66577-4

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NO. 66577-4-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

QUINCY T. CHILDRESS,

Appellant

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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1. Did the juvenile court judge abuse his discretion when, after considering all eight Kent factors, he concluded that it was in the best interest of the public decline juvenile court jurisdiction and transfer the defendant's case to adult court?

2. Was the defendant entitled to a jury trial at the juvenile decline hearing?

3. Was the defendant entitled to proof beyond a reasonable doubt at the juvenile decline hearing?

II. STATEMENT OF THE CASE

A. THE RAPE.

On November 12, 2009 A.K.[1] was working as an on call supervisor for Pioneer Human Services at Cypress house. That houses one of two group homes for juveniles run by that company. A.K.'s shift ran from 6 a.m. to 2 p.m. She arrived back at the house around 9:30 a.m. after taking some residents to school. A.K. stayed upstairs, while the program director, Elsbeth Stebbins and

[1] A.K. married between the time of the rape and the time of trial. Although in other parts of the record she is referred to by her former name, A.P., she will be referred to by her married name in this brief.

the defendant, Quincy Childress remained downstairs. RP[2] 19, 22, 30-31.

The defendant was a resident of Tamarack house, the second home run by Pioneer Human Services. A.K. first met the defendant on November 10 when he was brought to Cypress house and was asked to supervise him. A.K. took the defendant to an appointment with another resident, and then transported him back to Tamarack house after that. The defendant did not give her any reason to be concerned during that contact. RP 20-21.

On November 12 when the defendant came upstairs at Cypress House he sat on the couch watching television or playing video games. Around noon A.K. fixed the defendant lunch. After lunch he continued to play video games while A.K. sat on another couch updating the home's log book. While they were engaged in those activities Ms. Stebbins left the home around 1:40 to 1:45 p.m. As she was leaving she told A.K. that someone from Tamarack house had an appointment in Lynnwood. Ms. Stebbins directed A.K. to take the defendant to the appointment and from there someone from Tamarack house would return him home. Two other

[2] RP refers to the transcript of the trial. All other hearings are referred to by hearing date.

employees had also left the home by the time Ms. Stebbins left. A.K. and the defendant were alone. RP 33-35.

After the last person left the defendant got off the couch and closed the door. He then went to the couch and laid down. Suddenly he got up and attacked A.K. The defendant first put his face very close to hers, appearing angry. The defendant then wrapped his hands around A.K.'s neck, choking her. A.K. tried to get her cell phone out of her pocket. The defendant prevented her from doing that by emptying her pockets himself. RP 36-38.

The defendant put A.K. in a headlock, and pulled her to the floor. He continued choking her. A.K. grabbed his thumbs that were pressing into her throat to try and loosen his grip. She squirmed to get away. The defendant took a sweatshirt hood and pulled it over her head, pressing it against her face. A.K. could not breathe. She struggled and squirmed until the defendant stopped. RP 37-39.

The defendant resumed choking A.K. The defendant got on top of A.K. and kissed her. He told her "I want you to kiss me." A.K. thought if she complied that he would let her go, so she did kiss him. The defendant, unsatisfied, stated "Kiss me like you mean it." A.K. told him "it's kind of hard when you're choking me."

The defendant then let up a bit. The defendant stuck his tongue in A.K.'s mouth and she bit it. The defendant then pulled back, looking angry and confused. RP 40-41.

A.K. tried talking the defendant out of further assaulting her. The defendant responded by asking her if she was going to tell anyone what he was doing. A.K. did not want to lie, but feared if she told the truth that she would report the assault, that the defendant would kill her. After the defendant repeated his question several times A.K. ultimately lied and said she would not report the assault. RP 42.

A.K. made further attempt to get away from the defendant by kicking a lamp causing it to fall on him. She thought she could knock him out with it. Her action did not have the desired effect. When the lamp hit the defendant he just looked up, and then resumed assaulting A.K. RP 42.

The defendant told A.K. that he wanted to lift up her shirt. She told him no, but he disregarded her. He reached under her sweatshirt, t-shirt, and bra, and began fondling her breast. He had his full weight on A.K., and she could no longer struggle. The defendant tried to kiss A.K.'s breast, but she squirmed so he was not able to do that. RP 43-44.

The defendant then put his hands down A.K.'s pants and inserted his finger into her vagina. He sat up on her and said "you are too irresistible." He then undid her belt and unzipped her pants. Just as he did that the door opened and Lisa Dellino, another employee, entered the home. When Ms. Dellino came in A.K. yelled "help, he's raping me. Help!" The defendant looked surprised. He pulled his hand up quickly, and got off A.K. He then shook his head, and walked out of the door. RP 46-47, 84-86.

A.K.'s hair was mussed and she was shaking and crying. She got up and went to a chair where she curled up in the fetal position. A.K. had Ms. Dellino lock the doors to prevent the defendant from coming back. They then called the police, and Ms. Stebbins. RP 47, 67, 88-90.

After the police took a report A.K. went to the hospital for a rape exam. The forensic nurse examiner took a history from A.K., which was consistent with the facts recounted above. During the physical examination the nurse noted that there was some petechia on the right side of her neck, a small bruise on the left side of her head under her ear, and a small abrasion on the back of her neck. She did not observe any genital injuries, which she opined was consistent with the history given. RP 48-49, 101-06.

B. THE PROCEDURE FOLLOWING THE RAPE.

The defendant, who was 15 at the time of the rape, was charged in juvenile court with one count of second degree rape. 4 CP 496-97. The State filed a motion to decline juvenile jurisdiction to adult court. 5 CP 498.

A hearing on decline of juvenile jurisdiction was held on April 14, 2010.[3] At the hearing the court considered the testimony of A.K., the probation counselor's testimony and report, the records in the court file and the argument of counsel. A.K. said the attack on her was pre-planned, as evidenced by the defendant repeatedly asking her if she would tell on him while he was strangling her. She noted that the defendant was in community treatment at the time he attacked her. The attack came out of the blue; she had no warning

[3] The defendant's recitation of his early life in his statement of the case is taken from the State's exhibit to its sentencing memorandum. BOA 5-7; 3 CP 250-319. Although the probation counselor noted in his report that he intended to provide some of the information contained in that exhibit to the parties and the court, they are not attached to his decline hearing report, nor do they appear in the record at the decline hearing. The State assumes the Judge considered the documents Mr. Gaudette specifically said he provided in his report or in the transcript of the decline hearing. Those documents are 3 CP 256-84, 3 CP 288-89, 3 CP 313-16. The exhibit also contains a May 2008 Psychiatric evaluation from May 2008 and a March 2008 Psychosexual Evaluation (Risk Assessment) and Treatment Plan. 3 CP 252-55, 299-306. It is not clear whether these evaluations were before the decline court, or whether they were simply summarized in Mr. Gaudette's decline report. The State does not agree that the record supports the conclusion that these reports were actually before the judge when he rendered either his original decision declining jurisdiction, or when he denied the motion for reconsideration.

that he intended to assault her. He assaulted her without concern for who may appear. She concluded by asking the court to protect other women by giving the defendant "a good long while to think about it and realize the gravity of what he has done, so that maybe with enough time and therapy, that maybe he won't do this ever again." 4-14-10 RP 8-10.

Mr. Gaudette, the probation counselor also noted that the victim reasonably believed that her life was in danger because the defendant attempted to cut off her airway. Mr. Gaudette said the defendant had been identified since he was 13 years old as a high risk for sexual and violent offense. He noted that some information was missing. He only had an intake summary and discharge document from the Pennsylvania School the defendant attended for 10 months, with no information about whether he received any treatment there. Although he had been recently evaluated, that evaluation was not provided to the probation department or the court. 4-14-10 RP 10-12.

In his report Mr. Gaudette noted there was evidence the defendant premeditated the offense. The defendant wore his backpack while committing the offense, and left as soon as another staff member intervened. Mr. Gaudette reported the defendant had

one prior conviction for battery from Idaho. The incident occurred at an inpatient facility where the defendant was placed to address his many issues, including his sexually deviant behavior. The offense was committed against a staff member. While at that facility the defendant was reported to have written notes to other youth in the facility promoting the rape of female staff members. Mr. Gaudette reported that the defendant has had sexual behavior problems since he was four years old. A deviancy evaluation from 2008 reported that when the defendant was six he crawled in a foster-sister's bed and pulled down her pants. He also humped a caregiver's leg, and had to be separated from other children because he continued to openly masturbate, despite being told not to. When he was 12 he was alleged to have had sexual contact with a male foster sibling. In 2007 he was expelled from school for writing sexually explicit letters to counselor and teachers. He threatened violence if they did not comply with his sexual demands. The defendant had been in a formal deviancy program in a locked facility in Pennsylvania from May 2008 to March 2009. The discharge summary recommends that the defendant remain in a sexual offender specific residential program due to his risk level, as well as unsuccessfully completing their program. There was also a

report from the defendant's biological mother in August 2009 that the defendant has sexually assaulted his pregnant 16 year old sister. The assault was not reported to police. 2 CP 243-45.

At the conclusion of the hearing the court went through the eight Kent factors. It concluded that four of the eight factors weighed in favor of declining jurisdiction, two did not weigh for or against decline, and two weighed against decline. It then entered an order declining jurisdiction to the adult court. 4-14-10 RP 19-23; 2 CP 247-49.

The defendant filed a motion for reconsideration which he supported by a series of studies on juvenile sex offender recidivism. The motion was denied. The court focused on the defendant's prior history of sexual misconduct, the evaluation which reported the defendant was a high risk for future violent offenses, and the restrictions on sentencing if the defendant were retained in juvenile court as bearing on community protection. 9-21-10 (vol 2) RP 2-4; 2 CP 86-242; 3 CP 321.

III. ARGUMENT

A. SUBSTANTIAL EVIDENCE SUPPORTED THE COURT'S FINDINGS IN SUPPORT OF AN ORDER DECLINING JUVENILE COURT JURISDICTION.

The juvenile court has exclusive original jurisdiction over juveniles alleged to have committed offenses unless the juvenile court transfers jurisdiction of a particular juvenile to adult criminal court pursuant to RCW 13.40.110. RCW 13.04.030(1)(e)(i). After a decline hearing the court may order the case transferred for adult criminal prosecution upon finding that declination would be in the best interest of the juvenile or the public. RCW 13.40.110.

The State bears the burden to show decline of juvenile jurisdiction would be in the best interest of the juvenile or the public by a preponderance of the evidence. State v. Massey, 60 Wn. App.131, 803 P.2d 340 (1990), review denied, 115 Wn.2d 1021, 802 P.2d 126 (1990), cert. denied, 499 U.S. 960, 111 S.Ct. 1584, 113 L.Ed.2d 648 (1991), abrogation on other grounds recognized, State v. Miller, 92 Wn. App. 693, 704, 964 P.2d 1196 (1998). It is within the juvenile court's discretion to decline jurisdiction. State v. Toomey, 38 Wn. App, 831, 834, 690 P.2d 1175 (1984), review denied, 103 wn.2d 1012, cert. denied, 471 U.S. 1067, 015 S.Ct. 2145, 85 L.Ed.2d 501 (1985). A trial order declining jurisdiction is

subject to reversal only if the decision is exercised upon untenable grounds or is manifestly unreasonable. Id. The court must consider the eight factors set out in Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). Id.

In Kent the Court held that prior to transferring a juvenile offender's case to adult court the juvenile is entitled procedural protections including a hearing and access to counsel. Kent, 383 U.S. at 557. The Court said there were eight factors that were determinative:

> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
>
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
>
> 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
>
> 4. The prosecutive merit of the compliant, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment . . .
>
> 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime . . .
>
> 6. The sophistication and maturity of the juvenile as determined by consideration of his home,

> environmental situation, emotional attitude and pattern of living
>
> 7. the record and previous history of the juvenile, including previous contacts with Youth Aid Division, other law enforcement agencies, juvenile court and other jurisdictions, prior periods of probation.., or prior commitments to juvenile institutions.
>
> 8. the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Kent, 383 U.S. at 566-67.

A trial court must consider all of the Kent factors, although not all factors must be proven to justify declination. State v. M.A., 106 Wn. App. 493, 498, 23 P.3d 508 (2001). The court's findings which support its decision to decline jurisdiction must be supported by substantial evidence. Id. On review the Court will consider the entire record, including the juvenile court's oral decision, to determine if the court's reasons for decline are sufficient. Id.

Here the court found four of the eight factors were supported by substantial evidence; (1) the protection of the community requires waiver given the seriousness of the alleged offense, (2) the alleged offense was committed in an aggressive, violent, premeditated, or willful manner, (3) the alleged offense was against a person or persons, and (4) juvenile court procedures, services

and facilities are not likely to result in reasonable rehabilitation of the Respondent or adequate protection of the public. 4 CP 486-87.

The court found the offense was committed in an aggressive violent, willful and premeditated manner and it was committed against a person. 4-14-10 RP 21. This finding was supported by A.K.'s statement that the defendant caused her to fear for her life. She stated the defendant knew what he was doing was wrong because he kept asking her if she would report him while he was strangling her. Despite her pleas, the defendant would not stop his attack. 4-14-10 RP 8.

The finding is also supported by the probation officer's decline report and the affidavit of probable cause. The affidavit states the defendant choked the victim by putting his thumbs on her throat. He then molested her and digitally raped her by force. 4 CP 496-97. The probation report further detailed that the defendant knocked the victim to the floor and tried to use her hood to smother her while he was choking and raping her. The defendant was wearing his backpack during the attack, and immediately left when a co-worker arrived. That supported the inference that the attack was premeditated. 4 CP 482-83. Thus the juvenile court judge did

not abuse his discretion in finding the second and third factors favored decline.

With respect to the first factor, the court noted the relative differences between the juvenile and adults systems in the amount of potential control over the defendant. While under both systems a sexually violent predator petition could be filed after the term of confinement was completed, such a petition would not necessarily be filed. The court noted the juvenile system would lose control over the defendant once he turned 21, in five and three-quarters years. The term of confinement in the adult system was much longer, followed by a period of supervision. 4-14-10 RP 19-20.

The offense was clearly serious. Rape 2nd degree is class A felony. RCW 9A.44.050(2). It is defined as a violent offense in the Sentencing Reform Act. RCW 9.94A.030(54)(a)(i). The defendant was charged with rape by forcible compulsion. 4 CP 496. Second degree rape under that theory requires evidence that the force exerted was directed at overcoming the victim's resistance and as more than that which is normally required to achieve penetration. State v. McKnight, 54 Wn. App. 521, 528, 774 P.2d 532 (1989). Here, the victim was not simply overpowered. She reasonably feared for her life because the defendant strangled her during the

assault. In light of the legislative designation of the offense and the particular facts of this case the record supported a finding that community protection favored decline.

The first factor was also supported by the evidence which supported the fourth factor. The court relied on what it characterized as "a disturbing pattern where the behavior is getting more and more severe, more intense." 4-14-10 RP 23. That finding was supported by the probation officer's report, affidavit of probable cause from his conviction for battery, and collateral information from the social worker provided by the probation officer.

The decline of jurisdiction report prepared by the probation officer stated the defendant had exhibited sexualized behavior since he was four years old, continuing on to the present. While in foster care he was found in a foster sister's room with his pants off asking her if she wanted to "play the hump game". His sexualized behavior escalated to publicly masturbating, and attempting to hump a teacher's leg. Two years before the instant offense the defendant had been expelled from school for writing sexually explicit and threatening letters to counselors and teachers. 3 CP 267-68; 4 CP 484.

The probation officer's report also stated that while the defendant had been in an inpatient facility in Idaho to address issues including his sexually deviant behavior he attacked a staff member. He was adjudicated guilty of misdemeanor battery. The affidavit of probable cause filed with that case stated the defendant had been talking to a counselor in her office when he grabbed her face, putting his face close to hers. The defendant pushed the staff person over and fell on top of her. When she pushed him off of her the defendant ran outside and concealed himself in her truck. Before this incident the defendant was caught writing notes to other juveniles promoting the rape of female staff members. These facts were repeated in the DSHS Individual Service and Safety Plan and Idaho probable cause statement. 3 CP 271, 273, 288-89; 4 CP 483.

The probation officer's report and DSHS report also set out treatment the defendant had received. The defendant had been receiving mental health treatment from a young age. He was diagnosed as a sexually aggressive youth. In 2007 the Northwest Children's Home strongly recommended that the defendant be placed in a secure environment with intense supervision to address his treatment needs. He was in sexual deviancy treatment in

Pennsylvania from May 2008 to March 2009. The discharge summary recommended continued treatment. There was further information that while in Pennsylvania the defendant had sexually assaulted against his 16 year old sister. When he left he was sent to Tamarack House, a place which was considered ideal to address his sexually aggressive youth therapy needs. 3 CP 259, 262, 268-70, 272-73, 278-79; 4 RP484.

Against the backdrop of this history the juvenile court was faced with an assault which was in some respects similar to the earlier assault in Idaho. It was an assault on an older female staff person which appeared to have been planned. Unlike the Idaho assault the victim here was unable to get the defendant off of her. Instead the allegation was he carried out his sexual fantasy of raping a female staff person. In light of the defendant's history, and the allegations of a violent attack on the victim, the court's findings that the protection of the community required waiver was supported by substantial evidence. The court's finding that the procedures, services, and facilities available through the juvenile system were inadequate to protect the public likewise was supported.

The defendant challenges the court's findings as insufficient to support the decision to decline juvenile jurisdiction. The

defendant first argues that the trial court failed to discuss his best interest and weigh that against the public interest. However, the public interest alone permits declination of jurisdiction. Toomey, 38 Wn. App. at 838, n. 4. Nor is the court required to balance the interest of the juvenile against the public interest. M.A., 106 Wn. App. at 505.

This court rejected the same argument made here in M.A. where the record showed the court considered the relative standard ranges in adult and juvenile court and found the community would be protected for a longer period of time if the defendant were tried in adult court. M.A. 106 Wn. App. at 505. Like the trial court in that case, here the court also considered the relative sentences under each system. The court further explained its reasoning at the motion for reconsideration took into account the need to supervise the defendant upon his release from confinement. 9-21-10 (vol 2) RP 3-4.

The defendant makes an emotional appeal, pointing to his troubled childhood. While it is not disputed that he suffered from an unstable and at times abusive environment, that circumstance alone does not dictate juvenile jurisdiction should be retained. In Holland a decline order was affirmed, despite evidence the

defendant suffered from a terrible childhood. The defendant's parents separated before he was born and his mother died when he was five. He went to live with his father and step-mother where he suffered abuse and neglect. He spent five years in foster homes before being placed with an aunt and uncle. State v. Holland, 98 Wn.2d 507, 510, 656 P.2d 1056 (1983). Like the trial court here, the court in Holland considered the nature of the alleged offenses, the defendant's background, his mental an emotional problems, the comparative rehabilitative services available in each system, and the lack of any definite prediction of successful treatment before the defendant's 21st birthday when he would be released from the juvenile court's jurisdiction. The court held the record supported the trial court's decision, in spite of testimony from mental health experts that decline was not in the defendant's best interest. Id. at 517-18.

The defendant also argues the court erred because the alleged offense was not extraordinary in relation to other second degree rape cases. He cites Stubbs as comparable to his case. State v. Stubbs, 170 Wn.2d 117, 124-28, 205 P.3d 143 (2010), BOA at 19. Stubbs is not comparable because the issue there was whether an exceptional sentence under the Sentencing Reform Act

was justified in an adult prosecution. The Court has interpreted that statute to require consideration of the nature of injury inflicted as it relates to the injury contemplated by the Legislature in setting the standard range. Id. at 124-25. A comparison to the quantum of proof necessary to support an exceptional sentence under the Sentencing Reform Act is unavailing however, because the issue in a decline hearing is not guilt or punishment, but rather whether the case should be heard in juvenile or adult court. State v. H.O., 119 Wn. App. 549, 554, 81 P.3d 883 (2003), review denied, 152 Wn.2d 1019, 101 P.3d 108 (2004). The court's discretion is governed by the eight Kent factors and by the purposes of the Juvenile Justice Act. State v. Foltz, 27 Wn. App. 554, 556, 619 P.2d 702 (1980).

In any event, if the standards for an exceptional sentence had any relevance to the question here, the trial court would not have abused its discretion. The degree of force necessary for a second degree rape requires only enough force to overcome the victim's resistance, and may not even include physical force. McKnight, 54 Wn. App. at 528. Here the defendant did far more than that when he strangled the victim to the point that she feared for her life.

The defendant also argues the decision to decline jurisdiction was improper because the State failed to prove that he could not be rehabilitated in the juvenile system. BOA at 20. He points to the probation officer's statement that he could not determine from the information available whether the defendant could be successfully treated by age 21. He argues that statement was not proof that he could not be rehabilitated.

The uncertainty regarding the effectiveness of resources in the juvenile system to protect the public is the very thing that supports the conclusion that the last factor weighed in favor of declining jurisdiction to adult court. The defendant's history and violent behavior during the assault suggest intensive supervision and treatment were necessary for any hope of rehabilitation sufficient to protect the community. Without that certainty the court was justified in declining to adult court where more controls could be placed on the defendant.

In addition the probation officer's statement was not the only thing that supported the court's finding. The evidence showed the defendant had received mental health treatment since at least 2002. In November 2007 he was evaluated for recommendations from the Sexually Aggressive Youth panel and began receiving

treatment to address his sexual deviancy in January 2008. He had been transferred from the Pennsylvania school to Tamarack house just before the rape occurred. His escalating sexual behavior supports the conclusion that he had a long term need for treatment that was not being adequately addressed by the available resources. 3 CP 267-70, 272-76, 279.

The studies used to support the defendant's motion for reconsideration of the decline decision did not refute the court's conclusion. None of those studies specifically addressed the history of offenders studied. There is no indication that offenders with the defendant's history of escalating violence were taken into account when attempting to predict future violence. Even so, the studies uniformly stated that there were a small percentage of sexual offenders who went on to offend as adults. Given the defendant's history, it was reasonable for the court to consider whether the defendant would possibly fall within that minority population.

The defendant points to evaluations conducted on him. He argues the conclusions were not valid because they were either out of date, or the tools used to measure his risk assessment were no longer considered valid. BOA at 21-22. However, as noted above,

it does not appear that these actual evaluations were before the juvenile court at the decline hearing. See BOR page 6, note 3. Even if the trial judge had the evaluations, and not just the probation officer's decline report containing summaries of the evaluations, the facts reported in those evaluations show the defendant had a history of escalating sexualized behavior and misconduct. 3 CP 285-86, 290, 298. Those evaluations do not undermine the trial court's decision to decline jurisdiction.

In addition to the studies provided in his motion for reconsideration the defendant also relies on the two relatively recent United States Supreme Court decisions of Graham v. Florida __ U.S. __, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) and Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). He argues each of these authorities recognize the cognitive changes in adolescence make juveniles less culpable and more amenable to rehabilitation. However neither Graham nor Roper was concerned with the forum in which a juvenile offender's guilt or innocence should be determined. Each case was concerned with the constitutionality of certain penalties imposed on juvenile offenders. The Court concluded that the death penalty at issue in Roper, and a sentence of life without the possibility of

parole for non-homicide offenders at issue in Graham were both unconstitutional as applied to persons under 18 because of characteristics most commonly present with juvenile offenders. Roper, 543 U.S. at 569-574, Graham, 130 S.Ct. at 2026-2030.

Graham specifically stated that the "State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham, 130 S.Ct. at 2030. This is exactly what an indeterminate sentence under the Sentencing Reform Act provided the defendant. Graham does not conflict with the court's decision to decline jurisdiction to adult court.

B. WHETHER THE DEFENDANT WAS ENTITLED TO HAVE A JURY DETERMINE WAIVER JUVENILE JURISDICTION ON PROOF BEYOND A REASONABLE DOUBT WAS NOT PRESERVED FOR REVIEW. IF THE COURT REVIEWS THE ISSUE THEN IT WAS NOT ERROR FOR THE JUVENILE COURT JUDGE TO DECLINE JURISDICTION BASED ON PROOF BY A PREPONDEARNCE OF THE EVIDENCE.

The defendant argues for the first time on appeal that he was entitled to have a jury determine whether to waive juvenile court jurisdiction based on proof beyond a reasonable doubt. Generally appellate courts will not consider issues raised for the

first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). A party may raise an issue for the first time on appeal if it is a manifest error affecting a constitutional right. Id., RAP 2.5(a)(3). The reviewing court must first determine whether the alleged error is in fact a constitutional issue. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). If the error is truly of constitutional magnitude, then the court considers whether it is manifest. Id. To establish this requirement the defendant must make a plausible showing that the asserted error had a practical an identifiable consequence in the trial of his case. Id. If he satisfies the first two steps, then the court must consider the merits of the claim. Id. Any error that was committed is may be harmless. Id.

The procedure by which the court declines juvenile jurisdiction does not raise a constitutional issue because juveniles do not have a constitutional right to be tried in juvenile court. Massey, 60 Wn. App. at 137. Even if a constitutional issue had been raised, no error occurred.

The defendant relies on Apprendi[4] and Blakely[5] for the proposition that he has a constitutional right to have every fact

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[4] Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)

which is essential to punishment determined by a jury beyond a reasonable doubt, whether or not that fact is labeled an "element." The defendant claims his punishment increased when the juvenile court declined jurisdiction because of the difference in possible punishments in juvenile and adult court. The argument rests on the erroneous claim that the Kent factors favoring decline are an "element" which bears on the defendant's sentence. BOA at 27.

The argument is similar to the one made in United States v. Miguel, 338 F.3d 995 (9th Cir. 2003). There the defendant argued the transfer statute was like those statutes which increase the potential penalties in adult cases. The court rejected that argument because transfer did not per se increase punishment, but only established a basis for the district court's jurisdiction. Miguel, 338 F.3d at 1004.

The defendant also argued that he had a right to a jury verdict beyond a reasonable doubt under the New Mexico system for declining juvenile jurisdiction based on the language in Apprendi in Gonzales v. Tafoya, 515 F.3d 1097 (10th Cir. 2008), cert. denied, 129 S.Ct. 211, 172 L.Ed.2d 156 (2008). The court acknowledged

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[5] Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

that the defendant's arguments had some support from the language in Apprendi itself because the decision to sentence under the adult system exposed the defendant to a longer sentence than he would have been under the juvenile system. Id. at 1110. Nevertheless the court concluded that Apprendi's holding did not apply in juvenile decline proceedings. The Court reasoned that the decision to decline jurisdiction involved the kind of decision making traditionally performed by judges and not juries. Gonzales, 515 F.3d at 1111-14.

The defendant acknowledges that courts in this State which have reviewed this issue have rejected his arguments. This court found the defendant was not entitled to a standard of proof beyond a reasonable doubt at a decline hearing on the first rationale identified in Gonzales. The issue to be resolved was not the defendant's guilt or what sentence should be imposed. "Rather the hearing is designed to determine whether the case should be heard in juvenile or adult court." H.O. 119 Wn. App. at 554. In Hegney the court also rejected the argument that Apprendi and Blakely required a jury verdict on proof beyond a reasonable doubt in juvenile court decline hearings. In re Hegney, 138 Wn. App. 511, 525-528, 158 P.3d 1193 (2007).

The defendant asks the court to reconsider these authorities in light of Blakely, United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), and Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007). None of these cases provide a reason to depart from the court's earlier decisions on this issue.

The court has already rejected application of Blakely to this issue for two reasons. First the court had previously held Blakely did not apply to juvenile proceedings because juveniles were not entitled to a jury trial under the Juvenile Justice Act of 1977. Hegney, 138 Wn. App. at 527. Second, the court also followed the analysis of the Alaska Court of Appeals in Alaska v. Kalmakoff, 122 P.3d 224 (Alaska 2005). Kalmakoff surveyed courts which had considered this issue and decided to follow the overwhelming weight of authority at that time that concluded Apprendi had no application because juvenile court waiver hearings are not sentencing proceedings. Hegney, 138 Wn. App. at 528 quoting Kalmakoff, 122 P.3d at 227.

Neither Booker nor Cunningham changes this analysis. Like Blakely and Apprendi each case considered the procedures constitutionally necessary for sentencing. Booker considered the

application of the Court's decision in Blakely to the Federal Sentencing Guidelines. Booker, 543 U.S. at 226. Cunningham considered California's determinate sentencing law in light of Apprendi and cases which followed it. Cunningham, 549 U.S. at 274-75. These cases did not consider the procedures necessary to determine the forum in which guilt and any punishment would be determined. They do not change the analysis relied on by courts in this State and other jurisdictions which found juveniles are not entitled to a jury verdict beyond a reasonable doubt when considering whether to decline juvenile jurisdiction to adult court.

Finally, the defendant claims that even if he is not entitled to a jury verdict at a juvenile decline hearing he was still entitled to a burden of proof beyond a reasonable doubt under the Fourteenth Amendment, citing In re Winship, 397 U.S. 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Winship considered the "narrow question whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by a an adult." Id. at 359. The Court made it clear that it was not considering constitutionally required procedures in pre-judicial stages of the judicial process. Id. at 359,

n. 1. Whether decline is in the best interest of the public or the juvenile is not an element of any offense, necessary for a determination of guilt. Winship does not dictate that the fundamental fairness guaranteed by the Fourteenth Amendment requires that question to be answered upon a higher standard than a preponderance of the evidence.

Nor do other cases which have considered a juvenile's Due Process rights. In Gault the Court considered the proceedings in which a court determines a juvenile's guilt resulting in potential confinement. In re Gault, 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.E.d2d 527 (1967). As in Winship the Court specifically stated it was not considering what constitutional rights were due in pre-judicial stages of the juvenile process. Id. When the Court did consider due process requirements for a decision to transfer a juvenile offender to the jurisdiction of an adult court it held a juvenile was entitled to a hearing, access to information relied on by the juvenile court in making its decision, and a statement of reasons for the decision to retain or waive juvenile jurisdiction. Kent, 383 U.S. at 557. But the Court also said that the right to a hearing did not mean that the hearing had to conform to all of the procedural requirements of a criminal trial. Id. at 562.

The court has previously held the burden of proof in a juvenile decline hearing is by a preponderance of the evidence. State v. Jacobson, 33 Wn. App. 529, 531, 656 P.2d 1103 (1982), review denied, 99 Wn.2d 1010 (1983). The court reasoned that standard was sufficient because the juvenile's guilt was not at issue in a decline hearing. Id. This Court rejected the argument that Apprendi and cases which followed it require a higher burden of proof. H.O., 119 Wn. App. at 552. Because the cases relied on by the defendant are based on the same legal principal announced in Apprendi, the defendant has not provided any authoritative reason to depart from this court's earlier decision.

IV. CONCLUSION

For the forgoing reasons the State asks the court to affirm the decision of the juvenile court declining jurisdiction to adult court.

Respectfully submitted on December 2, 2011.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: Kathleen Webber
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent