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STATE OF WASHINGTON
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SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

T.J.S.-M., PETITIONER/APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. SUMMARY

Following an adjudicatory hearing, the juvenile court found T.J.S.-M. guilty of two counts of unlawful imprisonment with sexual motivation and one count of fourth degree assault with sexual motivation. At the subsequent disposition hearing, the court found that a standard range disposition would constitute a manifest injustice, imposed a Special Sex Offender Disposition Alternative (SSODA), and suspended a 36-week commitment to the Juvenile Rehabilitation Authority (JRA). T.J.S.-M. appealed the disposition, challenging the suspended commitment to JRA. The Court of Appeals dismissed the appeal, finding the issue not ripe for review.

The State maintains the positions advanced in its brief before the Court of Appeals. That court correctly determined that the issue presented was not yet ripe. However, the issue has since become moot. *See* State's Motion to Supplement the Record and Dismiss Appeal filed Feb. 4, 2019. This Court should affirm dismissal of the appeal for lack of a justiciable controversy. If this Court reaches the merits of the appeal, sufficient evidence supported the disposition order.

II. ISSUES PRESENTED

1. Whether a suspended, manifest injustice disposition is ripe for review prior to its imposition?

2. Whether sufficient evidence supported the finding that a disposition within the standard range would constitute a manifest injustice?
3. What quantum of evidence is necessary to support a disposition outside the standard range?

III. STATEMENT OF THE CASE¹

On February 17, 2016, J.G. was a high-school junior and went to school as normal. RP 142. At the beginning of that semester, J.G. and the defendant Trevon Solomon-McDonald had become friends, but they never discussed any romantic notions or engaged in any romantic acts. RP 143-45. That day, J.G. ran into T.J.S.-M. in the hallway. RP 146. She was not feeling well and he asked if she needed a hug. RP 146-47. When he hugged her, he gripped her tightly. RP 147. She tried to pull away, but he would not let her go. *Id.* He then grabbed her chin, pushed her head up and kissed her. RP 147. She continued struggling and told him to get away. *Id.*

K.C. was a sophomore at the same school. RP 15. Earlier that same day, T.J.S.-M. walked her to class. RP 21. As they were walking up the stairs, he grabbed her buttocks. RP 22. When they got to the top of the stairs, he grabbed her arm, and then kissed her. RP 23. Initially she reciprocated, but then she told him she needed to leave and tried to go to class. RP 24-25.

¹ The recitation of facts here is taken from the State's Response Brief filed at the Court of Appeals.

However, T.J.S.-M. continued to grab her and pull her towards him. RP 25. She pulled back and said he was making her angry; he then put her in a corner. RP 25-26. While doing this, he was touching her breasts. RP 26. T.J.S.-M. then asked her to give him a blow job, and pulled his penis out. RP 27-28.

A.R. was a junior at the same school. RP 76. She met T.J.S.-M. that semester and discovered that he was the stepson of her biological father. RP 77-80. Because of that newfound relation, T.J.S.-M. began hugging her every day when they ran into each other in the hall. RP 80. On February 18, 2016, T.J.S.-M. approached her in a hallway. RP 88. He pressed her against the wall and began forcefully kissing her. RP 88-89. He grabbed her breasts and she told him to stop. RP 89. At one point, she managed to pull away, and T.J.S.-M. grabbed her arm and pulled her back. RP 90. Another student came up the stairwell, and A.R. was able to get away. RP 90-91.

As a result of these incidents, the State charged T.J.S.-M. with two counts of indecent liberties, two counts of unlawful imprisonment with sexual motivation, and one count of fourth degree assault with sexual motivation. CP 1-2. Following a bench trial, the trial court found T.J.S.-M. not-guilty on the two counts of indecent liberties, but guilty on the remaining three counts. RP 278-286.

At sentencing, the State asked the court to impose a SSODA, with a suspended 36-week disposition at the JRA. CP 20-25. T.J.S.-M. asked the court to impose a standard range disposition with “SSODA like conditions,” to include sex offender counseling. CP 51-52. The court imposed the State’s recommended sentence, and T.J.S.-M. appealed. Further facts concerning sentencing are included below as appropriate.

IV. ARGUMENT

On appeal, T.J.S.-M. has not challenged the adjudication against him, nor has he challenged the imposition of a SSODA. Rather, his sole argument on appeal has been that the record does not support the conclusion that a standard range disposition would cause a manifest injustice so as to support imposition of a JRA disposition.

Following an adjudication of guilt, the juvenile court will hold a disposition hearing. RCW 13.40.150. At such a hearing, the court must select one of four sentencing options: (A) a standard range disposition, (B) a suspended disposition alternative, (C) a chemical dependency or mental health disposition alternative, or (D) a manifest injustice disposition outside the standard range. Option B allows the juvenile court, on eligible sex offenses, to impose a SSODA under RCW 13.40.162. RCW 13.40.160(3). On imposing a SSODA, the court will ordinarily suspend a standard range disposition during two years of community supervision, with sex offender

treatment requirements. RCW 13.40.162. If the court concludes that a standard range disposition would cause a manifest injustice, the court may impose and suspend a disposition outside the standard range under option D. *Id.*

At T.J.S.-M.'s disposition hearing, the State asked the court to impose a SSODA under option B, while defense asked the court to order one year of probation with "SSODA-like" treatment conditions. RP 329-50. The court considered statements from the victims, RP 291-98; the testimony of probation counselor Joe Destefano,² RP 299-328; sentencing memoranda from both parties, CP 20-68; and the psychosexual evaluation completed by Priscilla Hannon, CP 27-35. Based on this information, the court ordered a SSODA. RP 356. The court also found that without treatment, T.J.S.-M. posed a serious risk to community safety. RP 355. On that basis, the court determined that if T.J.S.-M. failed to complete the required treatment program, JRA would be necessary to protect the community. RP 356-7; CP 105-6. Consequently, the court found that a standard range disposition would effectuate a manifest injustice and ordered a suspended, 36-week JRA disposition. *Id.*; RP 98, 111.

² Defense cross examined Mr. Destefano concerning his pre-disposition report that appears to have been submitted to the court at the disposition hearing, but is absent from the record. RP 298.

A. THIS MATTER IS NOT JUSTICIABLE BECAUSE IT WAS NOT YET RIPE AT THE TIME OF APPEAL AND IS NOW MOOT

The court of appeals correctly found that an appellate challenge to a suspended JRA disposition is not ripe while the disposition remains suspended. “Until a juvenile’s SSODA disposition is revoked, appeal of the suspended disposition is not proper.” *State v. J.B.*, 102 Wn. App. 583, 585, 9 P.3d 890 (2000); *see also State v. Langland*, 42 Wn. App. 287, 292, 711 P.2d 1039 (1985) (finding suspended sentence not ripe for review until the suspension is revoked and the sentence imposed). More generally, an appeal is ripe if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008).

Until T.J.S.-M.’s SSODA was revoked, the imposition of a JRA disposition depended on some hypothetical conditions precedent. Whether a revocation was legally justified depended on the subsequent events that served as a basis for revoking the SSODA. This reality is reflected in the judicial ruling. There was no determination that JRA was necessary at the time of disposition. Rather, the court determined that community based treatment and supervision was necessary, and that JRA only become necessary if T.J.S.-M. failed to complete treatment. Unfortunately, that

contingency *was* needed, and the matter has since become moot. *See* State's Motion to Supplement the Record and Dismiss Appeal.

Because of the focus on rehabilitation and the short periods of juvenile dispositions, there is a very narrow window during which a disposition is ripe for appellate review and not yet moot. The lengthy nature of appellate procedure is not amenable to review of such time sensitive issues. For this reason, the Juvenile Justice Act includes a procedure for accelerated review of manifest injustice dispositions. RCW 13.40.230; RAP 18.13. Thereunder, the court of appeals will review a disposition outside the standard range without briefing, on the record, and dispose of the matter within 45 days. RCW 13.40.230(1). The appropriate procedure for challenging the JRA sentence imposed here would have been to bring an accelerated appeal under RCW 13.40.230 at the time the SSODA was revoked and the JRA disposition imposed. *J.B.*, 102 Wn. App. at 585.

B. THE MANIFEST INJUSTICE DISPOSITION IS WELL SUPPORTED BY THE RECORD

If this Court chooses to review the suspended disposition, it is well supported by the facts presented. In order to affirm a juvenile disposition outside the standard range, an appellate court must determine whether the reasons supplied by the judge are supported by the record, and whether those reasons clearly and convincingly support the conclusion that a

standard range sentence would constitute a manifest injustice. RCW 13.40.230.

The evidence presented to the court indicated that T.J.S.-M.'s behaviors were learned. He learned from his step-father how to interact with women. CP 60. He learned that men can take what they want, and he observed his step-father do just that repeatedly. *Id.* Because of this, he did not perceive that he had done anything wrong. *Id.* That skewed perception of the world is precisely what a treatment program would seek to correct. CP 60-61. The psychosexual evaluator's conclusion was that he should receive treatment in order to learn about healthy sexual behaviors. CP 61. This strongly supports the court's conclusion that T.J.S.-M. would be likely to reoffend without adequate treatment.

The court determined that sex offender treatment was necessary and that without it T.J.S.-M. would constitute a severe risk to the community. Without an understanding of consent and healthy sexual behaviors, T.J.S.-M. could only be expected to reoffend. This expectation was bolstered by testimony of Mr. Destefano that T.J.S.-M. was a high risk to reoffend. RP 300-305. The court gave T.J.S.-M. the opportunity to do treatment in the community, but without the suspended JRA disposition the court could not ensure that he received the treatment he needed. Consequently, a JRA disposition was needed as a contingency treatment

option to protect community safety and help T.J.S.-M. The evidence clearly and convincingly supports the court's conclusion that a standard range sentence would constitute a manifest injustice.

T.J.S.-M. asserts that the trial court applied an incorrect standard at his disposition hearing when the judge stated that the clear and convincing standard is less than beyond a reasonable doubt. RP 353. The clear and convincing standard is prescribed by statute. RCW 13.40.160, .230. It is well established that the clear, cogent, and convincing standard is an intermediate standard, greater than a preponderance but less than beyond a reasonable doubt. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963); *Davis v. Dept. of Labor and Indus.*, 94 Wn.2d 119, 126, 615 P.2d 1279 (1980); *Born v. Thompson*, 154 Wn.2d 749, 754, 117 P.3d 1098 (2005). It is an amount of proof sufficient to convince the factfinder that the fact at issue is "highly probable." *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).

Despite this, courts have frequently equated the clear and convincing standard with the beyond a reasonable doubt standard in the context of juvenile sentencing. See *State v. Rhodes*, 92 Wn.2d 755, 760, 600 P.2d 1264 (1979), *overruled on other grounds by State v. Baldwin*, 150 Wn.2d 448, 78 P.3d 1005 (2003); *State v. Tai N.*, 127 Wn. App. 733, 736, 113 P.3d 19 (2005); *State v. N.B.*, 127 Wn. App. 776, 779,

112 P.3d 579 (2005). This proposition is taken from a case that found due process to require proof beyond a reasonable doubt in order to deprive an individual of his liberty in a proceeding for involuntary commitment. *In re Levias*, 83 Wn.2d 253, 517 P.2d 588 (1973). That proposition was later overruled, when it was determined that the less stringent standard of clear and convincing evidence satisfied due process requirements in civil commitment proceedings. *In re McLaughlin*, 100 Wn.2d 832, 842-3, 676 P.2d 444 (1984); *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). There is no continuing reason to apply this overruled case, nor is there a constitutional requirement that proof at a disposition hearing be beyond a reasonable doubt.

Juvenile criminal proceedings differ substantially from adult criminal proceedings. While adult offenders are subject to criminal proceedings, juvenile proceedings are not fully criminal and not subject to the same constitutional strictures. *See Application of Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (announcing the scope of due process rights afforded to juveniles accused of committing a crime); *State v. Chavez*, 163 Wn.2d 262, 180 P.3d 1250 (2008) (finding no right to a jury for juvenile accused of serious violent offense). Where a juvenile is accused of committing a crime, due process requires proof beyond a reasonable doubt

in the adjudicatory phase. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *see also* RCW 13.40.130(3).

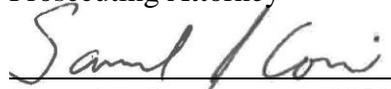
However, at the disposition hearing, the court is tasked with effectuating the broader purposes of the Juvenile Justice Act. RCW 13.40.010. The court is permitted to examine a broad array of evidence not otherwise admissible to arrive at an appropriate disposition that considers the needs of both the juvenile and the community. RCW 13.40.150; ER 1101(c)(3). Due process is not offended by requiring less than proof beyond a reasonable doubt of dispositional issues. *See In re Winship*, 397 U.S. at 366-67 (affirming that proof beyond a reasonable doubt on adjudication does not affect the court's ability at disposition to consider the juvenile's social history and need for treatment).

V. CONCLUSION

For the above stated reasons, this Court should affirm dismissal of the appeal for lack of a justiciable issue. If the substantive issue is reached, the disposition should be affirmed.

Dated this 8 day of February, 2019.

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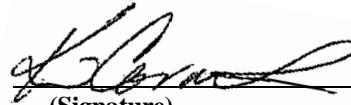
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on February 8, 2019, I e-mailed a copy of the Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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(Date)

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SPOKANE COUNTY PROSECUTOR

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