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King County Prosecutor
Appellate Unit
COA NO. 66208-2-1

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

STATE OF WASHINGTON,

Appellant,

v.

M.L.,

Respondent.

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

The Honorable Christopher Washington, Judge

BRIEF OF RESPONDENT

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COURT OF APPEALS
DIVISION ONE
KING COUNTY

TABLE OF CONTENTS

	Page	
A. <u>ISSUE</u>	1	
B. <u>STATEMENT OF THE CASE</u>	1	
C. <u>ARGUMENT</u>	2	
TO AVOID STRAINED RESULTS INCONSISTENT WITH THE JUVENILE JUSTICE ACT, THE STATUTE MUST BE INTERPRETED TO ALLOW THE COURT TO IMPOSE A POST-TRIAL DEFERRED DISPOSITION ON M.L		2
1. <u>A Deferred Disposition Holds Juveniles Accountable For The Crimes They Committed While Responding To Rehabilitative Needs</u>		3
2. <u>To Avoid Undermining The Purposes Of The Juvenile Justice Act, The Statute Must Be Read To Allowed Post-Trial Deferred Dispositions In Cases Where The Juvenile Is Acquitted Of Charges That Rendered Him Ineligible To Seek A Pre-Trial Deferred Disposition</u>		6
3. <u>Interpreting The Plain Language Of The Statute To Categorically Disallow Post-Trial Deferred Dispositions Based Solely On The Prosecutor's Charging Decision Results In Unjust, Unreasonable And Absurd Consequences</u>		13
4. <u>The State's Attack On The Trial Judge's Integrity Is Misplaced</u>		19
5. <u>The State's Remaining Contentions Lack Merit</u>		22
D. <u>CONCLUSION</u>	25	

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Cherry v. Metro Seattle</u> , 116 Wn.2d 794, 802, 808 P.2d 746 (1991).....	14
<u>City of Spokane v. Vaux</u> , 83 Wn.2d 126, 516 P.2d 209 (1973).....	20
<u>City of Wenatchee v. Owens</u> , 145 Wn. App. 196, 185 P.3d 1218 (2008).....	7
<u>Davis v. Dep't of Labor and Indus.</u> , 94 Wn.2d 119, 615 P.2d 1279 (1980).....	19
<u>Dep't of Ecology v. Campbell & Gwinn, L.L.C.</u> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	6
<u>In re Welfare of Hoffer</u> , 34 Wn. App. 82, 659 P.2d 1124 (1983).....	18
<u>Murphy v. Campbell Inv. Co.</u> , 79 Wn.2d 417, 486 P.2d 1080 (1971).....	7, 13
<u>State v. B.J.S.</u> , 140 Wn. App. 91, 169 P.3d 34 (2007).....	11, 12
<u>State v. Cirkovich</u> , 41 Wn. App. 275, 703 P.2d 1075 (1985).....	17
<u>State v. Curwood</u> , 50 Wn. App. 228, 748 P.2d 237 (1987).....	4, 17, 18
<u>State v. Elgin</u> , 118 Wn.2d 551, 825 P.2d 314 (1992).....	3, 14, 15
<u>State v. Hendrickson</u> , 165 Wn.2d 474, 198 P.3d 1029 (2009).....	21

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES</u> (CONT'D)	
<u>State v. J.P.</u> , 149 Wn.2d 444, 69 P.3d 318 (2003).....	3, 6, 14
<u>State v. Lopez</u> , 105 Wn. App. 688, 20 P.3d 978 (2001).....	11, 12, 14
<u>State v. L.W.</u> , 101 Wn. App. 595, 6 P.3d 596 (2000).....	4
<u>State v. Manro</u> , 125 Wn. App. 165, 104 P.3d 708 (2005).....	9, 10
<u>State v. McDougal</u> , 120 Wn.2d 334, 841 P.2d 1232 (1992).....	14, 16
<u>State v. Mewes</u> , 84 Wn. App. 620, 929 P.2d 505 (1997).....	20
<u>State v. Mohamoud</u> , 159 Wn. App. 753, 765, 246 P.3d 849 (2011).....	11, 12, 14
<u>State v. Phillips</u> , 65 Wn. App. 239, 828 P.2d 42 (1992).....	22
<u>State v. Posey</u> , 130 Wn. App. 262, 122 P.3d 914 (2005), <u>reversed</u> , 161 Wn.2d 638, 167 P.3d 560 (2007)	10
<u>State v. Posey</u> , 161 Wn.2d 638, 167 P.3d 560 (2007).....	8, 10, 11
<u>State v. Riles</u> , 135 Wn.2d 326, 957 P.2d 655 (1998).....	7
<u>State v. Smith</u> , 65 Wn. App. 887, 830 P.2d 379 (1992).....	7

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES (CONT'D)</u>	
<u>State v. Walton</u> , 64 Wn. App. 410, 824 P.2d 533 (1992).....	19
<u>State v. Watson</u> , 146 Wn.2d 947, 51 P.3d 66 (2002).....	24
 <u>RULES, STATUTES AND OTHERS</u>	
2A N. Singer, Statutory Construction § 45.12 (4th ed. 1984)	14
CJC 2.2.....	19
Former RCW 13.04.030(1)(e)(v)A) (Laws of 2000, ch. 135 § 2)	9, 10
Juvenile Justice Act	1-4, 6-8, 11-13, 15-17, 23, 24
RAP 2.2(b).....	19
RCW 9A.36.021(1).....	20
RCW 9A.36.031(1).....	20
RCW 9A.56.190	21
RCW 9.94A.030(53)(a)(i).....	1
RCW 9.94A.030(53)(a)(viii)	1
RCW 13.40.010(2).....	3, 4, 9
RCW 13.40.010(2)(b)	3, 8
RCW 13.40.010(2)(c)	3

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHERS (CONT'D)

RCW 13.40.010(2)(d).....	3, 8
RCW 13.40.020(4).....	24
RCW 13.40.020(34).....	1
RCW 13.40.127	6, 8, 12, 13, 15, 18
RCW 13.40.127(1).....	1, 4
RCW 13.40.127(2).....	4, 6, 23
RCW 13.40.127(3)(a)	5, 6
RCW 13.40.127(3)(b)	5, 6
RCW 13.40.127(3)(c)	5, 6
RCW 13.40.127(5).....	5
RCW 13.40.127(9).....	5
RCW 13.40.300	17

A. ISSUE

M.L. was acquitted in juvenile court of robbery and second degree assault — the charged crimes that rendered him ineligible to seek a deferred disposition before trial. In light of the purposes of the Juvenile Justice Act, should the relevant statute be read to allow for a post-trial deferred disposition when the juvenile actually commits offenses that would have made him eligible had they been charged? Does the State's contrary reading of the statute result in absurd, unjust and unreasonable consequences?

B. STATEMENT OF THE CASE

The State charged M.L. (born 4/1/97) with second degree assault and second degree robbery in juvenile court, both of which qualify as "violent offenses" under the Juvenile Justice Act. CP 1-2; RCW 13.40.020(34); RCW 9.94A.030(53)(a)(i) and (viii). The State amended the robbery charge to first degree on the day of trial. CP 5-6. The applicable statute does not permit juveniles to seek a deferred disposition before trial when the State charges a violent offense. RCW 13.40.127(1).

Following trial, the juvenile court acquitted M.L. of the charged offenses that made him ineligible to seek a deferred disposition before trial. CP 11, 41. The court found M.L. guilty of the lesser offenses of third degree assault and third degree theft. CP 11, 41. M.L. subsequently requested a deferred disposition. CP 27-35. The State opposed this request, contending

the court categorically lacked statutory authority to impose a deferred disposition after trial. CP 12-26. The court disagreed and imposed a deferred disposition consisting of 12 months of community supervision. CP 36-38.

C. ARGUMENT

TO AVOID STRAINED RESULTS INCONSISTENT WITH THE JUVENILE JUSTICE ACT, THE STATUTE MUST BE INTERPRETED TO ALLOW THE COURT TO IMPOSE A POST-TRIAL DEFERRED DISPOSITION ON M.L.

In the Juvenile Justice Act (JJA), the Legislature intended juveniles to be held accountable for the crimes they committed, not for crimes charged but not committed. Similarly, the available range of punishment options are supposed to be commensurate with the crimes actually committed, not with a charged offense that the juvenile did not in fact commit. The Legislature did not intend to deny the deferred disposition option to those juveniles who committed an eligible offense and had no means to seek a deferred disposition prior to having been found guilty of the eligible offense due to the prosecutor's contrary charging decision. In that circumstance, the statute must be read to allow the imposition of a post-trial deferred disposition.

The State's argument that the court lacked statutory authority to impose a deferred disposition on M.L. is inconsistent with the express

purposes of the JJA. The State's interpretation of the statute is also infirm because it leads to absurd, unreasonable and unjust consequences.

1. A Deferred Disposition Holds Juveniles Accountable For The Crimes They Committed While Responding To Rehabilitative Needs.

Questions of statutory interpretation are reviewed de novo. State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003). The purpose of statutory interpretation is to give effect to the Legislature's intent. State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992).

RCW 13.40.010(2) enumerates the purposes of the JJA, of which the deferred disposition provision is a part. The Legislature expressly intended the juvenile justice system, in responding to the needs of juvenile offenders, to hold youth "accountable for their offenses" and that "the juvenile courts carry out their functions consistent with this intent." RCW 13.40.010(2). The express purposes of the JJA include "determining whether accused juveniles have committed offenses as defined by this chapter;" holding the juvenile offender "accountable for his or her criminal behavior;" and providing "for punishment commensurate with the . . . crime . . . of the juvenile offender." RCW 13.40.010(2)(b), (c), (d).

Responding to the needs of juvenile offenders through rehabilitation as well as punishment are the dual purposes behind the JJA. State v. Curwood, 50 Wn. App. 228, 231-32, 748 P.2d 237 (1987); RCW

13.40.010(2). Toward that end, the Legislature has provided courts with broad discretion and a wide range of flexible sentencing options. State v. L.W., 101 Wn. App. 595, 602, 6 P.3d 596 (2000).

One such option is the deferred disposition, which allows the court to defer disposition pending compliance with a variety of conditions. RCW 13.40.127(1) provides "A juvenile is eligible for deferred disposition unless he or she: (a) Is charged with a sex or violent offense; (b) Has a criminal history which includes any felony; (c) Has a prior deferred disposition or deferred adjudication; or (d) Has two or more adjudications."

RCW 13.40.127(2) allows the court to continue a case for disposition for a period not to exceed one year following a "motion at least fourteen days before commencement of trial," consultation with the juvenile's parents, consent of the juvenile and consideration of "whether the offender and the community will benefit from a deferred disposition."

Before the trial court accepts a plea of guilty or enters a finding on an offense eligible for a deferred disposition, an offender shall "[s]tipulate to the admissibility of the facts contained in the written police report;" "[a]cknowledge that the report will be entered and used to support a finding of guilt and to impose a disposition if the juvenile fails to comply

with terms of supervision;" and waive the juvenile's right to call and confront witnesses. RCW 13.40.127(3)(a), (b), (c).

A juvenile granted a deferred disposition is placed on community supervision. RCW 13.40.127(5). The juvenile's conviction is dismissed at the end of the deferral period if the juvenile has fully complied with supervision conditions and paid full restitution. RCW 13.40.127(9).

It is undisputed M.L. is a first-time offender for purposes of RCW 13.40.127(1). But the State charged M.L. with second degree robbery and second degree assault, both of which qualify as a "violent offense." RCW 13.40.020(34); RCW 9.94A.030(53)(a)(i) and (viii). M.L. thus had no basis to make a motion in the trial court 14 days before trial to ask for a deferred disposition, as RCW 13.40.127(1) provides "[a] juvenile is eligible for deferred disposition unless he or she: (a) Is charged with a . . . violent offense."

Following trial, the court found M.L. did not commit the charged offenses.¹ CP 41. Instead, the court found M.L. committed the lesser offenses of third degree assault and third degree theft, neither of which qualify as a "violent offense." CP 41. M.L. argued he should be allowed

¹ On the day of trial, the State amended the robbery charge to first degree. CP 5-6.

to make a post-trial request for a deferred disposition under these circumstances. CP 27-35. The court agreed. CP 36-38.

2. To Avoid Undermining The Purposes Of The Juvenile Justice Act, The Statute Must Be Read To Allowed Post-Trial Deferred Dispositions In Cases Where The Juvenile Is Acquitted Of Charges That Rendered Him Ineligible To Seek A Pre-Trial Deferred Disposition.

In determining legislative intent, statutory interpretation begins with the statute's plain language. J.P., 149 Wn.2d at 450. "The plain meaning of a statute may be discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

M.L. does not ignore the plain language of RCW 13.40.127. He acknowledges its language regarding filing the motion 14 days before trial, stipulating to the police report as the basis for a finding of guilt, and waiving the right to call and confront witnesses. RCW 13.40.127(2), (3)(a), (b), (c). A literal reading of the statute, however, was not intended to apply to the situation presented by M.L.'s case. RCW 13.40.127 does not expressly address what should happen when a juvenile is found not guilty of charges that rendered him ineligible to seek a pre-trial deferred disposition but who is found guilty of committing lesser offenses that, had

they been charged, would have allowed the juvenile to seek a pre-trial deferred disposition.

As with any statute, courts interpreting the Juvenile Justice Act "must examine the statute as a whole and avoid narrow, overly strict interpretations that defeat the intent of the Legislature." State v. Riles, 135 Wn.2d 326, 341-42, 957 P.2d 655 (1998). The "equity of the statute" doctrine applies here, under which the intent of statutes trumps the precise letter of them, "for oftentimes things, which are within the words of statutes, are out of the purview of them, which purview extends no further than the intent of the makers of the Act." Murphy v. Campbell Inv. Co., 79 Wn.2d 417, 420, 486 P.2d 1080 (1971). That is, there are times when the literal expression of legislation may be inconsistent with the general objectives or policy behind it. Murphy, 79 Wn.2d at 420.

The statutory authority question presented by this case must be resolved in light of the purposes behind the Juvenile Justice Act. Statutes are construed as a whole. State v. Smith, 65 Wn. App. 887, 891, 830 P.2d 379 (1992). "By reading the statute as a whole, and harmonizing statutory provisions to the extent possible, the court ensures proper construction of every provision and a unified statutory scheme." City of Wenatchee v. Owens, 145 Wn. App. 196, 205, 185 P.3d 1218 (2008).

Allowing the juvenile court to enter a deferred disposition after trial where the juvenile is convicted of having committed a lesser, eligible offense is fully consistent with the purposes of the Juvenile Justice Act. The State's interpretation, meanwhile, conflicts with JJA goals.

The central purposes of the juvenile justice system are to rehabilitate and to "hold juveniles responsible for their offenses." State v. Posey, 161 Wn.2d 638, 645, 167 P.3d 560 (2007). This dual purpose extends to the offense actually committed, not to those offenses that are merely charged and on which the juvenile is acquitted. Posey, 161 Wn.2d at 644-46.

No purpose of the JJA includes holding juveniles accountable for offenses they did *not* commit. Available punishment should be commensurate with the crime that was *committed*, not the crime that was charged but not committed. RCW 13.40.010(2)(b) and (d).

From this perspective, it becomes apparent the Legislature did not intend to identically treat those juveniles who committed the charged offense that rendered them ineligible for a deferred disposition and those who did not commit the charged offense. It makes no sense to interpret RCW 13.40.127 in a manner that effectively ties the court's hands, leaving it at the mercy of the State's charging decision regardless of the actual culpability of the juvenile.

The State's interpretation of the statute frustrates the Legislature's express intent that youth should be held "accountable for their offenses" and that "the juvenile courts carry out their functions consistent with this intent." RCW 13.40.010(2). In crafting a fair and appropriate disposition, juvenile courts cannot carry out their sentencing function in a manner consistent with holding juveniles accountable for the crimes they in fact committed when one sentencing option is completely taken off the table because of a prosecutor's charging decision.

The history of statutory interpretation surrounding the automatic decline provision provides a cautionary counterpoint to the State's desire for a simplistic application of the plain language approach here. Like the deferred disposition statute, the automatic decline statute included language that appeared to make a prosecutor's charging decision determinative. Former RCW 13.04.030(1)(e)(v)(A)² stated, "the juvenile courts in this state shall have exclusive original jurisdiction . . . unless . . . [t]he juvenile is sixteen or seventeen years old and the *alleged* offense is . . . [a] serious violent offense as defined in RCW 9.94A.030." (emphasis added). This Court determined "[u]se of the word 'alleged' indicates that our Legislature intended the charge, not the final outcome, to dictate the proper court jurisdiction." State v. Manro, 125 Wn. App.

² Laws of 2000, ch. 135 § 2.

165, 174, 104 P.3d 708 (2005). According to Manro, "RCW 13.04.030 is clear on its face — jurisdiction attaches when certain enumerated offenses are charged." Manro, 125 Wn. App. at 174. The charge, not the offense for which the juvenile was ultimately found guilty, dictated adult court jurisdiction. Id. at 168, 174-75.

From this premise, the court reasoned Manro's acquittal on the enumerated charged offense in adult court had no bearing on the continued retention of adult court jurisdiction. Id. at 173-74. It believed "The plain language of the statute, coupled with the Legislature's objectives, leaves no room for a different interpretation." Id. at 174-75. Division Three quickly jumped on board, likewise claiming the plain language of the statute made it clear that the charge, not the final outcome, dictated jurisdiction. State v. Posey, 130 Wn. App. 262, 267-68, 122 P.3d 914 (2005), reversed, 161 Wn.2d 638, 167 P.3d 560 (2007).

Yet the Supreme Court dismissed that interpretation two years later, holding the charge did not dictate jurisdiction for sentencing purposes. Posey, 161 Wn.2d at 644-45. The Supreme Court easily smashed through what the lower courts had deemed an insurmountable barrier. Notwithstanding the clear language of former RCW 13.04.030(1)(e)(v), the Supreme Court determined "The legislature has established a statutory scheme intended to impose more severe punishment on juveniles who

have *committed* certain criminal offenses." Posey, 161 Wn.2d at 645. As a result, "once Posey was acquitted of the enumerated charge, the matter should have been remanded to juvenile court for a decline hearing or sentencing because . . . the legislative intent underlying the automatic decline provision is to impose more severe punishment on juveniles who have *committed* certain criminal offenses." Id. at 647.

In other words, interpreting the decline statute in a manner that gave the prosecutor's charging decision determinative effect would undermine the purposes of the JJA. The same holds true when interpreting the deferred disposition statute.

The State claims the juvenile court had no authority to grant M.L.'s post-trial request for a deferred disposition, citing State v. Lopez, 105 Wn. App. 688, 20 P.3d 978 (2001), State v. Mohamoud, 159 Wn. App. 753, 765, 246 P.3d 849 (2011) and State v. B.J.S., 140 Wn. App. 91, 169 P.3d 34 (2007). Brief of Appellant (BOA) at 8-9. Those cases are distinguishable.

Lopez held the requirement of moving for a deferred disposition at least 14 days before trial was mandatory and therefore the juvenile court lacked statutory authority to grant a post-trial motion for deferred disposition. Lopez, 105 Wn. App. at 697-98. The juvenile in Lopez was

eligible to move for the deferred disposition 14 days before trial but chose to wait until after trial to seek a deferred disposition. Id. at 692.

Relying on Lopez, Mohamoud held the post-conviction deferred disposition order was untimely, the court lacked statutory authority to order it on its own motion, and it failed to follow all statutory requirements under RCW 13.40.127. Mohamoud, 159 Wn. App. at 761-62, 765. The juvenile in Mohamoud pleaded guilty to an eligible offense but agreed not to seek a deferred disposition as part of the plea deal, leading the trial court to sua sponte impose a disposition unsought by the parties. Id. at 755.

In B.J.S., trial counsel provided ineffective assistance in misadvising her juvenile client that a post-trial motion for deferred disposition could be sought. B.J.S., 140 Wn. App. at 101. The juvenile in B.J.S. was eligible to move for a deferred disposition 14 days before trial but did not exercise that option because he was misadvised. Id. at 96, 101.

In none of those cases did the prosecutor's charging decision render the juvenile ineligible to seek a deferred disposition before trial. That distinction is important in a case like this, where the juvenile did not actually commit the charged offenses that rendered him ineligible to seek the disposition before trial. Lopez, Mohamoud and B.J.S., in recognizing an eligible juvenile must seek a deferred disposition before trial, do not

conflict with the purposes of the JJA on their facts. But those cases do not contemplate the situation here. The purposes of the JJA would be undermined if the prosecutor can prevent a juvenile from obtaining a deferred disposition through a charging decision that does not comport with the offenses that the juvenile actually committed. RCW 13.40.127 must be interpreted in a manner that renders it consistent with the express purposes of the JJA.

3. Interpreting The Plain Language Of The Statute To Categorically Disallow Post-Trial Deferred Dispositions Based Solely On The Prosecutor's Charging Decision Results In Unjust, Unreasonable And Absurd Consequences.

Where a literal reading of the provisions of RCW 13.40.127 results in an unreasonable, unjust and absurd outcome, it is necessary to go beyond the literal language and construe that provision in light of the purposes of the Juvenile Justice Act. A juvenile offender's eligibility for deferral should not depend on utter happenstance — how a particular prosecutor decides what charges to file.

In this connection, the Court "has long held that a thing within the letter of the law, but not within its spirit, may be held inoperative where it would otherwise lead to an absurd conclusion." Murphy, 79 Wn.2d at 421. Juvenile statutes are not construed without sense or reason. Courts must "avoid a literal reading of a statute if it would result in unlikely, absurd, or

strained consequences." Elgin, 118 Wn.2d at 555. The courts employ this "stopgap principle" because it is presumed the Legislature does not intend such results. J.P., 149 Wn.2d at 450; Cherry v. Metro Seattle, 116 Wn.2d 794, 802, 808 P.2d 746 (1991).

Interpretations that lead to unjust results are rejected in favor of those that lead to reasonable ones. State v. McDougal, 120 Wn.2d 334, 351, 841 P.2d 1232 (1992) (citing 2A N. Singer, *Statutory Construction* § 45.12 (4th ed. 1984) ("It is fundamental . . . that departure from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the act in question.")).

Lopez and Mohamoud lead to a reasonable result on their facts. In Lopez, the juvenile chose to gamble on a trial and then seek a deferred disposition that he was eligible to seek before trial. In Mohamoud, the juvenile agreed not to seek a deferred disposition before trial as part of a plea deal. In both circumstances, it makes sense to hold the trial court lacked authority to enter a post-trial deferred disposition because the juvenile in each case decided to forego an available pre-trial opportunity to seek one. But their holdings, when applied to different scenarios, lead to unreasonable results that the Legislature could not have intended.

M.L.'s case presents one such scenario. Others are readily conceivable. What would happen if the State amended the information to omit a violent offense less than 14 days before trial and the juvenile then moves for a deferred disposition? Would this Court adhere to the literal language of RCW 13.40.127 and hold the statute prevents a court from granting a pre-trial motion for deferred disposition?

Suppose an eligible juvenile moved for a deferred disposition 14 days before trial but then the State amended the information to include a violent offense. What would happen if the State then amended the information once again, this time omitting the previously charged violent offense less than 14 days before trial? Is the juvenile, and the court, simply without any deferred disposition option due to the State's unilateral charging decisions?

The State will argue the facts of M.L.'s case are different, but that does not mean such hypothetical examples are irrelevant. BOA at 10. The State is advocating a "one size fits all" approach to statutory interpretation. Before this Court resolves the issue, it has a duty to avoid interpreting the statute in a way that leads to unlikely, unjust or unreasonable consequences that are inconsistent with the purposes of the JJA. Elgin, 118 Wn.2d at 555. Alternative scenarios must be taken into

account in deciding whether the literal language of the statute controls in all situations. McDougal, 120 Wn.2d at 351.

Under the State's reading of the statute, a prosecuting attorney could control the offender's eligibility through strategic charging decisions. The State argues the trial court had no authority to impose a post-trial deferred disposition where there was no indication the State had manipulated the original charges simply to prevent the juvenile from getting a deferred sentence. BOA at 6. Yet manipulative intent is legally irrelevant if the plain language of the deferred disposition statute is interpreted to preclude post-trial deferred dispositions based on the determinative effect of charging decisions. Under that approach to statutory interpretation, the intent of the prosecutor does not matter.

That is why the statute cannot be read to categorically bar post-trial deferred dispositions. Giving dispositive effect to the plain language of the statute leads to the unjust and absurd consequence of allowing prosecutors to unilaterally prevent juveniles to obtain a deferred disposition by improperly manipulating the charges. The statutory interpretation advanced by the State protects that kind of abuse.

Again, whether the plain language of the statute makes sense turns on the circumstances to which it is applied in light of the purposes of the Juvenile Justice Act. This Court has gone beyond the plain language of

juvenile statutes in the past in order to make them sensible and consistent with the purposes of the JJA.

State v. Cirkovich, 41 Wn. App. 275, 703 P.2d 1075 (1985) is instructive. Unable to sensibly resolve the juvenile jurisdictional problem raised in that case by looking at the plain language of RCW 13.40.300, this Court decided to "read the underlying purposes and goals of the [Juvenile Justice] Act to supply such additional language as necessary in this case." Cirkovich, 41 Wn. App. at 279. The normal rules of statutory construction were unhelpful "in divining a proper result consistent with the purposes, goals, and intent of the Act." Id. at 278. Even though the plain language of RCW 13.40.300 did not allow for the juvenile court to retain jurisdiction under the circumstances of Cirkovich's case, this Court interpreted the statute to allow for that outcome in order to avoid an absurd result: "To permit the offender to entirely avoid his punishment merely by invoking the appellate process and obtaining a stay of execution of sentence would permit a result contrary to the express purposes of the Act and not intended by the Legislature." Id. at 279.

In Curwood, this Court employed the same approach in resolving whether the juvenile court retained jurisdiction even though the juvenile court, through oversight, did not enter an order extending jurisdiction to cover a juvenile's confinement period. Curwood, 50 Wn. App. at 229-30,

234. This Court recognized "the Legislature clearly did not contemplate the situation we have here where the offender was both adjudged guilty of the juvenile offense and a disposition hearing was held while the offender was still under the jurisdiction of the juvenile court." Id. at 233. Under those circumstances, [a] strict and literal interpretation of the statute would be inconsistent with the legislative intent of the Act and would lead to an absurd result." Id.

M.L.'s case compels the same type of approach. RCW 13.40.127 does not specifically address the circumstances presented here but the juvenile deferred disposition statute, like all statutes, "should receive a sensible construction which will effect the legislative intent and avoid unjust or absurd consequences." Curwood, 50 Wn. App. at 231 (quoting In re Welfare of Hoffer, 34 Wn. App. 82, 84, 659 P.2d 1124 (1983)). The statutory language directing a motion be filed before trial and the waiver of trial rights cannot be construed as mandatory in a case like this, where the prosecutor's charging decision precluded M.L. from following the statute. The construction offered by the State undermines the intent of the Legislature that juvenile courts impose dispositions that are consistent with holding juveniles accountable for crimes that have actually been *committed*.

4. The State's Attack On The Trial Judge's Integrity Is Misplaced.

The State tries to deflect attention from the troubling implications of giving the prosecutor's charging decision dispositive effect by essentially arguing the trial judge violated the Code of Judicial Conduct in refusing to find M.L. guilty of the charged offenses. BOA at 10, 12-13; see CJC 2.2 ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."). This contention is irrelevant to the legal issue of whether the trial court had authority to order a post-trial deferred disposition. But such an accusation cannot go unchallenged, especially because the State implicitly argues M.L. does not deserve a deferred disposition because he actually committed the charged offenses that rendered him ineligible. BOA at 10-11.

The trial court's acquittal on the charged offenses cannot be appealed. RAP 2.2(b). The State's complaint that the trial court should have found M.L. guilty of the charged offenses amounts to sour grapes. The trial judge, as trier of fact, decides the weight and credibility of the witnesses' testimony and resolves any conflicts in that testimony. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is not the function of an appellate court to substitute its judgment on those matters. Davis v. Dep't of Labor and Indus., 94 Wn.2d 119, 124, 615 P.2d 1279

(1980); City of Spokane v. Vaux, 83 Wn.2d 126, 131, 516 P.2d 209 (1973). Appellate courts do not retry factual issues. State v. Mewes, 84 Wn. App. 620, 622, 929 P.2d 505 (1997).

The State claims the trial judge's oral and written findings clearly show he found the elements of second degree assault beyond a reasonable doubt. BOA at 12. In its oral opinion, the court found M.L. *negligently* caused the injury: "So assault in the third degree is defined with criminal negligence causes bodily harm accompanied by substantial physical pain that extends for a period sufficient to cause considerable suffering. And I think that's what happened here." 1RP³ 188. The court incorporated its oral findings and conclusions into the written findings and conclusions. CP 41.

A person who intentionally assaults another but negligently rather than recklessly causes harm is guilty of third degree assault, not second degree assault. Compare RCW 9A.36.021(1) "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm;" with RCW 9A.36.031(1) ("A person is guilty of assault in the third degree if he or she,

³ The verbatim report of proceedings is referenced as follows: 1RP - 913/10 and 9/14/10; 2RP - 10/6/10.

under circumstances not amounting to assault in the first or second degree. . . (f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering;").

The record is clear that the court found M.L. guilty of third degree assault and that the State had not proven second degree assault beyond a reasonable doubt. CP 11, 41 (Section III); 1RP 187-88. Conclusion of Law II(a) provides the State proved third degree assault beyond a reasonable doubt, but then sets forth boilerplate statutory language that M.L. "recklessly inflicted substantial bodily harm." CP 41. The "recklessly inflicted substantial bodily harm" language must be considered a clerical error in light of the court's clear intent to acquit M.L. of second degree assault, as shown by the record as a whole and the court's express incorporation of its oral opinion into its written findings and conclusions. See State v. Hendrickson, 165 Wn.2d 474, 479, 198 P.3d 1029 (2009) (an error is "clerical" when it does not embody the trial court's intention as expressed in the record).

The State also complains it is unclear why the court convicted M.L. of theft instead of robbery. BOA at 13. The court did not find M.L. took T.M.'s MP3 player. CP 39 (FF 1). The court found M.L. took T.M.'s laser pointer. CP 40 (FF 4). M.L. used no force or threat of force to obtain

T.M.'s laser pointer because he simply asked for it, whereupon T.M. allowed M.L. to play with it. CP 40 (FF 2). M.L. then gave the laser pointer to another person without T.M.'s knowledge. CP 40 (FF 3). When T.M. confronted M.L. about the missing laser pointer, M.L. punched him. CP 40 (FF 5, 6). At that point, the assault could be interpreted as a response to T.M.'s confrontation, not as a means to retain possession of the laser pointer by use of force. See RCW 9A.56.190 ("A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.").

5. The State's Remaining Contentions Lack Merit.

The State elsewhere complains there was no "finding" or "discussion" that the community would benefit from a deferred disposition. BOA at 9. The State did not object on this basis below and is therefore precluded from raising the issue on appeal. See State v. Phillips, 65 Wn. App. 239, 242-43, 828 P.2d 42 (1992) (appellant waived argument that

trial court erred by imposing financial obligations without considering ability to pay because no objection on that basis raised below).

Moreover, the statute does not require a finding or discussion. RCW 13.40.127(2) provides "The court shall *consider* whether the offender and the community will benefit from a deferred disposition before deferring the disposition." (emphasis added). There is no requirement that this consideration be placed on the record and in the absence of objection on this point, any deficiency in the record is attributable to the State's failure to make it an issue below.

Furthermore, the court heard from T.M.'s mother and aunt before imposing disposition. 2RP 15-30. The court also heard from M.L.'s mother and another supporter. 2RP 31-34. The juvenile probation counselor expressed her view. 2RP 34-35. The prosecutor, meanwhile, was given full opportunity to say her piece. 2RP 2-3, 6-10, 13-15, 30. All stakeholders were given an opportunity to express their views of the matter. The court ordered M.L. to have no contact with M.H. as part of the deferred disposition. CP 38; 2RP 38, 40, 42. This is not a case where the court rashly entered a deferred disposition order without thinking about its implications.

Finally, the State claims the disposition imposed on M.L. "did not achieve any purpose of the JJA with regard to M.L. or the victim." BOA

at 14 n. 4. That claim is primarily based on the faulty premise that the State can legitimately attack the trial court's acquittal on the charged offenses as part of this appeal. BOA at 13-14.

The State further claims the deferred disposition "served to disenfranchise a young victim who may now be reluctant to report crimes in the future" due to retaliation for reporting the incident to police. BOA at 14 n.4. The State's argument is spurious. Any alleged retaliation had nothing to do with the disposition M.L. received because it happened before the court imposed disposition. 2RP 18.

The State's final claim that the deferred disposition "imposed no meaningful penalty" betrays a remarkably cynical view of the juvenile justice system and its supporting legislation. BOA at 14 n.4. The deferred disposition alternative meets the JJA goals of rehabilitation and accountability. State v. Watson, 146 Wn.2d 947, 952-53, 51 P.3d 66 (2002). M.L. did not escape punishment. He has been sentenced to 12 months community supervision with numerous conditions designed to ensure proper behavior. CP 37-38. Community supervision includes punishment in the form of community based sanctions and monitoring and reporting requirements. RCW 13.40.020(4).

The State's contention on appeal is all the more curious given that the trial prosecutor's local sanction recommendation was, in practical

terms, nearly identical to the terms of the deferred disposition. The prosecutor recommended a total of 12 months supervision, which M.L. received as part of the deferred disposition. CP 16, 37. The prosecutor recommended 30 days detention with authorization for electronic home monitoring and credit for time served, which would have amounted to zero days of actual post-disposition detention due to credit for time served. CP 16; 2RP 40. The prosecutor recommended 45 hours of community service. CP 16. M.L. received 48 hours of community service as part of the deferred disposition. CP 37. The conditions of the deferred disposition were nearly identical to the prosecutor's recommended sentence. CP 16, 37-38.

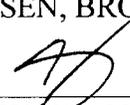
D. CONCLUSION

For the reasons stated, this Court should affirm the trial court order imposing deferred disposition.

DATED this 24th day of June 2011.

Respectfully Submitted,

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



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6-24-11

Date
Done in Seattle, Washington