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SUPREME COURT
STATE OF WASHINGTON
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CLERK

Supreme Court No. 96434-3

No. 35130-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

T.J.S.-M.,

Appellant/Petitioner.

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

PETITION FOR REVIEW

Note: Treated as Motion for
Discretionary Review. See
Clerk's 10-23-2018 letter

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A. IDENTITY OF PETITIONER

Petitioner, T.J.S.-M., through his attorney, Sean M. Downs, requests the relief designated in Part B.

B. COURT OF APPEALS DECISION

T.J.S.-M. requests review of the unpublished opinion of the Court of Appeals in 35130-1-III, filed on September 20, 2018. A copy of the decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Is the imposition of a manifest injustice disposition ripe for review before SSODA is revoked?
2. Was the imposition of a manifest injustice disposition improper?
 - i. Was there sufficient evidence to find that T.J.S.-M. threatened serious bodily injury to victims A.E.R. and K.R.C.?
 - ii. Was there sufficient evidence to find that T.J.S.-M. was a high risk to reoffend without treatment?
 - iii. Did the lower court apply an incorrect standard of proof to find a manifest injustice?

D. STATEMENT OF THE CASE

T.J.S.-M. 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 T.J.S.-M. 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 T.J.S.-M.'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 T.J.S.-M. 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 T.J.S.-M.. CP 27-35. Ms. Hannon indicated that T.J.S.-M. 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 disposition 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 T.J.S.-M. pretrial, that he conducted a risk assessment of T.J.S.-M. and found that he was a moderate risk to reoffend, the SSODA treatment provider indicated that she would accept T.J.S.-M. into the SSODA program, and that the reason for asking for 36 weeks is so that T.J.S.-M. 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 disposition upwards of 36 weeks with the SSODA program imposed. RP 357.

Subsequently, T.J.S.-M. was found to be in violation of the SSODA program, the disposition order was modified, and suspended time was revoked due to the violation. CP 129-131. T.J.S.-M. was ordered to serve five days in confinement for the violation, which was converted to twenty hours of community service. *Id.*

E. ARGUMENT

1. The imposition of a manifest injustice disposition is ripe for review.

If the court did not impose a manifest injustice disposition, T.J.S.-M. would be serving a local sanctions disposition, pursuant to RCW 13.40.020(18), of 0 – 30 days of confinement with 83 days credit. *See* RP 313; RCW 13.40.0357 (local sanctions for instant offense); RCW 13.40.160 (credit for time served required for time spent in detention prior to disposition); *State v. L. W.*, 101 Wn. App. 595, 600, 6 P.3d 596 (2000) (failure to give credit for time spent in pre-disposition detention violates a juvenile’s due process and equal protection rights). Therefore, T.J.S.-M.’s sentence would have been a maximum of 30 days imposed with credit for

all of those 30 days, which would not leave any suspended confinement time hanging over his head and the imposition of SSODA would essentially be ineffective. *See* RCW 13.40.162(3) (either a standard range disposition or a manifest injustice disposition may be suspended). T.J.S.-M.'s current disposition includes 24 months of community supervision on SSODA, whereas local sanctions only allow up to 12 months of supervision. T.J.S.-M. would not be subject to those additional 12 months of intensive monitoring but for the disposition imposed by the Superior Court. Moreover, T.J.S.-M. would not have been subject to modifications of the SSODA disposition for violations, short of revocation.

The disposition of a juvenile offender is appealable in the same manner as criminal cases. *State v. J.W.*, 84 Wn. App. 808, 811, 929 P.2d 1197 (1997) (citing RCW 13.04.033). A criminal defendant is permitted to appeal an exceptional disposition generally or he may appeal a standard range disposition if the sentencing court failed to follow a procedure required by the Sentencing Reform Act. *J.W.*, 84 Wn. App. at 811 (citing *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)).

State v. Langland, 42 Wn. App. 287, 292, 711 P.2d 1039 (1985) addressed ripeness in challenging whether a sentence constitutes cruel and unusual punishment pursuant to the Eighth Amendment. *State v. J.B.*, 102 Wn. App. 583, 585, 9 P.3d 890 (2000) involves an untimely appeal of a

SSODA sentence after the defendant pled guilty. In *J.B.*, the Court of Appeals noted that SSODA dispositions are not appealable under RCW 13.40.230. *J.B.*, 102 Wn. App. at 585 (citing RCW 13.40.162(10)). Ordinarily, a disposition outside the standard range is appealable under RCW 13.40.230 by the state or the respondent. RCW 13.40.160(2). The SSODA statute does indicate that a SSODA disposition is not appealable under RCW 13.40.230. RCW 13.40.162(10). However, T.J.S.-M. is appealing his manifest injustice disposition, not the imposition of SSODA. Moreover, he is timely appealing after trial, not untimely appealing after entering a plea of guilty as in *J.B.*, *supra*. To the extent that this court deems that *J.B.* is controlling authority, Appellant respectfully requests that this court abrogate that 17 year old Court of Appeals decision.

T.J.S.-M.'s disposition has already been modified due to a violation of SSODA and T.J.S.-M. has already been sanctioned with confinement due to the violation. This confinement due to modification of the disposition is what makes this case ripe for review. By the Court of Appeals' logic, T.J.S.-M. could be sanctioned 36 weeks minus any credit for time served and T.J.S.-M. would still not be able to appeal his erroneous manifest injustice disposition because his SSODA had not been "revoked". The consequences of an appeal of this sentence are not merely potential consequences. The actual result is that T.J.S.-M. would not be

able to be sanctioned and be subject to further confinement with a local sanctions disposition that he has already served. By refusing to review this case, the Court of Appeals has allowed T.J.S.-M. to be confined when he otherwise would not be confined.

Given the foregoing, T.J.S.-M.'s improper manifest injustice disposition is ripe for review and this court should accept review pursuant to RAP 13.4(b)(4) as this case involves an issue of substantial public interest that should be determined by the Supreme Court.

2. The imposition of a manifest injustice disposition 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 T.J.S.-M. 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) (quoting former RCW 46.61.522(2)).

Victim A.E.R. testified that T.J.S.-M. never threatened to harm her physically. RP 123. Abigayle Piper testified that T.J.S.-M. 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. T.J.S.-M. 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 T.J.S.-M. 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 T.J.S.-M.'s risk to reoffend sexually were low and to reoffend generally were moderate. In fact, those objective tools were used before T.J.S.-M. 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 T.J.S.-M. monitored with additional time hanging over his head. The court found that T.J.S.-M. 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 disposition 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 disposition must be reversed.

F. CONCLUSION

Given the foregoing, T.J.S.-M. respectfully requests this court to accept review.

DATED this 22nd day of October, 2017.

Respectfully submitted,

s/ Sean M. Downs
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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 October 22, 2018 to email address scpaappeals@spokanecounty.org. Service was made by email pursuant to the Respondent's consent. I also served Appellant/Petitioner, T.J.S.-M., a true and correct copy of the document to

which this certification is affixed on October 22, 2018 via first class mail
postage prepaid to Spokane County Jail, 1100 W Mallon Ave., Spokane,
WA 99260.

s/ Sean M. Downs
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APPENDIX A

Court of Appeals ruling

Renee S. Townsley
Clerk/Administrator

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*The Court of Appeals
of the
State of Washington
Division III*



September 20, 2018

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CASE # 351301
State of Washington v. T.J.S.-M.
SPOKANE COUNTY SUPERIOR COURT No. 168001811

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

A handwritten signature in cursive script that reads "Renee S. Townsley".

Renee S. Townsley
Clerk/Administrator

RST:jab
Enclosure

c: **E-mail**—Hon. Annette S. Plese

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

STATE OF WASHINGTON,)	
)	No. 35130-1-III
Respondent,)	
)	
v.)	
)	
T.J.S.-M., [†])	UNPUBLISHED OPINION
)	
Appellant.)	

SIDDOWAY, J. — Following a disposition hearing at which juvenile T.J.S.-M. was found guilty of two counts of unlawful imprisonment with sexual motivation and one count of fourth degree assault, all committed against female high school classmates, the trial court imposed a two-year special sex offender disposition alternative (SSODA). It also imposed a suspended manifest injustice sentence of 36 weeks to be served if T.J.S.-M.’s SSODA was revoked. T.J.S.-M. seeks to appeal the manifest injustice sentence. There is no indication his SSODA has been revoked.

[†] We have changed the case title in accordance with an amendment to RAP 3.4 and the General Order for the Court of Appeals, *In Re Changes to Case Title* (Wash. Ct. App. 2018), both effective September 1, 2018.

If a juvenile offender is found to have committed a sex offense other than a sex offense that is also a serious violent offense as defined by RCW 9.94A.030, and has no history of a prior sex offense, the court may impose a SSODA. RCW 13.40.162; .160(3). The SSODA is not appealable under RCW 13.40.230. RCW 13.40.162(10); *State v. J.B.*, 102 Wn. App. 583, 585, 9 P.3d 890 (2000).

In *J.B.*, this court addressed the proper timing of appeals from suspended manifest injustice dispositions, an issue it observed “has been the source of some confusion among practitioners and the courts.” *Id.* It concluded that “the proper time to appeal a suspended manifest injustice disposition is after that disposition is imposed following SSODA revocation.” *Id.* at 584. Citing *State v. Langland*, 42 Wn. App. 287, 292, 711 P.2d 1039 (1985), the decision observed that the suspended sentence is not ripe for review “because the consequences of such rulings are merely potential, not actual,” and that if the juvenile completes the alternative disposition, “the propriety of a suspended manifest injustice disposition is a superfluous issue.” *J.B.*, 102 Wn. App. at 585.

T.J.S.-M. asks that we “abrogate [the] 17 year old¹ Court of Appeals decision.” Appellant’s Reply Br. at 3. We are not bound by *J.B.* *In Re Pers. Restraint of Arnold*, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018). While not bound, we find its reasoning to be sound.

¹ Now 18 years old.

No. 35130-1-III
State v. T.J.S.-M.

T.J.S.-M.'s appeal is dismissed as premature.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Siddoway, J.

WE CONCUR:


Fearing, J.


Pennell, A.C.J.

GRECCO DOWNS, PLLC

October 22, 2018 - 8:49 AM

Filing Petition for Review

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