

NO. 36375-5-II

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

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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STATE OF WASHINGTON,  
Respondent,

v.

A.R.W.  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE GORDON GODFREY, JUDGE

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BRIEF OF RESPONDENT

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## I. STATEMENT OF CASE

The State accepts Petitioner's STATEMENT OF THE CASE, except as noted in the arguments below. The State has no objection to hearing the merits of the issues raised on appeal by Accelerated Review.

## II. ARGUMENT

### 1. There Was No Breach Of A Plea Agreement

#### **A. The State did not have a Plea Agreement with the Respondent.**

The Respondent, A.R.W. plead guilty in open court to Threat to Bomb or Injure Property on February 22, 2007. Neither the state or probation made a plea offer or a plea agreement with the Respondent before this plea was entered. There is no record of a written or oral offer of plea agreement in this case from the state or probation. While the plea form does state that probation and the state would recommend local sanctions, those two entries are not initialed by the prosecutor or the probation department. CP 9. Further, the prosecutor did not sign off on the plea of guilty, the signature line for the deputy prosecuting attorney is blank. CP 10. It was the states understanding that this case was likely going to go to Fact Finding and the state had no warning or advanced knowledge that the Respondent was going to change her plea to guilty.

#### **B. The Defense made No Mention or Complaint about a Plea Agreement**

Defense counsel made no claim at the time of disposition that a plea agreement had been reached. While defense argued against the Manifest Injustice upward, at no time during either the original disposition in front of Commissioner Cotton nor the hearing for revision in front of the Superior Court Judge, did defense claim that there was a plea offer or agreement or that the

state or probation were in violation of a previously made plea offer or agreement. RP 15 - 18, 28 - 31.

**C. The Probation Department did not make a Sentencing Recommendation before Disposition.**

On March 22, 2007, after the plea of guilty but before disposition in this matter, the court ordered a psycho-social diagnostic to be done on A.R.W. for all her underlying charges that still had disposition set. Supplemental RP 3. This was done at the courts own initiative and not by the request of the defense, the state or probation. The ability of the court to order a diagnostic is covered by the Juvenile Justice Act under RCW 13.40.140, which addresses the procedures upon a plea of guilty that the court shall and may follow. The pertinent part to this matter is as follows:

(7) The court following an adjudicatory hearing may request that a predisposition study be prepared to aid the court in its evaluation of the matters relevant to disposition of the case.

RCW 13.40.140 (7)

The probation officer/counselor has duties and responsibilities that are set out by statute under the Juvenile Justice Act. These duties are laid out in RCW 13.04.040. Among them is the requirement to prepare predisposition studies and be prepared to speak about the findings of the study to the court, as follows:

(4) Prepare predisposition studies as required in RCW 13.40.130, and be present at the disposition hearing to responded to questions regarding the predisposition study: . . .

RCW 13.04.040 (4)

In this case, A.R.W. was awaiting disposition on her Threat to Bomb and on other matters. She was released and allowed to go back home but to be under 24 hour house arrest unless she was with her parents or in school. A.R.W. was charged with a new crime during this period of release before disposition and the court ordered probation to have a diagnostic report done upon A.R.W.

The courts have previously held that the prosecutor and the defendant are the only court recognized parties to a plea agreement. *State v. Sanchez*, 146 Wash.2d 339, 248, 46 P.3d 774 (2002), see *State v. Wakefield*, 130 Wash.2d 464, 474, 925 P.2d 183 (1996). In *Sanchez* the court found that the Community Corrections Officer was an employee of the court and not under the prosecutors control. *Id.* at 352. It further found that, while the statutory obligation for the officer to prepare a pre-sentence report did not include language to allow oral argument, it also did not disallow it. The court found that it would be “incongruous to require a report on a standard form that contemplates a sentencing recommendation without permitting oral presentation of that recommendation and the reasons for it.” *Id.* at 354. An earlier court found that probation counselors, in their role of producers of the pre-disposition reports, provide a valuable aid to the court for disposition purposes. The court stated that tying probations recommendations from the report to any plea agreement the state may have made would have the effect of eliminating a valuable source of information to the court unless it happened to agree with the prosecutor’s previously made agreement. *State v. Poupart*, 54 Wash.App 440, 447, 773 P.2d 893 (1989).

Here, there is no evidence, save from the defense counsel’s writing it in the guilty plea

form, that probation made any sort of agreement with the Respondent. Once the court asked for a pre-disposition report, the probation department followed its statutorily required procedures, prepared the report and made its oral arguments to the court at disposition, based upon the findings in the report.

**C. There was no Error and the Disposition should Stand.**

The state made no offer to A.R.W. concerning disposition of her case. Instead, the state asked for a continuation of disposition and the defense made no objection. RP 6. At no point during the disposition conducted by the Commissioner or the re-hearing on disposition conducted by the Superior Court Judge did defense counsel object to or complain of any violation of a previously made plea agreement. RP 7 - 36. Probation made no agreement of disposition recommendation to A.R.W. The court ordered a diagnostic to be done (Supplemental RP 3.) and the probation department complied with its statutory duty to compile a report and present it to the court, along with the department's oral recommendations. RP 12 - 14, 26 - 27. "The Court may rely on *any information* in the presentence report unless it is the subject of an objection." (*Italics theirs*), *Sanchez*, 146 Wash.2d at 353-354. Here, the court made its decision based upon the information given it from the diagnostic report by way of its own reading of the report plus the oral recommendations of the probation department.

There was no breach of promise in the disposition and the plea of guilty should stand.

## **2. The Manifest Injustice was Proper in this Case.**

### **A. Standard Of Review**

The court may impose a disposition above the standard range if the court finds that the standard range sentence will impose an excessive sentence or would impose a serious and clear danger to society in light of the purposes of the Juvenile Justice Act. RCW 13.40.160(2) and 13.40.020(17).

(2) If the court concludes, and enters reasons for its conclusion, that disposition within the standard range would effectuate a manifest injustice the court shall impose a disposition outside the standard range, as indicated in option D of RCW 13.40.0357. The court's finding of manifest injustice shall be supported by clear and convincing evidence.

(17) "Manifest injustice" means a disposition that would either impose an excessive penalty on the juvenile or would impose a serious, and clear danger to society in light of the purposes of this chapter.

### **B. Purposes**

The purposes of the JJA are set out in RCW 13.40.010, as follows:

(1) This chapter shall be known and cited as the Juvenile Justice Act of 1977.

(2) It is the intent of the legislature that a system capable of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders, as defined by this chapter, be established. It is the further intent of the legislature that youth, in turn, be held accountable for their offenses and that communities, families, and the juvenile courts carry out their functions consistent with this intent. To effectuate these policies, the legislature declares the following to be equally important purposes of this chapter:

(a) Protect the citizenry from criminal behavior;

(b) Provide for determining whether accused juveniles have committed offenses as defined by this chapter;

- (c) Make the juvenile offender accountable for his or her criminal behavior;
- (d) Provide for punishment commensurate with the age, crime, and criminal history of the juvenile offender;
- (e) Provide due process for juveniles alleged to have committed an offense;
- (f) Provide necessary treatment, supervision, and custody for juvenile offenders;
- (g) Provide for the handling of juvenile offenders by communities whenever consistent with public safety;
- (h) Provide for restitution to victims of crime;
- (i) Develop effective standards and goals for the operation, funding, and evaluation of all components of the juvenile justice system and related services at the state and local levels;
- (j) Provide for a clear policy to determine what types of offenders shall receive punishment, treatment, or both, and to determine the jurisdictional limitations of the courts, institutions, and community services; and
- (k) Provide opportunities for victim participation in juvenile justice process, including court hearings on juvenile offender matters, and ensure that Article I, section 35 of the Washington state Constitution, the victim bill of rights, is fully observed; and
- (j) Encourage the parents, guardian, or custodian of the juvenile to actively participate in the juvenile justice process.

**C. Proof Required**

The court's finding of manifest injustice must be supported by "clear and convincing evidence." RCW 13.40.160(2).

**D. The Court is not Limited to Mitigating or Aggravating Factors**

In determining that a finding of manifest injustice is appropriate the court is not limited to

the statutory mitigating or aggravating factors listed in RCW 13.40.150 (3) (h) and (I), which reads as follows:

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

(i) The Respondent's conduct neither caused nor threatened serious bodily injury or the Respondent did not contemplate that his or her conduct would cause or threaten serious bodily injury;

(ii) The Respondent acted under strong and immediate provocation;

(iii) The Respondent was suffering from a mental or physical condition that significantly reduced his or her culpability for the offense though failing to establish a defense;

(iv) Prior to his or her detection, the Respondent compensated or made a good faith attempt to compensate the victim for the injury or loss sustained; and

(v) There has been at least one year between the Respondent's current offense and any prior criminal offense;

(i) Consider whether or not any of the following aggravating factors exist:

(i) In the commission of the offense, or in flight therefrom, the Respondent inflicted or attempted to inflict serious bodily injury to another;

(ii) The offense was committed in an especially heinous, cruel, or depraved manner;

(iii) The victim or victims were particularly vulnerable;

(iv) The Respondent has a recent criminal history or has failed to comply with conditions of a recent dispositional order or diversion agreement;

(v) The current offense included a finding of sexual motivation pursuant to RCW 13.40.135;

(vi) The Respondent was the leader of a criminal enterprise involving several persons;

(vii) There are other complaints which have resulted in diversion or a finding or plea of guilty but which are not included as criminal history; and

(viii) The standard range disposition is clearly too lenient considering the seriousness of the juvenile's prior adjudications.

*State v. Strong*, 23 Wn.App.789, 793, 599 P.2d 20 (1979); *see also State v. Racliff*, 58 Wn.App.717, 794 P.2d 869 (1990). The court is not limited in what it can consider as a mitigating or aggravating factor so long as the factor was not contemplated by the Legislature in establishing the standard range for the crime.

#### **E. Length of the Sentence**

When the sentencing court finds an aggravating or mitigating factor and that factor is supported by the record, it has broad discretion in determining the appropriate length of commitment. However, the sentence recommendation should not be too lenient or too excessive. The sentencing court will be overturned only if an abuse of discretion is shown. Appellate courts will not find an abuse of discretion unless the sentence imposed cannot be justified by any reasonable view from the record. *Strong*, 23 Wn.App. at 795. If the recommendation is based solely on the need for treatment, the sentence recommendation should not exceed the duration of the treatment needs. *State v. Beaver*, 148 Wn.2d 338, 60 P.3d 586 (2002).

The sentencing court has authority to determine the minimum and maximum sentences. DSHS (JRA) has authority to determine the release date.

In this matter, the standard range with a criminal history score of zero was local sanctions, 0 - 30 days, 12 months probation, for one count of Threat to Bomb or Injury Property.

RP 29.

**F. Mitigating Factors**

None of the Mitigating Factors applied in this case.

**G. Aggravating Factors**

1) **The victim or victims were particularly vulnerable.** This factor can be established by the age, size, mental disability, physical disability or circumstances of the case. *State v. Jacobsen*, 95 Wn.App.967, 979-980, 977 P.2d 1250 (1999); *State v. Scott*, 72 Wn.App. 107, 217, 686 P.2d 1258 (1992), *affirmed*, 126 Wn.2d 388 (1995). The victim can be found to be particularly vulnerable due to location even when location is an element of the crime (e.g. threatening to bomb a school building). Examples of victims found to be particularly vulnerable: Alzheimer's patient; 6 & 8 year old, and a sleeping victim.

Here, the charge of Threat to Bomb or Injure Property is expressly concerning school buildings. CP 1. When the court relied on victim vulnerability, the building was not the victim; the students and adults inside the building were the victims. The relevant parts of RCW 9.61.160 contains the following language:

- Penalty. (1) It shall be unlawful for any person to threaten to bomb or otherwise injure any public or private school building, . . . or to communicate or repeat any information concerning such a threatened bombing or injury, knowing such information to be false and *with the intent to alarm the person or persons to whom the information was communicated.*

*Italics mine*

RCW 9.61.160

Clearly, the intent of the statute was to address the distress and fear such a threat would cause. The building is the place where the threat occurs, the people in the building are the victims. The victims here were a whole school full of students, concentrated in their classrooms with no easy way to quickly flee the building except to file out the exits as their turn comes up and even then having no readily available and immediate transportation to leave the area of the school grounds except to flee on foot. These victims are expressly vulnerable and that is what the commissioner was trying to convey at the original disposition on April 19, 2007. RP 18 - 19.

**2) Respondent presents a serious Risk to Re-Offend:** This is one of the most commonly cited reasons for a MI. The basis for this finding may overlap with other factors, in this case, a clear threat to community safety and recent criminal history/failure to comply with previous disposition. One of the risks was the Respondent refused to acknowledge wrongdoing. This finding suggests that the Respondent was not amendable to treatment, and therefore presented a risk to re-offend. *Jacobsen*, 95 Wn.App. at 982-983.

Here, Respondent did not take responsibility for her actions and behavior. She either minimized, denied or did not take responsibility for her behavior. RP 13. Mr. Sturgill further stated in the re-hearing of the disposition that the Respondent did not show much remorse for her actions. RP 27.

The court commissioner noted that she had watched the Respondent during one of the times that the prosecution was speaking. The court stated that while the prosecution spoke the Respondent was very angry. RP 22. This anger also shows a lack of taking responsibility, instead blaming another, in this case, the prosecutor, for her troubles.

**3) Need for Treatment.** The need for treatment is recognized as a basis for a finding of manifest injustice. *State v. Sledge*, 83 Wash.App 639, 922 P.2d 832 (1996).

Mr. Sturgill stated that Dr. Buckman concluded in his evaluation that the Respondent had a Conduct Disorder. The mother admitted to the doctor that the Respondent had always been difficult and that problems had accelerated in the last year. RP 13. The Respondent's mother stated that she was "begging for help in any way I can get it" and so filed a Youth at Risk petition against the Respondent. She further stated that the Respondent herself had told her that there was something wrong with her. The mother ended with a plea for her daughter to get professional help. RP 32. The defense attorney in his statement said that the Respondent told him that she needed anger management. RP 29.

Commissioner Cotton, in the first disposition, stated that the Respondent needed counseling or therapy. She was worried that if the Respondent received time off for good behavior or credit for time served that she would not receive the help that she obviously needed. RP 20. While the commissioner was originally mistaken about the availability of time off in a disposition to the Juvenile Rehabilitation Administration (JRA), she was later advised of this mistake on her part by Mr. Sturgill before the hearing was over. The commissioner nevertheless confirmed the time to be 52 to 60 weeks. RP 23.

While Judge Godfrey mentions credit for time served during his decision to confirm the Commissioner's earlier decision, he then states in the next sentence that the Respondent will be another year older when she gets out. He also states that "[T]hey have anger management

programs there too.” RP 36.

**H. The Court Adopted the Aggravating Factors as Stated.**

With the first disposition hearing and then the motion for revision, Commissioner Cotton and Judge Godfrey covered all of the aggravating factors stated in the Order of Adjudication and Disposition.

Commissioner Cotton began with a discussion of a recent school shooting back east, thereby showing that she was very concerned about the vulnerability of the victims. Her mention of the shooting of the college students trapped in their classrooms showed the vulnerability of the victims involved. RP 19. She addressed the recent criminal history when she discussed the Respondent’s previous crime, mentioning that the Respondent took two small children she was to be babysitting along with her when she committed the crime. RP 22. The commissioner specifically found that the Respondent was a threat to community safety and that she would likely re-offend if she did not get the full time for treatment that she needed. RP 22 - 23.

Judge Godfrey, in his decision to uphold Commissioner Cotton’s disposition, mentioned that the Respondent’s was out of control, her past criminal history and her most recent plea of guilty to the forgery charge, a crime not counted on her criminal history. All of these are factors marked as aggravating for the reason to Manifest Injustice upward. Further, the judge specifically states that when he let the Respondent out before disposition, that this was her chance to show that she could behave herself. Instead, she “[G]oes out and commits forgeries.” RP 34. Finally, as mentioned above, the judge confirms that the Respondent needs counseling by stating that JRA has anger management programs available. RP 36.

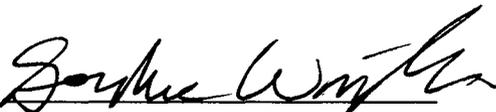
### III. CONCLUSION

The finding of a manifest injustice should be upheld. There was no previous plea agreement between the parties and probation did not give a sentencing recommendation to the defense before the plea of guilty.

The record supports such a finding on the basis of, the particular vulnerability of the potential victims, the lack of empathy or remorse, a high risk to re-offend and a need for treatment.

The length of sentence is appropriate for the crime and the treatment needed.

Respectfully Submitted,

By:   
GORDON L. WRIGHT  
Deputy Prosecuting Attorney  
WSBA #32997

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STATE OF WASHINGTON,

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**DECLARATION OF MAILING**

A.R.W.

Appellant.

**DECLARATION**

I, Barbara Chapman hereby declare as follows:

On the 23<sup>rd</sup> day of October, 2007, I mailed a copy of the Brief of the Respondent to Nancy P. Collins; Washington Appellate Project 91052; 1511 Third Avenue, Suite 701; Seattle, Washington 98101., by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman