

NO. 47312-7-II

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

STATE OF WASHINGTON,
Respondent,

v.

I. G.,
Appellant.

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

THE HONORABLE DAVID EDWARDS, JUDGE

BRIEF OF RESPONDENT

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A. INTRODUCTION

The State asks the court to uphold the appellant's conviction for Assault in the Second Degree based on the sufficiency of the evidence. Further, the State asks the court to 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. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Respondent accepts Appellant's Issues Pertaining to Assignments of Error as stated.

D. STATEMENT OF THE CASE

Respondent accepts Appellant's Statement of the Case with the following exceptions. Appellant correctly stated H.G. testified that initially she and her brother were involved in a "cat fight" and that she pushed him, and then he grabbed her neck and squeezed it and that she was unable to breathe. Appellant's brief at 4. However, H.G. also testified that the appellant grabbed her neck with both his hands and squeezed it really hard. Report of Proceedings (RP) at 20. H.G. testified that she could not breathe, and she was gasping for air. RP at 20.

Not only did the police officer testify that he observed marks on H.G.'s neck, he stated, "She had redness around her throat and her neck on her – on the right side of her neck and throat and actually that extended all way around." RP at 12. Further, the officer testified that scratch marks on I.G. were consistent of defense wounds from a victim being strangled. RP at 15.

E. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS APPELLANT'S ASSAULT IN THE SECOND DEGREE CONVICTION

Appellant argues that the State failed to prove beyond a reasonable doubt that he strangled his sister. Viewing the evidence in the light most favorable to the State, Appellant's argument fails. The State produced sufficient evidence that I.G. strangled his sister, and she could not breathe and was gasping for air.

A person is guilty of Assault in the Second Degree if, under circumstances not amounting to assault in the first degree: he assaults another by strangulation or suffocation. RCW 9A.36.021(1)(g). RCW 9A.04.110(26) states strangulation means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe.

At trial, the State must prove each element of the charged crime beyond a reasonable doubt. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all reasonable inferences that reasonably can be drawn therefrom.” Id.

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Fiser*, 99 Wn. App. 714, 719, 995 P.2d 107 (2000). Circumstantial and direct evidence are equally reliable. Id. at 718. A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

Here, the victim testified that she told her brother he could not use her laptop and he could not go into her room. RP at 19. She said when she tried to keep him from going into her room he started hitting at her

like a cat fight, and then he choked her. RP at 19. H.G. testified that I.G. grabbed her neck and squeezed it really hard with both hands. RP at 20. She further testified, "I couldn't breathe and I was gasping for air." RP at 20. H.G. was asked at trial if when I.G. had his hands around her throat did he block off the air so she could not breathe? She replied, "Yeah." RP at 24-25.

In addition to the victim's testimony, Officer Glaser testified that when he arrived on scene, H.G. told him that I.G. had grabbed her with both hands around her throat and neck. RP at 11. The officer testified that he observed redness to H.G.'s throat and neck, and the officer said, "She also stated that she wasn't able to speak or to breathe." RP at 11. The officer testified that H.G. "Had redness around her throat and her neck on her – on the right side of her neck and throat and actually that extended all way around. The photograph doesn't show that but – and redness to her chest." RP at 12. Officer Glaser testified that the scratch marks on the face of I.G. were "Consistent with strangulation, assault, and those are defense wounds. Through my training and experience, when a person is grabbed around the throat the only thing they can really do is reach up and try and push the person away or defend themselves and that results in

usually the face getting scratched or injuries to the face from the victim.”

RP at 15.

Finally, the Trier of Fact stated, “The prosecuting attorney called two witnesses and according to I.G. both of them have – have lied about facts to which they testified. And frankly, I.G.’s story doesn’t make sense to me. It certainly doesn’t explain why H.G. had the red marks around her neck that Officer Glaser testified were – were so readily visible to him and were so consistent with someone having their hands around her neck and applying significant pressure to her neck. There’s no question in my mind that he – that he did what he is accused of having done and that is he – he attempted to strangle his sister, did strangle his sister. The fact that she didn’t require medical treatment doesn’t mean that it didn’t happen.” RP at 33-34.

Admitting the truth of H.G. and Officer Glaser’s testimony and drawing all reasonable inferences in favor of the State, there is substantial evidence from which a rational trier of fact could find that I.G. did strangle the victim. This Court should affirm I.G.’s assault in the second degree conviction.

**2. THE RECORD SUPPORTS THE IMPOSITION OF A
MANIFEST INJUSTICE DISPOSITION AND THE
DISPOSITION WAS NOT CLEARLY EXCESSIVE**

a. Accelerated review is proper.

The state stipulates to the Appellant's contention that accelerated review is proper in this matter.

b. 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 impose an excessive or lenient sentence in light of the purposes of the Juvenile Justice Act (JJA). RCW 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). A court reviewing the factors supporting an imposed 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. *In Re Luft*, 21 Wn.App. 841, 589 P.2d 314 (Div 3, 1979). The purpose of the JJA is set out in RCW 13.40.0101 and includes 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. *State v. P.B.T.*, 67 Wn. App. At 301.

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

A dispositional court's finding of a manifest injustice is subject to appellate review under the standard set forth in RCW 13.40.230. That statute provides that to uphold a disposition outside the standard range, the court must find (1) that the reasons supplied by the disposition judge are supported by the record which was before the judge, (2) that those reasons clearly and convincingly support the conclusion that a disposition within the standard range would constitute a manifest injustice, and (3) that the sentence imposed was neither clearly excessive nor clearly too lenient.

RCW 13.40.230. *State v. P.*, 37 Wn. App. 773, 777, 686 P.2d 488 (1984) (quoting *State v. Rhodes*, 92 Wn.2d 755, 760, 600 P.2d 1264 (1979)).

While a manifest injustice disposition must pass all three parts of this test under RCW 13.40.230(3), it is not necessary for all three factors from which the court based its decision to be recognized or upheld on appeal. *State v. Johnson*, 45 Wn. App. 716, 719, 726 P.2d 1042 (1986). Even one remaining aggravating factor may be sufficient. *State v. Fisher*, 108 Wn. 2d 419, 739 P.2d 683 (1987) (court upheld an exceptional sentence when only one factor out of four cited by the trial court was affirmed).

The standard range for I.G. was 15 - 36 weeks of commitment to Juvenile Rehabilitation Administration (JRA). RCW13.40.0357. At disposition the Trier of Fact imposed a manifest injustice of 80 - 100 weeks in JRA. The court found the following specific factors in support of the manifest injustice: (1) In the commission of the offense, or flight therefrom, I.G. inflicted or attempted to inflict serious bodily injury to another; (2) There are other complaints which have resulted in diversion or a finding or plea of guilty which are not included as criminal history; (3) I.G. is a threat to the community; (4) I.G. is beyond parental control; and (5) I.G. has mental health and drug and alcohol needs that cannot be

addressed in the community. CP 22. In addition, the court incorporated the State's brief into the record, which included the factor that I.G. does not take responsibility for his actions. RP at 39, CP 19.

i. I.G.'s parents lack control over him.

Courts may consider a respondent's parents' lack of parental control as an aggravating factor warranting a manifest injustice disposition. *See State v. T.E.C.*, 122 Wash.App. 9, 21, 92 P.3d 263, 268 (2004) (“[L]ack of parental control may be a valid aggravating factor in supporting a manifest injustice disposition.” (Citation omitted.)); *State v. S.S.*, 67 Wash.App. 800, 817, 840 P.2d 891, 901 (1992) (“We hold that lack of parental ability to control a child's criminal behavior is a proper aggravating factor for the court to consider.”). *In S.S.*, the Court of Appeals, when upholding the manifest injustice sentence of a habitual joy-rider, explained that poor parental control of a juvenile can create an increased threat to the community:

If a child cannot be controlled by his or her parent, the danger or risk to society is commensurately increased. 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 risk.

Id. Logically, a youth who cannot or is not controlled by his or her parents is a greater risk to the community than one who is controlled by his or her parents.

On January 30, 2015, I.G. underwent a psychological evaluation conducted by Dr. Keith Kruger, PhD. Supplemental Clerk's Papers (SuppCP) 33-37. I.G. told Dr. Kruger that I.G.'s parents separated when he was very young. SuppCP 35. He stated he lived with his father until I.G. was "Seven or nine." SuppCP 35. He reported his father went to jail, so I.G. had to live with his mother. SuppCP 35. When asked if the he would rather live with his father now I.G. said, "Not no more, because since then he's turned into a real bad alcoholic." SuppCP 35. I.G. said that whenever he sees his dad now, "He's always got a beer in his hand." SuppCP 35.

I.G. seemed to be disappointed in his mother. At one point he told Dr. Krueger that his "Mom kinda does her own thing. SuppCP 35. She was probably busy with something else." SuppCP 35. I.G. reported that his mother works steadily. I.G. also said that while he was in treatment at Ryther Child Center his mother, "Never came to see me, not once." SuppCP 34-35.

Dr. Krueger stated that I.G.'s feelings about his family shifted quite a bit during the interview. SuppCP 36. He blamed his mother for never visiting him in either of his treatment placements, but said she only missed detention visits when she was running out of gas money. SuppCP 36. He said he did not want to be around his father because of his alcoholism; yet said things went much better when they lived together. SuppCP 36.

The court pointed out that the I.G.'s father refuses to exercise control over I.G. and his mother, despite good intentions, lacks control over him. RP at 40. I.G.'s mother was present for disposition and agreed with the court that she had lost control over I.G. when he was around 12 years old. RP at 44. The court pointed out that I.G.'s father has never been anyone who even attempted to exercise control over I.G. and found to the contrary that the father facilitated and even provided opportunities to I.G. to break the law. RP at 44.

- ii. A manifest injustice is necessary to meet the appellant's treatment needs.

The court may consider the respondent's treatment needs when addressing a request for a manifest injustice disposition. *See T.E.C.*, 122 Wash.App. at 17, 92 P.3d at 266-267 ("It is also proper for the trial court to consider a juvenile's need for treatment in relation to a manifest

injustice determination.” (Citation omitted.)). In cases where a respondent is deemed to be at a high risk to reoffend, “[a]n extended period of structured residential care and specialized treatment may be appropriate.” Id. (internal quotation marks and citation omitted).

I.G. reported he started using drugs when he was in the seventh grade. SuppCP 34. He said he would be at the home of a certain friend whose parents not only condoned drug use, but would be using them at the same time. SuppCP 34. He said these parents tried to hide that they were using meth, but I.G.’s friend found their stash, “And that’s how I wound up doing it the first time.” SuppCP 34. According to I.G., he began using marijuana when he was 12-years-old, and he began regular use at age 14. SuppCP 36. He further reported he started using meth when he was 14 or 15. SuppCP 36.

I.G. was supposed to participate in out-patient treatment three times a week at True North. SuppCP 34. However, he said that during the first meeting “All they did was give us snacks and play games,” so he never went back. SuppCP 34.

I.G. went to in-patient treatment at Ryther. SuppCP 34. He said he participated in classes, groups, DBT groups and individual sessions. SuppCP 34. He reported he graduated successfully from the program.

SuppCP 34. However, after treatment he only stayed clean 30 days before he began using marijuana and meth again. SuppCP 34.

I.G. also went to in-patient treatment at Excelsior. SuppCP 34. He snuck out of treatment five times in order to use drugs. SuppCP 34. The first time he snuck out with a boy who had some marijuana and shared it with him. SuppCP 34. The rest of the times were with girls who asked him to leave with them. SuppCP 34. He stated they would sit in a nearby park and use, “Weed, meth, whatever they had.” SuppCP 34. He said he eventually decided, “To discharge myself.” SuppCP 34.

The court addressed I.G.’s drug treatment and stated, “I have twice sent him to inpatient treatment programs without any measure of success, that’s – that’s with remark. He has been provided numerous services through the court, counseling, True North, has either refused to participate or has not benefited in any measureable degree from any court-ordered services. RP at 46.

iii. I.G. does not take responsibility for his actions.

I.G. took this matter to fact-finding and was found guilty as charged on December 18, 2014. RP at 34. He told Dr. Krueger that his sister punched him in the face several times. SuppCP 35. He said he held her at arm’s length in order to protect himself, and then just walked out the

door. SuppCP 35. Dr. Krueger said, “He insisted he just held his little sister at arm’s length, not squeezing her neck.” SuppCP 35. When Dr. Krueger asked how she got the bruises, he said she might have done it herself. SuppCP 35. He then told Dr. Krueger, “Nobody should be in here on false charges.” SuppCP 35.

I.G. reported there had been allegations from his older sister that he had threatened to kill his family in their sleep. SuppCP 35. He adamantly claimed, “That right there is a lie,” as they are just angry at him for using drugs. SuppCP 35.

During the interview, I.G. informed Dr. Krueger that prior to the current criminal charge of Assault 2° he had only been in trouble for truancy. SuppCP 33. However, on February 26, 2102, I.G. had a Diversion for Assault 4° and Harassment – Knowingly Threaten. CP 9. I.G. said, “I went from truancy to Youth at Risk.” SuppCP 33. He said he got in some trouble for using drugs, but it was mostly for not going to school. SuppCP 33. He then reported, “I’d get a bench warrant for not showing up for court, but I wouldn’t get in trouble with Youth at Risk for that; I never got any contempts for it, and I’m not on it anymore.” SuppCP 33. It should be noted that while the respondent was on truancy he

received 18 contempts and while he was on Youth at Risk he received six contempts. CP 20.

Appellant argues that his record as a truant and his prior involvement with the court for non-criminal matters cannot be considered in the imposition of a manifest injustice. Brief of Appellant at 13. However, the court stated, “I have a copy of the statute and the statute says the court may not consider the fact that the juvenile was in the dependency program, but it doesn’t say anything about youth at risk.” RP at 42. The court went on to explain that I.G. has a long history with the court and it defies logic that the court would not be able to consider the behavior that occurred in those cases to the extent that it might be relevant to the likelihood of him being able to follow rules and comply with treatment requirements. RP at 42.

The court stated I.G. has never engaged in behavior that would allow the court to conclude he is willing to take responsibility for his action. RP at 47-48. Further, the court noted I.G. has shown little or no remorse for any of his misconduct, nor has he owned any of his behavior. RP at 48.

- iv. There are other complaints which have resulted in diversion or a finding or plea of guilty which are not included as criminal history.

In February of 2012 I.G. received a diversion for Assault in the Fourth Degree and Harassment – Knowingly Threaten. CP 9. By statute these were not included in his criminal history. RCW 13.40.0357. However, these incidents, coupled with the fact I.G.’s criminal behavior has escalated to a felony assault may be considered by the court when imposing a manifest injustice disposition. RCW 13.40.150(3)(vii).

c. The manifest injustice is not clearly excessive.

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. 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. *State v. S.H.*, 75 Wn.App. 1, 13, 877 P.2d 205 (Div 1, 1994), overruled on other grounds *State v. Sledge*, 83 Wash.App. 639, 645, 922 P.2d 832.

Dr. Krueger stated that I.G.’s track record in open, non restrictive programs is poor. SuppCP 37. Dr. Krueger said that any further placements must include extensive social skills training to go along with treatment and relapse prevention. SuppCP 37. The court stated I.G.’s

drug treatment needs and his serious emotional and mental health needs cannot be adequately addressed in the community. RP at 47. The record indicates a careful consideration of the sentence imposed which is neither excessive nor an abuse of discretion.

F. CONCLUSION

There is sufficient evidence on the record to uphold I.G.'s conviction for Assault in the Second Degree. Further, the juvenile court's reasons for finding a manifest injustice are permissible, are supported by evidence in the record, and clearly and convincingly support the finding. The State respectfully requests this Court to affirm the conviction and disposition.

DATED this 16 day of June, 2015.

Respectfully Submitted,

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LJS/

GRAYS HARBOR COUNTY PROSECUTOR

June 16, 2015 - 1:42 PM

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