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Division II
State of Washington

No. 49791-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Timar Degraffe,

Appellant.

Clark County Superior Court Cause No. 15-1-00957-5

The Honorable Judge David E. Gregerson

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court infringed Mr. Degraffe's Sixth and Fourteenth Amendment right to a jury trial by imposing a sentence based in part on judicial factfinding.
2. The trial court infringed Mr. Degraffe's Fourteenth Amendment right to proof beyond a reasonable doubt by imposing a sentence based on judicial factfinding.
3. In the absence of a special verdict, the trial court erred by relying (in part) on Uptmor's status as the "functional equivalent of a good Samaritan" to justify Mr. Degraffe's exceptional sentence.
4. The trial court erred by adopting Finding of Fact No. 2.4 in the Judgment and Sentence.

> **ISSUE 1:** A sentencing court may not rely on judicial factfinding to justify an exceptional sentence. In the absence of a jury finding, did the trial court violate Mr. Degraffe's Sixth and Fourteenth Amendment rights by imposing an exceptional sentence based in part on the judge's determination that Uptmor was the "functional equivalent of a good Samaritan"?
>
> **ISSUE 2:** Pretext has been described as "a triumph of form over substance; a triumph of expediency at the expense of reason." Did the sentencing court improperly rely on the jury's special verdict finding rapid recidivism as a pretext for imposing an exceptional sentence based in part on impermissible judicial factfinding that Uptmor qualified as the "functional equivalent of a good Samaritan"?

5. The court erred by ordering Mr. Degraffe to pay discretionary legal financial obligations.
6. The court's finding that Mr. Degraffe will "be able to pay financial obligations in the future" is not supported by the evidence.
7. The court erred by adopting Finding of Fact No. 2.5 in the Judgment and Sentence.

> **ISSUE 3:** A court may not order a person to pay discretionary legal financial obligations (LFOs) absent individualized inquiry into his ability to do so. Did the court err by ordering Mr.

Degraffe to pay discretionary LFOs in the absence of any evidence suggesting that he will ever be able to pay?

8. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 4: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Timar Degraffe is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Timar Degraffe went into a bank, demanded money while showing a knife, and attempted to leave. RP 78-92, 266-271. In an attempt to prevent Mr. Degraffe from leaving, a man in line tackled him. RP 120-137. Mr. Degraffe stabbed the man, William Uptmor, one time and left. RP 178-187. Soon after, police found and arrested Mr. Degraffe. RP 155-164.

The state charged Mr. Degraffe with attempted murder two, assault one, and robbery one. CP 1-3. At trial, Mr. Degraffe admitted the robbery and stabbing, and told the jury he had no intention of harming the man, he only wanted to get away. RP 266-271. The jury did not convict Mr. Degraffe of the charges as urged by the state, but only convicted of the robbery and a lesser charge of assault two. RP 455-461. The jury endorsed the deadly weapon enhancement on both counts.[1] RP 455-461.

The prosecution had sought a finding from the jury that the "good Samaritan" doctrine applied as an aggravator. But, under the court's instructions, this aggravator only applied should jurors find guilt on the murder or assault one charges. The jury did not make the finding. RP 316-318, 455; CP 46-47.

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[1] The convictions themselves are not at issue in this appeal. The challenge here only relates to the sentence.

The charges included another enhancement allegation, that Mr. Degraffe had been recently released from prison at the time of the offenses. CP 1-3; 462-473. After the verdicts, the state presented evidence relating to this allegation to the jury. They answered the special interrogatory in the affirmative. RP 462-473.

At sentencing, Mr. Degraffe again admitted he'd committed the offenses, and sought a sentence within the standard range (which included the deadly weapon enhancements). RP 429-436.

But the state urged an aggravated sentence, equivalent to what Mr. Degraffe would have received had the jury convicted him of the more serious charge of assault one. RP 427-430. The prosecutor told the court that this offense was "so shocking that a sentence above standard range is called for". RP 426. While the higher of the standard ranges, including the deadly weapon enhancement, was 132 to 168 months, the state argued for a total of 240 months. RP 429. He went on, arguing once again that the man who was stabbed was really a "good Samaritan":

> This case is much, much more aggravated than a typical bank robbery case because not only was force threatened in this case, not only was the bank teller, Ms. Peru, menaced with a large hunting knife, but a Good Samaritan. And you can say, well, this doesn't fit the precise legal definition of a Good Samaritan, but that's essentially the capacity Mr. Uptmor was acting in when the defendant stabbed him, penetrated with a knife through to his back muscles with a very large knife.
> ....

> Defendant in this case didn't choose to use some lesser degree of force. He didn't flee. Instead, he chose the most violent means possible to commit his crime. He didn't display any compassion or remorse. He left Mr. Uptmor there bleeding in that bank lobby and fled from the scene.
> RP 426.

The judge in his ruling pointed out that the injured man was in actuality a "good Samaritan":

> … [T]his crime so specifically shocks the conscience of this community that somebody who would rise to intervene to be if not a statutory Good Samaritan would be the functional equivalent of a Good Samaritan and would be harmed in this way is -- it's one of the more bothersome and troubling factual cases that's ever been presented during my four years on the bench here.
> RP 438.

The judge further noted that his main concern was for "community safety", and issued a sentence of 220 months. RP 439; CP 55.

No party addressed Mr. Degraffe's work history or prospects at the final hearing on the case, except to note that he had been out of prison for less than two weeks when he committed these crimes. RP 423-440. After issuing a prison sentence of over 18 years, the court checked a box on the Judgment and Sentence that indicated "The defendant is presently indigent but is anticipated to be able to pay financial obligations in the future." CP 55. The court assessed legal financial obligations including attorney fees of $7,920.00, expert costs of $3,719.05, and restitution of $246,669.72. CP 58-59.

Mr. Degraffe timely appealed. CP 68. The court then found Mr. Degraffe indigent. CP 90-92.

ARGUMENT

I. THE EXCEPTIONAL SENTENCE WAS IMPOSED IN VIOLATION OF MR. DEGRAFFE'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY TRIAL AND TO PROOF BEYOND A REASONABLE DOUBT.

The jury was not asked and did not find that Mr. Degraffe committed second-degree assault against "a good Samaritan." CP 46, 47; Verdict forms (entered September 29, 2016), Supp. CP. Despite this, the sentencing judge based Mr. Degraffe's exceptional sentence, at least in part, on the judge's own determination that Uptmor was the "functional equivalent of a Good Samaritan." RP 438-439.

In the absence of a jury finding based on proof beyond a reasonable doubt, the trial judge should not have used the "good Samaritan" aggravator in any way to justify the exceptional sentence. The order imposing consecutive sentences must be vacated and the case remanded for a new sentencing hearing.

A. The Court of Appeals should review Mr. Degraffe's sentencing challenge *de novo*.

Appellate courts review constitutional arguments and legal issues *de novo*.[2] *State v. Arlene's Flowers, Inc.*, --- Wn.2d ---, ___, 389 P.3d 543 (2017); *State v. Love*, 183 Wn.2d 598, 604, 354 P.3d 841 (2015), *cert. denied*, 136 S. Ct. 1524, 194 L. Ed. 2d 604 (2016), *reh'g denied*, 136 S. Ct. 2386, 195 L. Ed. 2d 276 (2016).

The Court of Appeals should review Mr. Degraffe's sentencing arguments *de novo*. This case involves a constitutional challenge to an exceptional sentence based on judicial factfinding. Mr. Degraffe also raises a pure legal issue: whether an exceptional sentence based in part on impermissible judicial factfinding can be justified by pretextual reliance on an aggravator found by the jury.

Because Mr. Degraffe raises a constitutional challenge and an issue of law, the arguments must be reviewed *de novo*. *Arlene's Flowers*, --- Wn.2d at ___; *Love*, 183 Wn.2d at 604.

[2] In addition, courts review exceptional sentences *de novo* to determine whether the reasons articulated by the sentencing court justify an exceptional sentence. *State v. Griffin*, 173 Wn.2d 467, 474, 268 P.3d 924 (2012) RCW 9.94A.585(4)(a).

B. The exceptional sentence was based in part on impermissible judicial factfinding.

Any fact that increases the penalty for a crime must be submitted to a jury and proved beyond a reasonable doubt. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 21, 22; *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Blakely errors may be raised for the first time on review. RAP 2.5(a)(3); *see State v. O'Connell*, 137 Wn. App. 81, 89, 152 P.3d 349 (2007). In Washington, such errors are not subject to harmless error analysis. *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (citing Wash. Const. art. I, § 21).

In this case, the sentencing court based Mr. Degraffe's exceptional sentence, at least in part, on facts that were not found by the jury beyond a reasonable doubt. The jury was not asked to determine if Mr. Degraffe committed second-degree assault of "a good Samaritan." CP 46. Although the state charged the "good Samaritan" aggravating factor, the instructions only allowed consideration of the aggravating factor if jurors convicted Mr. Degraffe of attempted murder or first-degree assault. CP 1-2, 46.[3]

[3] In addition, Uptmor testified that he only hoped to prevent Mr. Degraffe from escaping, and thus was not "providing immediate aid to someone in peril," as required to support the Good Samaritan aggravating factor. RP 129-137; *In re Crow*, 187 Wn. App. 414, 424, 349 P.3d 902, 907 (2015); *see also* CP 47; 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC

Despite the absence of a jury finding, the prosecutor addressed the "good Samaritan" aggravator at sentencing:

> [N]ot only was force threatened in this case, not only was the bank teller, Ms. Peru, menaced with a large hunting knife, but a Good Samaritan. And you can say, well, this doesn't fit the precise legal definition of a Good Samaritan, but that's essentially the capacity Mr. Uptmor was acting in.
> RP 426.

Similarly, the court relied (at least in part) on Uptmor's status as the "functional equivalent of a Good Samaritan" when imposing the exceptional sentence. RP 438. Specifically, the judge indicated that the harm to Upton "shocks the conscience of this community," making the case "one of the more bothersome and troubling factual cases that's ever been presented during" the judge's four years on the bench. RP 438.

The record makes clear that the court relied primarily on facts that were not found by the jury: that Uptmor was harmed after he "[rose] to intervene," putting himself at risk "for the safety and property of complete strangers." RP 438. Although the judge mentioned Mr. Degraffe's recent release as one basis for the aggravated sentence, the court's oral ruling

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300.32 (4th Ed) ("A Good Samaritan is a person who comes to the aid of an injured, stranded, or otherwise imperiled person.") Both the prosecutor and the court implicitly acknowledged the lack of evidence supporting the aggravating factor. *See* RP 426 (Prosecutor: "[Y]ou can say, well, this doesn't fit the precise legal definition of a Good Samaritan, but that's essentially the capacity Mr. Uptmor was acting in"); RP 438 (Court: Mr. Uptmor, "if not a statutory Good Samaritan would be the functional equivalent of a Good Samaritan.")

shows that the primary reason for the sentence was Uptmor's status as "the functional equivalent of a Good Samaritan." RP 438-439.

The court made no mention of Mr. Degraffe's "disdain for the law," which is "the gravamen" of the rapid recidivism aggravator. *State v. Combs*, 156 Wn. App. 502, 506, 232 P.3d 1179 (2010); RP 438-439. Instead, it appears that the court relied (at least in part) on the jury's special verdict as a pretext for imposing an exceptional sentence based on the "good Samaritan" aggravator. RP 438-439.

The law does not favor pretexts. *See State v. Ladson*, 138 Wn.2d 343, 351, 979 P.2d 833 (1999) (rejecting pretextual traffic stops); *State v. Saintcalle*, 178 Wn.2d 34, 43, 309 P.3d 326 (2013) (noting that a proffer of pretextual reasons for striking a juror gives rise to an inference of race discrimination). Pretext is "a triumph of form over substance; a triumph of expediency at the expense of reason." *Ladson*, 138 Wn.2d at 351.

The court based Mr. Degraffe's exceptional sentence, at least in part, on judicial factfinding. Because of this, the sentence violates Mr. Degraffe's Sixth and Fourteenth Amendment right to a jury determination beyond a reasonable doubt of all facts used to enhance his sentence. *Blakely*, 542 U.S. at 303.

The judge gave no indication as to how he would sentence Mr. Degraffe based solely on the rapid recidivism aggravator.[4] CP 55; RP 438-439. Where the sentencing court does not "specifically state that it would impose the same length of exceptional sentence based [solely on valid] aggravating factors standing alone," a reviewing court must remand for resentencing. *State v. Weller*, 185 Wn. App. 913, 930–31, 344 P.3d 695, 705 (2015), *review denied*, 183 Wn.2d 1010, 352 P.3d 188 (2015).

Given the trial court's silence on this point, the exceptional sentence must be vacated and the case remanded for a new sentencing hearing. *Id.*

II. THE SENTENCING COURT SHOULD NOT HAVE ORDERED MR. DEGRAFFE TO PAY ANY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.[5]

The legislature has mandated that a court "'*shall not* order a defendant to pay costs unless the defendant is or will be able to pay

[4] Instead of entering written findings of fact and conclusions of law supporting the exceptional sentence, as required by RCW 9.94A.535, the court adopted a single non-substantive boilerplate finding preprinted on the judgment and sentence. CP 55.

[5] RAP 2.5(a) permits an appellate court to review errors even when they are not raised in the trial court. RAP 2.5(a); *Blazina*, 182 Wn.2d at 835. The *Blazina* court found that "[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." *Id.* The Supreme Court noted the significant disparities both nationally and in Washington in the administration of LFOs and the significant barriers they place to reentry of society. *Id.* at 683-85. This court should follow the Supreme Court's lead and consider the merits of Mr. Degraffe's argument even though it was not raised below.

them.'" *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (quoting RCW 10.01.160(3)) (emphasis in *Blazina*).

This imperative language prohibits a trial court form ordering discretionary LFOs absent evidence supporting individualized findings on the person's ability to pay. *Id.* The *Blazina* court suggested that an indigent person would likely never be able to pay LFOs. *Id.* ("[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs").

Mr. Degraffe has never held employment. CP 88; ROR Interview Sheet, p. 2, filed May 28, 2015, Supp. CP. He has no assets or income, and was burdened with $200,000 in debt even before he was convicted in this case. CP 86-88. In addition, the sentencing court ordered him to pay restitution exceeding $246,000. CP 59.

The lower court found Mr. Degraffe indigent at the beginning and end of the proceedings in superior court. CP 90-92; Order Appointing Counsel, filed May 28, 2015, Supp. CP. That status is unlikely to change, given his lack of employment history, his criminal record, and the 220-month prison sentence imposed by the court. CP 56.

No evidence was presented suggesting that Mr. Degraffe will be able to find employment or to pay off the restitution debt imposed by the court, much less the additional discretionary LFOs. Under these

circumstances, the court's boilerplate finding that Mr. Degraffe "is anticipated to be able to pay financial obligations in the future" is not supported by the record. CP 55. The finding must be vacated.

Despite the absence of any evidence suggesting future ability to pay discretionary LFOs, the court ordered Mr. Degraffe to pay $7,920 in attorney fees and $3,719 in other defense costs. CP 58. Given Mr. Degraffe's circumstances, this was error.

The sentencing court abused its discretion by ordering Mr. Degraffe to pay these discretionary LFOs. *Blazina*, 182 Wn.2d at 838. The order imposing attorney fees and other defense costs must be stricken.[6] *Id.*

III. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

The Court of Appeals should decline to award appellate costs because Mr. Degraffe "does not have the current or likely future ability to pay such costs." RAP 14.2. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs.

As noted above, Mr. Degraffe is indigent, and that status is unlikely to change. The *Blazina* court indicated that courts should

[6] In the alternative, the case must be remanded to the trial court for a hearing on Mr. Degraffe's ability to pay.

"seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested. RAP 14.2.

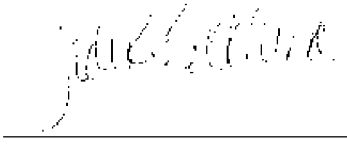
CONCLUSION

For the foregoing reasons, the Court of Appeals should vacate Mr. Degraffe's sentence and remand the case for a new sentencing hearing. In addition, the court must strike the discretionary LFOs imposed as part of Mr. Degraffe's judgment and sentence.

The court should decline to impose appellate costs if Respondent substantially prevails and requests such costs.

Respectfully submitted on April 28, 2017,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

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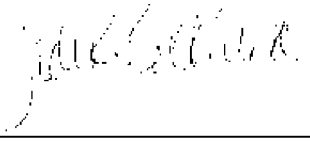
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 28, 2017.



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