

NO. 50082-5

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BIJON PRICE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth Martin

No. 15-1-05215-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court decline to review the defendant's sentence when the sentencing court considered, and then rejected, the defendant's request for a mitigated sentence and, even if this court were to reach the merits of the defendant's claim, did the sentencing court properly find that the defendant failed to meet his statutory burden under RCW 9.94A.535?

B. STATEMENT OF THE CASE.

On December 29, 2015, Bijon Tyree Price, hereinafter "defendant," was charged with assault in the first degree with a firearm sentencing enhancement and unlawful possession of a firearm in the first degree. CP 1-2. Trial commenced on March 6, 2017 with pretrial motions. The defendant then entered a plea of guilty to a second amended information, which charged assault in the first degree without a firearm enhancement and unlawful possession of a firearm in the first degree. CP 16-17, 18-29. The defendant made the following statement as part of his plea:

On December 22, 2015, in the State of Washington, I knowingly possessed a firearm after having previously been convicted three times for the serious offense of second degree burglary. On that same date, and in the State of

Washington, I intentionally fired the firearm into a car that Michael Allen was driving with Faye Reynolds in the right-rear seat and Luciano Romero in the left-rear seat. In firing my gun into the car, I do not acknowledge that I intended to inflict great bodily harm, i.e. bodily injury that creates a probability of death. As to that element, I maintain my innocence but I nevertheless wish to plead guilty to the charge of first degree assault because I wish to accept the State's plea offer and I, after full consultation with my counsel, believe there is a substantial likelihood that I would be convicted of the current charges if this matter proceeded to trial. My gunshot hit Allen in the head and in fact inflicted great bodily harm. In firing the gun into the car, I assaulted Allen, Romero, and Reynolds by putting all three in an immediate and reasonable apprehension of harm.

While the State does not agree with this position, I maintain that under RCW 9.94A.535(1)(a), Romero, Reynolds, and Allen were, "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." I maintain that the three were trying to seal from me and that Romero had what appeared to be a firearm that he displayed toward me in a threatening manner. However, I do acknowledge that, as I stated to Detective Martin, I "fucked up" because my actions were not necessary for self-defense as their car was driving off when I fired my gun.

CP 18-29.

The parties appeared for sentencing on March 10, 2017. RP Sent.

14. The defendant requested an exceptional sentence downward based on Revised Code of Washington (RCW) 9.94A.535(1)(a). The defendant asserted that Michael Allen was the "initiator, willing participant, aggressor, or provoker of the incident." Sent. RP 20.

According to the defendant, he had been contacted by Faye Reynolds and agreed to give her a laptop computer in exchange for narcotics. 1RP 21. When he arrived at the agreed location, Michael Allen and Luciano Romero were with Faye Reynolds. *Id.* Allen, Romero, and Reynolds remained in a vehicle and the defendant conversed with Reynolds. 1RP 22. The defendant provided Reynolds the laptop, at which point the vehicle lurched forward. *Id.*

It appears to be undisputed that Reynolds, Allen and Romero had planned on giving the defendant counterfeit heroin in exchange for the computer. Sent. RP 14. Defense counsel asserted that “they were going to use fake dope for the deal.” *Id.* The victim, Michael Allen, told the lawyers that he agreed to drive Romero and Reynolds to meet the defendant. Sent. RP 25. After the defendant handed the computer to Reynolds, Allen was supposed to drive off, but he did not do so immediately. Sent. RP 18, 26-27. During that period of time, the defendant fired into the car, striking Allen in the head. Sent. RP 27; CP 3-4. Allen was struck near the temple, with the bullet exiting his cheek. CP 3-4.

At sentencing, the issue of whether Romero was armed at the time of the shooting was factually contested. The defense asserted that Romero lifted a firearm as Reynolds was examining the computer. Sent. RP 18.

The defense further asserted that the defendant shot into the car in response to Romero raising a firearm. *Id.*

The State conceded that it was unknown if Romero was armed with a gun at the time. Sent. RP 31. The State indicated that no gun was ever located on Romero, no gun was found in the car, and no other shots were fired. Sent. RP 29-30. During his statement to the police, the detectives asked the defendant why he would shoot Allen (the driver) when it was Romero (the left rear passenger) who allegedly had a gun. Sent. RP 28. In response, the defendant stated, "I fucked up. I thought they might try to rob me." Sent. RP 29. The court then issued the following ruling:

I think what I am struggling with is to what degree the presence of the gun or no gun makes a difference. I don't think that by a preponderance of the evidence I can conclude that Mr. Romero in fact had a gun. I think I can conclude by a preponderance of the evidence that there was an intent to take the laptop and that to some degree this was a setup.

I think that the evidence is sufficient to establish that Ms. Reynolds being in the back seat and Mr. Romero also being in the back seat, Ms. Reynolds having moved to the back seat suggest some sort of intent to take the laptop. I think the issue of the gun is relevant because I think it goes to the degree to which the victim was the initiator, willing participant, aggressor or provoker of the incident.

If you look at the language of 535 Subpart 1, it says, "To a significant degree the victim was an initiator, willing participant, aggressor or provoker." When we look at what happened, I think that none of the witnesses are terribly

reliable. Ms. Reynolds' story has changed. I did look at Mr. Romero's interview which was within days of the incident, and he was quite clear in that interview that he did not have a gun.

Now, I understand later he now says he doesn't remember. I note that there was no gun found in the car and no gun found on his person.

That statement, if it was made, that you referenced to Page 41, can certainly be explained by the fact that at least a taking was the motive. Whether it was a robbery or it wasn't, I think there was certainly an intent to steal something, and so I do find that there was an intent to steal.

Does that rise to the level of justification to depart from the guidelines? And I struggle with this because I understand where Mr. Hershman is coming from, but at the same time, without the presence of a gun by a preponderance of the evidence, there is no evidence that any gun was pointed at Mr. Price, even from Ms. Reynolds who is the only one that says there was a gun in addition to Mr. Pierce.

I don't know that I can conclude that the elements of Subpart A are satisfied, and so I am going to decline to go below the range.

Sent. RP 43.

The court then imposed low end of the standard range of 129 months. CP 59-72. The defendant filed a timely notice of appeal. CP 76.

C. ARGUMENT.

1. THIS COURT SHOULD DECLINE TO REVIEW THE DEFENDANT'S SENTENCE WHEN THE SENTENCING COURT CONSIDERED AND THEN REJECTED A REQUEST FOR AN EXCEPTIONAL SENTENCE DOWNWARD BASED ON RCW 9.94A.535(1)(a).

a. The court's sentence is not appealable because the court considered and then rejected the defendant's request for a mitigated sentence after argument.

A standard range sentence is generally not appealable. *State v. Friederich-Tibbets*, 123 Wn.2d 250, 252, 866 P.2d 1257 (1994). Appellate review of a sentencing court's denial of a request for an exceptional sentence is limited to situations where the sentencing court refuses to exercise its discretion in any way, or relies on an unlawful basis for refusing to consider an exceptional sentence. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998). Whether a sentencing court is authorized to impose an exceptional sentence is a question of law, which is reviewed de novo. *State v. Saltz*, 137 Wn. App. 576, 581, 154 P.3d 576 (2007).

A trial court abuses its discretion when it categorically refuses to consider whether or not to impose an exceptional sentence below the standard range. *See State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944

P.2d 1104, *review denied*, 136 Wn.2d 1002 (1998). The failure to *consider* an exceptional sentence is reversible error. *Id.* (emphasis added).

In *State v. Cole*, 117 Wn. App. 870, 73 P.3d 411, *review denied*, 151 Wn.2d 1005 (2004), the sentencing court denied the defendant's request for an exceptional sentence downward and the defendant appealed. The court held that the defendant could not appeal from his standard range sentence where the sentencing court considered the defendant's request for the application of a mitigating factor, heard argument on the issue, and then exercised its discretion in denying the request. *Id.* at 881. This case is similar to *Cole*. In this case the court considered the defendant's request for an exceptional sentence, heard extensive argument as to that issue and then denied the request.

In *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005), a case relied on by the defendant, the sentencing court categorically refused to consider a Drug Offender Sentencing Alternative (DOSA) sentence based on a belief that the DOSA program was inadequately funded. *Id.* at 342. The court held that the sentencing court abused its discretion and should have meaningfully considered a DOSA sentence. *Id.*

The present case is distinguishable from *Grayson*. Here, the trial court did not categorically deny the defendant's request for an exceptional sentence. Rather, the trial court considered it and determined that the

legally required burden under RCW 9.94A.535(1)(a) was not met. RCW 9.94A.535(1)(a) requires that the defense establish, by a preponderance of the evidence, that the victim was the initiator, participant, aggressor or provoker of the assault. Stated conversely, instead of categorically refusing to consider an exceptional sentence, the trial court simply found that there was inadequate evidence to support one. The trial court appropriately exercised its discretion in finding that the burden was not factually satisfied in this case.

- b. The trial court properly considered the evidence that was presented and concluded that the defendant had not established that the victim instigated the assault by a preponderance of the evidence.

There was no evidence, outside the defendant's own self-serving statements, to support the claim that the victim or anyone else in the vehicle was acting as the initiator, participant, aggressor or provoker of the assault. The defendant asserts that "someone who lures an innocent person to a location with the intent to rob him is an initiator, willing participant, aggressor or provoker of the incident." BOA, page 12. Such assertion is inaccurate in several ways. First, at best, the victim and other individuals in the car were initiators in a theft by deception—a nonviolent act. *See* RCW 9A.56.020(1)(b). Facts were introduced that the victim and others were going to attempt to exchange heroin for the defendant's

computer. Sent. RP 14. The plan was to use coffee grounds to mimic heroin. *Id.* The fact that the victim and the other members of his vehicle were planning to engage in a nonviolent deceptive act cannot be reframed as a “robbery,” as the defendant seeks to do. BOA, page 12. The defendant asserts that the trial court made the finding that the defendant was lured to the location as a set up for a robbery. BOA, page 12. That is not what the court found. The court stated that “to some degree this was a setup” and that there was an intent to take the defendant’s laptop, but the court never characterized that intent as an intended robbery. Other than the defendant’s own version of events, there was no evidence that any force was applied or planned to be applied to accomplish the theft of the defendant’s computer. At best, the victim can be said to have “lured” the defendant to swindle him, to which the defendant responded with gunfire.

The defendant cites to *State v. Whitfield*, 99 Wn. App. 331, 994 P.2d 222 (1999), and *State v. Pascal*, 108 Wn.2d 125, 736 P.2d 1065 (1987). Both cases are distinguishable from this case. In *Whitfield*, the defendant was convicted of assault in the third degree and disorderly conduct. *Whitfield*, 99 Wn. App. 331 at 332. Before the assault occurred the victim engaged in verbal confrontations with the defendant’s fiancé about other women the defendant was seeing. *Id.* As the defendant and his fiancé attempted to leave, the victim followed them outside and

continued the confrontation, at which point the defendant hit the victim. *Id.* The sentencing court held that the victim had pursued a “controversial, confrontational, and accusatory conversation” with the fiancé and had therefore provoked the incident. *Id.* at 333. The appellate court agreed.

In *Pascal*, 108 Wn.2d 125, 736 P.2d 1065 (1987), the defendant stabbed her boyfriend to death and was convicted of first degree manslaughter. *Id.* at 126. The victim had been verbally and physically abusive of the defendant over a period of time. *Id.* The day of the incident, the victim had shoved the defendant, slapped her, and knocked her down. *Id.* The trial court’s exceptional sentence was affirmed under an abuse of discretion standard. *Id.* at 140. The court held that:

The record shows that while the defendant did not persuade the jury that she acted in self defense, she was nonetheless a battered, beaten, and abused woman. The trial court looked not only to the immediate circumstances of the fight in which Richard Kieffer was killed, but to the multitude of beatings which preceded it.

Id. at 139.

In *Whitfield*, the victim engaged in combative and confrontational behavior—behavior designed and intended to elicit a response from the defendant. In the present case, there was no credible evidence to support such a finding. The plan was to trick the defendant with fake drugs, not to engage in confrontational behavior. In *Pascal*, the defendant responded to

violent acts perpetrated by the victim, some of which occurred close in time to the act—no such evidence exists in this case. This case is an attempted theft by deception in which the defendant fired the only shot. Therefore this case is distinguishable from both *Whitfield* and *Pascal*.

There was extensive argument as to whether Romero was armed with a firearm at the time of the incident. The defendant mischaracterizes the argument below as the sentencing court holding that the presence of the firearm precluded an exceptional sentence on its face. BOA, page 15. First, the sentencing court did not preclude an exceptional sentence on its face, but rather found insufficient evidence to support one. Second, the court and the parties focused on the issue of whether Romero was armed with a firearm because that contested fact was the basis of the defendant's explanation as to why he fired into the car. The defendant's assertion that Romero had a firearm is what—according to the defendant's story—elevated the victim's conduct to a violent act. The trial court essentially concluded that without finding that Romero had a gun pointed at the defendant, he cannot establish that the victim provoked the incident. It is the presence of the firearm by Romero that would elevate this theft by deception into a robbery, and without that fact, the defendant could not meet his burden below.

The final two cases cited by the defendant, *State v. Hinds*, 85 Wn. App. 474, 936 P.2d 1135 (1997), and *State v. Clemons*, 78 Wn. App. 458, 898 P.2d 324 (1995) are also distinguishable. In *Hinds*, the victim had given the defendant—who was underage—whiskey before allowing the defendant to drive her car. *Id.* at 476. The defendant then caused a collision in which the victim was killed. *Id.* The court remanded to the trial court to make a determination as to whether there was a causal connection between the victim’s conduct and the defendant’s driving. In *Clemons*, the court upheld that the sentencing court properly exercised its discretion in imposing an exceptional sentence on the charge of rape of a child in the third degree when the minor victim pursued the defendant sexually. *Clemons*, 78 Wn. App. 458 at 464, 469.

In all of the cases relied upon by the defendant—*Whitfield, Pascal, Hinds*, and *Clemons*—the State was the appellant seeking review of an exceptional sentence downward. In other words, in each case relied upon by the defendant, the State sought review under an abuse of discretion standard and the court found that the sentencing courts did not abuse its discretion. That is not the standard that is applicable here, where the court considered and then rejected a request for a mitigated sentence. This case is not in the same procedural posture. The only way this court can find an

abuse of discretion is to find that the court erred as matter of law in categorically refusing to consider such a sentence.

The analysis the defendant asks this court to apply would lead to absurd results in other contexts. For example, a suspect using counterfeit bills to pay for items in a store would then be entitled to a mitigated sentence for violence against a merchant who attempted to retain the bills. Alternatively, an unsuspecting seller advertising wares on Craigslist or Ebay would be entitled to use violence against individuals who may attempt to swindle him or her. The fact that the victim in this case was prepared to engage in a theft by deception does not make him an instigator in an assault in the first degree. Under RCW 9.94A.535(1)(a), the defendant has the burden of proof establishing that the victim was the instigator of the assault by a preponderance of the evidence. The defendant was unable to meet his burden and the court properly held that he was unable to do so.

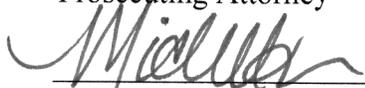
D. CONCLUSION.

This case involves a properly imposed standard range sentence after the trial court considered and rejected a mitigated sentence. The trial court properly declined to impose an exceptional sentence downward when the victim was a participant in an attempted theft by deception, not an assault with a firearm. The State respectfully requests that the court

find that the defendant cannot appeal his standard range sentence and the trial court did not err as a matter of law.

DATED: September 14, 2017

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Certificate of Service:

The undersigned certifies that on this day she delivered by ^{efele}U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/14/17 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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