No. 47258-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN RUSSELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY,

BRIEF OF APPELLANT

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2. The trial court imposed an unlawful sentencing condition when it ordered Mr. Russell be evaluated for civil commitment prior to release.

3. The trial court erred by imposing discretionary legal financial obligations without inquiring into Mr. Russell's ability to pay.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The State bears the burden of proving the essential elements of a criminal offense. Here, the State was required to prove that Mr. Russell acted with the intent to inflict great bodily harm against a woman he had, by all accounts, no ill feelings toward. Was the evidence presented sufficient to prove that Mr. Russell acted with the intent to cause great bodily harm?

2. The sentencing court may impose punishment only as authorized by the Sentencing Reform Act (SRA). There was no evidence presented that Mr. Russell suffered a mental health disorder. Should the sentencing condition that Mr. Russell be held until an evaluation for purposes of civil commitment be conducted therefore be vacated?

3. Before imposing legal financial obligations, a sentencing court must make an inquiry as to a defendant's ability to pay. This court may

address a trial court's failure to conduct this inquiry for the first time on appeal. The trial court here imposed discretionary financial obligations against an indigent defendant, although it did not inquire on the record as to the defendant's ability to pay. Following our Supreme Court's lead, should this Court remand for a proper determination as to the defendant's ability to pay discretionary legal financial obligations? State v. Blazina, 182 Wn.2d 830, 833, 344 P.3d 680 (2015).

C. STATEMENT OF THE CASE.

The Johnson family has lived for many years in the small community of Wishkah, a few miles up the river, outside Aberdeen. RP 74. Ms. Johnson and her husband Don have been married for 25 years; they have four adult children, all of whom live nearby with their partners and friends. RP 54-55. The family home has an open plan, with many activities for the Johnson kids and their friends to enjoy on the family's 62 acres, including fishing, skeet shooting, a motocross track, and a shop. RP 54-56. The Johnson family also owns several rental homes on the property, which are managed by Ms. Johnson.

June 28, 2014 was a typical evening in the Johnson home. Several of the Johnson kids were home with their girlfriends, and a number of neighbors came by as well. RP 59. In addition to Ms. Johnson's sons and their girlfriends, the family was joined that evening by a few of the

"neighbor boys" who lived in one of the Johnsons' rental homes. RP 56. This group of neighbors included Isaac "Ike" Stone. Id. The group was soon joined by John "Jack" Russell, a friend of the neighbors. RP 60-61. The Johnsons had met Mr. Russell before, since he had attended school in the area, and was friendly with their kids. RP 62.

Ms. Johnson and her husband made dinner for the entire group, and after some additional rallying on the motocross track, the younger generation returned to the house. RP 63-64. The tone of the evening changed, and the heavier drinking began at this point. The kids and their girlfriends opted to play pool and drink at home that night. RP 64-68, 95-96. Ms. Johnson joined the younger generation as Mr. Johnson turned in for the evening, since he had been at work early that morning. RP 68, 97. By around 1:00 a.m., the Johnson kids had all gone home. Only three people remained in the kitchen – Ike Stone, Ms. Johnson, and Mr. Russell. RP 68, 96. The three of them sat around drinking and talking until approximately 3:00 a.m., and by all accounts, a great deal of alcohol was consumed. RP 86, 96, 112 (Ms. Johnson estimates consuming four to five mixed drinks; Mr. Stone estimates five mixed drinks containing two shots in each). Mr. Stone recalled that Mr. Russell was mumbling, incoherent, and so intoxicated that he could barely hold fluids in his mouth or hold his head upright. RP 98, 117. Mr. Stone described, "He asked for a drink and

we handed him one and he tried to drink out of [a] straw and it just ran out the other side." Id.

At approximately 3:00 a.m., Ms. Johnson told Mr. Stone and Mr. Russell that it was time to end the evening; considering Mr. Russell's intoxicated state, Ms. Johnson offered to allow him to sleep on the couch, rather than drive home. RP 71. Mr. Russell declined that offer, and the evening continued. RP 72. Approximately 15 minutes later, while Mr. Stone's back was turned to get a glass of water, Mr. Russell suddenly stood up. RP 72, 98-99. Mr. Stone said he turned to see Mr. Russell jump up from his chair – his head had previously been resting on the counter – walk quickly behind Ms. Johnson, and make a motion across her neck. RP 98-99. Ms. Johnson later said she suddenly had felt a rush of warmth, and she realized she had been cut. RP 72. She pinched the large wound in her neck with her hand, which resulted in another deep cut to her right hand. RP 76-79.

Mr. Stone jumped in and disarmed Mr. Russell, who had apparently grabbed his knife from the bar and inflicted this injury. RP 72, 100-01. Mr. Stone incurred some light wounds in this process, but did not require medical attention; he restrained Mr. Russell until law enforcement arrived moments later. RP 102-03.

After speaking with Mr. Stone for a few seconds, Mr. Russell passed out again on the kitchen floor. RP 157.[1] When deputies arrived, their several attempts to awaken Mr. Russell were unsuccessful, so he was handcuffed in an unconscious state. RP 158-59; Ex. 16 (photograph of Mr. Russell handcuffed and propped up, unconscious, in Johnson kitchen). Deputies ultimately had to carry Mr. Russell to their patrol car because he was unable walk independently. RP 159. Deputy Richard Ramirez transported Mr. Russell to the county jail, and testified that at 5:47 a.m., Mr. Russell "was still passed out." RP 163. When Deputy Ramirez was not able to remove Mr. Russell from his car and carry him into the jail alone, he was advised that in this condition, Mr. Russell would need to be medically cleared for incarceration. RP 163-64.

Mr. Russell was then brought to Summit Pacific Medical Center, and Deputy Ramirez testified it was as if Russell "came out of his alcohol-induced coma." RP 165. Mr. Russell was informed that he was involved in a stabbing and was read his Miranda[2] rights. He was medically cleared 26 minutes later. RP 166. Mr. Russell stated, both at the hospital and later

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[1] During this brief period of consciousness, Mr. Russell asked Mr. Stone to remove his wallet from his pocket because it was bothering him. RP 102-03. In addition to the wallet, Mr. Stone removed a loaded pistol, for which Mr. Russell had a concealed carry permit. Id.; 211-12; Ex. 28.

[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

at the jail, that he had no recollection of evening's events once the heavy drinking began, and did not recall being angry or upset at anyone that night. RP 224. He also could not recall becoming violent, displaying the knife, fighting with anyone, or anything that happened from approximately 1:00 a.m. until the time he awoke inside the patrol car. RP 223-25 (stating he recalled consuming between six and eight mixed drinks that evening).

Based on these events, the State charged Mr. Russell with one count of assault in the first degree for the incident with Ms. Johnson, and one count of assault in the second degree, for that with Mr. Stone. CP 34-35. A deadly weapon enhancement was added to each count, as well as a firearm enhancement, due to the knife and the pistol. Id. Following a jury trial, Mr. Russell was convicted of both counts of assault. CP 15-16; RP 281-87. The jury responded "No" to the special verdict regarding the firearm, and "Yes" regarding the knife, as to both counts of assault. CP 14; RP 281-87.

The trial court sentenced Mr. Russell to 183 months incarceration. CP 2-10. The court also ordered, over defense objection, that Mr. Russell be evaluated for civil commitment following his release from confinement, despite the absence of psychiatric evidence presented at trial. CP 7; 2RP 8, 10.

D. ARGUMENT.

1. THERE WAS INSUFFICIENT EVIDENCE PRESENTED THAT MR. RUSSELL INTENDED TO COMMIT ASSAULT IN THE FIRST DEGREE.

a. Due process requires the State to prove the essential elements of a criminal offense beyond a reasonable doubt.

The State bears the burden of proving the essential elements of a criminal charge beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 796 (1995); U.S. Const. amend. XIV; Const. art. I § 3. Evidence is sufficient only if, when viewed in the light most favorable to the prosecution, any rational trier of fact would have found the elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

b. The State did not prove Mr. Russell committed the crime of assault in the first degree.

The crime of assault in the first degree, as it was charged and prosecuted by the State, required the State to prove that with intent to inflict great bodily harm, Mr. Russell assaulted Ms. Johnson with a deadly weapon. RCW 9A.36.011(1); CP 34-35. The jury concluded the State proved Mr. Russell committed this offense. But even viewed in the light most favorable to the State, Mr. Russell's conduct did not establish the

essential elements of first-degree assault. In particular, the State failed to prove that, under the circumstances adduced at trial, Mr. Russell acted with the requisite intent to inflict great bodily harm. His conviction must be reversed and remanded for a new trial.

According to statute, "great bodily harm" is "bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9.94A.110(4)(c). "'Great bodily harm' ... encompasses the most serious injuries short of death. No injury can exceed this level of harm." State v. Stubbs, 170 Wn.2d 117, 128, 240 P.3d 143 (2010).

To support Mr. Russell's conviction for assault in the first degree, the State thus had to prove that he actually intended to kill Ms. Johnson, or that he intended to inflict injuries so serious that they would create a probability of death. The State did not meet this burden.

Mr. Russell was practically unconscious at the time of the assault. RP 117-18, 135. In his statement, Mr. Russell said he had consumed between six and eight mixed drinks, and his drinking companion Mr. Stone noted that just before the incident, Mr. Russell could barely lift his head off the counter or keep liquids from dribbling out of his mouth. Id. Immediately after the burst of physical energy required to effectuate the

assault, Mr. Russell was tackled by Mr. Stone; then Mr. Russell almost immediately collapsed onto the kitchen floor, passing out. RP 135-37. Mr. Russell remained unconscious, or as deputies put it, in an "alcohol-induced coma," until he regained consciousness in the patrol car, in the sally port of the county jail more than two hours later. RP 155-57, 165.

Nothing about Mr. Russell's conduct immediately before or after the incident supports the inference that he actually intended to kill Ms. Johnson or inflict great bodily harm on her. There was no argument or sharp words exchanged. RP 71-72. Mr. Russell did not lunge at Ms. Johnson. He quickly rose to his feet from what had been described as a virtual drunken stupor. RP 121. He then made one swift move with the knife and was quickly tackled by Mr. Stone and restrained in a "bear hug." RP 122, 124-25, 128. Mr. Russell then collapsed to the kitchen floor, motionless again in a state of drunken unconsciousness. RP 155-57.

Ms. Johnson was not even sure how she sustained the injury on her throat, noting it all happened so quickly. RP 72. She assumed it happened after Mr. Russell rose from the table, but neither she, nor Mr. Stone, saw Mr. Russell pick up the knife. RP 72, 132.

The accidental infliction of injury, even if serious, is not sufficient to prove specific intent to inflict great bodily harm. State v. Elmi, 166

Wn.2d 209, 215, 207 P.3d 439 (2009) (mens rea for assault in the first degree is specific intent to inflict great bodily harm).

The evidence does not establish that Mr. Russell intended to inflict an injury that would create a probability of death, cause significant serious permanent disfigurement, or cause a significant permanent loss or impairment of the function of any bodily part or organ. The State did not meet its burden of proof regarding this essential element of assault in the first degree.

For the reasons stated, the evidence is insufficient to support Mr. Russell's conviction for assault in the first degree. Mr. Russell conceded at trial that the evidence was sufficient to prove assault in the second degree, as to Ms. Johnson. RP 267; CP 20 (Jury Instruction 9); CP 26 (Verdict Form A2). Mr. Russell's conviction for assault in the first degree should be reversed, and this case remanded for a new trial on a single count of assault in the second degree. See Elmi, 166 Wn.2d at 215.

In the alternative, since the jury was instructed on the lesser included charge of assault in the second degree, the remedy is vacation of the assault in the first degree conviction and remand for entry of the lesser offense of assault in the second degree. In re Heidari, 174 Wn.2d 288, 296, 274 P.3d 366 (2012).

2. THE SENTENCING CONDITION REQUIRING MR. RUSSELL TO BE EVALUATED FOR CIVIL COMMITMENT IS UNLAWFUL AND MUST BE VACATED.

A sentencing court may impose punishment only as authorized by the Sentencing Reform Act (SRA). RCW 9.94A.505(1); In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007); In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) ("A trial court only possesses the power to impose sentences provided by law"). It is fundamental that the statutory maximum for an offense sets the ceiling of punishment that may be imposed. RCW 9A.20.021; See, e.g., State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

Here, there was no evidence presented at trial that Mr. Russell suffered a mental health disorder or mental defect. Mr. Russell was not evaluated for competency pursuant to RCW 71.05. When the sentencing court ordered that Mr. Russell "shall be evaluated for civil commitment on mental health ground prior to release," he objected. 2RP at 10 ("You know, I am not familiar, I am not sure if the Court has the authority on this paper work --"). The sentencing court, unperturbed, responded, "I'm not sure if I do either. But I am going to give it a try." Id. Defense counsel objected. Id.

Mr. Russell was convicted of one count of assault in the first degree and one count of assault in the second degree, both with deadly

weapon enhancements. CP 14-16. Mr. Russell was sentenced to 183 months confinement, including the consecutive enhancements. CP 4; RCW 9A.36.011(1)(a); RCW 9A.36.021(1)(c); RCW 9.94A.825. The court also imposed a term of community custody of 36 months on count one, and 18 months on count two. CP 4. Mr. Russell also owes upwards of $71,000 in restitution. CP 6.[3]

The sentencing court ordered, however, that Mr. Russell will be held until he is subjected to a mental health evaluation and possibly subject to civil commitment, following his lawful sentence. CP 7. This portion of the court's sentence is not supported by a finding by a judge or jury, nor by evidence in the record, and as such, is an unlawful sentence.

"Courts have the duty and power to correct an erroneous sentence upon its discovery." In re Pers. Restraint of Call, 144 Wn.2d 315, 332, 28 P.3d 709 (2001). Because nothing in the SRA authorizes it, the sentencing condition regarding civil commitment must be vacated.

[3] RCW 9.94A.753(3). SRA authorizes restitution to crime victims for medical treatment reasonably related to the offense.

3. THE TRIAL COURT IMPROPERLY IMPOSED DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS BASED ON AN UNSUPPORTED FINDING THAT MR. RUSSELL HAD THE ABILITY TO PAY.

Courts may require an indigent defendant to reimburse the state for only certain authorized costs, and only if the defendant has the financial ability to do so. State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015) ("the state cannot collect money from defendants who cannot pay"); see also Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3) ("The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them"). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his poverty.

a. There is no evidence to support the trial court's finding that Mr. Russell had the present or future ability to pay legal financial obligations.

"The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." Blazina, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.; RCW 10.01.160(3) (the court shall take account of the financial

resources of the defendant and the nature of the burden that payment of costs will impose) (emphasis added).

Here, the court entered no finding on the Judgment and Sentence as to whether Mr. Russell had the ability to pay LFOs. CP 2-10. In Blazina, the Supreme Court found even a boilerplate assessment of a defendant's ability to pay LFOs to be insufficient consideration. 182 Wn.2d at 831.

There was no evidence Mr. Russell was employed or would be employable following his release from prison. Mr. Russell was represented by a court-appointed attorney during trial, and the trial court found he remained sufficiently indigent to require appointed counsel on appeal. Yet inexplicably, the court failed to enter any findings on the Judgment and Sentence regarding the ability or likely future ability to pay the discretionary legal financial obligations imposed by the court. CP 5-7. The LFOs in this matter include $200 in court costs and $575 for Mr. Russell's court-appointed attorney. CP 5-6.[4]

b. Because the court failed to exercise its discretion in the imposition of LFOs, this Court should remand for resentencing.

Since the Blazina decision, the mandate to trial courts has been clarified: judicial discretion must be exercised when the issue of LFOs is

[4] https://www.google.com/search?q=john+oliver+public+defenders&ie=utf-8&oe=utf-8 (last accessed Sept. 21, 2015) (John Oliver on public defender system: "You can't tell people something's free, and then charge them for it. "This is the American judicial system, not 'Candy Crush'…").

considered, and the trial court must consider a defendant's "current or future ability to pay those LFOs based on the particular facts of the defendant's case." Blazina, 182 Wn.2d at 834. As the Supreme Court noted in the Blazina decision, Washington has been part of the "national conversation" on the equal justice concerns raised by LFO's, as the amount of fines and fees imposed upon conviction vary greatly by "gender and ethnicity, charge type, adjudication method, and the county in which the case is adjudicated and sentenced."[5]

The court's imposition of legal financial obligations without giving any consideration to a person's ability to pay exacerbates the problems that those released from confinement face, and often leads to increased recidivism.

> It therefore appears that the legislative effort to hold offenders financially accountable for their past criminal behavior reduces the likelihood that those with criminal histories are able to successfully reintegrate themselves into society. Insofar as legal debt stemming from LFOs makes it more difficult for people to find stable housing, improve their occupational and education situation, establish a livable income, improve their credit ratings, disentangle themselves from the criminal justice system, expunge or discharge their conviction, and re-establish their voting rights, it may also increase repeat offending.

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[5] See Katherine A. Beckett, et al, Washington State Minority and Justice Commission, The Assessment of Legal Financial Obligations in Washington State, 32 (2008); Blazina, 182 Wn.2d at 836.

Beckett, The Assessment of Legal Financial Obligations in Washington State, at 74.

The Blazina Court also discussed its concern about LFOs inhibiting re-entry for past offenders, noting that LFOs accrue interest at a rate of 12 percent, so that even an individual "who pays $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." Blazina, 182 Wn.2d at 836 (citing State Minority and Justice Commission at 22).

The court's imposition of substantial legal financial obligations, despite the lack of findings on ability to pay, coupled with the obvious hardship of reentering society after spending substantial time in prison, constitutes significant punishment that violates the right to equal protection of the law, is contrary to statute and case law, and must be reconsidered on remand, giving attention to his financial circumstances.

E. CONCLUSION

The evidence was insufficient to prove the essential elements of assault in the first degree. The conviction should be reversed, and this case remanded for a new trial on the charge of assault in the second degree. In the alternative, the matter should be remanded for resentencing so that the Judgment and Sentence may be corrected and the errors in sentence corrected.

DATED this 21st day of September, 2015.

Respectfully submitted:

s/ Jan Trasen

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DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 47258-9-II
	)	
JOHN RUSSELL,	)	
	)	
APPELLANT.	)	

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