66208-2

66208-2

NO. 66208-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

M.L.,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRISTOPHER WASHINGTON

BRIEF OF APPELLANT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Appellant

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ASSIGNMENT OF ERROR

1. The juvenile court erred by entering an order deferring disposition.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by granting a deferred disposition after a full trial, instead of 14 days before trial, and without following the other statutory prerequisites for imposing a deferred disposition?

2. Were the trial court's concerns about potential prosecutorial abuse of power unfounded where the court found no evidence of bad faith in the prosecutor's decision to charge assault in the second degree and where, indeed, the trial court found all the elements of that crime but chose to convict on a lesser crime of assault in the third degree, evidence notwithstanding?

C. STATEMENT OF THE CASE

The juvenile victim in this case (hereinafter, T.J.), lived in the same Renton apartment building as the respondent, M.L. 1RP 26, 153. On June 10, 2010, T.J. was walking outside the building and listening to music on his iPod music player. 1RP 28. His left arm

was in a sling at the time because his arm was broken in three places. 1RP 36. M.L. came up from behind T.J., snatched his music player from his hand, and refused to return it. 1RP 28, 36-37. He taunted T.J. and repeatedly held out the music player and then pulled it back when T.J. attempted to retrieve it. 1RP 38. M.L. then repeatedly hit T.J. in the face, head, and on his already broken arm. 1RP 38-39. M.L. said, "Nigga, you just got jacked." 1RP 49.

T.J. returned to his apartment and his mother called police. 1RP 41-42. His eye was closed due to swelling and it was painful. 1RP 42-43. He went to the hospital for treatment. 1RP 43. Hospital records were admitted by stipulation and they showed that M.L.'s blows had caused a fracture to the orbital bone in T.J.'s face. 1RP 43; Ex. 9. Defense counsel never challenged this fact. 1RP 181 ("...it may be that this young man sustained some sort of orbital fracture..."). Responding officers noted that T.J. was upset, crying, and had an obvious injury to his face. 1RP 85-89 (Ofc. Tolliver); 102-03 (Ofc. Chang).[1]

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[1] About three days later, a group of M.L.'s friends or family assaulted T.J. for "snitching" to the police. 1RP 18-20, 72-76; 2RP 18, 21, 23, 26.

M.L. testified that he had not taken a music player but he had taken a laser pointer. 1RP 157-60. He claimed that he, a group of his friends, and T.J. had gone to the store and T.J. had purchased a laser pointer. He said T.J. loaned the laser pointer to one of the group, they ran away, M.L. obtained the pointer, and when T.J. attempted to retrieve it, he hit T.J. in self-defense. 1RP 160-61. Witness T.T. testified that M.L. simply defended himself when T.J. tried to retrieve the laser pointer. 1RP 124-25. Both M.L. and T.T. denied that M.L. took T.J.'s music player.

M.L. was charged by information with assault in the second degree and robbery in the second degree. CP 1-4. Count II was amended at trial to robbery in the first degree. 1RP 4; CP 5-6.

As to count II, the trial court first found that it did not know what to make of the difference in testimony about the music player and the laser pointer, so it simply found M.L. guilty of theft in the third degree since, even by his testimony, he took the laser pointer from T.J. 1RP 187-88.

As to count I, the assault, the court made the following oral findings:

> So assault in the third degree is defined with criminal negligence causes bodily harm accompanied by substantial pain that extends for a period sufficient

> to cause considerable suffering. And I think that's what happened here.
>
> I have the medical records and I do recognize there was a fracture there, but I don't think it rises to the level of assault in the (sic) degree in this particular case. It does indicate -- I think the --- there was some evidence in this particular case that at some point the two people did square off to some extent, and there was a fight. I think that [T.J.] was portrayed or there is the argument that he is somehow a bully in this particular case -- I don't think there was evidence of that.
>
> I think in spite of his size, in fact if anything he appears to me to be somewhat of a target -- as in tall people -- it looks better when they go down, and I don't think he was sufficiently sophisticated to do this.
>
> I think, from what I heard in this particular case, he wanted to be part of this group, and he was taken advantage of, and he was teased and he was tormented and his property was taken and he was struck and injured, so that is the reason for my finding, and I will sign the verdict to that extent.

1RP 188-89.

The trial court later entered written findings of fact and conclusions of law. CP 39-41. As to count I, the assault, the court found as fact that "the respondent intentionally and repeatedly punched [T.J.] in the face. . . . The Court finds that [T.J.] suffered an orbital fracture as a result of the respondent's intentional assault. . ." CP 40 (Finding of Fact 6).[2] The court also found that

[2] At the disposition hearing, the court reiterated that the assault had been intentional and that T.J. had suffered a broken facial bone. 2RP 36 ("What you did, it seemed pretty mean to me"); 37 (victim ended "up with a broken bone in [his] face").

M.L. was the aggressor and did not act in self-defense. Id. As to conclusions of law, the court said,

> "The State has proven Assault in the Third Degree, contrary to RCW 9A.36.031(1)(d), beyond a reasonable doubt. . . . a. That on or about June 10, 2010, the respondent intentionally assaulted [T.J.] and thereby recklessly inflicted substantial bodily harm, i.e. an orbital fracture. . .

CP 41 (Conclusion of Law II). On count II, the robbery, the court found that a theft in the third degree had occurred. CP 41.

At the disposition hearing, M.L. asked the court to impose a deferred disposition. 2RP 4-6; CP 27-35. The State objected and pointed out that a deferred disposition could not be ordered unless the statutory requirements were met, and it also pointed out that a deferred disposition could not be granted after a full fact-finding hearing, i.e., trial. 2RP 6-12; CP 12-26. The court reasoned that the State's argument could not be correct because it would allow the prosecutor to over-charge a case simply to make a respondent ineligible for a deferred disposition and then, by citing the statutory requirements for a motion fourteen days before trial, prevent the court from imposing a deferred sentence even if the respondent was convicted of a lesser offense after fact-finding. 2RP 6, 8, 12-14. The court repeatedly noted, however, that there was no

evidence of bad faith by the prosecutor in this case. 2RP 7 ("I do not suggest any bad faith on the part of the State"); 2RP 12 ("I don't think there is any malice or anything that was done that wasn't appropriate in this particular case...").

The court then ordered a deferred disposition. 2RP 40-44. It seemed poised to impose detention time but the prosecutor noted that detention cannot be ordered pursuant to a deferred sentence. 2RP 40. The court then imposed a term of probation for one year. 2RP 41. The State appealed.

D. ARGUMENT

The trial court erred by imposing a deferred sentence after trial where such a sentence is not authorized under the relevant statute and where there was no indication that the State had manipulated the original charges simply to prevent the juvenile from getting a deferred sentence. The imposition of a deferred sentence was legally incorrect and should be reversed.

1. THE TRIAL COURT LACKED STATUTORY AUTHORITY TO IMPOSE A DEFERRED DISPOSITION.

The deferred disposition statute establishes the limited circumstances under which a juvenile may receive a deferred sentence. The statute provides as follows:

> (1) A juvenile is eligible for deferred disposition unless he or she:
>
> (a) Is charged with a sex or violent offense;
> (b) Has a criminal history which includes any felony;
> (c) Has a prior deferred disposition or deferred adjudication; or
> (d) Has two or more adjudications.
>
> (2) The juvenile court may, upon motion at least fourteen days before commencement of trial and, after consulting the juvenile's custodial parent or parents . . ., continue the case for disposition for a period not to exceed one year from the date the juvenile is found guilty. The court shall consider whether the offender and the community will benefit from a deferred disposition before deferring the disposition.
>
> (3) Any juvenile who agrees to a deferral of disposition shall:
> (a) Stipulate to the admissibility of the facts contained in the written police report;
> (b) Acknowledge that the report will be entered and used to support a finding of guilt and to impose a disposition if the juvenile fails to comply with terms of supervision; and
> (c) Waive the following rights to: (i) A speedy disposition; and (ii) call and confront witnesses.

> The adjudicatory hearing shall be limited to a reading of the court's record.
>
> (4) Following the stipulation, acknowledgment, waiver, and entry of a finding or plea of guilt, the court shall defer entry of an order of disposition of the juvenile.

RCW 13.40.127.

A superior court may impose a deferred disposition only as authorized by statute. State v. Mohamoud, ___ Wn. App. ___, 246 P.3d 849 (2011), *citing* State v. H.E.J., 102 Wn. App. 84, 87, 9 P.3d 835 (2000). Interpretation of the statute is a question of law that is reviewed *de novo*. Mohamoud, 246 P.3d at 851-52. Unless expressly authorized, the "court shall not suspend or defer the imposition or the execution of the disposition." RCW 13.40.160(10). The fourteen day requirement in the statute is mandatory. State v. Lopez, 105 Wn. App. 688, 20 P.3d 978 (2001). A juvenile may not seek a deferred disposition after trial. State v. B.J.S., 140 Wn. App. 91, 100-02, 169 P.3d 34 (2007). A juvenile may not obtain a deferred disposition unless each requirement of the statute is met. Mohamoud, at 854.

Assault in the second degree and robbery in the first degree are both violent offenses. RCW 9.94A.030(53). Because he was charged with two violent offenses, M.L. was not eligible for a

deferred disposition, so he did not (and could not) move for a deferred disposition fourteen days in advance of trial. RCW 13.40.127(2). Under the statute and State v. B.J.S., M.L.'s request for a post-trial deferred sentence should have been denied.

Moreover, the dispositional court did not require a stipulation to the police reports, a waiver of rights to speedy disposition, a waiver of the right to call and confront witnesses, or a limit on the scope of the adjudicatory hearing, because a full fact-finding hearing had already occurred. RCW 13.40.127(3)(a)-(c). Finally, there was no finding by the court that ". . .the community *and* the offender would benefit from a deferred disposition. . ." RCW 13.40.127(2) (italics added). In fact, there was no discussion by the court as to how the community would benefit from this sentence.

Plainly, the court applied this statute in a circumstance where it was never intended to apply, and the court did not comply with the statute's requirements. For these reasons, the trial court erred and the deferred disposition must be reversed.

2. THE TRIAL COURT'S CONCERNS ABOUT PROSECUTORIAL ABUSE OF POWER WERE MISPLACED, AND DO NOT JUSTIFY A DEFERRED SENTENCE WHERE THE JUVENILE COMMITTED A VIOLENT OFFENSE.

The conceptual rationale for the court's sentence appears to have been a generalized concern that a hypothetical prosecutor *could* over-charge a juvenile in order to block a court from imposing a deferred disposition that is justified by the facts. 2RP 6, 12-13. This judge evidently believed that a court should, at least in principle, have the authority to prevent such prosecutorial abuses by imposing a deferred disposition if it finds that a lesser crime was committed. Id. Although the court's hypothetical poses interesting theoretical questions, those questions are inapt here, because there was absolutely no hint that the prosecutor over-charged simply to prevent the court from exercising an otherwise available sentencing option. 2RP 7, 12.

Instead, it appears that it was the court that defeated legislative intent by artificially reducing the charge of conviction to make this juvenile eligible for a sentence that the legislature deemed inappropriate. As set forth in the statutory language above, eligibility for a deferred disposition is tied to the seriousness of the offense, so an offender is not eligible if he has committed a

violent offense or a sex offense. RCW 13.40.127(1)(a). Assault in the second degree is a violent offense. RCW 9.94A.030(53).

Whether an offender committed a violent offense turns on whether the facts support the elements of the crime beyond a reasonable doubt. The elements of assault in the second degree are that the defendant intentionally assaulted the victim and recklessly inflicted substantial bodily harm. RCW 9A.36.021(1)(a); WPIC 35.13. "Substantial bodily harm . . . means bodily injury . . . which causes a fracture of any bodily part." RCW 9A.04.110(4)(b). Thus, a juvenile who has intentionally assaulted another and recklessly fractured a bone in the victim's face is ineligible for a deferred disposition.

A prosecutor who charged a violent offense simply to preclude an offender from obtaining a deferred sentence would be violating his ethical obligations. RPC 3.8(a); State v. Cameron, 30 Wn. App. 229, 633 P.2d 901 (1981) (unfounded charging decision may subject prosecutor to sanctions for contempt of court under RCW 7.21.010). Such a nefarious tactic would also defeat the legislative purpose of the statute by precluding an otherwise appropriate deferred sentence. Under such circumstances, the disposition court might have the authority under the Due Process

Clause to award a deferred sentence. After all, such a sentence would have been available to the juvenile from the outset, but for the prosecutor's misconduct. Thus, a prosecutor cannot artificially limit the court's dispositional options by over-charging a case.

In any event, this Court need not resolve that hypothetical issue in this case because, as the trial court here made abundantly clear, there was no question that the prosecutor charged the case appropriately; there was not even a suggestion of bad faith.

However, a judge could also violate the legislative purpose of the deferred disposition statute by reducing a charge from a violent offense to a non-violent offense simply to make the juvenile eligible for a deferred sentence. If the juvenile intentionally assaulted someone and recklessly caused substantial bodily harm, that juvenile has committed assault in the second degree, a "violent offense," and should not be eligible for a deferred sentence. Under such circumstances it would be the court, not the prosecutor, who defeats the legislative purpose of the statute. The judge would essentially be granting a deferred sentence to a violent offender who the legislature deemed unsuitable for a deferred sentence.

Here, the trial court's oral and written findings make clear that he found the elements of assault in the second degree beyond

a reasonable doubt. CP 41. He also rejected any claim that M.L. acted in self-defense. CP 41. But the trial court declined to enter a finding of guilt as to the charged crime; instead, he entered a finding of guilt as to the lesser degree crime of assault in the third degree. CP 40-41. *See* RCW 9A.36.031; RCW 10.61.003 (defendant may be found guilty of any lesser degree crime).[3]

Thus, the court used a hypothetical abuse of prosecutorial power -- where no actual abuse occurred -- to justify an unauthorized use of judicial power that permits a deferred sentence for a violent offender, contrary to the legislature's intent. The court's ruling was an abuse of discretion and must be reversed.

The court's ruling also failed to serve the broader interests of the Juvenile Justice Act insofar as it failed to hold the juvenile accountable for his actions. RCW 13.40.010 (purposes include protecting citizenry and holding juvenile accountable). Moreover, by artificially reducing the charge against M.L. and by imposing a deferred sentence for this significant assault against an already

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[3] In addition to the apparent conflict between the court's factual findings and his verdict of guilt on assault in the third degree, it is also unclear why the court convicted M.L. of theft instead of robbery as to count II. According to the court's own findings, M.L. admitted to taking T.J.'s laser pointer, and other findings show that M.L. used force to take or retain the property, and the victim was injured. CP 40-41. Ordinarily, such conduct would constitute robbery. *See* RCW 9A.56.200(1)(a)(iii). A robbery conviction is a violent offense and would have barred a deferred sentence. RCW 13.40.127(1)(a).

injured and vulnerable victim, the court diminished the faith of the victim -- who had been harassed for reporting this event to police -- in the ability of law enforcement and the courts to redress a violation of the law.[4]

E. CONCLUSION

For the foregoing reasons, the court's order deferring disposition was not authorized by law and must be reversed.

DATED this 18th day of March, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Appellant
Office WSBA #91002

[4] The victim's mother emphasized these points at the disposition hearing. *See* 2RP 16-23. Although she did not wish to see M.L. treated harshly, she expressed dismay that the court had failed to find assault in the second degree where the victim's facial bone was unquestionably broken, especially where the victim was clearly disabled at the time of the assault. 2RP 17. She also pointed out that no juvenile would take the courts seriously with the disposition imposed by the court. 2RP 19-20. Finally, she noted her frustration given the fact that her son was subject to retaliation for contacting police, i.e., snitching. RP 18, 21. In short, the court's sentence did not achieve any purpose of the JJA with regard to M.L. or the victim. The disposition imposed no meaningful penalty and it served to disenfranchise a young victim who may now be reluctant to report crimes in the future.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nielsen, Broman & Koch, the attorney for the respondent, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Appellant, in STATE V. M.L., Cause No. 66208-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

UBrame
Name

3/18/11
Date 3/18/11

Done in Seattle, Washington