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

STATE OF WASHINGTON, Respondent, v. M.S., DOB: 08/28/01, Appellant.	)	No. 78442-1-I COMMISSIONER'S RULING ACCELERATING REVIEW AND AFFIRMING MANIFEST INJUSTICE DISPOSITION

M.S. appeals from a "manifest injustice" above the standard range disposition of 52 to 52-week commitment to juvenile rehabilitation administration (JRA) for fourth degree assault. The trial court imposed the disposition after revoking his deferred disposition for violating the terms of the disposition order. As reasons for the manifest injustice disposition, the court additionally found that M.S. posed a high risk to reoffend, could not be controlled by those supervising him, and was unable to receive the drug and alcohol and other services he desperately needed in the community. The court found that each one of these reasons, standing alone, was sufficient to impose a manifest injustice disposition. M.S. argues that the trial court erred in imposing the disposition based on prohibited factors (his dependency status and lack of facilities) and non-statutory aggravating factors. He argues that insufficient evidence supports the reasons for the disposition, that the disposition is clearly excessive, and that he was not given notice of the specific aggravating factors when he entered the deferred disposition. As explained below, M.S. fails to show a reversible error in the trial court's decision to impose a manifest injustice disposition. Review is accelerated, and the disposition is affirmed.

FACTS

In November 2017, the State charged M.S., then 16 years old, with third degree assault against a metro bus driver in King County Superior Court. On the morning of November 1, 2017, he approached a metro bus on the driver's side. When the driver leaned out of the window to address him, M.S. threw urine from a bottle at him, and the liquid hit the driver all over his face. M.S. then threw the bottle at the driver, hitting him in the face. The driver's clothes, seat, dashboard, and control area got soaked with urine.

On January 3, 2018, M.S. requested a deferred disposition. Pursuant to plea negotiations, the State amended the charge from third to fourth degree assault, and M.S. stipulated to the admissibility of the facts stated in a police report for determining his guilt. The trial court granted his request and entered a deferred disposition order. The court found M.S. guilty of fourth degree assault based on the police report. The deferred disposition order required M.S. to comply with the terms of community supervision, including a requirement to attend and participate in case management process and all scheduled appointments with his juvenile probation counselor (JPC).[1] M.S. was a dependent child. The order required him to live in a placement approved by the Department of Social and Health Services (DSHS) in compliance with placement requirements and curfew restrictions.[2] The order required him to attend school or a G.E.D. program.[3] The order prohibited him from using, possessing, or consuming any controlled substance except by doctor's prescription and required him to submit to random urinalysis (UA) as directed by his JPC or treatment provider.[4]

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[1] CP 8.
[2] CP 8.
[3] CP 8.
[4] CP 8.

From the beginning, M.S. struggled to comply with the terms of his community supervision, resulting in a violation hearing in February and March 2018. After the hearings, the trial court found that M.S. willfully violated the conditions of his deferred disposition by failing to attend his scheduled appointments with his JPC, comply with curfew restrictions, attend school, and submit to random UAs to probation.[5] JPC Daryl Cerdino did not seek to revoke the deferred disposition then. Cerdino told the court M.S. "should be given opportunities not to get to that point."[6] On March 22, 2018, the court entered an order modifying the deferred disposition order and imposing a 10-day detention as sanctions with credit for two days already served.

M.S.'s behavioral problems persisted. He was placed in Cypress House, a therapeutic group home in Snohomish County designed to serve youths with behavioral issues needing services. He used alcohol and marijuana excessively and brought home drugs and drug paraphernalia.[7] He did not follow his curfew.[8] JPC Cerdino had difficulty reaching him because M.S. would leave early in the morning, spend his entire day running the streets in downtown Seattle with his "street family" using drugs, and would come home late at night past Cerdino's work hours.[9] He would come home intoxicated and under the influence of marijuana to the point he threw up in his bed, room, and bathroom.[10] He threw up in the bathtub and refused to clean up.[11] Cerdino was unable to collect M.S.'s UAs because M.S. was absent for office appointments.[12] Recognizing M.S.'s "limited

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[5] CP 21.
[6] RP 55.
[7] CP 52; RP 105, 135.
[8] RP 105.
[9] CP 51-52; RP 118, 129.
[10] RP 104-105.
[11] RP 105.
[12] RP 131.

ability to follow the house rules," DSHS created modified, liberalized, and flexible rules for him, trying to help him succeed.[13] But he still did not follow the rules.

M.S.'s poor hygiene and refusal to receive any medical treatment posed serious health and safety concerns for him and the entire home.[14] When he got sick, he coughed up blood in his room and all over the home.[15] He refused medication.[16] He refused all services.[17] He testified that he had been vomiting recently because he did not know he had pneumonia and acknowledged that he did not follow through with or attend the medical appointments scheduled for him.[18] During his JRA detention, he received dental work, which revealed a need for 12 fillings and two root canals.[19] He received three fillings before his release and refused all dental treatment.[20]

M.S. also engaged in assaultive behavior. He brought weapons into Cypress House and threatened staff and peers there.[21] He assaulted his staff and peers, causing injuries.[22] He attempted to push a staff person down the stairs and tied a resident's and a staff person's hands together with a zip tie.[23] He threatened to beat up another resident and grabbed a staff chair.[24] He threatened his staff and peers with a blowtorch made from a lighter and an aerosol spray, turning on a gas stove with his lighter, thus threatening to set the entire house on fire.[25] Cypress House requested his immediate

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[13] RP 114-15.
[14] CP 52; RP 101, 104, 106.
[15] RP 104-105.
[16] CP 50.
[17] RP 114.
[18] RP 133-35.
[19] RP 112.
[20] RP 112.
[21] RP 105.
[22] RP 105.
[23] RP 108.
[24] RP 108.
[25] RP 105-106, 121.

removal.[26] In April 2018, M.S. was arrested and was charged with felony harassment.

In April 2018, JPC Cerdino filed a notice of revocation of deferred disposition for violations of the deferred disposition order. M.S.'s whereabouts were unknown, and Cerdino requested a warrant for his arrest. Cerdino submitted his confidential report to the court. The court conducted a hearing on April 30 and May 8, 2018 and heard testimony provided by JPC Cerdino, social worker assigned to M.S.'s dependency case, M.S.'s dependency counsel, and M.S. himself.

After the hearing, the trial court revoked M.S.'s deferred disposition by finding that M.S. violated the terms of the deferred disposition order by failing to participate in the case management process and comply with case management.[27] The court imposed a manifest injustice disposition upward of 52-52 weeks in JRA. The court explained that M.S. was at a high risk to reoffend, could not be controlled by those supervising him, was unable to obtain the services he needed if he remained in the community, and failed to comply with court orders.[28] The court further found that a standard range disposition of 30 days with credit for time served would not provide any meaningful opportunity for services or rehabilitation. The court pointed out that M.S. had not been successful in having his needs met while in the community since the entry of his deferred disposition in January 2018. The court found that M.S. was in need of "numerous services" and that the structured JRA setting was the only place he would be able to successfully access those services.[29] The court found that any one of these reasons, standing alone, was

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[26] RP 122.
[27] CP 24.
[28] CP 40-42; Finding of Fact (FF) 6, 7, 9, 10.
[29] CP 43; FF 11.

sufficient for the court to impose a manifest injustice disposition.[30]

DECISION

The juvenile justice act, chapter 13.40 RCW, provides for sentencing standards for juvenile offenders.[31] When a trial court finds that a standard range disposition would effectuate a "manifest injustice," it may impose a sentence outside the range.[32] "Manifest injustice" is a disposition that would either "impose an excessive penalty on the juvenile" or "impose a serious, and clear danger to society" in light of the act's purposes.[33] This Court will uphold a manifest injustice disposition if (1) substantial evidence supports the reasons given for the disposition, (2) the reasons clearly and convincingly support the disposition, and (3) the disposition is not clearly excessive.[34]

M.S. argues that the trial court erred in imposing a manifest injustice disposition based on aggravating factors expressly prohibited by the juvenile justice act. He argues that the court considered his dependency status and the lack of treatment facilities in the community in violation of RCW 13.40.150(4)(e) and (5), which provide as follows:

> (4) The following factors may not be considered in determining the punishment to be imposed:
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> (e) Factors indicating that the respondent may be or is a dependent child within the meaning of this chapter.
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> (5) A court may not commit a juvenile to a state institution solely because of the lack of facilities, including treatment facilities, existing in the community.

But M.S. fails to show that the trial court imposed a manifest injustice disposition

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[30] CP 43; FF 12.
[31] See RCW 13.40.0357.
[32] RCW 13.40.160(2).
[33] RCW 13.40.020(19).
[34] State v. J.V., 132 Wn. App. 533, 540, 132 P.3d 1116 (2006); RCW 13.40.230(2).

based on his dependency status or solely on the lack of facilities in the community. He points out Finding of Fact 7 as addressing his DSHS placement and work with his social worker and dependency attorney. But the finding does not show the court's consideration of his dependency *as a reason for imposing a manifest injustice disposition.* Rather, the finding reflects the court's assessment as to whether he could be controlled by those supervising him, a non-statutory aggravating factor:

> Despite the very hard work of many people on [M.S.'s] behalf, he has failed to meet his legal guardians halfway, and has consistently taken advantage of the freedoms provided to him by using drugs, running the streets, and putting himself in danger of exploitation. He does not follow the rules of his DSHS placement, even when that placement has modified the rules to make compliance easier for him. He refuses to care for his own physical safety and hygiene. He has declined to attend school or counseling as directed by the adults in his life, and essentially lives an emancipated, dangerous life. As a result, he puts himself and others in danger.[35]

M.S. also points out the court's questioning of his dependency attorney about "the pros and cons" of having him in "structured setting like JRA" as opposed to continuing to try to provide him with "services in the community."[36] The question does not appear to reflect the court's consideration of M.S.'s dependency status as a reason for imposing a manifest injustice disposition. Rather, it appears to reflect the court's assessment as to whether he was able to obtain services in the community, another aggravating factor.[37]

Nor did the trial court commit M.S. to JRA "solely because of the lack of facilities . . . existing in the community."[38] The court's findings reflect the court's concern not about the lack of facilities in the community but about M.S.'s refusal and inability to engage in

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[35] FF 7; State v. T.E.H., 91 Wn. App. 908, 917-18, 960 P.2d 441 (1998) ("serious lack of family control" may be an aggravating factor).

[36] RP 92.

[37] See J.V., 132 Wn. App. at 541 ("need for treatment" may be an aggravating factor).

[38] RCW 13.40.150(5).

any services existing in the community.

M.S. argues that the trial court erred in considering non-statutory aggravating factors. But he did not raise this argument below. In his brief submitted to the trial court, he acknowledged that a high risk to reoffend and a lack of parental control could be a basis to impose a manifest injustice disposition.[39] He has waived this argument.[40]

In any event, this Court has held that a trial court "may consider both statutory and nonstatutory factors."[41] For example, it is "proper for a trial court to consider a juvenile's need for treatment in considering a manifest injustice determination."[42] Also, a "high risk that a juvenile will reoffend is a valid ground for a manifest injustice disposition."[43] A "serious lack of family control" has also been "recognized as an 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."[44]

M.S.'s reliance on State v. Bacon[45] is misplaced. That case did not involve consideration of non-statutory aggravating factors. It involved a juvenile court's lack of authority to suspend a disposition as prohibited by RCW 13.40.160(10), which provides: "*Except as provided* under subsection (3), (4), (5), or (6) of this section, or option B of RCW 13.40.0357, or RCW 13.40.127, the court *shall not* suspend or defer the imposition or the execution of the disposition."[46] The Supreme Court held that the juvenile court could not suspend a disposition under subsection (2) because it was not included in the

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[39] CP 58-59.
[40] See RAP 2.5(a).
[41] J.V., 132 Wn. App. at 540-41.
[42] Id. at 541.
[43] T.E.H., 91 Wn. App. at 918.
[44] Id.
[45] 190 Wn.2d 458, 415 P.3d 207 (2018).
[46] RCW 13.40.160(10) (emphasis added).

statutory exceptions to the ban on suspended dispositions.[47] Unlike RCW 13.40.160(10), which prohibits a court from suspending a disposition except under certain specified circumstances, RCW 13.40.150(3)(i) lists certain aggravating factors the court must consider but does not prohibit consideration of other factors. If a court is prohibited from considering factors other than those listed in subsection (3)(i), as M.S. argues, subsection (4) that expressly prohibits consideration of certain specified factors (e.g., dependency and lack of facilities) would be superfluous.

M.S. argues that insufficient evidence supports the findings of statutory and non-statutory aggravating factors. He does not really challenge the underlying facts that form the bases for the aggravating factors. Rather, he argues that the facts are insufficient to support the findings of the aggravating factors. He argues that he had no criminal record, that he complied with certain rules, and that there was insufficient evidence that he needed specific treatment and was unable to receive it in the community. But the record supports the findings that he posed a high risk to reoffend, lacked parental control, and was unable to obtain the services he needed if he remained in the community.

M.S. had two recent criminal matters from 2017 that were sent to diversion programs. He was arrested in April 2018 for a felony harassment charge. He engaged in assaultive conduct against his peers and staff at Cypress House. He brought weapons into the home and threatened staff and peers.[48] He attempted to push a staff person down the stairs and tied a resident's and a staff person's hands together with a zip tie.[49] He threatened to beat up another resident and grabbed a staff chair.[50] He threatened his

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[47] See Bacon, 190 Wn.2d at 466.
[48] RP 105.
[49] RP 108.
[50] RP 108.

peers and staff with a blowtorch made from a lighter and an aerosol spray in front of a gas stove.[51] He did not follow his curfew.[52] He would leave home early, spend his entire day running the streets using drugs, and come home late at night, intoxicated and high on drug.[53] He refused recommended medical, dental, and mental health treatment and all services in the community.[54] He had a treatment plan, including a DBT program for his hyperactive and defiant behavior.[55] He needed an assessment and treatment to address his alcohol and marijuana addictions.[56] His refusal to receive any services and poor hygiene posed serious health and safety concerns for himself and the entire home.[57] When he was sick, he coughed up blood in his room and all over his house.[58] He would throw up in his bed, his room, and his bathroom.[59] He threw up in the bathtub and refused to clean up.[60] Efforts to stabilize and keep him off the streets had failed.[61]

An "extended period of structured residential care and specialized treatment may be appropriate where a juvenile is considered a high risk to reoffend."[62] In N.E., this Court upheld the finding that in light of a juvenile's "untreated, long-term alcohol and drug abuse, as well as the lack of parental control, [she presented] a high risk to reoffend, as evidenced by her recent and frequent criminal history, her failure to comply with recent disposition orders, and running away from community-based treatment."[63] This Court

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[51] RP 105-106.
[52] RP 105.
[53] RP 129; CP 51-52.
[54] RP 101, 104, 106, 112, 114.
[55] CP 72.
[56] CP 72.
[57] CP 52, 71.
[58] RP 104-105.
[59] RP 104-105.
[60] RP 105.
[61] CP 71.
[62] J.V., 132 Wn. App. at 541.
[63] State v. N.E., 70 Wn. App. 602, 606-607, 854 P.2d 672 (1993).

held that the trial court properly imposed a manifest injustice disposition "in order to provide [the juvenile offender] with "much needed treatment for the problems that underlie[d] her criminal behavior, without which she pose[d] a high risk to reoffend."[64]

Here, the trial court found that without the structure of JRA, M.S. would not get an education, would not be physically safe, would not receive alcohol and drug treatment he desperately needed, would not be medically safe, and would likely commit new offenses and hurt other people.[65] The record supports this finding.

M.S. argues that his violation of the deferred disposition order does not constitute a failure to "comply with conditions of a recent dispositional order or diversion agreement," a statutory aggravating factor under RCW 13.40.150(3)(i)(iv). The State does not address this argument. The trial court explained that a failure to comply with court orders was "not a huge factor in the Court's decision to impose a manifest injustice."[66] The court made an express finding that any one of the aggravating factors, standing alone, was sufficient to impose a manifest injustice disposition.[67] Because substantial evidence supports the findings of M.S.'s high risk to reoffend, lack of parental control, and need for treatment, and these findings clearly and convincingly (beyond a reasonable doubt) support the trial court's decision to impose a manifest injustice disposition, I need not address M.S.'s argument with respect to the statutory aggravating factor.

M.S. argues that the 52 to 52-week disposition is clearly excessive. The length of the manifest injustice disposition is within the "broad discretion" of the trial court and may

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[64] N.E., 70 Wn. App. at 607.
[65] FF 11.
[66] RP 155.
[67] FF 12.

not be disturbed absent a showing of an abuse of discretion.[68] M.S. argues that the trial court made no specific findings as to the necessary treatment, length of treatment programs, or availability of such services. But there is "no specific criteria for choosing the length of a disposition," and a disposition is clearly excessive "only when it is not justified by any reasonable view of the record."[69] In view of his high risk to reoffend and refusal to engage in any of the services he was found to need in the community, including medical, dental, substance abuse, and mental health treatment, M.S. fails to show that the length of the disposition is clearly excessive.

M.S. argues that the trial court failed to give him notice of the aggravating factors when he entered a deferred disposition. But he did not make this argument below. Even if he could raise this issue for the first time on appeal, he fails to show a reversible error.

The deferred disposition statute requires that a juvenile "[a]cknowledge the direct consequences of being found guilty and the direct consequences that will happen if an order of disposition is entered."[70] Here, the record shows M.S.'s acknowledgment of the direct consequences pursuant to the statute. In a signed statement, he acknowledged, among other things, that if he did not comply with any term of his community supervision, the trial court would revoke his deferred disposition and could then impose any sentence authorized by law.[71] In a colloquy, the court informed him that if it found aggravating factors, it could impose a manifest injustice disposition, and M.S. stated he understood:

> Court: I'd be required to sentence you within that standard range unless I found special circumstances or what we call aggravating factors that made that standard range sentence what we call a manifest injustice, do you understand that?

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[68] State v. M.L., 134 Wn.2d 657, 660, 952 P.2d 187 (1998).
[69] State v. Moro, 117 Wn. App. 913, 923, 73 P.3d 1029 (2003) (citation omitted).
[70] RCW 13.40.127(3)(d).
[71] CP 17.

M.S.: Yes.[72]

M.S.'s counsel confirmed that he had reviewed the paperwork with M.S. and "gone over a variety of options in this case."[73] Counsel confirmed M.S.'s knowing, intelligent, and voluntary decision to enter the deferred disposition.[74]

Citing State v. Siers,[75] M.S. argues that due process and Sixth Amendment rights include the right to notice of aggravating circumstances for exceptional sentences. There, our Supreme Court held that "so long as a defendant receives constitutionally adequate notice of the essential elements of a charge, 'the absence of an allegation of aggravating circumstances in the information does not violate the defendant's rights under article I, section 22 of the Washington Constitution, the Sixth Amendment to the United States Constitution, or due process."[76] Siers is inapposite and does not require notice of potentially applicable aggravating factors when a juvenile enters a deferred disposition.

M.S. cites no authority requiring a juvenile court, when granting a deferred disposition, to identify the specific aggravating factors it could potentially consider for a manifest injustice disposition if the deferred disposition is revoked. Neither Apprendi v. New Jersey[77] nor Blackey v. Washington[78] appears to support such a proposition. Both cases "involved the application to certain adult criminal sentencing procedures of the Sixth Amendment jury trial right and the Fourteenth Amendment due process guaranty of proof beyond a reasonable doubt," and in "*this context*, the United States Constitution

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[72] RP 14.
[73] RP 18.
[74] RP 18.
[75] 174 Wn.2d 269, 274 P.3d 358 (2012).
[76] Siers, 174 Wn.2d at 276-77.
[77] 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).
[78] 542 U.S. 296, 124 S. Ct. 2351, 159 L. Ed. 2d 403 (2004).

requires that any fact that increases the penalty for a crime beyond that authorized by the verdict alone, other than the fact of a prior conviction, be submitted to a jury and proved beyond a reasonable doubt."[79] As this Court explained in Tai N., our juvenile justice act "already provides this guaranty" by requiring clear and cogent evidence, which has been interpreted to require proof beyond a reasonable doubt, of the reasons for a manifest injustice disposition.[80] This Court explained the "critical distinction" between an adult exceptional sentence and a manifest injustice disposition, namely the "policy of responding to the needs of offenders" underlying the latter.[81] "The juvenile court must necessarily focus on the offender's circumstances, and must consider numerous factors that may not be relevant to adult sentencing."[82]

Here, the trial court concluded that a manifest injustice disposition was necessary for M.S. to have "any meaningful opportunity for services or rehabilitation."[83] Substantial evidence supports the trial court's reasons for the disposition, and the reasons clearly and convincingly support the disposition. When M.S. entered a deferred disposition, he acknowledged the direct consequences that would happen if a deferred disposition order was entered. M.S. fails to show a statutory or due process violation.

M.S. argues that the trial court exceeded its authority by imposing a sentence greater than the statutory maximum for fourth degree assault, a gross misdemeanor. He points out that the statutory maximum is a term of imprisonment up to 364 days. Here, the trial court imposed a manifest injustice disposition of 52 to 52 weeks (i.e., 364 days).

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[79] State v. Tai N., 127 Wn. App. 733, 740, 113 P.3d 19 (2005) (emphasis added).
[80] Tai N., 127 Wn. App. at 742.
[81] Id. at 744.
[82] Id.
[83] FF 11.

The disposition does not exceed the statutory maximum. M.S. fails to show that the trial court exceeded its authority in imposing the manifest injustice disposition.

CONCLUSION

M.S. fails to show a reversible error in the manifest injustice disposition. Therefore, it is

ORDERED that review is accelerated, and the manifest injustice disposition is affirmed.

Done this 26th day of November, 2018.

Maseko Kanazawa
Court Commissioner