

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

No. 41702-2-II

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

STATE OF WASHINGTON,
Respondent,

v.

Z.J.D.,
Appellant.

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

Before Honorable David L. Edwards, Judge

RESPONDENT'S BRIEF

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A. INTRODUCTION

The State asks the Court affirm the adjudication the respondent is guilty of Harassment-Threat to Kill as it is supported by sufficient evidence. The State asks the Court affirm the manifest injustice imposed as it is supported by clear and convincing evidence and is not clearly excessive.

B. ASSIGNMENTS OF ERROR

Respondent accepts Appellant's Assignments of Error as stated.

C. STATEMENT OF CASE

Respondent accepts Appellant's Statement of the Case as stated with the following exceptions. Additional facts will be included in this brief in support of the argument.

D. ARGUMENT

1. THERE IS SUFFICIENT EVIDENCE SUPPORTING THE ADJUDICATION THE RESPONDENT IS GUILTY OF HARASSMENT- THREAT TO KILL.

“When reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt.”¹ “All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.”² Circumstantial evidence is not any less reliable than direct evidence³ and the reviewing court must “defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.”⁴ To convict an individual of Harassment - Threat to Kill, the fact finder must find beyond a reasonable doubt that the person threatened was placed in reasonable fear that the threat would be carried out.⁵

In *State v. C.G.* the victim threatened was the school’s vice-principal.⁶ While the victim was telling C.G. to leave a classroom due to disruptive behavior she yelled “I’ll kill you Mr. Haney, I’ll kill you.”⁷ The

¹ *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002).

² *Id.*

³ *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.3d 99 (1980).

⁴ *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

⁵ *State v. Mills*, 154 Wash.2d 1, 10-11, 109 P.3d 415 (2005).

⁶ *State v. C.G.*, 150 Wash.2d 604, 80 P.3d 594 (2003).

⁷ *Id.*

victim testified the threat caused him concern and he believed she might try to harm him or someone else in the future. The Court found this evidence insufficient to prove the victim feared C.G. would kill him.⁸

In *State v. E.J.Y.*, E.J.Y. told a school counselor “You’re going to have another Columbine around here, you guys better watch out. It’s not just the white boys that go off, I might do it, too”.⁹ The victim testified he was concerned E.J.Y. was threatening to “come back and shoot up the place”.¹⁰ The court held this evidence was “sufficient for a rational trier of fact to find that Greer [,the victim,] was subjectively afraid.”¹¹

Likewise in *State v. Schaler* the Court held there was sufficient evidence a jury could conclude that Schaler’s threats were “a serious expression of his intention to take the life of another individual”.¹² Schaler told a third party he had been planning to kill his neighbors for months and wanted to do so. Schaler’s demeanor did not indicate he was kidding. The

⁸ *Id.*

⁹ *State v. E.J.Y.*, 113 Wash.App. 940, 953, 55 P.3d 673 (Div. 1, 2002).

¹⁰ *Id.*

¹¹ *Id.*

¹² *State v. Schaler*, 169 Wash.2d 274, 291, 236 P.3d 858 (2010).

third party asked questions of Schaler which affirmed to the third party that Schaler was serious and Schaler had a history of unpleasant interactions with his neighbors.¹³

There is sufficient evidence Z.J.D. threatened to kill his mother, Kristin.¹⁴ Z.J.D. and Kristin were in the kitchen. Kristin was on the phone. Z.J.D. told Kristin “don’t F’ing touch me”.¹⁵ Kristin was shocked that he said that and put her arm around Z.J.D. with his back against her chest tightly so he wouldn’t be able to get loose.¹⁶ Z.J.D. then picked up a butcher knife laying in the kitchen.¹⁷ He turned the knife around and pointed towards his mother’s face and said “if you piss me off enough, I’m going to use it”.¹⁸ Kristin got the knife away from Z.J.D. and he left and went to his room.¹⁹

¹³ *Id.*

¹⁴ The State refers to the victim using her first name to maintain confidentiality of the last name of the respondent who is the son of the victim and who shares the same last name.

¹⁵ RP 14.

¹⁶ RP 15.

¹⁷ RP 10, ln 5; 14, ln 9.

¹⁸ RP 14.

¹⁹ RP 15.

Kristin testified it scared her.²⁰ Kristin and Z.J.D. testified Z.J.D. held a very large knife in his hand pointed at Kristin's face.²¹ Kristin and Z.J.D. testified Z.J.D. told her he would use it if she made him angry enough.²² Z.J.D. testified he said this because he was "pissed off".²³ Z.J.D. testified he wasn't sure if his mom was scared that night but she didn't seem to be.²⁴ Based upon the testimony Judge Edwards found Kristin was in reasonable fear the threat would be carried out.²⁵

Unlike C.G., Z.J.D. had an actual weapon in his possession at the time he made his statements. Like Schaler, Z.J.D.'s manner and circumstances of the threat indicated that it was a true threat. Kristin testified Z.J.D. didn't intend to kill her and had just "done something stupid".²⁶

Where there is conflicting evidence, the reviewing court must defer

²⁰ RP 18.

²¹ RP16-17.

²² RP 16, 19, ln. 21.

²³ RP 20.

²⁴ RP 21.

²⁵ RP 17. CP 23.

²⁶ RP 17, ln 25, 18, ln 1.

to the fact finder.²⁷ “Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Cord*, 103 Wash.2d 361, 367, 693 P.2d 81 (1985).”²⁸ Judge Edwards was able to observe the demeanor of the witnesses as they testified, viewed the knife admitted into evidence and found Kristin’s testimony she was scared and the circumstances she testified to including her reaction to Z.J.D.’s holding the knife and statements sufficient to find beyond a reasonable doubt that at the time, Kristin had a real fear Z.J.D. would carry out his threat.²⁹ The evidence was sufficient to prove each element of the crime and the adjudication should be affirmed.

2. THE FACTORS SUPPORTING THE MANIFEST INJUSTICE DISPOSITION ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE

The juvenile court may impose a disposition outside the standard range if the court finds that the standard range sentence would result in an

²⁷ *State v. Thomas*, 150 Wn.2d 821.

²⁸ *State v. Thomas*, 150 Wash.2d at 874-875.

²⁹ CP 23.

excessive or lenient sentence in light of the purposes of the Juvenile Justice Act (JJA).³⁰ A court reviewing the factors supporting a manifest injustice disposition is not limited to considering the formal findings of the sentencing court. The court should also consider the purpose of the JJA and those parts of the record which have been considered by the sentencing judge.³¹ The purposes of the JJA set out in RCW 13.40.010 and include protecting the citizenry and providing necessary treatment, supervision or custody for the juvenile.

A nonexclusive list of statutory aggravating factors that may be used to support a manifest injustice are listed in RCW 13.40.150(3)(i). The sentencing 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.³²

Substantial evidence in the record must support the court's findings supporting the manifest injustice and the findings must clearly and

³⁰ 13.40.020(17) and RCW 13.40.160(1) and (2); *State v. P.B.T.*, 67 Wash.App. 292, 300, 834 P.2d 1051 (Div. 1, 1992), review denied, 120 Wash.2d 1021, 844 P.2d 1017 (1993).

³¹ *In Re Luft*, 21 Wn.App. 841, 589 P.2d 314 (Div. 3, 1979).

³² *State v. P.B.T.*, 67 Wn. App. at 301.

convincingly support the manifest injustice beyond a reasonable doubt³³.

If a factor is not supported by evidence beyond a reasonable doubt, it does not require reversal of the manifest injustice if it appears the dispositional court would have entered the same sentence on the basis of the remaining valid aggravating factors, the disposition may affirm the disposition.³⁴

The standard range for the respondent was local sanctions.³⁵ At disposition Judge Edwards imposed a manifest injustice of 30-40 weeks. Judge Edwards findings were supported beyond a reasonable doubt.

1) **The Respondent has a need for significant treatment not available in the community.**

The need for treatment is recognized as a basis for a finding of manifest injustice so long as the lack of treatment available in the community is not the only factor supporting the manifest injustice.³⁶ In *Meade* the respondent needed treatment, refused to cooperate with

³³ RCW 13.40.160(2), *State v. Minor*, 133 Wash.App. 636, 137 P.3d 872 (Div. 2, 2006) overruled on other grounds *State v. Minor*, 162 Wash.2d 796, 174 P.3d 1162 (2008).

³⁴ *State v. Roberson*, 118 Wash.App. 151, 162, 74 P.3d 1208 (Div. 2, 2003).

³⁵ RCW 13.40.0357.

³⁶ RCW 13.40.150(5); *State v. Sledge*, 133 Wash.2d 828, 845, 947 P.2d 1199 (1998); *State v. Tai N.*, 127 Wash.App. 733, 113 P.3d 19 (2005).

treatment and had shown no indications his attitude towards treatment had changed. The court's finding that Meade failed treatment and needed a structured treatment program was supported by sufficient evidence on the record.³⁷ Failure at community based treatment is not required to show that community based treatment is not available. .

In enacting the JJA, the legislature's intent was, in part, to "respond[] to the needs of youthful offenders" by providing "necessary treatment." It is thus proper for a trial court to consider a juvenile's need for treatment in considering a manifest injustice determination. Further, an extended period of structured residential care and specialized treatment may be appropriate where a juvenile is considered a high risk to reoffend. (citations omitted)³⁸

Because treatment is required to be provided by the Juvenile Rehabilitation Administration (JRA), Judge Edward's finding that JRA would provide treatment is reasonable.

Judge Edwards relied heavily upon Dr. Krueger's report³⁹ to emphasize Z.J.D.'s need for treatment. Judge Edwards noted that the

³⁷ *State v. Meade*, 129 Wash.App. 918, 120 P.3d 975 (Div. 2, 2005).

³⁸ *State v. J.V.*, 132 Wn.App. 533, 544, 132 P.3d 1116 (Div. 1, 2006) citing RCW 13.40.010(2). *See also State v. Duncan*, 90 Wash.App. 808, 812, 960 P.2d 941 (Div. 3, 1998) ("purposes [of JJA] include protection of the citizenry and provision of necessary treatment, supervision and custody for juvenile offenders").

³⁹ CP 15.

reason there was no diagnosis made, according to Dr. Krueger's report, was because the respondent's answers during the evaluation were "wildly off the charts".⁴⁰ Based upon the evaluation Dr. Krueger had "grave concern about the potential for [the respondent to engage in] violent, aggressive behavior".⁴¹ Judge Edwards concluded at sentencing that Z.J.D. needed intensive therapy on a daily basis and that JRA would be the best facility to provide that.

2) **The Respondent poses a high risk to re-offend.**

The respondent's need for treatment was not the only factor relied upon by the court in imposing the manifest injustice. Judge Edwards also found the respondent posed a high risk to re-offend.⁴² This factor is consistent with the Juvenile Justice Act. "Protecting society from dangerous juvenile offenders is a recognized reason for disposition outside the standard range".⁴³ In imposing a manifest injustice the court must look

⁴⁰ RP 36, ln. 1.

⁴¹ RP 39, ln 1-5.

⁴² CP 16.

⁴³ *State v. Roberson*, 118 Wash.App. at 163, citing *State v. S.H.*, 75 Wash.App. 1, 11, 877 P.2d 205 (Div. 1, 1994), overruled on other grounds *State v. Sledge*, 83 Wash.App. 639, *State v. T.E.H.*, 91 Wn. App. 908, 917-18, 960 P.2d 331 (1998).

beyond the offense to other circumstances and factors relevant to the rehabilitation of the juvenile.⁴⁴

The respondent also lacks adequate or effective parental supervision. This fact also places the respondent at a greater risk to re-offend.⁴⁵ “Whether or not a child’s parent can exert normal control over a child’s behavior is clearly related to the degree of risk to society where the child’s behavior itself constitutes such a risk.”⁴⁶ Judge Edwards disagreed with the respondent’s parents statements that their son didn’t mean to do what he did at disposition.⁴⁷ Furthermore the crime was committed against the respondent’s own family member. Thus, JRA is more equipt to provide effective supervision of the respondent and reduce the risk of re-offending.⁴⁸

In *Roberson*, one of the factors supporting the manifest injustice

⁴⁴ *State v. Tai*, 127 Wash.App. at 744; *State v. Meade*, 129 Wash.App. 918.

⁴⁵ *State v. T.E.H.* 91 Wn. App. at 446-47; and *State v. N.E.* 70 Wn. App. 602, 605-7, 854 P2d 672 (1993); and *State v. S.S.*, 67 Wash.App. 800, 817, 840 P.2d 891 (Div. 1, 1992).

⁴⁶ *State v. S.S.*, 67 Wash.App. at 817.

⁴⁷ RP 38.

⁴⁸ RP 39, ln 10-19.

was the risk of re-offending. The court relied upon a psychosexual evaluation which concluded the respondent was highly sexualized, had escalating behavior pattern prior to offense and posed a moderate to high risk of re-offending. The evidence put forth in the written evaluation was sufficient to support the finding the juvenile had a risk of re-offense.⁴⁹

Like *Roberson*, Judge Edward's statements referring to the report of Dr. Krueger at disposition establish sufficient clear and convincing evidence that Z.J.D. poses a high risk of re-offense and the need for a manifest injustice to provide community safety. At disposition Judge Edwards told Z.J.D. he found Z.J.D. was "a scary guy".⁵⁰ Based upon the statements at disposition and specifically Dr. Krueger's report, Judge Edwards concluded Z.J.D. "has the potential to be a radically dangerous individual".⁵¹ Judge Edwards expressed his concern that Z.J.D. had reached this level of dangerousness while still so young.⁵²

The finding of a manifest injustice should be upheld. The record

⁴⁹ *State v. Roberson*, 118 Wash.App. at 163; citing *State v. Jacobsen*, 95 Wash.App. 967, 982, 977 P.2d 1250 (Div. 2, 1999).

⁵⁰ RP 39, ln 15.

⁵¹ RP 39, ln 11-13.

⁵² RP 39, ln. 13.

supports such a finding on the basis of a need for treatment and a high risk to re-offend creating a danger to community safety.

2. THE MANIFEST INJUSTICE DISPOSITION IS NOT CLEARLY EXCESSIVE

When the sentencing court finds an aggravating factor and that factor is supported by the record, it has broad discretion in determining the appropriate length of commitment.⁵³ However, the sentence should not be too lenient or too excessive. Appellate courts will not find a manifest abuse of discretion and overturn the disposition unless the disposition imposed cannot be justified by any reasonable view from the record.⁵⁴

At disposition the sentencing judge imposed a manifest injustice disposition of 30-40 weeks. Appellant argues the length of the disposition is without basis. To the contrary the record reflects Judge Edwards considered imposing a longer disposition and taking into consideration Z.J.D.'s age and lack of prior convictions chose to impose a disposition to provide treatment and protect the community. Dr. Krueger recommended a year disposition to address treatment needs.⁵⁵ Judge Edwards specifically

⁵³ *State v. J.V.*, 132 Wash.App. at 545.

⁵⁴ *State v. Strong*, 23 Wn.App. at 795.

⁵⁵ CP 15.

inquired whether or not a 30-40 week sentence would give sufficient time for treatment and the probation officer confirmed she believed it would.⁵⁶ Given the aggravating factors and the court's imposition of a disposition length sufficient for treatment but considering the young age of the respondent, this disposition is not clearly excessive or too lenient and should be affirmed.

D. CONCLUSION

For the reasons set forth above, the State respectfully requests the Court affirm the adjudication as it is supported by sufficient evidence and affirm manifest injustice as it is supported by clear and convincing evidence and is not clearly excessive.

Dated: April 25, 2011,

Respectfully Submitted,

By: 
MEGAN M. VALENTINE
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RP 40, ln 5-12.

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STATE OF WASHINGTON,

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DECLARATION OF MAILING

DECLARATION

I, Carl Thomas hereby declare as follows:

On the 26th day of April, 2011, I mailed an original and one copy of the Brief of Respondent and Supplemental Designation of Clerk's Papers and Exhibits to Mr. David Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402-4454, and to Peter B. Tiller, Attorney at Law, P. O. Box 58, Centralia, WA 98531-0058, and to Kyle Imler, Attorney at Law, P. O. Box 2, McCleary, WA 98557, 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.

Carl Thomas