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COURT OF APPEALS
DIVISION II

46035-1

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Case No. ~~46035-1~~ OF WASHINGTON
COURT OF APPEALS OF THE STATE OF
WASHINGTON ^{BY} DEPUTY
DIVISION TWO

STATE OF WASHINGTON, *Respondent*,

v.

JACQUELINE RAY
Appellant.

BRIEF OF APPELLANT

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I. STATEMENT OF ISSUES AND ASSIGNMENT OF ERROR

- A. Whether the Court should hold that the sentencing court violated the real facts doctrine by hearing and considering facts probative of a more serious crime during the State's sentencing presentation?
- B. Whether the Court should hold that the defendant's due process rights were violated by the comments of the sentencing judge during the sentencing hearing?

II. STATEMENT OF THE CASE

A. Procedural History

On August 13, 2012, the appellant was charged with two alternative theories of Murder in the First Degree under RCW 9A.32.030(1)(a) and RCW 9A.32.030(1)(c), both with a firearms sentencing enhancements under 9.94A.533(3)(a) for the death of Leon Baucham on July 11, 2012. CP 1-2. On October 16, 2013, the parties entered into a plea agreement where the defendant would plead to Murder in the First Degree, but the State would amend the charge to Murder in the Second Degree upon the defendant's full cooperation with the prosecution of her codefendants. CP 18-21. On January 10, 2014, after the defendant having performed her obligations under the plea agreement, the State amended the information to charge Murder in the Second Degree under RCW 9A.32.050(1)(a) with a firearms sentencing enhancements under 9.94A.533(3)(a), and the defendant entered a guilty plea. CP 31. On the same day, a portion of the sentencing hearing took place during which the State argued for the high end of the sentencing range, and family and

friends of the victim made statements to the court asking for the same. Verbatim Transcript of Proceedings Sentencing, *State v. Ray*, 12-1-03045-1 (January 10, 2014). The hearing was recessed until February 21, 2014, when the defendant's counsel argued for an exceptional downward sentence, and family and friends of the defendant made statements to the court asking for the same. Verbatim Transcript of Proceedings Sentencing, *State v. Ray*, 12-1-03045-1 (February 21, 2014). The judge then imposed a sentence within the standard range Murder in the Second Degree, and imposed the mandatory additional sentence required for the firearms sentencing enhancement. *Id.* at 41; Judgment and Sentence attached to Notice of Appeal.

B. Statement of Facts

On July 12, 2012, Leon Baucham was killed at his mother-in-law's home. CP 3-5. His mother-in-law, Jacqueline Ray, the defendant herein, later admitted that she agreed to assist her codefendants in the assault of Mr. Baucham, and that that assault resulted in his death. CP 4. The State offered Ms. Ray a plea agreement in which it would amend the charges from two alternative theories of Murder in the First Degree with firearms enhancements to one count of Murder in the Second Degree with a firearms enhancement on the condition that she cooperate in the

prosecution of her codefendant. CP 5. The defendant cooperated, and the State amended its charge as agreed. CP 31.

On January 10, 2014, a hearing was held at which the State officially amended the information as agreed, and the defendant entered a Statement of Defendant on Plea of Guilty. CP 32-41. In her statement, the defendant admitted:

On July 11, 2012, in Pierce County, Washington, I knowingly aided my co-defendants in the assault on Leon Baucham and in furtherance of that assault, my co-defendants caused the death of Leo Baucham while using a firearm.

CP 40.

The sentencing phase commenced immediately thereafter, during which the State presented statements of Mr. Baucham's friends and family, and argued for the high end of the standard sentencing range, plus the statutory adjustment for the firearms sentencing enhancement.

Verbatim Transcript of Proceedings Sentencing, *State v. Ray*, 12-1-03045-1 (January 10, 2014). The defendant's counsel of record was not able to be present, and the court continued the defense's presentation because of the reasons provided. *Id.* at 4.

In addition to the written Victim Impact Statements presented by the State, six members of Mr. Baucham's family and friends made oral statements to the court. The first to speak was Evelyn Roberston, Mr.

Baucham's aunt. During her statement, Ms. Robertson quoted a passage from the Book of Proverbs noting what God hates: "a proud look", "a lying tongue", "a heart that deviseth wicked imaginations", "feet that be swift to running to mischief", "a false witness that speaketh lies", and "he that soweth discord among brethren." *Id.* at 13-14. Ms. Robertson then mapped each element against the defendant. *Id.* The court stated in response that it "does not disagree on a factual basis that the seven elements of what you describe as sin have been committed by Ms. Ray." *Id.* at 16.

The second to speak was Rachel Baucham, Mr. Baucham's sister. During her comments, she spoke about having to plan the funeral with the defendant, and the defendant's daughter, who is Mr. Baucham's widow, and stated her feeling that the defendant was unemotional, and only acting as if she cared during the preparations. *Id.* at 19-20. The court then commented on the duplicity that Ms. Baucham and her family endured while planning her brother's funeral with his murderer, and that it seemed "so terribly cold." *Id.* at 20.

The third person to speak was Natalie Leath, Mr. Baucham's grandmother. During her statement, she disputed the defendant's version of events, calling her a liar. *Id.* at 22. She stated that she believed the defendant's "intent all along was murder," and asserted that there was no

evidence of domestic violence between Mr. Baucham and his wife, except for one incident a few weeks prior to his death. *Id.* She continued by alleging that the defendant planned out the murder, and hired another person to help carry it out. *Id.* at 22-23. The judge responded that the crime was a “cold-blooded and calculated effort” on the defendant’s part, and that he would take Ms. Leath’s comments into account at sentencing. *Id.* at 24.

The fourth person to speak was Mark Robertson, Mr. Baucham’s uncle. During his statements, he also disputed the facts admitted to by the defendant - in prior Statements of Defendant on Plea of Guilty - that she aided the man who killed Mr. Baucham. *Id.* 28-30. He alleged that the defendant masterminded the plan to kill, and attempted to disrespect the body of the deceased during preparations for the funeral. *Id.* He continued by criticizing the charges as insufficient, and used racially charged language to argue in favor of Aggravated First Degree Murder. *Id.* at 30. The judge responded by noting that the court does not make charging decisions, but commented on the “repugnant,” and “potentially haunting experience of participating in the funeral of your beloved nephew with his murderer. I find that overwhelming.” *Id.* at 31.

The fifth speaker was LaVonne Brown, Mr. Baucham’s mother, who also alleged that the murder of her son was premeditated, *id.* at 32,

and that the defendant set him up to die in her home. *Id.* at 35. The court responded by describing this as an “act of senseless and ruthless violence.” *Id.* at 41. He further noted that the defendant slandered Mr. Baucham after his death by alleging a history of domestic violence against his wife as a justification for premeditated murder, and such was “offensive to this Court’s sense of justice in every way.” *Id.* The judge went on to describe the defendant as deceptive, disgraceful, and duplicitous, and assured Mr. Baucham’s family and friends that their remarks would be taken into consideration when he ordered the sentence. *Id.* at 41-42. The hearing was then recessed to allow the defendant’s primary counsel to be present for the presentation of her sentencing arguments. *Id.* at 47-48.

On February 21, 2014, the sentencing hearing reconvened, and the defendant was again represented by Mr. Trujillo, and by Bryan Hershman, who was standing in for primary counsel, Gary Clower. Verbatim Transcript of Proceedings Sentencing, *State v. Ray*, 12-1-03045-1 (February 21, 2014). At this hearing, the Defense argued that the court factor the defendant’s subjective state of mind when imposing a sentence, offered a number of written statements in support of the defendant, and brought forth three people to give oral statements to the court. The first was Edmond Plaehn, the defendant’s former pastor, who discussed her extensive history of community service at Peace Community Center,

where she worked with children, and at Nativity House, where she worked to feed the homeless. *Id.* at 25-26. Mr. Plaehn then quoted Abraham Lincoln by stating, “I destroy my enemies when I make them my friends,” and spoke of the Biblical principal of forgiveness. *Id.* at 27. The court thanked him for his presence, and noted his “best of intentions in trying to assists the Court in sorting out this challenging matter.” *Id.* at 27-28.

The second to speak was Lethaniel Ray, the defendant’s husband. He discussed the defendant’s devotion to being involved with her family, and dedication to the care of others through her profession as a respiratory therapist, and volunteer work with Emergency Search and Rescue. *Id.* at 28-31. Mr. Ray then disputed the statements made by others at the earlier hearing regarding allegations that the defendant hated Mr. Baucham, and described an incident when Mr. Baucham forced his way into Mr. and Mrs. Ray’s home to pressure his wife to come home with him. *Id.* at 31-33. The judge again thanked Mr. Ray, and said that he would keep his comments in mind. *Id.* at 34.

Finally, Umeko Baucham spoke to the court. She is the defendant’s daughter and Mr. Baucham’s widow. She discussed the history of violence in her home, and explained the lack of an official record. *Id.* at 34-35. She noted for the court how Mr. Baucham and his family intervened to convince her not to file for a protection order when they discovered her

intent to do so. *Id.* at 35. She stated that she did not call the police, because she did not believe they could help; Mr. Baucham was not afraid of the police or of going to jail. *Id.* She pointed out that the defendant was supportive of her marriage to Mr. Baucham, and tried to help in any way she could. *Id.* Mrs. Baucham concluded by stating that she knew her mother, the defendant, had made the wrong choice, but that she did it in an attempt to protect her and her children. *Id.* at 36. The judge interpreted these comments as feelings of guilt on Mrs. Baucham's part, and assured her that she was not guilty of anything, and noted that he appreciated her comments. *Id.* at 36-37.

The defendant herself made a statement thanking her supporters, apologizing to Mr. Baucham's friends and family, and accepting the court's judgment. *Id.* at 37-38. The judge thanked her, and then commented on the difficulty of considering her subjective state of mind. *Id.* at 38-39. He urged forgiveness and mercy on the parts of the people involved while noting that the same is not the role of the courts. *Id.* at 39. He described the defendant as the instigator of a murder for hire, and not in response to an act of violence. *Id.* at 40-41. He stated that the defendant lured Mr. Baucham to her home for what she knew would be a fatal encounter, and how shocked he was at the descriptions of her participation at the funeral. *Id.* at 41. He then imposed a sentence 220 months, within

the standard range of 183-280 months, inclusive of the firearms sentencing enhancement. *Id.*

III. SUMMARY OF THE ARGUMENT

The sentencing court violated the real facts doctrine when it heard, commented upon, and considered facts probative of a more serious offense, and imposed a sentence more consistent with such facts than those actually admitted by the appellant.

The sentencing court denied the appellant's due process right to a fair sentencing hearing, because the sentencing judge improperly commented on the statements of the State's witnesses indicating his agreement with their assessment of the appellant's degree of culpability as that was relevant to imposing a sentence. These comments belied the opinion of the sentencing judge, which was formed before the defendant's counsel, witnesses, and the defendant herself had an opportunity to present arguments in her favor. Because the impartiality of the judiciary, and the appearance thereof, is essential to ensuring fairness to all parties, and especially to criminal defendants, in all phases of the proceeding, a violation that calls such impartiality into question is necessarily a violation of due process.

IV. ARGUMENT

A. THE SENTENCE VIOLATES THE REAL FACTS DOCTRINE BECAUSE THE COURT HEARD AND CONSIDERED FACTS PROBATIVE OF A MORE SERIOUS CRIME DURING THE SENTENCING HEARING.

In Washington courts, the real facts doctrine, as it applies to sentences within the standard range, derives from statute. As relevant here, this statute requires sentencing courts to “rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530(2). The U.S. Supreme Court opined on the importance of this rule in general. Writing for the majority, Justice Scalia stated that the finder of fact – there a jury:

could not function as a circuitbreaker [sic] for the State’s machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.

Blakely v. Washington, 542 U.S. 296, 306-7, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (emphasis in the original).

In cases where a defendant is found guilty by entry of a plea of guilty, no facts are found by a jury or a judge sitting as a trier of fact. The facts are as the guilty-pleading defendant admits they are. Just as in a jury trial, however, a sentencing court must only consider those facts actually

admitted. *See id.* at 310 “The purpose of the real facts hearing is to protect the defendant ‘from consideration of unreliable or inaccurate information.’” *State v. Morreira*, 107 Wn. App. 450, 456, 27 P.3d 639 (2001) (quoting *State v. Handley*, 115 Wn.2d 275, 282, 796 P.2d 1266 (1990)).

Here, the sentencing court heard repeated statements from Mr. Baucham’s friends and family, some tending to inflame racial tensions or prejudices, which presented argument for a higher degree of the crime charged. Verbatim Transcript of Proceedings Sentencing, *State v. Ray*, 12-1-03045-1 (January 10, 2014). To each of these statements, the sentencing judge assured the commenter that he would take his or her statement into consideration. *Id.* By way of contrast, his responses to the appellant’s supporters were short, and could be interpreted as dismissive when placed in context with his comments to the State’s witnesses. Verbatim Transcript of Proceedings Sentencing, *State v. Ray*, 12-1-03045-1 (February 21, 2014). When announcing his sentence, he restated many of the same factors as presented by the State and its witnesses as support for his sentencing order, despite the fact that these were not found by a trier of fact, or admitted to by the appellant. *Id.* at 38-41.

By any reasonable standard, this must constitute a violation of the real facts doctrine. A plain language reading of the statute reveals that the

law is not put in place solely in regard to imposing exceptional sentences, but must apply to all sentencing hearings. RCW 9.94A.530(2). Even when an exceptional sentence is not imposed, it is the mere consideration of those facts that are not proven or admitted to that is prohibited. *See id.* It is important to note here also that the defendant elected to make a statement in her own words of why she is guilty of the crime in the Second Amended Information, and did not check the box on the form indicating that the court may review police reports or the statement of probable cause to establish the factual basis for the plea. CP 40.

The transcript of proceedings clearly shows that the sentencing judge did indeed take unproven and unadmitted to facts into consideration. Accordingly, this Court should hold that the doctrine was violated, and order a new sentencing hearing consistent with that holding.

B. THE SENTENCING COURT VIOLATED THE APPELLANT'S DUE PROCESS RIGHT TO A FAIR SENTENCING WHEN IT MADE INAPPROPRIATE COMMENTARY ON VICTIM STATEMENTS DURING THE SENTENCING HEARING.

1. This appeal is reviewable by this Court, because it is not foreclosed by statute, and it involves a manifest error affecting a constitutional right.

In general, when a sentencing court imposes a sentence within the standard range, a reviewing court will not find an abuse of discretion, and will hold that no right to appeal the time imposed exists. *See RCW*

9.94A.370(1); *State v. Mail*, 65 Wn. App. 295, 297, 828 P.2d 70 (1992) *aff'd*, 121 Wn.2d 707, 854 P.2d 1042 (1993) (citing *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719 (1986)). Importantly, the *Mail* court noted that “*Ammons* does permit challenges to the procedure by which a sentence within the standard range is imposed,” and, although it discussed errors in offender score calculation as being the general context for such a challenge, the court did not foreclose other similarly important challenges. *Id.*

Furthermore, errors not objected to at time of trial or sentencing are also typically immune from appellate review, except under certain circumstances, including those involving a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). Such an error affecting such a right occurred here.

A criminal defendant has a constitutional right to due process of law. U.S. Const. amend. 5, 14; Wn. Const. art 1, § 3. This right includes the right to a fair trial and a fair sentencing. See *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012) (citing *State v. Herzog*, 112 Wn.2d 419, 431–32, 771 P.2d 739 (1989); Const. art. I, § 3). It also include the right to an impartial judge. *In re Swenson*, 158 Wn. App. 812, 818, 244 P.3d 959 (2010) (citing U.S. Const. amend. 5, 14; Wn. Const. art 1, § 22). As a corollary to a criminal defendant’s due process right to a fair

sentencing, a judge must avoid impropriety or the appearance thereof in the execution of his judicial duties. *Id.* (citing *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992)). A reviewing court presumes that a judge acts without bias or prejudice. *Id.* A sentencing judge's inappropriate commentary on the evidence or testimony is evidence of bias or prejudice. *See State v. Carter*, 77 Wn. App. 8, 12, 888 P.2d 1230, 1232 (1995) (holding that the judge's comments at the original sentencing were not improper, and were relevant to establish facts in support of a finding of guilt at the defendant's subsequent sentencing pursuant to an *Alford* plea).

Here, the appellant presents both an allegation of the appearance of bias or impropriety, and evidence thereof present in the comments the sentencing judge made regarding the culpability of the defendant while on the record, and before the defense presented its sentencing arguments.

2. The appellant's due process right to a fair sentencing was violated, because the sentencing judge had prejudged her level of culpability.

The sentencing court must maintain the appearance of fairness. Washington courts, and this Court in particular, have consistently held that the appearance of fairness in judicial proceedings is important in the context of criminal proceedings. *State v. Chambers*, 176 Wn.2d 573, 293 P.3d 1185 (2013); *State v. Finch*, 326 P.3d 148 (Div. II, 2014); *State v.*

Kipp, 171 Wn. App. 14, 286 P.3d 68 (2012) *rev'd on other grounds*, 179 Wn.2d 718, 317 P.3d 1029 (2014); *State v. Witherspoon*, 171 Wn. App. 271, 286 P.3d 996 (2012); *State v. Ra*, 144 Wn. App. 688, 175 P.3d 609 (2008); *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995). “The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973, 987 (2010). Before a reviewing court finds a violation of the appearance of fairness, the record must contain evidence of a judge's actual or potential bias. *Id.*

In *Bilal*, this Court stated, “a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing.” *Bilal*, 77 Wn. App. at 722 (quoting *State v. Ladenberg*, 67 Wn. App. 749, 754–55, 840 P.3d 228 (1992)). As recently as this year, this Court has ruled on this principle. *Finch*, 329 P.3d at 154. In *Finch* this court held that a trial judge, who was presiding over two separate cases involving a minor child, violated the appearance of fairness doctrine because the judge was unable to separate the two roles, and had attempted to investigate the truth of the minor child's allegations in the criminal proceeding by ordering a polygraph in the juvenile proceeding. *Id.*

In *Witherspoon*, the court held that a judge who may have previously represented a defendant before his court in an earlier, unrelated matter, and may have prosecuted him in a separate unrelated matter did not violate appearance of fairness, because the judge did not specifically remember whether or not he had represented the defendant, and because the defendant “[did] not provide any evidence that if the trial judge previously represented him, such representation affected the present case.” *Witherspoon*, 171 Wn. App. at 290.

In *Ra*, this Court noted that the trial court’s comments on the defendant’s character and scolding the defendant were inappropriate, and “did not show proper restraint, and should not have been made.” 144 Wn. App. 705. The *Ra* court did not, however, decide whether the appearance of partiality warranted reversal, because it had reversed on another issue, but it did order that the new sentencing hearing be held before a different judge. *Id.* Although not dispositive, this case is nevertheless instructive of what this Court has previously noted as inappropriate judicial behavior during sentencing, and the appropriate remedy therefor.

Here, the sentencing judge at least appears biased by the comments he made in response to the State’s witnesses, and the stark contrast of those statement when compared with what he said to the appellant’s supporters. Because the sentencing hearing was bifurcated, a “reasonably

prudent, disinterested observer” might have missed the obvious difference between the two approaches the judge gave to the statements made on behalf of one side or the other, but the clear, unambiguous record allows this Court to see it distinctly.

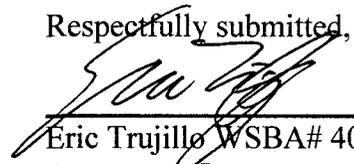
Accordingly, this Court should hold that the defendant’s due process right to a fair sentencing hearing was violated because the sentencing judge at least appears to have prejudged the defendant’s level of culpability prior to hearing Defense arguments, and order a new sentencing hearing before a different judge, as this Court did in *Ra, supra*.

V. CONCLUSION

For the reasons set out above, the appellant respectfully requests that the Court of Appeals hold that the sentencing court violated the real facts doctrine when it heard, commented upon, and considered facts that were probative of a more serious offense, and were not found by a trier of fact nor admitted by the appellant during the sentencing hearing. Additionally, the Court should hold that the appellant's due process right to a fair sentencing was violated, because the sentencing court improperly commented on statements made by the State's witnesses, thus revealing his prejudice against the appellant, and order a new sentencing hearing before a different judge.

Dated: August 14, 2014

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STATE OF WASHINGTON

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August, 2014, a true and correct copy (though improperly formatted) of the foregoing document was forwarded to the following parties, individuals, or their counsel of record via:

- [] Legal Messenger
[x] U.S. Mail *Jacqueline Ray, Appellant*
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I Further Certify that on the 14th day of August, 2014, a true and correct copy (this time properly formatted) of the foregoing document was forwarded to the following parties, individuals, or their counsel of record in the same manner described above.

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

Dated at Tacoma, WA this 14th day of August, 2014


Eric Trujillo