

No. 96434-3

No. 35130-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

TREVON J. SOLOMON-MCDONALD,

Appellant.

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

APPELLANT'S OPENING BRIEF

Sean M. Downs
Attorney for Appellant

GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

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ASSIGNMENTS OF ERROR

1. The court's finding of an aggravating factor that Mr. Solomon-McDonald threatened to inflict serious bodily injury is not supported by substantial evidence.
2. The court's finding of an aggravating factor that Mr. Solomon-McDonald was a high risk to reoffend without treatment is not supported by substantial evidence.
3. The court applied an incorrect standard of proof to find a manifest injustice.

A. STATEMENT OF THE CASE

Mr. Solomon-McDonald was charged by information in Spokane County Superior Court – Juvenile Department with two counts of Indecent Liberties with Forcible Compulsion regarding two separate alleged victims, two counts of Unlawful Imprisonment with Sexual Motivation regarding the same two alleged victims, and one count of Assault in the Fourth Degree with Sexual Motivation regarding a third alleged victim. CP 1-2. The case proceeded to bench trial and Mr. Solomon-McDonald was ultimately found guilty of two counts of Unlawful Imprisonment with Sexual Motivation and one count of Assault in the Fourth Degree without the Sexual Motivation finding. RP 5, 286; CP 124-128.

The parties proceeded to a contested sentencing hearing on January 25, 2017. RP 290. The State requested that the court impose the Special Sex Offender Disposition Alternative (SSODA) and to make a finding of manifest injustice and impose but suspend 36 weeks due to aggravating factors of sexual motivation and need for treatment in order to have additional time hanging over Mr. Solomon-McDonald's head in the SSODA program. CP 20-40; RP 329. The State also argued that there was an aggravating factor of threatened serious bodily injury simply by virtue of Mr. Solomon-McDonald being convicted of Unlawful Imprisonment. RP 333. In its briefing, the State included a report from Priscilla Hannon, certified sex offender treatment provider, who conducted an evaluation of Mr. Solomon-McDonald. CP 27-35. Ms. Hannon indicated that Mr. Solomon-McDonald was a low risk to reoffend sexually and recommended that he participate in an adolescent treatment program and be evaluated by a mental health professional, amongst other things. *Id.* The defense requested a sentence within the standard range of 0 – 30 days of confinement and objected to a finding of an aggravating factor based on threatened serious bodily injury or incentivizing completion of treatment. CP 41-78.

Juvenile Court probation officer Joe Distefano testified at the sentencing hearing that he monitored Mr. Solomon-McDonald pretrial,

that he conducted a risk assessment of Mr. Solomon-McDonald and found that he was a moderate risk to reoffend, the SSODA treatment provider indicated that she would accept Mr. Solomon-McDonald into the SSODA program, and that the reason for asking for 36 weeks is so that Mr. Solomon-McDonald would be subject to more treatment and more education. RP 305, 309, 318.

The court found that there were both mitigating factors and aggravating factors that existed by clear and convincing evidence. CP 105-106; RP 356. The mitigating factors listed were: (1) Respondent has no criminal history; (2) Respondent has intellectual limitations requiring treatment. CP 105. The aggravating factors listed were: (1) the Unlawful Imprisonment counts included a finding of sexual motivation; (2) Respondent threatened serious bodily injury to the two victims in the Unlawful Imprisonment counts; (3) Respondent has intellectual limitations requiring treatment and showing a high risk to reoffend without treatment; (4) Respondent poses a serious risk to community safety and an increased danger that his behavior could escalate without treatment. CP 105-106. The court indicated that the clear and convincing standard was “just below” the beyond a reasonable doubt standard. RP 353. The court then imposed an exceptional sentence upwards of 36 weeks with the SSODA program imposed. RP 357. This appeal follows.

B. ARGUMENT

1. The imposition of a manifest injustice sentence was improper.

Under the Juvenile Justice Act (“JJA”), any offense is subject to a disposition above the standard range “[i]f the court concludes, and enters reasons for its conclusion, that disposition within the standard range would effectuate a manifest injustice” such that the standard disposition would impose a serious and clear danger to society. *State v. J.V.*, 132 Wn. App. 533, 539–40, 132 P.3d 1116 (2006); RCW 13.40.160(2). Mitigating and aggravating factors are listed under RCW 13.40.150. However, a juvenile court may rely on factors not listed in the JJA. *State v. Crabtree*, 116 Wn. App. 536, 544, 66 P.3d 695 (2003).

A finding of manifest injustice will be upheld if substantial evidence supports the reasons given, those reasons clearly and convincingly support the disposition, and the disposition is not too excessive or too lenient. *J.V.*, 132 Wn. App. at 540–41; RCW 13.40.230(2). The clear and convincing standard under the JJA is equivalent to the beyond a reasonable doubt standard. *State v. Rhodes*, 92 Wn.2d 755, 760, 600 P.2d 1264 (1979).

The disposition court must consider whether mitigating and/or aggravating factors exist, and may consider both statutory and non-

statutory factors. *State v. S.H.*, 75 Wn. App. 1, 11–12, 877 P.2d 205 (1994); RCW 13.40.150(3). At the disposition hearing “all relevant and material evidence ... may be received by the court.” RCW 13.40.150(1).

i. There is insufficient evidence to find that Mr. Solomon-McDonald threatened serious bodily injury to victims A.E.R. and K.R.C.

“Serious bodily injury” is not defined in the JJA, RCW chapter 13.40. It is currently only defined in the Revised Code of Washington under RCW 79A.60.060 as “bodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body”. RCW 79A.60.060 (Assault by watercraft); see also *State v. Stubbs*, 170 Wn.2d 117, 125, 240 P.3d 143 (2010) (citing former RCW 46.61.522(2)).

Victim A.E.R. testified that Mr. Solomon-McDonald never threatened to harm her physically. RP 123. Abigayle Piper testified that Mr. Solomon-McDonald made threats to her and victim K.R.C. that he would push K.R.C. against a wall to hurt her after she told people about the allegation. RP 135. Mr. Solomon-McDonald denied making any threats to K.R.C. RP 226. The court’s finding of an aggravating circumstance is in contravention to the court’s previous finding that it could not find beyond a reasonable doubt that the sexual contact occurred by forcible compulsion because the victim must perceive a threat. RP 278.

There was absolutely no testimony about a threat involving bodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body.

Given the above, the court's finding of an aggravator based on threats of serious bodily injury are not supported by substantial evidence.

ii. There is insufficient evidence to find that Mr. Solomon-McDonald was a high risk to reoffend without treatment.

The sentencing information provided by the State and the testimony provided at the sentencing hearing all show that the objective measures of Mr. Solomon-McDonald's risk to reoffend sexually were low and to reoffend generally were moderate. In fact, those objective tools were used before Mr. Solomon-McDonald had stable housing, employment, and had been out of trouble with law enforcement for a year. Even though the court specifically denied imposing a manifest injustice in order to incentivize compliance with treatment, the court's findings and order of SSODA clearly indicates that the court wanted Mr. Solomon-McDonald monitored with additional time hanging over his head. The court found that Mr. Solomon-McDonald was a high risk to reoffend without substantial evidence of this.

iii. The court applied an incorrect standard of proof to find a manifest injustice.

The “clear and convincing” standard is the civil counterpart to “beyond a reasonable doubt”. *In re Levias*, 83 Wn.2d 253, 517 P.2d 588 (1973); *State v. McCarter*, 91 Wn.2d 249, 588 P.2d 745 (1978). Our Supreme Court has held that the phrase “manifest injustice” represents a demanding standard. *State v. Taylor*, 83 Wn.2d 594, 521 P.2d 699 (1974). Thus, in order for a manifest injustice sentence to stand on review, the standard range for the offense(s) and that particular defendant must present, beyond a reasonable doubt, a clear danger to society. *State v. Rhodes*, 92 Wn.2d 755, 760, 600 P.2d 1264, 1267 (1979) (overruled on other grounds by *State v. Baldwin*, 150 Wn.2d 448, 78 P.3d 1005 (2003)).

In the instant case, the court mistakenly believed that the “clear and convincing” standard for purposes of the JJA was “just below” the beyond a reasonable doubt standard. RP 353. This is an incorrect understanding, even though the parties briefed the court on the correct standard in their sentencing memoranda. Therefore, since the court only found that the aggravators were proven by the lower standard, the court did not actually find that the aggravators were proven. Accordingly, the aggravators should be stricken and the exceptional sentence must be reversed.

C. CONCLUSION

Given the foregoing, Mr. Solomon-McDonald respectfully requests this court to reverse his exceptional sentence upwards and remand to the Superior Court for resentencing.

DATED this 29th day of September, 2017.

Respectfully submitted,

s/ Sean M. Downs
Sean M. Downs, WSBA #39856
Attorney for Appellant
GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, served the Spokane County Prosecuting Attorney a true and correct copy of the document to which this certification is affixed, on September 29, 2017 to email address scpaappeals@spokanecounty.org. Service was made by email pursuant to the Respondent's consent. I also served Appellant, Trevon Solomon-McDonald, a true and correct copy of the document to which this certification is affixed on September 29, 2017 via first class mail postage prepaid to 12204 E 4th Ave. Apt. 10, Spokane Valley, WA 99206.

s/ Sean M. Downs
Sean M. Downs, WSBA #39856
Attorney for Appellant
GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

GRECCO DOWNS, PLLC

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