/1/10.

A video of the encounter inside the teen center appears to show K.K. talking with a second unidentified male (Individual 2) in a black hoodie at the front desk, a few feet from S.S. CP 109 (FF 3); Ex. 1. S.S. and Individual 2 whispered to one another. CP 109 (FF 3); 1RP 52-53. S.S. did not hear what was said. CP 109 (FF 3); 1RP 52.

K.K. then approached S.S. again and tried to reach into his pocket. CP 109 (FF 4); 1RP 54; Ex. 1. S.S. moved away. CP 109 (FF 4); 1RP 54. K.K. followed S.S. around the lobby until he stood within a few feet of S.S. near the front desk. CP 109 (FF 4); Ex. 1.

Another male in a white shirt, later identified as B.J.C., entered the teen center lobby and approached K.K. and S.S. CP 109-10 (FF 5); 2RP 44, 210. B.J.C. stood next to K.K. and bent forward to look at S.S.'s right pant pocket. CP 110 (FF 5); Ex. 1. As this occurred, Individual 2 walked toward the front exit, then ran back toward S.S. and grabbed S.S.'s pants pocket. CP 110 (FF 6); Ex. 1. Individual 2 walked away from S.S. for a few seconds, then returned and again grabbed S.S.'s left pocket. CP 110 (FF 6); 1RP 54; Ex. 1. B.J.C. also approached S.S. and grabbed S.S.'s right pocket, saying something like "it looks like he has an iPod in his pocket." CP 110 (FF 7); 1RP 54. At the same time, K.K. grabbed S.S.'s left pocket. CP 110 (FF 7). S.S. realized K.K. was not joking. CP 110 (FF 7); 1RP 57; 2RP 46, 74.

Teen Life Center worker Buck Buchanan, who was at the front desk during the sequence of events described above, told S.S. that the camera was inoperable and he would need to have his photo taken some other time. CP 110 (FF 8); 1RP 55; Ex. 1. Buchanan asked the other males to leave because they were "messaging" with S.S. CP 110 (FF 8); 2RP 209-11. Buchanan told S.S. to wait in the center for a few minutes because he was afraid B.J.C. and Individual 2 would "mess" with S.S. once he was outside. CP 110 (FF 8); 2RP 209, 211; 3RP 17, 27. Buchanan thought the males were just playing around. 3RP 13. Buchanan testified that S.S. never seemed frightened of K.K. 3RP 13. According to Buchanan, kids in the center asked other kids for money all the time. 3RP 13-14. Buchanan also testified he spoke with K.K. while B.J.C. and another individual were playing around with S.S. 3RP 15-16. Buchanan did not hear K.K. ask anyone to check S.S.'s pockets or tell anyone to get S.S. or his money. 3RP 16-17.

S.S. told Buchanan he was okay. CP 110 (FF 9); 2RP 209. B.J.C., K.K. and S.S. walked out the door. CP 110 (FF 9); Ex. 1; 2RP 54. S.S. did not hear K.K. tell anyone to follow him outside. 2RP 54, 66. Individual 2 stayed inside the teen center lobby, talking to a girl. Ex. 1.

Seconds after leaving the community center, K.K. approached S.S. and said "give me five dollars." CP 110 (FF 10); 1RP 55; 2RP 74. Two or three seconds later, a group of 8 to 10 males surrounded S.S., all of them

standing within two feet of S.S. CP 110-11 (FF 10); 1RP 55, 60; 2RP 76. There were frequently groups of kids outside the entrance to the teen center. 3RP 23. K.K. was closer, standing one foot away from S.S. CP 111 (FF 10); 1RP 61.

S.S. testified B.J.C. and "the person in the black sweatshirt," who the court identified as Individual 2, were in this group. CP 109 (FF 3), CP 111 (FF 11); 1RP 55, 59, 61. According to S.S., "When I walk outside I see [K.K.] and the person with the black sweatshirt [Individual 2] and the person with the white T on." 1RP 58. But the videotape evidence shows B.J.C., K.K. and S.S. walked out the door at the 3:23 mark, whereas the person in the black sweatshirt identified by the court as Individual 2 did not leave the center until the 4:10 mark. Ex. 1.

As the males surrounded S.S., one of them reached into S.S.'s pants pocket and took his wallet or MP3 player. CP 111 (FF 11); 1RP 55, 61. As S.S. turned to see who took his property, another male punched him in the face, causing his lip to bleed and bruise. CP 111 (FF 11); 1RP 55. S.S. did not know who hit him. 2RP 58-59. A third male who was part of the group reached into S.S.'s jacket pocket and took his MP3 player or wallet. CP 111 (FF 11); 1RP 55. S.S. did not know the two individuals who took the wallet and MP3 player. 1RP 62-63. S.S. did not know if those who took his

property went back inside the community center. 2RP 58-59, 63. Most of the kids ran off. 2RP 61-62.

K.K. did not take S.S.'s wallet or MP3 player. CP 111 (FF 11); 2RP 58. K.K. did not strike S.S. on the lip. CP 111 (FF 11); 2RP 58. S.S. did not overhear K.K. talking to any of the other individuals during the robbery. CP 111 (FF 11); 1RP 70; 2RP 58. S.S. did not hear K.K. tell anyone to take his wallet or MP3 player. 2RP 66. S.S. did not hear K.K. tell anyone to hit S.S. 2RP 66.

The unknown male who took S.S.'s wallet or MP3 player threatened to throw it on the roof of the teen center. CP 111 (FF 11); 2RP 57. K.K. walked back into the teen center at the 4:15 mark with a smile on his face, followed by B.J.C., Individual 2, and another male. CP 111 (FF 12, 13); 1RP 62, 66-67; 2RP 91; Ex. 1. They appeared to briefly converse with one another at the front desk. 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 K.K. took his property and was hiding it beneath his baseball cap, so S.S. reached for his cap, tipping the brim. CP 111 (FF 14); 1RP 67; 2RP 64. K.K. took his hat off his head, showing no property was hidden underneath. CP 111 (FF 14); 2RP 64.

John Frazier, another worker at the teen center, overheard the commotion and intervened. CP 112 (FF 15); 1RP 68; 2RP 185. He told

everyone to leave. CP 112 (FF 15); 1RP 68, 73. S.S. told Frazier that they could not leave because they just took his wallet. CP 112 (FF 15); 1RP 68. Frazier told S.S. that the only thing he could do is call the police. CP 112 (FF 15); 1RP 68; 2RP 186. S.S. called 911 from the front desk. CP 112 (FF 16); 1RP 69, 73. K.K. and the three other males left the teen center before police arrived. CP 112 (FF 16); 2RP 213.

Later that day, Buchanan received a phone call from a male who said S.S.'s wallet was on top of the roof. CP 112 (FF 17); 3RP 7-8, 21. This male was not K.K. CP 112 (FF 17); 3RP 22. The wallet was subsequently recovered and returned to S.S. CP 112 (FF 17); 1RP 78. The court concluded K.K. was guilty as an accomplice to second degree robbery. CP 112 (CL II (a)).

### 3. Disposition

Juvenile Probation Counselor (JPC) Gabrielle Pagano recommended a manifest injustice disposition of 27-36 weeks confinement followed by 12 months probation. Report at 12.<sup>4</sup> The State recommended a manifest disposition upward of 52-65 weeks detention. CP 116. Defense counsel argued for a manifest injustice downward in the form of 15-19 weeks confinement and 12 months of community supervision. CP 17, 30; 4RP 45.

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<sup>4</sup> JPC Pagano's written "Predisposition Diagnostic Report" has been submitted to the Court of Appeals as part of the record on appeal.

The court imposed a manifest injustice disposition of 27-36 weeks confinement followed by 12 months of supervision. CP 96-97.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO CONVICT K.K. AS AN ACCOMPLICE TO SECOND DEGREE ROBBERY.

In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The record lacks substantial evidence establishing K.K. knew someone was going to take S.S.'s property by force. Reversal of the conviction for second degree robbery is required due to insufficient evidence.

Due process under the Fourteenth Amendment of the United States Constitution requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is insufficient to support a conviction unless, viewed in the light most favorable to the State, a rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992).

To sustain conviction following a bench trial, this Court must determine whether (1) the evidence supports the findings of fact; (2) the

findings of fact support the conclusions of law; and (3) the conclusions of law support the judgment. State v. Enlow, 143 Wn. App. 463, 467, 178 P.3d 366 (2008). The issue here is whether the findings of fact for which there is substantial evidence support the conclusion of law that K.K. acted as an accomplice to robbery.

A person commits the crime of 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." RCW 9A.56.190. The intent to commit theft of property is a non-statutory element of robbery. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991).

A person is guilty of a crime as an accomplice if, "[w]ith 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)(a). "The State must show that the defendant aided in the planning or commission of the crime and had knowledge of the crime." State v. Trout, 125 Wn. App. 403, 410, 105

P.3d 69 (2005). "Mere knowledge or physical presence at the scene of a crime neither constitutes a crime nor will it support a charge of aiding and abetting a crime." State v. Robinson, 73 Wn. App. 851, 855, 872 P.2d 43 (1994) (quoting In re Welfare of Wilson, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979) (Wilson's presence, knowledge of the theft, and personal acquaintance with active participants was insufficient to support a finding of abetting crime of reckless endangerment)).

The prosecutor argued K.K. was present and ready to assist because K.K. was a step closer to S.S. than the rest of the kids surrounding S.S. 3RP 61. The prosecutor further argued the evidence showed K.K. was the "ringleader" because he was the first to confront S.S., he "pocket checked" S.S. more than others, and he was the first to walk into the teen center after the robbery. 3RP 62.

The defense argued the evidence was insufficient to show K.K. had knowledge that the crime of robbery would occur. 3RP 66. In rebuttal, the prosecutor argued that in order to believe K.K. lacked knowledge, one would have to believe K.K. went outside and demanded money "and then doesn't anticipate what else happens." 3RP 84.

In concluding K.K. was guilty as an accomplice to robbery, the court remarked "[t]he 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." 3RP 90. The trial court concluded K.K. was guilty as an accomplice to second degree robbery. CP 112 (CL II (a)). It entered the following conclusions of law:

The Respondent, with knowledge that it would promote or facilitate the commission of the Robbery, initiated contact with [S.S.] and orchestrated the conduct which ultimately led to the robbery of [S.S.].

Specifically, the Respondent, together with others, did aid in unlawfully taking a wallet and MP3 player from [S.S.]'s person. Thus, Respondent acted as an accomplice to robbery.

The Respondent, together with others, intended to deprive [S.S.] of his wallet and MP3 player. Thus, Respondent acted as an accomplice to robbery.

The Respondent, together with others, aided in the taking of the MP3 player or wallet which was against [S.S.]'s will by the use of force, specifically a punch to [S.S.'s] lip. Thus, the Respondent acted as an accomplice to robbery.

CP 113 (CL II (b) - (e)).

Accomplice liability attaches only when the accomplice acts with knowledge of the specific crime that is eventually charged, rather than with knowledge of a different crime or generalized knowledge of criminal activity. State v. Roberts, 142 Wn.2d 471, 512-13, 14 P.3d 713 (2000). The Supreme Court has rejected the "in for a dime, in for a dollar" theory of complicity wherein accomplice liability strictly attaches for any and all crimes that follow. Roberts, 142 Wn.2d at 512-13; In re Pers. Restraint of Domingo, 155 Wn.2d 356, 365-66, 119 P.3d 816 (2005). The culpability of an

accomplice does not extend beyond the charged crime of which the accomplice actually has knowledge. Roberts, 142 Wn.2d at 510-11; compare State v. Evans, 154 Wn.2d 438, 452-53, 114 P.3d 627 (2005) (contrary to prosecutor's argument and erroneous accomplice liability instruction, jury could not convict defendant of robbery based on nothing more than intent to commit theft) with State v. Davis, 101 Wn.2d 654, 658-59, 682 P.2d 883 (1984) (defendant validly convicted as accomplice to first degree robbery even if he did not know the principal was armed because the State proved he had general knowledge that he was aiding in the crime of robbery).

The court concluded K.K. acted as an accomplice to robbery because he, together with others, "did aid in unlawfully taking a wallet and MP3 player from [S.S.]'s person" and "intended to deprive [S.S.] of his wallet and MP3 player." CP 113 (CL II (c) and (d)). Taking a wallet and MP3 player from a person does not, by itself, constitute robbery. Robbery requires use of force. RCW 9A.56.190. Assuming the evidence establishes these two conclusions of law, they do not by themselves establish K.K. was an accomplice to robbery.

The court also concluded K.K. was an accomplice to robbery because he, "together with others, aided in the taking of the MP3 player or wallet which was against [S.S.]'s will by the use of force, specifically a

punch to [S.S.'s] lip." CP 113 (CL II (e)). The punch satisfies a taking by use of force as required by the robbery statute. There is no doubt a robbery occurred. But that is a different question than whether sufficient evidence shows K.K. was an accomplice to that robbery.

"[T]he culpability of an accomplice cannot extend beyond the crimes of which the accomplice actually has knowledge." Trout, 125 Wn. App. at 410. K.K. did not punch S.S. CP 111 (FF 11). He personally did not use force to take S.S.'s property. For K.K. to be guilty as an accomplice to robbery based on another's action of punching and taking the wallet/MP3 player, the State needed to prove K.K. knew another person was going to commit a robbery, i.e. that someone was going to use force to take S.S.'s property. This is because accomplice liability attaches only when the accomplice acts with knowledge of the specific crime that is eventually charged, rather than with knowledge of a different crime or generalized knowledge of criminal activity. Roberts, 142 Wn.2d at 512-13.

To withstand constitutional scrutiny, the verdict against K.K. must be supported by substantial evidence. State v. Prestegard, 108 Wn. App. 14, 22-23, 28 P.3d 817 (2001). Substantial evidence exists where the record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation. State v. Halstien, 122 Wn.2d 109, 129, 857 P.2d 270 (1993). "In finding substantial evidence, we

cannot rely upon guess, speculation, or conjecture." Prestegard, 108 Wn. App. at 23.

Viewed in the light most favorable to the State, substantial evidence does not establish K.K. knowingly aided a robbery. Inside the teen center, evidence shows K.K. attempted to take something from S.S.'s pocket. CP 109 (FF 2,4), CP 110 (FF 7); Ex. 1. Individual 2 and B.J.C. did the same. Ex. 1; CP 110 (FF 6, 7). But the court did not find any of them used force or violence in an attempt to take S.S.'s property. At that point, K.K.'s conduct amount to no more than attempted theft at best. "While an accomplice may be convicted of a higher degree of the general crime he sought to facilitate, he may not be convicted of a separate crime absent specific knowledge of that general crime." State v. King, 113 Wn. App. 243, 288, 54 P.3d 1218 (2002).

The court found K.K. whispered to Individual 2 while inside the teen center. No one knows what was said. There is no evidence that K.K., in whispering to Individual 2, communicated a plan or issued direction to take S.S.'s property by force. Speculation is not substantial evidence. State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

In this regard, K.K. challenges the court's finding that Individual 2 was "among the group of males that had surrounded [S.S.]." CP 111 (FF 11). K.K. approached S.S. and demanded five dollars "seconds" after

exiting the center. CP 110 (FF 10). A group of males "concurrently" surrounded S.S. CP 110-11 (FF 10). S.S. testified "When I walk outside I see [K.K.] and the person with the black sweatshirt [Individual 2] and the person with the white T on." 1RP 58. S.S. testified the group of 8 to 10 males surrounded him the second he walked out the door. 2RP 56. But Individual 2, identified by the court as wearing a black hoodie and dark blue torn jeans, did not leave the teen center until 47 seconds after K.K., B.J.C. and S.S. left the center. Ex. 1. That is what the incontrovertible videotape evidence shows. Ex. 1 (see time mark 3:23 through 4:10). The timeline pegged to the videotape does not allow for the physical possibility that Individual 2 was among the group of males that surrounded S.S. immediately after leaving the teen center. The court's finding regarding Individual 2 being part of the group that immediately surrounded S.S. outside the teen center is therefore unsupported by substantial evidence.

In any event, the record lacks substantial evidence showing K.K. knew a person in the group surrounding S.S. was going to use force to take S.S.'s wallet/MP3 player. S.S. did not know who hit him. 2RP 58. The court found K.K. did not himself hit S.S. or take his property. CP 111 (FF 11). The court did not find Individual 2 or B.J.C. hit S.S. or took his property. See State v. Cass, 62 Wn. App. 793, 795, 816 P.2d 57 (1991)

(when there is an absence of a finding on a factual issue, it is presumed that the party with the burden of proof failed to sustain its burden on this issue). K.K. did not talk to anyone while outside with S.S. CP 111 (FF 11); 1RP 70; 2RP 58. He did not direct anyone to punch S.S. 2RP 66.

This case is a far cry from others where sufficient evidence existed to support accomplice liability for robbery. Cf. Trout, 125 Wn. App. at 411-13 (evidence sufficient to convict as accomplice to first degree robbery where defendant sat in on planning session to recover property by force or threat of force, drove to victims' location knowing his cohorts were armed with a deadly weapons, and was in charge of the robbery carried out in his presence).

The court nevertheless concluded K.K., "with knowledge that it would promote or facilitate the commission of the Robbery, initiated contact with [S.S.] and orchestrated the conduct which ultimately led to the robbery of [S.S.]. CP 113 (CL II (b)). Substantial evidence does not show K.K. orchestrated a robbery.

The trial court held K.K. accountable for orchestrating conduct that "ultimately" led to the robbery. See 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."). This approach to the legal question of accomplice liability

is consistent with the prosecutor's argument that, in order to believe K.K. lacked knowledge of the crime of robbery, one would have to believe K.K. went outside and demanded money "and then doesn't anticipate what else happens." 3RP 84.

It is not enough, however, that K.K.'s conduct ultimately led to the robbery, even if he should have anticipated that such conduct could lead to a robbery. "[F]oreseeability is not sufficient to establish accomplice liability." King, 113 Wn. App. at 288.

In King, for example, this Court held there was insufficient evidence to convict the defendant Israel of kidnapping, even though it was foreseeable. Id. Although the evidence was sufficient to show Israel was involved in planning the robbery, none of the evidence indicated kidnapping was a part of that plan, and the testimony of the victims indicated that the decision to kidnap was a spontaneous one made at the scene by Israel's cohorts. Id. The evidence was insufficient to convict Israel of kidnapping absent any evidence that Israel knew another planned to commit the crime of kidnapping. Id.

The question comes down to whether K.K. had knowledge that he was aiding in the specific crime of robbery. Id. Here, an unknown assailant spontaneously punched S.S. and took his property. At that point, the crime of robbery was complete. Robinson, 73 Wn. App. at 857

(robbery is complete when person uses force to take personal property unlawfully from a person or in his presence against his will but used no additional force to retain the property or to effect an escape). K.K. could not be guilty as an accomplice without knowledge that he was aiding the crime of robbery before it was complete. Id. at 857-58 (passenger in car jumped out, snatched a purse from a pedestrian, and ran back to the car, whereupon Robinson drove the purse snatcher away from the scene; insufficient evidence to show Robinson was accomplice to robbery because the purse snatcher had completed the act of robbery by the time he reentered Robinson's car).

Necessary facts supporting verdicts cannot rest upon guess, speculation, or conjecture. Colquitt, 133 Wn. App. at 796. The evidence against K.K. is too insubstantial to show he knowingly aided a robbery. K.K. may have conducted himself in a manner that ultimately led to a foreseeable robbery, but the evidence is insufficient to convict him as an accomplice to robbery.

K.K.'s robbery conviction must therefore be reversed and the charge dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853-54, 72 P.3d 748 (2003) (remedy for conviction based on insufficient evidence is dismissal with prejudice). The prohibition against double

jeopardy forbids retrial after conviction is reversed for insufficient evidence. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

2. THE COURT'S FAILURE TO FIND MITIGATING FACTORS AND RELIANCE ON IMPROPER AGGRAVATORS REQUIRES REVERSAL OF THE MANIFEST INJUSTICE DISPOSITION.

The manifest injustice disposition must be reversed because the court wrongly failed to find mitigating factors, which influenced its decision to impose the disposition. Moreover, the court's reasons do not clearly and convincingly support the conclusion that a manifest injustice disposition was needed.

a. The Record Must Show Beyond A Reasonable Doubt That A Manifest Injustice Disposition Is Warranted.

A court may impose a disposition outside the standard range only if it determines a disposition within the standard range would "effectuate a manifest injustice." RCW 13.40.160(2). "Manifest injustice" means a disposition that would impose a serious and clear danger to society. RCW 13.40.020(17).

The juvenile court's findings of fact must be supported by substantial evidence. State v. Minor, 133 Wn. App. 636, 646, 137 P.3d 872 (2006). Evidence is substantial only if it is "sufficient to persuade a

fair-minded, rational person of the finding's truth." State v. Meade, 129 Wn. App. 918, 922, 120 P.3d 975 (2005).

To uphold a disposition outside the standard range, however, the appellate court must do more than merely determine whether substantial evidence supports the trial court's findings. State v. Rhodes, 92 Wn.2d 755, 760, 600 P.2d 1264 (1979), overruled on other grounds, State v. Baldwin, 150 Wn.2d 448, 461, 78 P.3d 1005 (2003). Rather, the reviewing court must determine whether (1) the record supports the trial court's reasons; (2) those reasons clearly and convincingly support the conclusion that a disposition within the standard range would constitute a manifest injustice; and (3) the disposition is neither clearly excessive nor clearly too lenient. Rhodes, 92 Wn.2d at 760; RCW 13.40.230(2). The "clear and convincing" standard is equivalent to "beyond a reasonable doubt." Rhodes, 92 Wn.2d at 760.

The court's reasons for imposing the disposition must be valid as a matter of law and must be clear in the record. RCW 13.40.230(2); State v. K.E., 97 Wn. App. 273, 279, 982 P.2d 1212 (1999); State v. S.S., 67 Wn. App. 800, 814-15, 840 P.2d 891 (1992) (improper reasons cannot be used to support exceptional sentence). Whether a court's reasons justify a departure from the standard range is a question of law." K. E., 97 Wn. App. at 279. Whether substantial evidence supports a finding is also a

question of law. Hutton, 7 Wn. App. at 728. Questions of law are reviewed de novo. State v. Campbell, 125 Wn.2d 797, 800, 888 P.2d 1185 (1995).

b. K.K.'s Lack Of Recent Criminal History Is A Mitigating Factor.

Before entering a dispositional order, the court is required to consider whether statutorily enumerated mitigating factors exist. RCW 13.40.150(3)(h); State v. J.V., 132 Wn. App. 533, 540-41, 132 P.3d 1116 (2006). A statutory mitigating factor exists when "[t]here has been at least one year between the respondent's current offense and any prior criminal offense." RCW 13.40.150(3)(h)(v). The defense and JPC Pagano argued this mitigating factor was present. CP 20-21; Report at 15; 4RP 40. The court erred in failing to find it. CP 96 (FF A.6).

The robbery offense for which K.K. was adjudicated guilty occurred on January 22, 2010. CP 96 (FF 2); CP 109 (FF A.1). K.K. had been adjudicated guilty of one prior offense (first degree manslaughter). CP 96 (FF 4). The manslaughter offense took place on October 25, 2008, more than a year before the current offense. Report at 3. By the plain terms of the statute, "[t]here has been at least one year between the respondent's current offense and any prior criminal offense." RCW 13.40.150(3)(h)(v).

Questions of statutory interpretation are reviewed de novo. State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003). The goal is to carry out legislative intent. State v. Mendoza, 165 Wn.2d 913, 921, 205 P.3d 113 (2009). When the meaning of a statute is clear on its face, the appellate court assumes the legislature means exactly what it says, giving criminal statutes literal and strict interpretation. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). "[C]ourts are to give effect to that plain meaning as an expression of legislative intent." State v. Thompson, 151 Wn.2d 793, 801, 92 P.3d 228 (2004).

There is no basis for not finding the statutory mitigating factor here. That K.K. committed the current offense six months after being released from confinement for his prior offense does not change the controlling statutory language under RCW 13.40.150(3)(h)(v). CP 96 (FF 7); see S.S., 67 Wn. App. at 813 ("Appellant's most recent offense occurred more than a year prior to his current offenses. That this is so constituted a mitigating rather than an aggravating factor.").

The court also noted K.K. had three program modifications during the period he was held in the juvenile detention facility on the current robbery offense, "two of which stemmed from assaults on other inmates." CP 96 (FF A.8). That finding does not defeat the existence of the mitigating factor under RCW 13.40.150(3)(h)(v).

The unambiguous language of RCW 13.40.150(3)(h)(v) shows the relevant time line for the statutory mitigating is the period *between* the current offense and any prior criminal offense. Whether an offense allegedly happened *after* the current offense is irrelevant in determining the existence of this mitigating factor. If the Legislature had meant to include alleged offenses that occurred after commission of the current offense in determining the presence of this mitigating factor, it would have said so in the statute. State v. Salavea, 151 Wn.2d 133, 144, 86 P.3d 125 (2004). Courts "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." Delgado, 148 Wn.2d at 727.

Moreover, those two "assaults" do not qualify as criminal offenses under RCW 13.40.150(3)(h)(v) even if they had occurred before the current offense. K.K. has never been charged with a criminal offense in connection with those events, much less convicted of committing assault. Further, the record does not show K.K. received any due process whatsoever within the detention system before penalty in the form of program modification was imposed. Report at 4-5; 4RP 25. JPC Pagano simply reported her understanding of what happened based on hearsay reports. Id. Our criminal justice system presumes a person innocent until proven guilty beyond a reasonable doubt. This fundamental due process right applies to all, including juveniles. U.S. Const. amend. XIV; Winship,

397 U.S. at 364. "The presumption of innocence is the bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007).

A juvenile court's reliance on unproven crimes violates the presumption of innocence. State v. Melton, 63 Wn. App. 63, 72, 817 P.2d 413 (1992). Although the court may rely on unproven allegations when the respondent admits to the criminal conduct, there has been no such admission here. Cf. State v. T.C., 99 Wn. App. 701, 707, 995 P.2d 98 (2000) (juvenile court can consider admitted criminal conduct to determine juvenile's risk of reoffending). Defense counsel described the incidents as "fights," which could encompass non-criminal behavior, such as acting in self-defense or in a way that does not meet the legal definition of assault. 4RP 41. "Assault" is a legal term of art with specific requirements that need to be established before a person is guilty of a criminal offense. See WPIC 35.50 (setting forth common law definitions of term "assault"); RCW 9A.36.011 (first degree assault); RCW 9A.36.021 (second degree assault); RCW 9A.36.031 (third degree assault); RCW 9A.36.041 (fourth degree assault). K.K. has not admitted committing any "assault" while in detention. Melton controls. The court erred in failing to find the statutory mitigating factor of lack of recent criminal history. CP 96 (FF A.6).

c. Lack Of Serious Bodily Injury Is A Mitigating Factor.

The court did *not* find the aggravating factor that "[i]n the commission of the offense, or in flight therefrom, the respondent inflicted or attempted to inflict serious bodily injury to another." RCW 13.40.150(3)(i)(i). A statutory mitigating factor exists 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 defense and JPC Pagano argued this mitigating factor was present. CP 20; Report at 15. The court erred in failing to find it. CP 96 (FF A.6).

In its JuCr 7.11(d) findings, the court found someone other than K.K. "punched [S.S.] in the face, which caused his lip to bruise and bleed." CP 111 (FF 11). Responding officer Heather Conway saw "a small amount on blood on his lip." 2RP 15. S.S. indicated he did not need medical treatment. 2RP 15. The officer considered the injury to his lip to be fairly minor and did not request medical attention. 2RP 26. This case stands in contrast from those where a juvenile's conduct inflicted or threatened infliction of serious bodily injury. See, e.g., State v. S.H., 75 Wn. App. 1, 7, 13, 877 P.2d 205 (1994) (no mitigating factor where eight year old rape victim sustained vaginal injury and juvenile could easily have suffocated victim by placing his hand over her mouth).

The phrase "serious bodily injury" is not defined in the Juvenile Justice Act. Other statutes relating to the same subject matter of "serious bodily injury" supply a consistent definition of the term. For undefined terms, courts may look to other statutes dealing with same subject matter. Slaughter v. Snohomish County Fire Protection Dist. No. 20, 50 Wn. App. 733, 738, 750 P.2d 656 (1988).

RCW 9A.04.110(4)(a) defines "bodily injury," "physical injury," or "bodily harm" as "physical pain or injury, illness, or an impairment of physical condition." RCW 79A.60.060(1), which involves assault by watercraft, defines "serious bodily injury" as "bodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body." Former RCW 46.61.522(2) (Laws of 1996, ch. 199 § 8), the vehicular assault statute, defined "serious bodily injury" in the same way.<sup>5</sup>

It is appropriate to apply the statutory definitions of "serious bodily injury" under former RCW 46.61.522(2) and RCW 79A.60.060(1) to

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<sup>5</sup> Laws of 2001 ch. 300 § 1 changed the element of "serious bodily injury" to that of "substantial bodily harm" as defined in RCW 9A.04.110. "Substantial bodily harm" means "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b). "When the legislature amends a statute and makes a material change in the wording, there is a presumption the legislature meant to change the law." State v. Roy, 126 Wn. App. 124, 128, 107 P.3d 750 (2005).

RCW 13.40.150(3)(h)(i) under established rules of statutory construction. "The purpose of reading statutory provisions in pari materia with related provisions is to determine the legislative intent underlying the entire statutory scheme and read the provisions 'as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.'" State v. Williams, 94 Wn.2d 531, 547, 617 P.2d 1012 (1980) (quoting State v. Wright, 84 Wn.2d 645, 650, 529 P.2d 453 (1974)). Statutes should be read as complementary whenever possible. In re Farina, 94 Wn. App. 441, 458, 972 P.2d 531 (1999) (citing In re Estate of Kerr, 134 Wn.2d 328, 337, 949 P.2d 810 (1998)); cf. State v. Anderson, 94 Wn. App. 151, 162, 971 P.2d 585 (1999) rev. on other grounds, 141 Wn.2d 357, 5 P.3d 1247 (2000) (while the term "firearm" need not necessarily be defined in exactly the same way for purposes of different statutes, consistent interpretation is desirable).

Minor bruising and bleeding to a person's lip does not qualify as "serious bodily injury." This level of injury merely encompasses simple "bodily injury" as that term is defined under RCW 9A.04.110(4)(a). See State v. Wall, 46 Wn. App. 218, 221, 729 P.2d 656 (1986) ("Court interpretations of adult criminal statutes may be applied in juvenile proceedings, in the absence of language to the contrary, provided the

purpose of the adult criminal statute is consistent with the purposes of the Juvenile Justice Act of 1977.").

The "serious bodily injury" standard requires a much more severe level of injury. See State v. Cardenas, 129 Wn.2d 1, 4, 6, 914 P.2d 57 (1996) (compound fracture of the left leg, an open, deep wound to her left ankle, multiple breaks in the right leg, three broken bones in her right foot, a fractured pelvis, and a concussion qualified as serious bodily injury under former RCW 46.61.522(2)); State v. Nordby, 106 Wn.2d 514, 515, 519, 723 P.2d 1117 (1986) (two broken legs, a broken arm, and a coma that lasted several days fit squarely within definition of "serious bodily injury" under former RCW 46.61.522(2)). The court erred in failing to find the statutory mitigating factor of no serious bodily injury under RCW 13.40.150(3)(h)(i). CP 96 (FF A.6).

d. The Court Erred In Relying On Unproven Offenses To Support The Disposition.

The court found K.K. had three program modifications during the period he was held in the juvenile detention facility on the current robbery offense, "two of which stemmed from assaults on other inmates." CP 96 (FF A.8). The court erred as a matter of law in relying on these two assaults as facts supporting a manifest injustice disposition. As argued in section C. 2. b. supra, a juvenile court's reliance on unproven allegations in support of a

manifest injustice disposition violates the presumption of innocence. Melton, 63 Wn. App. at 72. "[J]uvenile disposition proceedings may not violate fundamental notions of due process based on a 'misguided belief that such a denial of constitutional protection is for (the juvenile's) own good.'" S.S., 67 Wn. App. at 807 (quoting State v. Escoto, 108 Wn.2d 1, 14, 735 P.2d 1310 (1987) (Dore, J., dissenting)).

A statutory aggravating factor exists if the "respondent has a recent criminal history." RCW 13.40.150(3)(i)(iv). The trial court did not identify "recent criminal history" as an aggravating factor. The State on appeal may nonetheless argue such an aggravator is appropriate. Such argument must fail. The alleged "assaults" cannot be taken into account because they are unproven and unadmitted. Melton, 63 Wn. App. at 72; T.C., 99 Wn. App. at 707.

Furthermore, the manslaughter offense does not establish "recent criminal history" under RCW 13.40.150(3)(i)(iv). As noted in section C. 2. b., supra, that offense took place over one year before the current robbery offense took place. Recent criminal history does not include a single offense committed 50 weeks earlier. J.V., 132 Wn. App. at 544-45. A "far shorter" time frame is required to satisfy the "recent" time frame requirement of RCW 13.40.150(3)(i)(iv). Id.; see also S.S., 67 Wn. App. at 813 (occurrence of a most recent offense more than one year prior to the

current offense constituted a mitigating factor, not an aggravating factor of "recent" criminal history).

e. Treatment For Drug And Alcohol Abuse Is Not A Valid Aggravating Factor.

The trial court remarked "There was no evidence, of course, that any drugs or alcohol were utilized in this incident." 4RP 26. The court nevertheless found "The respondent has drug and alcohol issues as outlined in JPC Pagano's report." CP 96 (FF A.9).

The need for treatment can qualify as an aggravating factor supporting a manifest injustice disposition. S.H., 75 Wn. App. at 12. But the record must establish such treatment is needed. Substantial evidence in this case establishes no such thing. Rather, JPC Pagano noted K.K. used marijuana and wanted him evaluated and treated to determine the extent of any problem: "[K.K.] has never completed a D&A evaluation to determine whether or not he is dependent and if he should participate in any treatment." Report at 8-9. Pagano explained to the trial court that "we just want to make sure that if there's any treatment that needs to happen that we provide that treatment" and that an evaluation should be conducted to determine if treatment is needed. 4RP 26-27. The trial court remarked "You will follow through with the drug and alcohol evaluation and treatment *if it is necessary*, completing or finishing it." 4RP 61-62 (emphasis added).

The purpose of an evaluation is to determine whether treatment is needed. The desire for such evaluation does not establish the existence of the very thing it is meant confirm or dispel.

Manifest injustice represents a demanding standard. Rhodes, 92 Wn.2d at 760. Requiring further assessment to establish the possible existence of a substance abuse problem in need of treatment cannot justify a manifest injustice disposition predicated on the need for treatment. That type of reasoning is circular. When an appellate court reviews a finding of manifest injustice, the reasoning of the trial court is held to a stringent standard." State v. Payne, 58 Wn. App. 215, 219, 795 P.2d 134, 805 P.2d 247 (1990).

In re Interest of S.G., 140 Wn. App. 461, 166 P.3d 802 (2007) is instructive. In that parental rights termination case, the State claimed the father needed to complete drug and alcohol rehabilitation in order to determine whether he had a drug or alcohol problem. S.G., 140 Wn. App. at 469. This perspective was "neither reasonable nor supported by law" because "[a] parent cannot be denied his right to parent his child on the off-chance that he may have a problem unknown to the State." Id. The same rationale applies here. A juvenile cannot be denied his due process right to liberty by means of an exceptional sentence because the court wants to confirm the possible existence of a problem in need of treatment

by means of evaluation while in confinement. The court erred in relying on a purported need for drug and alcohol treatment as a basis for imposing a manifest injustice disposition. CP 96 (FF A.9).

f. The Court's Reasons For Imposing A Manifest Injustice Disposition Are Not Otherwise Clear And Convincing.

The court found K.K. committed the current offense six months after release from his prior conviction. CP 96 (FF A.1.). The court did not tie this fact to an aggravating factor or otherwise articulate why this fact constitutes an aggravating factor. 4RP 59. The trial court has a responsibility to express its reasoning on the record. Payne, 58 Wn. App. at 219. Its reasons for imposing the disposition must be clear. K.E., 97 Wn. App. at 279. The existence of an aggravating factor is question of fact, not law. State v. Suleiman, 158 Wn.2d 280, 292, 143 P.3d 795 (2006). This Court cannot fill in the gaps left by the trial court's findings because appellate courts are not fact finders. State v. E.A.J., 116 Wn. App. 777, 785, 67 P.3d 518 (2003).

As noted above, the court also found K.K. had three program modifications during the period he was held in the juvenile detention facility on the current robbery offense, "two of which stemmed from assaults on other inmates." CP 96 (FF A.8). Reliance on the "assaults" to impose a manifest injustice disposition is improper for the reasons set

forth in section C. 2. b. and d., supra. Furthermore, the court did not tie this fact to an aggravating factor or otherwise articulate why this fact constitutes an aggravating factor. 4RP 59. The third modification involved having a pencil in his room, which JPC Pagano rightly described as a "minor infraction." 4RP 25; Report at 4.

In imposing a manifest injustice disposition, the court concluded "[a] detention above the standard range is necessary to protect the public and adequately serve the goal of rehabilitating the respondent and to include a period of supervised probation." CP 96 (CL 1). The court similarly concluded "The term of this manifest injustice is not clearly excessive because of the treatment, rehabilitation, supervision and protection of the public needed in this case." CP 97 (CL 2).

The court's conclusions of law are consistent with the purposes of the Juvenile Justice Act and legislative intent set forth in RCW 13.40.010(2). But whether a sentence is consistent with legislative intent is premised on a proper determination that aggravating factors support the exceptional sentence. For the reasons set forth in this brief, the court erred in failing to find proper mitigating factors and in relying on improper aggravating factors. The court therefore erred in concluding "[t]he reasons for the manifest injustice disposition are supported by clear and convincing evidence." CP 97 (CL 3).

g. The Sentence Must Be Reversed Because There Is A Possibility The Trial Court Would Grant A Different Disposition.

This Court can affirm a manifest injustice finding only "if one or more of the factors supported by the record clearly and convincingly support the disposition and we can determine that the court would have entered the same sentence on the basis of the remaining valid aggravating factors." S.H., 75 Wn. App. at 12. Reversal is required here because aggravating factors relied on by the court are improper for the reasons set forth above.

Even if any aggravating factors retain validity, the court still erred in failing to find mitigating factors as set forth in section C. 2. b. and c., supra. That error is crucial in this case. The court stated it was rejecting defense counsel's sentencing recommendation "because I don't find any mitigating circumstances in this case." 4RP 59.

Even where the appellate court concludes remaining factors demonstrate beyond a reasonable doubt that a manifest injustice disposition is warranted, reversal is still appropriate when there is a possibility the lower court would grant a different disposition. K. E., 97 Wn. App. at 284-85; State v. Bourgeois, 72 Wn. App. 650, 664, 866 P.2d 43 (1994). The record supplies no clear basis for concluding the trial court would have necessarily imposed the same exceptional sentence if one or

more mitigating factors had been properly found or one or more improper aggravating factors had not been relied upon. This Court should remand the case for a redetermination of whether a manifest injustice disposition is still warranted in light of proper mitigating factors and any aggravating factors still retaining legitimacy.

D. CONCLUSION

K.K. respectfully requests that this Court reverse the robbery conviction and dismiss that charge with prejudice. In the event this Court declines to do so, then the manifest injustice disposition should be reversed and the case remanded for resentencing.

DATED this 19<sup>th</sup> day of January, 2011.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



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# APPENDIX A

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CASE NUMBER: 10-8-00930-4 SEA

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY  
JUVENILE DIVISION

STATE OF WASHINGTON,	)	
	)	
	)	Plaintiff,
	)	No. 10-8-00930-4
vs.	)	
	)	TRIAL FINDINGS OF FACT AND
KENNETH D. KELLY,	)	CONCLUSIONS OF LAW
09/12/93	)	
	)	Respondent.
	)	
	)	
	)	

THE ABOVE-ENTITLED CAUSE having come on for finding of fact before the  
Honorable Mary Yu; the State of Washington having been represented by Deputy Prosecuting  
Attorney Angela Gianoli; the respondent appearing in person and having been represented by his  
attorneys, Rick Lichtenstadter and Elizabeth Lopez; the court having heard sworn testimony and  
arguments of counsel, and having received exhibits, now makes and enters the following  
findings of fact and conclusions of law.

FINDINGS OF FACT

I.

The following events took place within King County, Washington:

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1. On January 22, 2010 at approximately 3:00PM, Shabazz Sallier, entered the Garfield Teen Life Center located 428 23<sup>rd</sup> Avenue in Seattle, Washington to get his photograph taken for his Identification Card.
2. Shortly after entering the Teen Life Center, Shabazz was approached by a former classmate who he knew as Kenneth Kelly (hereinafter Respondent). The Respondent walked up to Shabazz, who was standing at the front desk, and asked for \$5.00. Shabazz replied that he did not have \$5.00. Seconds after requesting money, the Respondent grabbed the exterior of Shabazz's pocket. Shabazz pulled away from the Respondent. Shabazz believed initially that the Respondent was joking with him as the two of them were laughing.
3. The Respondent turned around and the video appears to show him talking with a second unidentified male also standing at the front desk, located a few feet to the left of Shabazz. The second male (hereinafter Individual 2) was wearing a black hoodie and dark blue, torn jeans. Shabazz overheard the two males whispering, but was unable to discern what was being said.
4. After communicating with Individual 2 for a few seconds, the Respondent again approached Shabazz and grabbed the exterior of his pocket. In response, Shabazz moved his hip away from the Respondent and began to step backwards in an effort to move away from the Respondent. However, the Respondent, who was face to face with Shabazz, followed Shabazz around the lobby of the Teen Life Center until Shabazz walked to the end of the front desk, which is within close proximity to the solid glass front entrance. The Respondent also remained at the front counter, standing within feet of Shabazz.
5. A third male, later identified as Bobby Joe Credit (hereinafter Credit) and as one of the suspects involved in the Robbery, entered the Teen Life Center lobby and approached the

1 Respondent and Shabazz. The male was wearing blue jeans, a white tank top, and a dark  
2 beanie. He walked up and stood next to the Respondent and just to Shabazz's right. Credit  
3 then bent forward to look at Shabazz's right pant pocket.

4 6. As this was occurring, Individual 2 walked toward the front exit of the Teen Life Center  
5 appearing as if as if he was going to exit then turned and ran back toward Shabazz and  
6 grabbed his pant pocket. Individual 2 walked away from Shabazz for a few seconds, then  
7 again approached him from behind and grabbed his left pocket.

8 7. Credit also approached Shabazz and grabbed his right pocket and stated something to the  
9 effect of "it looks like he has an iPod in his pocket." Simultaneously, the Respondent who  
10 was on the left side of Shabazz, grabbed Shabazz's left pocket. It was at this point that  
11 Shabazz realized the Respondent was not joking.

12 8. Shabazz was informed by Teen Life Center worker, Buck Buchanan, that the camera was  
13 not operable and that he would have to have his photo taken on a different date. Mr.  
14 Buchanan also asked the Respondent and the other males to leave the facility because they  
15 were "messaging" with Shabazz. He further told Shabazz to wait in the community center for  
16 a few minutes because he was afraid that the males would "mess" with Shabazz once he was  
17 outside.

18 9. Shabazz told Mr. Buchanan he was okay and then exited the community center through the  
19 front entrance. He was accompanied by Credit, who walked out the door first, and the  
20 Respondent, who immediately followed Shabazz out of the Community Center.

21 10. Seconds after exiting the Community Center, the Respondent approached Shabazz again  
22 and demanded \$5.00. Concurrently, group of 8-10 males circled Shabazz and surrounded  
23

1 him, all of them standing within two feet of Shabazz. The Respondent was standing closer  
2 than the rest, he was one foot away from Shabazz.

3 11. The Respondent, Credit and Individual 2 were among the group of males that had  
4 surrounded Shabazz. As the males surround Shabazz, one of them reached into Shabazz's  
5 pants pocket and took his wallet. As Shabazz turned to see who had taken his wallet,  
6 another male punched him in the face, which caused his lip to bruise and bleed. A third  
7 male who was part of the group reached into his jacket pocket and took his MP3 player.  
8 The Respondent was not the individual who took Shabazz's wallet or MP3 player, nor did  
9 he strike Shabazz in the lip. The male who took Shabazz's wallet, threatened to throw it on  
10 the roof of the Teen Life Center. Shabazz did not overhear the Respondent talking to any of  
11 the other individuals during the robbery.

12 12. Immediately following the robbery, Shabazz glanced at the Respondent who walked back  
13 into the Teen Life Center with a smile on his face.

14 13. The Respondent was the first to walk back into the lobby of the Teen Life Center. He was  
15 immediately followed by three others: Credit, Individual 2, and another male, wearing a  
16 blue and red baseball cap, jeans and a black coat (hereinafter Individual 4). The four males  
17 reconvened at the front desk and appeared to briefly converse with one another.

18 14. Shabazz re-entered the Teen Life Center and approached the group of males. Shabazz  
19 believed that the Respondent took his property and was hiding it beneath his baseball cap, so  
20 he directed his attention towards the Respondent and reached for his cap tipping the brim.  
21 This caused the Respondent to remove his hat from his head, which showed that there was  
22 no property hidden beneath the cap.

1 15. John Frazier, another worker at the Teen Life Center overheard the commotion and  
2 intervened. He told the Respondent that he and the other males needed to leave the Teen  
3 Life Center. Shabazz explained to Mr. Frazier that the males cannot leave because they just  
4 took his wallet. Mr. Frazier, told Shabazz that the only thing he can do is call the police.

5 16. Shabazz used the phone located at the front desk of the Teen Life Center to call 911. While  
6 on the phone with the police the four males (i.e. Respondent, Individual 2, Credit and  
7 Individual 4) all walked down a back hallway and exited the Teen Life Center prior to the  
8 police arriving.

9 17. A few days after the incident, Buck Buchanan, received a phone call from a male who he  
10 claims to not remember, that stated Shabazz's wallet was on top of the roof. Buck stated that  
11 the male was not the Respondent. Mr. Buchanan recovered Shabazz's wallet from the roof  
12 of the Teen Life Center and gave it to the front desk who returned the property to Shabazz.  
13 And having made those Findings of Fact, the Court also now enters the following:

14 CONCLUSIONS OF LAW

15 I.

16 The above-entitled court has jurisdiction of the subject matter and of the Respondent,  
17 KENNETH D. KELLY, who was born 09-12-93, in the above-entitled cause.

18 II.

19 The Court finds the Respondent guilty of the crime of Robbery in the Second Degree:

- 20 a) The testimony and evidence presented in this case, particularly State's exhibit #1,  
21 a video of the interior lobby area of the Garfield Teen Life Center, shows beyond  
22 a reasonable doubt that the Respondent is guilty as an accomplice of Robbery in  
23 the Second Degree.



1 Presented by:

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Deputy Prosecuting Attorney

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\_\_\_\_\_  
Respondent

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Attorney for Respondent

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King County Superior Court  
Judicial Electronic Signature Page

Case Number: 10-8-00930-4  
Case Title: STATE OF WASHINGTON VS KELLY, KENNETH  
Document Title: ORDER  
Signed by Judge: Mary Yu  
Date: 10/4/2010 10:42:09 AM

digitally signed

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Judge Mary Yu

This document is signed in accordance with the provisions in GR 30.

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## APPENDIX B

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CASE NUMBER: 10-8-00930-4 SEA

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	No. 10-8-00930-4
	)	
vs.	)	
	)	FINDINGS OF FACT AND
KENNETH KELLY,	)	CONCLUSIONS OF LAW FOR
9/12/93	)	EXCEPTIONAL SENTENCE
	)	
Respondent.	)	
	)	
	)	
	)	

This matter came before the Court for disposition on August 27<sup>th</sup>, 2010. Having presided over the fact finding, reviewed all the evidence, records and other information in this matter, to wit: the State's motion for manifest injustice and attached documents, the Respondent's Brief in Support of 15-19 Weeks Disposition and attached documents, and having considered the arguments of counsel, Elizabeth Lopez and Richard Lichtenstadter on behalf of the respondent, and Deputy Prosecutors Angela Gianoli and Julie Kline representing the State, and having heard from Juvenile Probation Counselor Gabrielle Pagano and reviewed her Predisposition Diagnostic Report, and having heard from the Respondent and those on his behalf, the Court hereby imposes an exceptional sentence of 27-36 weeks at JRA followed by 12 months of probation and 48 hours of community service. This sentence is based on the following facts and law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
FOR EXCEPTIONAL SENTENCE - 1

**Daniel T. Satterberg**, Prosecuting Attorney  
Juvenile Court  
1211 E. Alder  
Seattle, Washington 98122  
(206) 296-9025, FAX (206) 296-8869

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A. FINDINGS OF FACT

- 1. The respondent, Kenneth Kelly, was born September 12<sup>th</sup>, 1993. At the time of disposition in this matter, he was 16 years old.
- 2. He was charged with robbery in the second degree stemming from the events that occurred at the Garfield Teen Life Center on January 22<sup>nd</sup>, 2010.
- 3. The respondent was found guilty by way of a bench trial of the charge of robbery in the second degree.
- 4. At the time he committed these offenses, and at the time of the disposition, the respondent had one prior conviction for manslaughter in the first degree.
- 5. The respondent's standard sentencing range for the crime charged is 15-36 weeks.
- 6. There were no mitigating circumstances.
- 7. The respondent committed this crime six months after release from his prior conviction.
- 8. The respondent had three program modifications during the period he was held in the juvenile detention facility on this matter, two of which stemmed from assaults on other inmates.
- 9. The respondent has drug and alcohol issues as outlined in JPC Pagano's report.

B. CONCLUSIONS OF LAW -- SUBSTANTIAL AND COMPELLING REASONS FOR IMPOSING EXCEPTIONAL SENTENCE

- 1. The Court finds that imposition of a standard range sentence of 15-36 weeks would constitute a manifest injustice. A detention above the standard range is necessary to protect the public and adequately serve the goal of rehabilitating the respondent and to include a period of supervised probation.

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- 2. The Court imposes a 27-36 week manifest injustice upward followed by 12 months of supervision with specific conditions to be monitored by the juvenile probation counselor and 48 hours of community service. The term of this manifest injustice disposition is not clearly excessive because of the treatment, rehabilitation, supervision and protection of the public needed in this case.
- 3. The reasons for the manifest injustice disposition are supported by clear and convincing evidence.
- 4. Sentence and disposition should be entered in accordance with these Findings of Fact and Conclusions of Law, which also incorporate the oral findings of this Court.

Date: 10/1/2010

  
 \_\_\_\_\_  
 Honorable Judge Yu,  
 King County Superior Court

\_\_\_\_\_  
 Angela Gianoli / Julie Kline  
 Deputy Prosecuting Attorneys

\_\_\_\_\_  
 Elizabeth Lopez / Richard Lischenstadter  
 Attorneys for the Defendant

King County Superior Court  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66021-7-1
	)	
K.K.,	)	
	)	
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 18<sup>TH</sup> DAY OF JANUARY 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] K.K.  
GREEN HILL SCHOOL  
375 SW 11<sup>TH</sup> STREET  
CHEHALIS, WA 98532

**SIGNED** IN SEATTLE WASHINGTON, THIS 18<sup>TH</sup> DAY OF JANUARY 2011.

x *Patrick Mayovsky*

2011 JUN 18 PM 4:19  
COURT OF APPEALS  
CLERK OF COURT