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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

D.L., Appellant.

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

BRIEF OF RESPONDENT

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INTRODUCTION

This appeal concerns a disposition outside the standard range for a juvenile offender. Under RCW 13.40.160(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.” Here, Whatcom County Superior Court Commissioner Alfred Heydrich found manifest injustice for the following reasons:

- “[T]he victim in this case is particularly vulnerable.” (VRP 246);
- There is a serious risk to reoffend both because of “a denial of criminal conduct” and “a low amenability to rehabilitation and treatment.” (VRP 247-248);
- “[T]here has been a demonstration of lack of parental control.” (VRP 248); and
- A disposition “outside the standard range was appropriate because...more time was necessary to...alter the defendant’s behavior.” (VRP 249).

Because sufficient evidence supports the Commissioner’s findings, and his disposition outside the standard range was not clear error, the State of Washington respectfully requests the Court to affirm D.L.’s Disposition Order and dismiss this appeal.

I. RESTATEMENT OF ISSUES PRESENTED

D.L.’s appeal presents five issues:

A. “To uphold a disposition outside the standard range, the court of appeals must find (a) that the reasons supplied by the disposition judge are supported by the record which was before the judge and that those reasons clearly and convincingly support the conclusion that a disposition within the range would constitute a manifest injustice, and (b) that the sentence imposed was neither clearly excessive nor clearly too lenient.” RCW 13.40.230. After Respondent failed to qualify for a Special Sex Offender Disposition Alternative (SSODA), the Commissioner entered a longer sentence in part to ensure D.L. received appropriate sex offender treatment. Did the Commissioner err?

B. “The [Juvenile Justice] statute does not require express notice to a defendant that the court is considering imposing a manifest injustice sentence.” State v. Moro, 117 Wn. App. 913, 923, 73 P.3d 1029 (2003). When he pled guilty, Respondent acknowledged that the juvenile court did not have to enter the sentence recommended in the plea agreement. (VRP 129). Did the court violate Respondent’s due process rights by accepting the probation counselor’s recommended manifest injustice sentence?

C. Probation “[c]ounselors may recommend exceptional sentences even when their recommendations conflict with those of

the prosecution.” State v. Merz, 54 Wn. App. 23, 26, 771 P.2d 1178 (1989). By accepting the probation counselor’s recommended sentence here, did the juvenile court violate the separation of powers doctrine?

D. “Where a traffic court judge invites the state’s witnesses to say ‘what happened,’ without more, she does not violate due process.” State v. Moreno, 147 Wn.2d 500, 512, 58 P.3d 265 (2002). At Respondent’s disposition hearing, the Commissioner asked two probation counselors to explain why they recommended an extended sentence. Did the Commissioner’s questions violate Respondent’s due process rights?

E. “In addition to its inherent authority, the trial court, under RCW 2.28.010, has the power to preserve and enforce order in the courtroom and to provide for the orderly conduct of its proceedings.” State v. Lormor, 172 Wn.2d 85, 93–94, 257 P.3d 624 (2011). During his sentencing, Respondent’s grandmother interrupted testimony by stating “I knew you bastards would do this.” (VRP 225). Did the Commissioner abuse his discretion by having the grandmother leave the courtroom?

II. STATEMENT OF FACTS

A. D.L. Molested His Five-Year-Old Half Brother.

When he pled guilty to one count of attempted child molestation in the first degree, Respondent D.L. adopted the probable cause statement as the relevant facts proving his guilt. (5/24/17 Statement on Plea of Guilty ¶ 15; CP 111) (“court may review probable cause statement to establish a factual basis”). The following statement of facts comes from that probable cause affidavit. (8/9/16 Affidavit of Probable Cause; CP 4).

On August 9, 2016, Matthew Mulder reported to Whatcom County Sheriff Deputies that he had discovered D.L. in a locked bedroom with Mulder’s five-year-old son. (8/9/16 Affidavit at 1; CP 4). Mr. Mulder said D.L. “had been slow to open the bedroom door when directed and was wearing only sports shorts; prior to entering the room, D.L. was fully clothed.” (8/9/16 Affidavit at 1; CP 4). He noticed that his son was naked under a blanket on D.L.’s bed.

When a deputy questioned the five-year old, he disclosed that D.L. had “humped” him three separate times by penetrating his anus. (8/9/16 Affidavit at 1; CP 4). The State charged D.L. with three counts of rape of a child in the first degree, and one count of attempted rape of a child in the first degree. (Information; CP 1-2).

B. When The Superior Court Denied His Motion To Dismiss, D.L. Pled Guilty To One Count.

The State amended the information against D.L. twice, adding alternative charges for child molestation in the first degree. (First Amended Information; CP 47) (Second Amended Information; CP 51). In response, D.L. moved to dismiss all charges, alleging the amendments were made too close to trial. (Motion to Dismiss; CP 77). On May 22, 2017, the first day of trial, Superior Court Judge Raquel Montoya-Lewis heard argument and denied the motion to dismiss. (VRP 114) (“I’m certainly willing to give you a brief continuance”).

The parties took a short break and returned with news that they were discussing settlement. (VRP 115) (“the State has made an offer to me that I feel I need to have some time to communicate to my client effectively”). The court postponed trial. Two days later, on May 24, 2017, D.L. returned to court to plead guilty.

At the plea hearing, Commissioner Heydrich questioned D.L. carefully to ensure he understood the consequences of pleading guilty. As part of the agreement, the State filed a third amended information charging Respondent with one count of attempted child

molestation in the first degree. The Commissioner began by making sure D.L. understood the charge.

Q. Any questions about what the new charge means or what it is about?

A. No.

Q. All right. And do you feel like you've had enough time to fully discuss this situation with Ms. Jones?

A. Yes.

Q. Okay. I'm going to go over your offered Statement on Plea of Guilty. If you have any questions about this, I want you to ask me, or if you wish you can take a time out and talk privately with Ms. Jones, okay?

A. Okay.

Q. All right. So I know it's hard for you to sit still and concentrate.

A. Yes, very.

Q. But I need you to do your very best to listen to what I'm saying and actually hear it, okay?

A. Okay.

(VRP 125). At the Hearing, the Commissioner went through each paragraph on D.L.'s Statement on Plea of Guilty. (VRP 122-137).

(Statement on Plea of Guilty; CP 107) (Attached as Appendix A)

Next, the Commissioner discussed D.L.'s rights and the consequences of waiving his ability to go to trial.

But here's what you need to be clear on. If I accept this plea today and we continue this, and you go through the process, when you come back to be sentenced, you wouldn't be able to say, you know, "I wish I hadn't pled guilty I want to take it back; I want to have a trial now." It would be too late.

(VRP 128). D.L. said he understood. (VRP 128).

Finally, the Commissioner repeatedly warned Respondent that the court did not have to accept the parties' recommended sentence, a Special Sex Offender Disposition Alternative (SSODA).

Q. We were just talking about a SSODA here, so that's a possible alternative sentence. But you need to understand that even if that is recommended to me, I don't have to follow that, and I have the discretion to send you to JRA if I think that's appropriate whether other people think it is or not; do you understand that?

A. Yes.

(VRP 129); (VRP 129-130) ("only thing you could appeal would be a sentence outside the range"); (VRP 134) ("ultimately, though, I'm the one who has to decide whether you actually get" a SSODA).

Respondent's Statement on Plea of Guilty also warned him of the consequences to pleading guilty. (Statement on Plea of

Guilty; CP 107). In paragraph 8, the Statement describes the judge's authority to sentence outside the standard range.

RIGHT TO APPEAL SENTENCE: I understand that the judge must impose a sentence within the standard range, unless the judge finds by clear and convincing evidence that the standard range sentence would amount to manifest injustice. If the judge goes outside the standard range, either the state or I can appeal that sentence. If the sentence is within the standard range, no one can appeal the sentence.

(Statement on Plea of Guilty ¶ 8; CP 108). Paragraph 9 warned Respondent that the maximum sentence could be commitment until he turns 21. (Statement on Plea of Guilty ¶9; CP 109).

Finally, the Statement repeated the Commissioner's warning that the court need not follow the recommended sentence.

Although the judge will consider recommendations of the prosecuting attorney and the probation officer, the judge may impose any sentence he or she feels is appropriate, *up to the maximum allowed by law*.

(Statement on Plea of Guilty ¶ 14; CP 111) (emphasis added). As detailed in paragraph 8 above, the maximum allowed included a manifest injustice sentence beyond the standard range.

After an extended discussion with the Commissioner, and ample time to discuss the Statement with counsel, D.L. pled guilty to one count of attempted child molestation in the first degree. (VRP 137).

C. D.L. Failed To Qualify For A SSODA.

To receive a SSODA, D.L. had to complete a number of evaluations, beginning with a polygraph examination. It did not go well. D.L. missed the first appointment, and at the make-up exam, he denied any responsibility for sexual behavior. (8/30/17 Sealed SSODA Report at 9; Sub Num. 144; CP __)*. He also failed to cooperate with the Sex Offender Treatment Providers, showing an unwillingness to participate in the program. (Sealed SSODA Report at 1; Sub Num. 144; CP __).

By the date of D.L.'s disposition hearing, no one recommended a SSODA. The Commissioner concluded,

I think that's all pretty much addressed in the reports done by Mr. Boyce explaining to what extent or not D.L. participated in the process. And I think it's pretty well documented in Boyce's reports how that all played out; the polygraph basically went nowhere, there were missed appointments, and so on. And so the conclusion was that continued efforts at doing a SSODA evaluation were not worthwhile. And I'm not hearing any argument, you know, contrary to Boyce's opinion on that, and certainly, nobody is urging the Court to impose a SSODA at this time, which you know, makes perfect sense under these regrettable circumstances.

(VRP 243).

* Respondent has filed a supplemental designation of clerk's papers and CP cites do not yet exist for these documents. The brief cites to the sub number to identify the document.

D. Probation Recommended A Manifest Injustice Sentence.

Under the plea agreement, both the Prosecutor and Respondent's counsel recommended a sentence within the standard range, 15 to 36 months. Whatcom County Probation was concerned this was too little time to guarantee D.L. adequate offender treatment. On August 1, 2017, Juvenile Probation Officer Linda Barry filed notice of intent to seek a manifest injustice sentence. (Notice; CP 158). This was four weeks before D.L.'s August 30, 2017 disposition hearing, allowing Respondent's counsel time for file a memorandum in opposition. (Respondent's Disposition Memorandum; CP 194).

To support a longer sentence, Probation filed a sealed Manifest Injustice Report documenting the need for a sentence outside the standard range. (Sealed Manifest Injustice Report; CP 224). The office recommended an extraordinary disposition of 36-40 weeks. (Respondent's Disposition Memorandum at 2; CP 195). Two Probation counselors also testified at D.L.'s disposition hearing.

The first, Linda Barry, described why additional time was necessary.

A longer sentence would allow the possibility for D.L. to go to a group home, and in a group home to finish his sentence he would have access to a certified sexual deviancy counselor. If he were to get the minimum sentence on the 15 to 36 range he would, with ten days credit, be out at the end of November; 36-week sentence would have him out mid/early May, early to mid-May; and a 40-week sentence would have him out early June. Probation just feels that to maximize the time at JRA where he's getting 24/7 coaching on behavioral and life skills, and then the possibility of transitioning to a group home through JRA to finish his sentence would allow him that time to work with a deviancy, a licensed deviancy counselor.

(VRP 216-17).

The second, Kelly Dahl, had direct experience with the programs at Echo Glen Children's Center, the JRA facility that would hold D.L. (VRP 220). An extended sentence would give Echo Glen the time to assess D.L.'s risk level, provide counseling, and then transfer him to an appropriate group home.

[W]e simply aren't going to have the ability to support, monitor skills and generalized skills in the community outside of the possibility of him going to a group home, which again the WAC requires that a youth serve ten percent of their aggregate minimum sentence or 30 days, whichever is greater, so that chews away an additional four weeks of that sentence before he'd be eligible. Throw in the risk level process, which can take 30 days to 90 days to complete; it just starts really chewing up time to focus in on some specific things that I think the longer D.L. is exposed to those things the better off he is. The more coaching he's going to have, the more structure he's going to have.

(VRP 229).

During Mr. Dahl's testimony, Betty Loomer, D.L.'s grandmother, began interrupting.

THE WITNESS: And I think a 30 to 40 week sentence would increase the likelihood –

MRS. LOOMER: I knew it.

THE WITNESS: That if D.L. behaved himself, and followed treatment, engaged in treatment –

MRS. LOOMER: I knew it.

THE WITNESS: --did all of those things, that he would be eligible to potentially transfer to a group home and participate in those services. Versus a standard range he releases at 15 weeks, okay, he's out in 15 weeks with 15 weeks of ---

MRS. LOOMER: I knew you bastards would do this.

THE COURT: Hang on a second. Ma'am please. I need you to not interject here, or I'm going to have to ask you to leave the room, okay? I've got to have a record here that everybody and follow and understand. And if you're going to keep speaking out like this, I'm going to have to ask you to leave, okay? So you're welcome to stay, but I can't have you interrupting this. So please, be quiet.

(VRP 225).

Despite this warning, Mrs. Loomer interrupted the witness again with a comment that was indecipherable on the video

recording. Commissioner Heydrich then halted proceedings and had Mrs. Loomer leave.

Stop. We're going to take a recess; I need you to leave. When I come back out here, I need you out of this room. If you don't leave, I'll have a deputy remove you because I can't have you interrupting this.

(VRP 226). Mrs. Loomer left the courtroom during a brief recess, and the Commissioner resumed the disposition hearing.

E. The Commissioner Entered a Manifest Injustice Disposition of 36 to 40 Weeks

After reviewing the parties' submissions, weighing testimony, and considering counsels' arguments, the Commission found clear and convincing evidence that a sentence with the standard range would be a manifest injustice. (VRP 242-250). First, D.L.'s victim was particularly vulnerable.

I believe that the information contained in the reports establishes that not only was the victim, in this case, five years old, but that this child was cognitively delayed...[W]hen you have a victim here who is in the same house, who is related to the defendant, and where there is easy access, and also where this five-year-old has cognitive delays, I think that gets us to particularly vulnerable.

(VRP 247).

Second, D.L. showed a serious risk of reoffending without specialized treatment for two reasons.

[O]ne would be denial of criminal conduct, which I think has been demonstrated here. And a low amenability to rehabilitation and treatment, which I think has also been demonstrated here.

(VRP 247).

Third, D.L.'s parents and grandparents had little control over his behavior.

[H]is own parents have...they've basically surrendered their responsibilities here. I'm aware the grandparents have stepped in, and I think they've done the best they can. But...I've got some serious questions about the grandparents' ability to control D.L.'s behavior...And I think that's clearly established here when one reviews the record here in terms of the number of reviews we've had to have and the problems that arose while this matter was under pretrial supervision.

(VRP 248).

Fourth, an extended sentence was necessary to provide D.L. the treatment and counseling he needs. Citing State v. T.E.H., 91 Wn. App. 908, 960 P.2d 441 (1998), the Commissioner found compelling that "the Court made a finding of serious risk to re-offend in that case and basically felt that an MI outside the range was appropriate because the record established that there was – more time was necessary to, in the Court's words, 'alter the defendant's behavior.'" (VRP 249).

The Commissioner found clear and convincing evidence of manifest injustice, imposing a sentence of 36 to 40 weeks. (VRP 250) (Disposition Order; CP 208).

Respondent now appeals.

ARGUMENT

III. STANDARD OF REVIEW

This Court reviews the manifest injustice sentence for the factors in RCW 13.40.230.

To uphold a finding of a manifest injustice: (1) substantial evidence in the record must support the trial court's reasons; (2) those reasons must clearly and convincingly support the manifest injustice disposition; and (3) the disposition cannot be too excessive or too lenient. RCW 13.40.230(2). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth.

State v. Meade, 129 Wn. App. 918, 921–22, 120 P.3d 975 (2005).

The Court reviews Respondent's constitutional challenges *de novo*. State v. Bradshaw, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004) ("reviews statutory construction issues and constitutional issues *de novo*").

Finally, the Court reviews the Commissioner's removal of a disruptive family member for an abuse of discretion. State v. Lormor, 172 Wn.2d 85, 94, 257 P.3d 624 (2011) ("because the

exclusion of one spectator is similar to the exclusion of a witness, we adopt this well-settled and widely understood standard of review”).

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE COURT’S MANIFEST INJUSTICE SENTENCE.

A. The Commissioner Had Compelling Evidence of D.L.’s Need for Intervention and Treatment

In the statement of facts above, the State quotes the testimony and reports that convinced Commissioner Heydrich that a manifest injustice sentence was necessary. This included:

- The testimony of Probation Counselor Linda Barry (VRP 214);
- The testimony of Probation Counselor Kelly Dahl (VRP 219);
- The Sealed 8/30/17 Manifest Injustice Report (CP 224); and
- The Sealed 8/30/17 Special Sex Offender Disposition Alternative Report (Sub Num. 144; CP ___).

Viewed as a whole, this evidence shows a young man with serious sexual behavior problems and a dysfunctional family environment that provides no boundaries or accountability. Only significant time and work at Echo Glen followed by placement in a therapeutic group home gives D.L. a chance at rehabilitation. Without a longer commitment, D.L. will return to the family that denies anything happened and has enabled his increasingly

dangerous actions. He failed to qualify for a SSODA, and without help, he will continue to pose a danger to children around him. State v. Tai N., 127 Wn. App. 733, 744, 113 P.3d 19 (2005) (“need to hold juveniles responsible for their offenses, but also the continuing rehabilitative goals of the juvenile justice system and the policy of responding to the individual needs of offenders”).

Substantial evidence proves Respondent’s serious risk of reoffending, his abuse of a particularly vulnerable victim, and his need for therapeutic help and counseling.

B. The Commissioner’s Reasons Support a Manifest Injustice Sentence Beyond a Reasonable Doubt.

Next, the Commissioner found aggravating factors beyond a reasonable doubt that support an extraordinary sentence. Under RCW 13.40.150(3)(i)(iii), the particular vulnerability of D.L.’s victim is a statutory aggravating factor. Furthermore, D.L.’s likelihood of reoffending and the lack of parental control are established aggravating factors justifying a longer sentence. State v. Jacobsen, 95 Wn. App. 967, 982, 977 P.2d 1250 (1999) (“juvenile offender’s denial of his or her criminal acts is a relevant factor for the court to consider when deciding whether a juvenile poses a high risk to reoffend”); State v. T.E.H., 91 Wn. App. 908, 918, 960 P.2d 441

(1998) (“aggravating factor where the inability to control the child is related to the degree of risk to society where the juvenile's behavior itself constitutes such a risk”).

Finally, the juvenile court may appropriately consider D.L.’s need for treatment in crafting an appropriate disposition.

In Tai N., Division One of this court stated that a juvenile's need for treatment may justify imposing a manifest injustice disposition. Tai N., 127 Wn. App. at 745, 113 P.3d 19. Here, Meade's mother testified that attempts at seeking treatment for Meade's behavioral problems have been unsuccessful due to Meade's failure to comply with treatment directives.

State v. Meade, 129 Wn. App. 918, 923, 120 P.3d 975 (2005). An equally compelling case exists for D.L. receiving the structured deviancy treatment he needs, but refuses to attend on his own.

C. The Disposition Is Not Excessive.

Commissioner Heydrich sentenced D.L. to 36 to 40 weeks, which is a maximum of four weeks above the top of the standard range, 15 to 36 weeks. Given the minimum time necessary to complete risk screening and qualify for placement in a group home, the sentence is reasonable, necessary and not excessive.

V. THE COURT DID NOT VIOLATE DUE PROCESS OR THE SEPARATION OF POWERS BY ENTERING A MANIFEST INJUSTICE SENTENCE.

To overturn the Commissioner's disposition, Respondent argues that the manifest injustice sentence violated the due process clause and the separation of powers doctrine. Neither argument is persuasive.

This case has a twist, which the Commissioner noted at the disposition hearing.

It's not every day that the Court has one of these cases where there's been an agreement to seek a SSODA, and somewhat rare for the SSODA evaluation process to fall apart...The vast majority of these things that I've seen, at least the process itself is completed, and more often than not there is a recommendation for a SSODA.

(VRP 243). Here, the parties expected D.L. to complete SSODA evaluation and qualify for an alternative sentence. When that did not happen, the parties were bound to recommend a standard range sentence.

Although the parties were bound, the court was not. Both the Probation Office and the juvenile court had authority to consider and impose a sentence outside the standard range. Because the Commissioner warned him about this before accepting his plea, D.L. cannot argue it came as a surprise, without notice.

A. Respondent Had Notice Of And The Opportunity To Contest A Manifest Injustice Sentence.

Respondent had 30 days' notice of the Probation Office's intent to seek an extraordinary sentence, and his counsel filed a comprehensive memorandum in opposition. This is more than what due process requires.

Due process requires that a defendant at a sentencing hearing be provided the opportunity to refute the evidence presented and that the evidence be reliable. However, due process does not require that an adult defendant receive notice that the court is considering imposing an exceptional sentence. No such notice is required because an exceptional sentence is a possibility in all sentencings. The courts reason that the defendant receives notice of the possibility of an exceptional sentence during the plea colloquy.

State v. Moro, 117 Wn. App. 913, 920, 73 P.3d 1029 (2003).

In Moro, the Court of Appeals applied this rule to juvenile proceedings.

There was no specific notice that a manifest injustice disposition was being considered by the court, but Mr. Moro was advised during the plea colloquy that "the court doesn't have to follow anybody's recommendations on the sentence." Report of Proceedings at 7. Just as in proceedings under the SRA, a manifest injustice disposition is a possibility in all juvenile sentencings. RCW 13.40.160(1). The statute does not require express notice to a defendant that the court is considering imposing a manifest injustice sentence. Mr. Moro received notice that the court might not follow the sentence recommendations. That was adequate notice for due process purposes.

Moro, 117 Wn. App. at 923. Here, Respondent acknowledged on the record: (1) that a SSODA was not a given (VRP 129); that the plea agreement was not binding on the court (VRP 134); and that the court could enter a manifest injustice sentence. (VRP 129-30) (Statement on Plea of Guilty ¶ 8; CP 108).

Despite this, Respondent argues that due process entitles him to a specific warning before he entered his plea. (Opening Brief at 12) (“before the court can impose an exceptional sentence, the accused must be notified of the aggravating factor the State will seek to prove beyond a reasonable doubt prior to the defendant’s plea or trial”). This is incorrect for a number of reasons.

First, as Moro observed, a manifest injustice sentence is a possibility in all juvenile sentences. Due process requires notice of that possibility, not the specific evidence the court may rely on to impose an extraordinary sentence. And unlike the Sentencing Reform Act for adults, the Juvenile Justice Act does not require notice of aggravating factors before an offender enters a plea. Compare RCW 9.94A.537(1) (SRA) with RCW 13.40.160(1) (JJA).

Second, Washington courts have repeatedly found juvenile sentencing substantially different from that for adults. The due

process rights to juries for adults in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d. 435 (2000), do not apply to juveniles.

Without a right of jury trial in juvenile cases, it is conceptually awkward to try to extract the due process component from Apprendi and Blakely and graft it onto non-jury juvenile dispositions. And it is unnecessary to do so because, as the State recognizes, the juvenile code already provides that a disposition harsher than the standard range must be supported by proof beyond a reasonable doubt.

State v. Tai N., 127 Wn. App. 733, 741, 113 P.3d 19 (2005).

Because a juvenile court must find proof of aggravating factors beyond a reasonable doubt, Respondent's constitutional rights at sentencing are secure. Tai N., 127 Wn. App. at 742 ("as the Juvenile Justice Act already provides this guarantee, we decline to decide whether Apprendi and Blakely require the same standard as a matter of constitutional due process").

Third, requiring prior notice of aggravating factors in juvenile cases is unworkable and inconsistent with treatment and rehabilitation. Here, the parties expected D.L. to qualify for a SSODA. That outcome would have provided him the evaluation, treatment, and supervision necessary to address his sexual

behavior. But his refusal to cooperate coupled with his family's denial thwarted the recommended outcome. All of this became vital information on how to provide D.L. meaningful services and treatment. And it arose after D.L.'s plea.

If juvenile courts lose the ability to use this information, along with the authority to enter manifest injustice sentences, juvenile offenders will suffer the consequences. D.L. would most likely serve a short commitment in Echo Glen, without time to be evaluated and start counseling, and be released to his family. No group home, no counseling, no treatment.

If we were to apply the adult maximum to the disposition provisions of the JJA, we would leave the juvenile courts without a means of responding to the obvious needs of juveniles like the defendants. It would be, in effect, telling the juvenile court to ignore the needs of the juvenile until he is convicted of committing an even more serious offense. Such an approach is necessary under the adult system in which punishment is the paramount purpose and where the punishment must fit the crime. But it is inimical to the rehabilitative purpose of the juvenile justice system. It would destroy the flexibility the legislature built into the system to allow the court, in appropriate cases, to fit the disposition to the offender, rather than to the offense.

State v. Rice, 98 Wn.2d 384, 397, 655 P.2d 1145 (1982).

B. The Probation Department Did Not Violate The Separation Of Powers By Recommending A Manifest Injustice Sentence.

Respondent next contends that as a member of the judicial branch, the Probation Department could not allege and prove aggravating factors supporting a manifest injustice sentence. (Opening Brief at 17). He argues that only the prosecutor – a member of the executive branch -- can do this.

The flaw in this argument is that it equates charging a crime with imposing the appropriate sentence. Respondent is correct that probation counselors cannot charge offenders with crimes. But acting for the sentencing judge, counselors may independently recommend a manifest injustice sentence and provide evidence in support.

Probation counselors are agents of the juvenile court, not the prosecution. Counselors may recommend exceptional sentences even when their recommendations conflict with those of the prosecution. Merz concedes that the juvenile court was not bound by the plea agreement. If the court was not bound, neither was the probation counselor.

State v. Merz, 54 Wn. App. 23, 26–27, 771 P.2d 1178 (1989).

Under RCW 13.04.040, probation counselors have authority to “prepare predisposition studies as required in RCW 13.34.120 and 13.40.130, as now or hereafter amended, and be present at the

disposition hearing to respond to questions regarding the predisposition study.” This includes the power to recommend an exceptional sentence.

Probation counselors have a statutory duty to make studies and recommendations to the court respecting dispositions. This function is a valuable aid to the court...This case is a good illustration of why probation counselors' sentence recommendations should be made independently of the prosecuting attorney.

State v. Poupart, 54 Wn. App. 440, 447, 773 P.2d 893 (1989).

Respondent argues that “filing of special available special allegations is the role of the prosecutor alone”, but to recommend a manifest injustice sentence, a probation counselor must have compelling evidence in support. (Opening Brief at 22). The authority to recommend an exceptional sentence necessarily includes the ability to provide supporting evidence of the relevant aggravating factors. Because this is all part of sentencing – a judicial function – the separation of powers is respected.

C. The Commissioner Asked Appropriate Questions Of The Probation Counselors.

Respondent next alleges that the Commissioner violated the appearance of fairness doctrine by asking questions of the probation counselors at the disposition hearing. “Where the State declined to elicit testimony from the probation officer, it violated the

appearance of fairness for the trial court to call the two probation employees as witnesses to provide testimony in support for a manifest injustice sentence.” (Opening Brief at 36).

Washington law does not forbid juvenile judges from asking questions. In State v. Moreno, 147 Wn.2d 500, 58 P.3d 265 (2002) – the case Respondent cites repeatedly – the Supreme Court upheld a judge’s ability to hear testimony and ask questions.

The only unfairness Moreno identifies is that the judge had to rule on objections to the judge's own questioning. But this practice is contemplated by both federal and state evidence rules. See Fed.R.Evid. 614(c); ER 614(c). Moreno's claim rests not on the ground that the judge took the prosecution's side, but on the technical ground of who uttered the words calling witnesses to the stand. Not only is this far short of the conduct condemned in Murchison, it is far short of the combination of investigative and adjudicatory roles upheld in Withrow.

Moreno, 147 Wn.2d at 509. As long as the judge does not advocate for a party, which the Commissioner did not here, he or she may ask questions of a witness.

VI. THE COMMISSIONER HAD AUTHORITY TO EXPEL A DISRUPTIVE FAMILY MEMBER.

Respondent faults the Commissioner for not allowing his grandmother, Betty Loomer, to allocute on his behalf. (Opening Brief at 32). But the Commissioner acted appropriately for two

reasons. First, Mrs. Loomer's outbursts were disruptive and disrespectful. The Commissioner had inherent authority to control unruly behavior in the courtroom.

In addition to its inherent authority, the trial court, under RCW 2.28.010, has the power to preserve and enforce order in the courtroom and to provide for the orderly conduct of its proceedings. The power to control the proceedings must include the power to remove distracting spectators, or else it would be meaningless. Any other rule would leave a trial court judge unable to keep the order necessary for a fair proceeding.

State v. Lormor, 172 Wn.2d 85, 93–94, 257 P.3d 624 (2011).

Second, the Commissioner took testimony from Bruce Loomer, Mrs. Loomer's husband and D.L.'s grandfather. (VRP 237). This provided consultation with D.L.'s custodians as required under RCW 13.40.150(3)(d). Given Mrs. Loomer's outbursts and state of mind, it was both unnecessary and unwise to have her return to the courtroom only to supplement her husband's comments.

CONCLUSION

Juvenile courts must simultaneously hold offenders accountable and provide them an opportunity to change. They "tread an equatorial line somewhere midway between the poles of rehabilitation and retribution." State v. Rice, 98 Wn.2d 384, 393, 655

P.2d 1145 (1982). The Commissioner in this case struck the appropriate balance by entering a manifest injustice sentence to give Respondent D.L. a fighting chance at rehabilitation.

The State of Washington respectfully requests the Court to affirm the juvenile court's Disposition Order and dismiss this appeal.

DATED this 22nd day of January, 2018.

DAVID S. McEACHRAN
Whatcom County Prosecuting Attorney

By 
Philip J. Buri, WSBA #17637
Special Deputy Prosecutor
BURI FUNSTON MUMFORD, PLLC
1601 F. Street
Bellingham, WA 98225
360/752-1500

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of **Brief of Respondent** to:

Washington Appellate Project
Attn: Kate Benward
1511 Third Ave., Ste. 701
Seattle, WA 98101

DATED this 22nd day of January, 2018.



Philip J. Buri, WSBA 17637

APPENDIX A

SCANNED

3

FILED IN OPEN COURT
5-24-2017
WHATCOM COUNTY CLERK

By _____
Deputy

SUPERIOR COURT OF WASHINGTON
COUNTY OF WHATCOM
JUVENILE COURT

STATE OF WASHINGTON

vs.

D. [REDACTED] L. [REDACTED]

Respondent

NO: 16-8-00165-1

STATEMENT OF JUVENILE ON PLEA
OF GUILTY
(STJOPG)

1. My true name is: D. [REDACTED] L. [REDACTED]
2. My age is 14. Date of Birth: 11/22/02
3. I have been informed and fully understand that I have the right to a lawyer, and that if I cannot afford to pay for a lawyer, the judge will provide me with one at no cost. I understand that a lawyer can look at the social and legal files in my case, talk to the police, probation counselor and prosecuting attorney, tell me about the law, help me understand my rights, and help me at trial.
4. I understand that I am charged with Count I: **Attempted Child Molestation in the 1st Degree**

Attempting to have sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.
5. **I UNDERSTAND I HAVE THE FOLLOWING IMPORTANT RIGHTS, AND I GIVE THEM ALL UP BY PLEADING GUILTY:**
 - a. I have the right to a speedy and public trial in the county where the offense(s) allegedly occurred.
 - b. I have the right to remain silent before and during trial, and I need not testify against myself.
 - c. I have the right to hear and question witnesses who might testify against me.
 - d. I have the right to testify and to have witnesses testify for me. These witnesses may be required to appear at no cost to me.
 - e. I am presumed innocent unless the charge is proven beyond a reasonable doubt or I enter a plea of guilty.
 - f. I have the right to appeal a finding of guilt after trial.

6. I have been informed that in order to determine an appropriate sentence regarding the charges to which I plead guilty in this matter, the judge will take into consideration my criminal history, which is as follows:

a.

7. The Standard Sentencing Range, which was calculated using my criminal history as referenced in Paragraph 6, above, is as follows:

LOCAL SANCTIONS:

COUNT	SUPERVISION	COMMUNITY RESTITUTION	FINE	DETENTION	CVC	RESTITUTION
<input type="checkbox"/> 1	0 to 12 months	0 to 150 hours	\$0 to \$500	0 to 30 Days	\$400	<input type="checkbox"/> As required <input type="checkbox"/>
<input type="checkbox"/> 2	0 to 12 months	0 to 150 hours	\$0 to \$500	0 to 30 Days	\$400	<input type="checkbox"/> As required <input type="checkbox"/>
<input type="checkbox"/> 3	0 to 12 months	0 to 150 hours	\$0 to \$500	0 to 30 Days	\$400	<input type="checkbox"/> As required <input type="checkbox"/>

~~I understand that, if community supervision is imposed, I will be required to comply with various rules, which could include school attendance, curfew, law-abiding behavior, associational restrictions, counseling, treatment, urinalysis, and/or other conditions deemed appropriate by the judge. Failure to comply with the conditions of supervision could result in a violation being found and further confinement imposed for the violation up to 30 days.~~

JUVENILE REHABILITATION ADMINISTRATION (JRA) COMMITMENT:

COUNT	WEEKS AT JUVENILE REHABILITATION ADMINISTRATION (JRA) FACILITY	CVC	RESTITUTION
<input checked="" type="checkbox"/> 1	<input checked="" type="checkbox"/> 15 - 36 <input type="checkbox"/> 30 - 40 <input type="checkbox"/> 52 - 65 <input type="checkbox"/> 80 - 100 <input type="checkbox"/> 103 - 129 <input type="checkbox"/> 180 - Age 21	\$75/\$100	<input type="checkbox"/> As required <input type="checkbox"/> _____
<input type="checkbox"/> 2	<input type="checkbox"/> 15 - 36 <input type="checkbox"/> 30 - 40 <input type="checkbox"/> 52 - 65 <input type="checkbox"/> 80 - 100 <input type="checkbox"/> 103 - 129 <input type="checkbox"/> 180 - Age 21	\$75/\$100	<input type="checkbox"/> As required <input type="checkbox"/> _____
<input type="checkbox"/> 3	<input type="checkbox"/> 15 - 36 <input type="checkbox"/> 30 - 40 <input type="checkbox"/> 52 - 65 <input type="checkbox"/> 80 - 100 <input type="checkbox"/> 103 - 129 <input type="checkbox"/> 180 - Age 21	\$75/\$100	<input type="checkbox"/> As required <input type="checkbox"/> _____

I understand that, if I am committed to a Juvenile Rehabilitation Administration (JRA) facility, following my release I may be required to comply with a program of parole for a number of months. I understand that if placed on parole, I will be under the supervision of a parole officer. The conditions of parole will restrict my actions and may require me to participate in activities and programs including, but not limited to, evaluation, treatment, education, employment, community restitution, electronic monitoring, and urinalysis. Failure to comply with the conditions of parole may result in parole revocation and further confinement. If the offense to which I am pleading guilty is a sex offense, failure to comply with the conditions of parole may result in further confinement of up to 24 weeks.

I understand that if I am pleading guilty to two or more offenses, the disposition terms shall run consecutively (one term after the other) subject to the limitations in RCW 13.40.180.

I understand that if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding.

8. RIGHT TO APPEAL SENTENCE: I understand, that the judge must impose a sentence within the standard range, unless the judge finds by clear and convincing evidence that the standard range sentence would amount to a manifest injustice. If the judge goes outside the standard range, either the state or I can appeal that sentence. If the sentence is within the standard range, no one can appeal the sentence.

9. **MAXIMUM PUNISHMENT:** I have been informed, and fully understand, that the maximum punishment I can receive is commitment until I am 21 years old, but that I may be incarcerated for no longer than the adult maximum sentence for this offense.
10. **COUNTS AS CRIMINAL HISTORY:** I understand that my plea of guilty and the judge's acceptance of my plea will become part of my criminal history. I understand that if I am pleading guilty to two or more offenses that arise out of the same course of conduct, only the most serious offense will count as an offense in my criminal history. I understand that my guilty plea will remain part of my criminal history when I am an adult and may affect my ability to remain in the Juvenile Justice System should I re-offend. I understand that the judge will consider my criminal history when sentencing me for any offense that I commit in the future as an adult or juvenile.
11. **GROUNDS FOR DEPORTATION:** If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law may be grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.
12. **NOTIFICATION RELATING TO SPECIFIC CRIMES: IF ANY OF THE FOLLOWING PARAGRAPHS DO NOT APPLY, THEY SHOULD BE STRICKEN AND INITIALED BY THE DEFENDANT AND THE JUDGE.**

~~[A] — SUSPENSION/REVOCAION OF DRIVING PRIVILEGE FOR FIREARMS OR DRUGS: I have been informed that if the offense that I am pleading guilty to involves a finding that I was armed with a firearm when I committed the offense or if the offense was a violation of RCW 9.41.040(2)(a)(iii) or chapters 66.44, 69.41, 69.50 or 69.52 and I was 13 years of age or older when I committed the offense, then the plea will result in the suspension or revocation of my privilege to drive.~~

~~[B] — SUSPENSION/REVOCAION OF DRIVING PRIVILEGE FOR DRIVING OFFENSES: I have been informed that if the offense that I am pleading guilty to is any felony in the commission of which a motor vehicle was used, reckless driving, driving or being in physical control of a motor vehicle while under the influence of intoxicants, driving while license suspended or revoked, vehicular assault, vehicular homicide, hit and run, theft of motor vehicle fuel, or attempting to elude a pursuing police vehicle, the plea will result in the suspension or revocation of my privilege to drive.~~

[C] **OFFENDER REGISTRATION FOR SEX OFFENSE OR KIDNAPPING OFFENSE:** Because this crime involves a sex offense, or a kidnapping offense involving a minor, or sexual misconduct with a minor in the second degree, communication with a minor for immoral purposes, or attempt, solicitation, or conspiracy to commit a sex offense or a kidnapping offense involving a minor, as defined in RCW 9A.44.128, I will be required to register where I reside, study or work. The specific registration requirements are set forth in the "Offender Registration" Attachment.

[D] **DNA TESTING:** Pursuant to RCW 43.43.754, if this crime involves a felony, or an offense which requires sex or kidnapping offender registration, or any of the following offenses: stalking, harassment, communication with a minor for immoral purposes, assault in the fourth degree with sexual motivation, custodial sexual misconduct in the second degree, failure to register as a sex or kidnapping offender, patronizing a prostitute, sexual misconduct with a minor in the second degree, or violation of a sexual assault protection order, I will be required to have a biological sample collected for purposes of DNA identification analysis. This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from me for a qualifying offense.

[E] **HIV TESTING:** If this crime involves a sexual offense, prostitution, or a drug offense associated with hypodermic needles, I will be required to undergo testing for the human immunodeficiency (HIV/AIDS) virus. RCW 70.24.340.

~~[F] DOMESTIC VIOLENCE ASSESSMENT: If this offense involves domestic violence, I may be required to pay a domestic violence assessment of up to \$100.~~

~~[G] CRIME LAB FEES: If this offense involves a controlled substance, I will be required to pay \$100 for the State Patrol Crime Lab fees to test the substance.~~

~~[H] MANDATORY PROSTITUTION/INDECENT EXPOSURE/COMMERCIAL SEXUAL ABUSE OF A MINOR/ TRAFFICKING ASSESSMENTS: I have been informed that the court will order me to pay a mandatory assessment as required under RCW 9A.88.120, RCW 9.68A.105, or RCW 9A.40.100. The court may reduce up to two-thirds of this assessment if the court finds that I am not able to pay the assessment.~~

[I] SCHOOL NOTIFICATION: If I am enrolled in a common school, the court will notify the principal of my plea of guilty if the offense for which I am pleading guilty is a violent offense as defined in RCW 9.94A.030; a sex offense as defined in RCW 9.94A.030; inhaling toxic fumes under chapter 9.47A RCW; a controlled substance violation under chapter 69.50 RCW; a liquor violation under RCW 66.44.270; or any crime under chapters 9.41, 9A.36, 9A.40, 9A.46, and 9A.48 RCW. RCW 13.04.155.

[J] SCHOOL ATTENDANCE WITH VICTIM PROHIBITED: I understand that if I am pleading guilty to a sex offense, I will not be allowed to attend the school attended by the victim or victim's siblings. RCW 13.40.160.

~~[K] FEDERAL BENEFITS: I understand that if I am pleading guilty to a felony drug offense, my eligibility for state and federal food stamps and welfare will be affected. -21 U.S.C. § 862a.~~

~~[L] MANDATORY MINIMUM SENTENCE: The crime of _____ has a mandatory minimum sentence of at least _____ weeks of total confinement. The law does not allow any reduction of this sentence.~~

[M] RIGHT TO POSSESS FIREARMS: [JUDGE MUST READ THE FOLLOWING TO OFFENDER] I have been informed that if I am pleading guilty to any offense that is classified as a felony or any of the following crimes when committed by one family or household member against another: assault in the fourth degree, coercion, stalking, reckless endangerment, criminal trespass in the first degree, or violation of the provisions of a protection order or no-contact order restraining the person or excluding the person from a residence; that I may not possess, own, or have under my control any firearm, and under federal law any firearm or ammunition, unless my right to do so has been restored by the court in which I am adjudicated or the superior court in Washington State where I live, and by a federal court if required.

~~[N] FIREARMS POSSESSION OR COMMISSION WHILE ARMED:~~

~~[i] Minimum 10 Days for Possession Under Age 18: I understand that the offense I am pleading guilty to includes possession of a firearm in violation of RCW 9.41.040(2)(a)(iii), and pursuant to RCW 13.40.193, the judge will impose a mandatory minimum disposition of 10 days of confinement, which must be served in total confinement without possibility of release until a minimum of 10 days has been served.~~

~~[ii] Unlawful Possession with Stolen Firearm: I understand that if the offenses I am pleading guilty to include both a conviction under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and one or more convictions for the felony crimes of theft of a firearm or possession of a stolen firearm, that the sentences imposed for these crimes shall be served consecutively to each other. A consecutive sentence will also be imposed for each firearm unlawfully possessed.~~

~~[iii] Armed During Commission of Any Offense: I understand that if the offense I am pleading guilty to includes a finding that either I or my accomplice was armed with a firearm during the commission of the offense, that the standard range disposition shall be determined pursuant to RCW 13.40.160, unless the judge finds a manifest injustice, in which case the disposition shall be determined pursuant to RCW 13.40.193(3). Such confinement will run consecutive to any other sentence that may be imposed.~~

~~[iv] Armed During Commission of a Felony: I further understand that the offense I am pleading guilty to includes a finding that either myself or my accomplice was armed with a firearm during the commission of a felony (other than possession of a machine gun, possession of a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first or second degree, or use of a machine gun in a felony) and, therefore, the following mandatory periods of total confinement will be added to my sentence: For a class A felony, six (6) months; for a class B felony, four (4) months; and for a class C felony, two (2) months. Such confinement will run consecutive to any other sentence that may be imposed.~~

13. I understand that the prosecuting attorney will make the following recommendation to the judge: **The State agrees to support and recommend a SSODA disposition, if the respondent is found eligible for the program. If not determined eligible for the program or revoked while on the program, standard range disposition of 15-36 week commitment at JRA will be recommended with credit for any time already served; \$100vfa/\$100 dna; NC with A.R.M.(4/28/11).**
14. Although the judge will consider recommendations of the prosecuting attorney and the probation officer, the judge may impose any sentence he or she feels is appropriate, up to the maximum allowed by law.
15. The judge has asked me to state in my own words what I did that makes me guilty of this crime. This is my statement: **The court may review the probable cause statement to establish a factual basis.**
16. I plead guilty to **Count 1** in the **Amended Information**. I have received a copy of that Information.
17. I make this plea freely. No one has threatened to harm me or anyone else to get me to plead guilty.
18. No one has made any promises to make me plead guilty, except as written in this statement.
19. I have read or someone has read to me everything printed above and I understand it in full. I have been given a copy of this statement and any applicable attachment. I have no more questions to ask the judge.

Dated: 5/24/17

~~Debra~~ ~~L. Jones~~
Respondent

I have read and discussed this statement with the respondent and believe that the respondent is competent and fully understands the statement.


MELISSA STONE, WSBA No. ABUWA


AMY JONES, WSBA No. 91001

BURI FUNSTON MUMFORD PLLC

January 22, 2018 - 11:23 AM

Transmittal Information

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