No. 45883-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

CANDACE RALSTON, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber L. Finlay, Judge

No. 11-1-00126-1

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Ralston stipulated to an exceptional sentence when she entered an Alford plea in this case. The length of the exceptional sentence then imposed by the court was not an abuse of the court's discretion because in light of the seriousness of Ralston's thefts, the sentence is not shocking to the conscience.

2. Most of the restitution award entered by the trial court is not in dispute. But Ralston disputes an award for $66,427.56 for investigative costs because the prosecutor voluntarily reduced the requested amount by 10% to account for a part of the investigation for which there was no corresponding criminal charge. And Ralston disputes an award of $8,607.54 for employee costs related to her crimes because the employees did not separately account for the time spent on Ralston's crimes. Because the facts support a finding that the figures used were under payments rather than overpayments, the trial court did not err by ordering these restitution figures.

3. The trial court considered the fact that Ralston would be unlikely to possess means to pay the legal financial obligations ordered by the court at sentencing; so, the court set the monthly payments at $25.00. However, after Ralston's filed her brief with this Court, the Supreme Court released its opinion in the case of *State v. Blazina*, 89028-5 (Mar. 12, 2015), which held that trial courts when imposing discretionary costs should completely consider each defendant's ability to pay and should do so on the record.

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B. FACTS AND STATEMENT OF THE CASE

Before she discovered to be stealing from them, the defendant-appellant, Candace Ralston, worked as the comptroller at the Alderbrook resort in Mason County. RP 206, 242-44. Ralston started out as a catering sales manager, but later advanced to become a staff accountant, and then over time advanced to the position of comptroller. RP 243-44.

Beginning in November of 2009, while Ralston was still in the position of staff accountant, began stealing money from Alderbrook. RP 206. Ralston used her position of trust as a staff accountant to engage in an ongoing series of thefts and forgeries. RP 206-35. These thefts continued after Ralston became the comptroller. RP 206-35. Between November 2009 and April 2011 Ralston stole $213,581.15 from Alderbrook. RP 251. A bank (and perhaps a timeshare in Mexico) suffered some of the losses, because of the forgeries, but Alderbrook directly suffered more than $190,000.00 in losses. RP 242, 251. In addition, Alderbrook sacrificed hundreds of hours of employee labor trying to sort out what had happened and assist in the criminal investigation. RP 243.

On January 6, 2014, in exchange for the prosecutor's agreement to drop two charges, Ralston entered an Alford plea of guilty to one count of

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theft in the first degree and one count of forgery, with aggravating factors for both counts. RP 199, 202-04; CP 57-66; CP 67-69. Ralston stipulated to the aggravating factor of major economic offense for both counts. RP 205. The prosecutor presented the factual basis for the plea to the court. RP 205-35. The court found that there were sufficient facts to support the plea and found the aggravating factors for both counts. RP 235; CP 67-69.

C. ARGUMENT

1. Ralston stipulated to an exceptional sentence when she entered an Alford plea in this case. The length of the exceptional sentence then imposed by the court was not an abuse of the court's discretion because in light of the seriousness of Ralston's thefts, the sentence is not shocking to the conscience.

Ralston stipulated to the aggravating factors when she entered her guilty plea (CP 65); thus, she does not contest the imposition of an exceptional sentence in this case. But, she contends that the exceptional sentence she received in this case is clearly excessive. Br. of Appellant at 8-14.

When the length of an exceptional sentence is challenged on appeal as an excessive sentence, the sentence is reviewed under the "abuse of discretion" standard to determine whether the sentence imposed is

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clearly excessive or too lenient. *State v. Hutsell,* 120 Wn.2d 913, 916, 845 P.2d 1325 (1993).

A sentence is "clearly excessive" if it one that is clearly unreasonable, "'i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken.'" *State v. Ritchie,* 126 Wn.2d 388, 393, 894 P.2d 1308 (1995) (quoting *State v. Oxborrow,* 106 Wn.2d 525, 531, 723 P.2d 1123 (1986)). When a sentencing court does not base its sentence on improper reasons, a reviewing court will find the sentence excessive only if its length, in light of the record, "'shocks the conscience.'" *State v. Vaughn,* 83 Wn. App. 669, 681, 924 P.2d 27 (1996) (internal quotation marks omitted) (quoting *Ritchie,* 126 Wn.2d at 396), *review denied,* 131 Wn.2d 1018(1997).

Ralston compares here sentence to the sentences imposed in the cases of *State v. Ritchie,* 126 Wn.2d 388, 894 P.2d 1308 (1995) and *State v. Haley*, 140 Wn. App. 313, 165 P.3d 409 (2007) and argues that her sentence is clearly excessive because her sentence is 16 times the top of the standard range and was a property crime committed against *a corporation*, while *Ritchie* and *Haley* involved violent crimes against individuals but resulted in sentences that ranged from less three times the standard range up to only nine times the standard range. Br. of Appellant

at 9-11. But the mere fact that Ralston's victims chose to organize their business as a corporation does not make them any less human. The impact of Ralston's crimes on human beings is obvious. Shareholders are, ultimately, human, and the money Ralston stole from Alderbrook obviously effected the resort's profitability and, thus, their ability to hire or retain workers, to offer raises or improved benefits to surviving workers, or to make improvements to the business that would enrich the working environment of the employees who depend on Alderbrook for their livelihoods. Still more, the resort provides diversity of employment to the rural Mason County economy and offers families an alternative to employment in the shellfish or forestry industries. If Alderbrook fails, the community suffers. Ralston's crimes were clearly crimes of major economic impact.

Additionally, Ralston's argument to compare her sentence to other sentences is without legal support, because *State v. Ritchie,* 126 Wn.2d 388, 894 P.2d 1308 (1995) rejected proportionality as a consideration on review of whether the length of a trial court's properly imposed exceptional sentence is excessive. *Id.* at 391, 396-97. Ralston's sentencing court was not required to engage in comparisons, but the court nevertheless had the benefit of comparing Ralston's sentence to sentences

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imposed by the court in comparable cases, if it chose to, and Ralston's sentence was not out of line with the comparable cases. RP 252-58, 269.

Still more, Ralston's comparisons do not support her argument. For example, Ralston cites *State v. Oxborrow*, 106 Wn.2d 525, 723 P.2d 1123 (1986) and points out that the defendant in *Oxborrow* stole $58 million from over 50 investors but received a sentence that was only 15 times the standard range. Br. of Appellant at 11-12. But in actuality, the defendant in *Oxborrow* "obtained over $58 million" in investments, "of which only $45 million was returned to the investors." *Id.* at 527. "Oxborrow pled guilty to theft in the first degree, RCW 9A.56.020(1)(a), and to willful violation of a cease and desist order concerning the sale of securities, RCW 21.20.390, by defrauding approximately 51 investors of over $1 million subsequent to July 1, 1984 [footnote omitted]." *Oxborrow* at 528.

Ralston contends that her sentence is excessive because she stole only a small fraction of what the defendant in *Oxborrow* stole, yet her sentence is 16 times the standard range. *Id.* But, Ralston's argument does not account for the fact that the defendant in *Oxborrow* received the *maximum* sentence of 10 years for his theft crime and received a sentence of one-half the maximum, or five years, for his crime of disobeying a

cease and desist order, to run consecutively, rather than concurrently. *Oxborrow* at 528. Obviously, where the sentencing court imposed the maximum sentence for the theft, an attempt to compare the sentence to a multiple of the standard range is not helpful.

When an exceptional sentence is based on proper reasons, as it ins in the instant case, a reviewing court will hold it clearly excessive only "if its length, in light of the record, 'shocks the conscience.'" *State v. Knutz*, 161 Wn. App. 395, 410-11, 253 P.3d 437, 444-45 (2011) (internal quotation marks omitted) (quoting *State v. Kolesnik,* 146 Wn. App. 790, 805, 192 P.3d 937 (2008)). A sentence shocks the conscience if it is one that "'no reasonable person would adopt.'" *Knutz,* 161 Wn. App. at 411 (quoting *State v. Halsey,* 140 Wn. App. 313, 324–25, 165 P.3d 409 (2007)).

In the instant case, the trial court properly imposed an exceptional sentence. Ralston stipulated to the aggravating factors when she pled guilty, and the court independently made a finding of the aggravating factor. CP 65; RP 272. Although Ralston's offender score was one, she had a prior, uncounted, conviction for theft from stealing from an employer. RP 249, 267. The trial court's sentence here should not shock the conscience. Without any sign of remorse, Ralston abused the trust of

her employer to commit a crime with major economic impact by stealing more than $200,000.00 over a period of a year and a half. RP 199, 202-35; CP 57-66; CP 67-69.

2. Most of the restitution award entered by the trial court is not in dispute. But Ralston disputes an award for $66,427.56 for investigative costs because the prosecutor voluntarily reduced the requested amount by 10% to account for a part of the investigation for which there was no corresponding criminal charge. And Ralston disputes an award of $8,607.54 for employee costs related to her crimes because the employees did not separately account for the time spent on Ralston's crimes. Because the facts support a finding that the figures used were under payments rather than overpayments, the trial court did not err by ordering these restitution figures.

At the restitution hearing, the prosecutor itemized the restitution requests to the court. RP Vol. 3, 7-13. The prosecutor summarized that there were three items of restitution to be reimbursed to CHUBB Insurance Company, as follows: $195,893.00 for missing cash; 2) $9,996.00 for the fraudulent time-share check; and, 3) $66,427.56 for accounting fees charged by Moss Adams for retracing Ralston's various thefts. RP Vol. 3, 13. The $66,427.56 requested for accounting fees represented a 10% reduction of the full fee, because the prosecutor proposed a 10% reduction to account for the fact that Moss Adams also

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examined records related to gift card fraud for which Ralston was never charged, and fees related to the gift card fraud were subtracted from the total fee "in fairness to the defendant." RP Vol. 3, 11.

The prosecutor also requested restitution for Alderbrook, as follows: 1) $5,000.00 to compensate Alderbrook for its insurance deductible; 2) compensation for time spent by Alderbrook employees dealing with investigating and accounting for Ralston's thefts (three employees at 80 hours each); and, 3) Alderbrook's attorney fees incurred for unraveling the thefts and seeking recovery. RP Vol. 3, 13.

The parties agreed to restitution in the amount of $9,996.00 to CHUBB Insurance and $8,191.63 to Key Bank. RP Vol. 3, 35. But there was disagreement regarding the cash receipts, investigative fees, fees for staff work, and attorney fees. RP Vol. 3, 35.

The trial court then considered various items of evidence, to include a report from Moss Adams which reviewed receipts from Alderbrook, a declaration from Tabatha McZorn, and other evidence and found that a restitution award of $195,893.00 for lost cash was appropriate as an easily ascertainable amount supported by proof by a preponderance of evidence. RP Vol. 3, 36.

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The trial court then ruled that the request for investigative fees, which included accounting fees, was appropriate, and the court ordered restitution of $66,427.56 for these fees. RP Vol. 3, 37. This amount reflected a 10% reduction from the original fee, in order to subtract out fees incurred for investigating Ralston's gift card fraud that was never charged. RP Vol. 3, 37.

The court declined to award restitution for attorney fees. RP Vol. 3, 38.

The court then found that Alderbrook was entitled to a restitution award for costs it incurred for employee salaries devoted to dealing with Ralston's thefts. RP Vol. 3, 38. But the court noted that there was an issue with whether this cost was an easily ascertainable amount. RP Vol. 3, 38. The court then described the evidence that it considered. RP Vol. 3, 38-38. The court then found that the amount requested was reasonable, and it ordered restitution of $8,607.54 for employee costs. RP Vol. 3, 39.

Finally, the court ordered $5,000.00 restitution to Alderbrook for the cost of their insurance deductible. RP Vol. 3, 39.

On appeal, Ralston disputes only the court's $66,427.56 restitution award for investigative fees and the court's $8,607.54 award for Alderbrook's crime-related employee expenses. Br. of Appellant at 18.

First, Ralston's reason for disputing the investigative fees is that the prosecutor unilaterally agreed to reduce the full amount of the investigative fees by 10% to account for costs incurred in investigating gift card fraud for which Ralston was not ultimately charged. Br. of Appellant at 15-16. But the State contends that even if the State agreed to reduce the charges by 10% "in fairness to the defendant" (RP Vol. 3, 11), it is also fair to attribute those costs to Ralston, because it was her acts of theft and forgery that brought about the need to undergo that analysis in the first place, and this need arose irrespective of whether she was separately criminally charged in relation to that investigation. See, e.g., Declaration of Reinhold Schuetz, CP 14-19.

Ralston disputes Alderbrook's request for employee expenses because they did not separately account for and segregate the time that each employee spent to deal with the aftermath of Ralston's thefts and the resulting investigation and recovery attempts. However, the trial court reviewed the evidence and determined that the restitution award was appropriate. RP Vol. 3, 37-39.

"When disputed, the facts supporting a restitution award must be proved by a preponderance of the evidence." *State v. Deskins*, 180 Wn.2d 68, 82-84, 322 P.3d 780 (2014), *as amended* (June 5, 2014), citing *State v.*

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Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). ""'Evidence supporting restitution is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture."'" *Deskins* at 82-83, quoting *Kinneman* at 285 (internal quotation marks omitted) (quoting *State v. Hughes,* 154 Wn.2d 118, 154, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco,* 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)). Still more, "[c]ourts may rely on a broad range of evidence—including hearsay—because the rules of evidence do not apply to sentencing hearings. ER 1101(c)(3). *Deskins* at 83.

Here, there was not an exact accounting of the amount of money that Alderbrook expended to investigate Ralston's gift card transactions, for which she was never charged, but the evidence is clear that Alderbrook incurred those charges because Ralston's acts of thefts against Alderbrook led to the necessity of this investigation. The mere fact that the prosecutor voluntarily elected not to pursue those costs, "in fairness to the defendant" (RP Vol. 3, 11), should not lead to a result that the remaining costs are not ascertainable.

Likewise, employee expenses attributable to Ralston's crimes were not separately tracked, but the totality of the circumstances shows that the

estimate that the court relied upon was an under estimate of the actual costs. Ralston should not benefit from this windfall.

3. The trial court considered the fact that Ralston would be unlikely to possess means to pay the legal financial obligations ordered by the court at sentencing; so, the court set the monthly payments at $25.00. However, after Ralston's filed her brief with this Court, the Supreme Court released its opinion in the case of *State v. Blazina*, 89028-5 (Mar. 12, 2015), which held that trial courts when imposing discretionary costs should completely consider each defendant's ability to pay and should do so on the record.

Ralston avers that the trial court did not consider her ability to pay when at sentencing the court ordered her to $39,211.85 in discretionary legal financial obligations. Br. of Appellant at 18-21. But the court did consider Ralston's ability to pay. RP 273. The court noted that Ralston would be in custody for some time and that payments would not be due until she was released. RP 273. The court also considered than Ralston's employment opportunities may be limited when she is released, so the court set the payments at a mere $25.00 per month. RP 273.

Ralston contends that she may raise this issue for the first time on appeal. Br. of Appellant at 21-22. When Ralston filed her brief, the Supreme Court had not yet released its recent decision of *State v. Blazina*,

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89028-5 (Mar. 12, 2015). The Court in *Blazina* rejected arguments similar to those Ralston is advancing in the instant case. *Id.* *Blazina* held that defendants do not automatically have the right to raise cost issues for the first time on appeal when there is no objection in the trial court to preserve the issue for appeal. *Id.*

Although the Court stated that reviewing courts were not required to consider unpreserved objections to costs for the first time on appeal, it nevertheless exercised its discretionary authority and accepted review under RAP 2.5(a). *Id.* The Court in *Blazina* found that the trial court did not conduct an adequate inquiry into the defendants' ability to pay costs in that case; so, the Court ordered remand for the trial court to fully consider the defendants' abilities to pay. *Id.*

The costs imposed in this case, combined with the large restitution award, cast doubt on Ralston's ability to pay. If she pays at the rate of $25.00 per month, it is likely the total accrued balance after accounting for interest will compound at a rate that will grow and grow month by month and never be reduced. If this Court exercises its discretionary authority and considers Ralston's cost issue for the first time on appeal, the State asks that, rather than a resentencing, this case be remanded to the trial court on the issue of costs only, for the trial court to fully consider

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Ralston's ability to pay and that the trial court modify its existing judgment and sentence to reflect the court's intent regarding costs.

D. CONCLUSION

For the reasons stated above the State requests the Court to sustain the length of the exceptional sentence imposed by the trial court and the award of restitution ordered by the trial court.

If this Court elects to exercise its authority under RAP 2.5(a) to review Ralston's claim that the trial court erred by not on the record conducting a complete inquiry of Ralston's ability to pay discretionary legal financial obligations, the State asks that this Court remand this case to the trial court for consideration of Ralston's ability to pay discretionary costs and for modification or amendment of the judgment and sentence, as appropriate to reflect the trial court's findings.

DATED: April 1, 2015.

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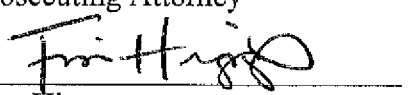

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