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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SOCORRO VELAZQUEZ,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITES ii

I. ISSUES..... 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 3

 A. THE TRIAL COURT’S IMPOSITION OF AN
 EXCPETIONAL SENTENCE DUE TO VELAZQUEZ’S
 MULTIPLE CURRENT OFFENSES LEAVING SOME
 CRIMES TO GO UNPUNISHED WAS SUPPORTED BY
 THE LAW AND FACT 3

 1. Standard Of Review 4

 2. The Trial Court Did Not Abuse Its Discretion When It
 Sentenced Velazquez To An Exceptional Sentence
 Because There Were Adequate Legal Basis For the
 Sentence, And The Aggravating Factor Is Supported
 By The Record..... 4

 B. THE RECORD SUPPORTS VELAZQUEZ’S
 ASSERTION HE IS INDIGENT PER SE, THEREFORE,
 THE STATE CONCEDES THE LEGAL FINANCIAL
 OBLIGATIONS WERE IMPPPROPERLY IMPOSED..... 11

IV. CONCLUSION..... 14

TABLE OF AUTHORITIES

Washington Cases

State v. Borg, 145 Wn.2d 329, 36 P.3d 546 (2001)4

State v. Brundage, 126 Wn. App. 55, 107 P.3d 742 (2005)7, 8, 9

State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003)4

State v. Ferguson, 142 Wn.2d 631, 15 P.3d 1271 (2001).....5

State v. France, 176 Wn. App. 463, 308 P.3d 812 (2013)5, 6, 7

State v. Knutz, 161 Wn. App. 395, 253 P.3d 437 (2011)5

State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018).....12

Washington Statutes

RCW 9.94A.0106, 10

RCW 9.94A.5108

RCW 9.94A.5158

RCW 9.94A.5258

RCW 9.94A.5355, 6, 9, 10

RCW 9.94A.5375

RCW 9.94A.5898

RCW 10.01.160(3)12, 14

RCW 10.101.01012, 13, 14

RCW 36.18.020(h) 13-14

RCW 43.43.7541	12
RCW 46.52.020(4)(b).....	8
RCW 46.61.522(1).....	8
RCW 74.09.035	14

Other Rules or Authorities

GR 34	12
Engrossed Second Substitute House Bill 1783.....	11
Laws of 2018, ch. 269 §§ 1, 2, 3, 4, 5, 17, 18, 20	12
Webster’s Third International Dictionary	9

I. **ISSUES**

- A. Did the trial court abuse its discretion by imposing an exceptional sentence on Velazquez based upon the multiple current offense policy allowing Velazquez a “free crime?”
- B. Did the trial court improperly impose discretionary legal financial obligations and the DNA fee on an indigent defendant due to the 2018 legislative amendments to the legal financial obligations statutes?

II. **STATEMENT OF THE CASE**

On August 9, 2017, there was a vehicle collision in Chehalis, Washington. CP 4-5. A red Saturn had collided head on with a white compact vehicle occupied by two women. *Id.* The driver of the Saturn had exited his vehicle, yelled at a witness to call 911, and then fled the scene. CP 5. The driver was later identified as Velazquez. CP 5-6.

The driver of the white vehicle, Judith Selmer, sustained broken bones and nerve damage as a result of the collision. CP 4-5. Both Ms. Selmer and the passenger, A.N., had to be airlifted due to their injuries. *Id.* The investigation concluded Velazquez’s speed at the time of the collision was approximately 12 to 14 miles per hour over the posted speed limit. CP 6.

The State charged Velazquez with Count I: Vehicular Assault, Count II: Hit and Run Injury, and Count III: Vehicular Assault. CP 7-

9. The State and Velazquez came to a plea agreement. RP (4/11/18) 2-3; RP 2-4, 39-49; CP 10-21.¹ The State recommended 68 months for Counts I and III and 60 months for Count II, all to run concurrent. RP 3-4. Velazquez's attorney concurred with the agreed recommendation. RP 45. There were a number of victim impact statements given to the trial court, including from both victims and numerous family and friends of the victims. RP 5-38. The victim statements informed the trial court about how deeply affected the victims had been by the collision, mentally, physically, and emotionally, as well as their friends and family *Id.* All pleaded for the trial court to impose a higher sentence than the standard range. *Id.*

After the statements, Velazquez's attorney commended many of the remarks of the victims, but noted several remarks made were not based in facts. RP 40-45. Velazquez's attorney requested the trial court disregard statements about Velazquez which were based upon speculation, Velazquez did not admit to, or were not proven. *Id.*

The trial court imposed an exceptional sentence above the standard range. RP 46-47, 49-50. The trial court sentenced Velazquez to 60 months on each count, but ran Counts I and II

¹ There are two verbatim report of proceedings. The sentencing and formal entry verbatim report of proceedings, dated 5/8/18 and 5/9/18 will be cited as RP. The other verbatim report of proceedings contain the plea hearing will include the date, 4/11/18.

consecutive to each other, for a total of 120 months. RP 47; CP 25-

26. The trial court stated,

I believe that 68 months would not be enough to serve justice, and I'm not even sure that 120 months or 10 years is enough to serve justice, but I do want to recognize that Mr. Velazquez has taken some responsibility and has admitted to his violations and not put everybody through a trial and all of the havoc that that also wreaks.

RP 47. The trial court also imposed legal financial obligations, including: \$100 DNA fee, \$200 criminal filing fee, and \$500 crime victim assessment, and reserved restitution. RP 48; CP 27-28. Velazquez timely appeals his sentence. CP 41.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE TRIAL COURT'S IMPOSITION OF AN EXCEPTIONAL SENTENCE DUE TO VELAZQUEZ'S MULTIPLE CURRENT OFFENSES LEAVING SOME CRIMES TO GO UNPUNISHED WAS SUPPORTED BY THE LAW AND FACT.

Velazquez asserts his exceptional sentence must be vacated due to the trial court's misapprehension of the law and fact. Brief of Appellant 6-18. Contrary to Velazquez's assertion, the trial court correctly applied the principles of the SRA when factoring whether an exceptional sentence was appropriate. Consequently, the trial

court held the free crimes aggravating factor applied because the multiple current offenses left some of Velazquez's current offenses unpunished. The trial court's sentence should be affirmed.

1. Standard Of Review.

An exceptional sentence is reviewed by the court by addressing the following three questions under the indicated standards of review: (1) Are the reasons supported by the evidence in the record? *State v. Borg*, 145 Wn.2d 329, 336, 36 P.3d 546 (2001). This is reviewed under a clearly erroneous standard. *Borg*, 145 Wn.2d at 336. (2) Do the reasons justify a departure from the standard range? *Id.* This is reviewed de novo. *Id.* (3) Finally, this court reviews under an abuse of discretion standard if the sentence is clearly excessive. *Id.* It is an abuse of discretion when the trial court bases its decision on untenable reasons or grounds or the decision is manifestly unreasonable. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003).

2. The Trial Court Did Not Abuse Its Discretion When It Sentenced Velazquez To An Exceptional Sentence Because There Were Adequate Legal Basis For the Sentence, And The Aggravating Factor Is Supported By The Record.

When a trial court imposes a sentence outside the standard sentence range it must find compelling and substantial reasons

justifying the exceptional sentence. RCW 9.94A.535. The trial court must enter written findings of fact and conclusions of law setting forth its reason for imposing the exceptional sentence. RCW 9.94A.537. Once a trial court has made the required determination, “the sentence court may exercise its discretion to determine the length of an appropriate exceptional sentence.” *State v. Knutz*, 161 Wn. App. 395, 410, 253 P.3d 437 (2011).

A trial court’s exceptional sentence is reviewed for a determination if the sentence was clearly excessive. *Knutz*, 161 Wn. App. at 410. A sentence is clearly excessive when it is clearly unreasonable. *Id.* A sentence is clearly unreasonable when the sentence is “exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken.” *Id.* (citations omitted). If a trial court relies upon reasons that are not substantial and compelling for the imposition of an exceptional sentence, it exceeds its authority, and the matter is required to be remanded for resentencing within the standard range. *State v. Ferguson*, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001).

This Court’s primary duty when construing the free crimes aggravator “is to ascertain and carry out the legislature’s intent.” *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013)

(citations omitted). The Court reviews the plain language of the statute, if the meaning is unambiguous, the Court's inquiry ends. *France*, 176 Wn. App. at 470. A statute susceptible to more than one reasonable interpretation is ambiguous. *Id.* "However, a statute is not ambiguous merely because different interpretations are conceivable." *Id.*

The trial court may depart from the standard range without a jury finding, aggravating a sentence, if "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c). RCW 9.94A.010 is the statute setting forth the purpose of the Sentencing Reform Act:

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;

(5) Offer the offender an opportunity to improve himself or herself;

(6) Make frugal use of the state's and local governments' resources; and

(7) Reduce the risk of reoffending by offenders in the community.

Therefore, if the trial court determines the standard range does not promote the purpose of the SRA, there is substantial and compelling reasons to impose the exceptional sentence, an aggravating factor applies as a matter of law, then “the trial court has all but unbridled discretion in fashioning the structure and length of an exceptional sentence.” *France*, 176 Wn. App. at 470 (internal quotations and citations omitted).

In *State v. Brundage*, the jury convicted Brundage of 11 counts: Count I, rape in the second degree (domestic violence); Count II, rape in the first degree (domestic violence); Count V, kidnapping in the second degree (domestic violence); Count VI, unlawful possession of a firearm, and seven counts of violation of a court order (domestic violence). *State v. Brundage*, 126 Wn. App. 55, 60, 107 P.3d 742 (2005). The court ruled the kidnapping in the second degree merged with Count I, rape in the first degree. *Brundage*, 126 Wn. App. at 60, n.3. The court sentenced Brundage to an exceptional minimum sentence of 400 months for Count I and

498 months for Count II for a number of reasons, including “free crimes.” *Id.* at 61.

This Court analyzed the imposition the “free crimes” aggravator in *Brundage* by the trial court when a defendant was not maxed out on points (nine) going into sentencing and one crime would go unpunished, similar to the facts of Velazquez’s matter. *Id.* at 65-69. Brundage’s offender score was 8 points from his prior convictions. *Id.* at 67. This Court noted the unlawful possession of a firearm, Count VI, would add one point, making Brundage’s offender score nine. *Id.* “Thus, if the trial court had imposed a standard range sentence, the second degree rape conviction would have gone unpunished. Only through an exceptional sentence could the trial court ensure that Brundage did not receive a ‘free crime.’” *Id.*

Similarly, Velazquez had an offender score of eight points from prior convictions. CP 24-25. Therefore, similar to Brundage, once the Hit and Run Injury is applied to Velazquez’s offender score, only one of the Vehicular Assaults will be accounted for and the other Vehicular Assault will be a “free crime,” regardless of any multiplier. RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.525; RCW 9.94A.589; RCW 46.61.522(1); RCW 46.52.020(4)(b); CP 7-9, 22-25. Velazquez argues, “some” as articulated in RCW

9.94A.535(2)(c), requires an offender to have multiple crimes that would go unpunished, not just one criminal offense. Brief of Appellant, 14-17. Contrary to Velazquez's contention, he does not have to have more than one "free crime" for the aggravating factor to apply. *Brundage*, 126 Wn. App. at 67. "Some" can be defined as, "being one, a part, or an unspecified number of something (as a class, group, species, collection, or range of possibilities) named or contextually implied[.]" Webster's Third International Dictionary, 2171. The plain language of RCW 9.94A.535(2)(c), "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished[.]" applies to Velazquez's situation. See, *Brundage*, 126 Wn. App. at 67. The free crime aggravator applies as a matter of law.

The trial court explained why there were substantial and compelling reasons to depart from the standard range, as required before handing down an exceptional sentence. RP 45-47. Velazquez claims the trial court only departed from the standard range due to dissatisfaction with the standard range, which is an improper basis for an exceptional sentence. Brief of Appellant 7-10. Yet, it is difficult to understand how the trial court, under Velazquez's analysis, is supposed to address the substantial and compelling reason to depart

from the standard range without being able to discuss the purpose of the SRA, as set forth in RCW 9.94A.010, which is what the trial court did here. The trial court's discussion of giving Velazquez credit for pleading guilty, taking responsibility, and not putting the victim's through a trial, yet also considering what punishment serves the interest of justice, is simply another way of stating promoting respect for the law and is proportionate to the seriousness of the offense. RCW 9.94A.010; RP 45-47.

The trial court fashioned an exceptional sentence of 60 months of each count, running the two Vehicular Assault counts, Count I and III, consecutive to each other and the Hit and Run concurrent to all other counts, for a total of 120 months. RP 47; CP 24-26. The State asked the trial court the legal basis for the sentence for the findings, and the trial court stated:

It's based on RCW 9.94A.535(2)(c). The defendant has committed multiple current offenses, and the defendant's high offender score results in some of the current offenses going unpunished.

Without an exceptional sentence, even if I gave 68 months, that would not punish him for Count II or Count III, so those would be what we sometimes refer to in the legal field as free crimes.

RP 49. The trial court continued:

I find that there's substantial and compelling reasons, considering the purpose of the Sentencing Reform Act,

to impose an exceptional sentence above the standard range, and that is by running those two consecutive.

RP 49-50. The fact that the trial court did not articulate its reasoning until prompted by the prosecutor does not mean the trial court's reasoning or legal basis is misapplied. The trial court simply articulated its substantial and compelling circumstances and had to be prompted for the finding to be submitted.

Velazquez's criminal history and current crimes meets the legal requirement for the "free crimes" aggravating factor. There were substantial and compelling reasons for the trial court to deviate from the agreed recommendation of a standard range sentence. Therefore, the trial court did not abuse its discretion when it imposed an exceptional sentence of 120 months. This Court should affirm the trial court's imposition of an exceptional sentence.

B. THE RECORD SUPPORTS VELAZQUEZ'S ASSERTION HE IS INDIGENT PER SE, THEREFORE, THE STATE CONCEDES THE LEGAL FINANCIAL OBLIGATIONS WERE IMPROPERLY IMPOSED.

Velazquez asserts he was indigent at the time of sentencing and therefore this Court must, pursuant to the 2018 legislative amendments to the legal financial obligation statutes enacted under Engrossed Second Substitute House Bill 1783, eliminate all discretionary legal financial obligations and the DNA fee. Brief of

Appellant 18-19. While the legal financial obligation reforms eliminate interest, the DNA fee for previously convicted defendants who have had the sample already taken, and many other useful reforms in regards to eliminating fees for indigent defendants, all indigent defendants are not created equal. Laws of 2018, ch. 269 §§ 1, 2, 3, 4, 5, 17, 18, 20; RCW 10.01.160(3); RCW 10.101.010. Only indigent defendants who fall into the category of indigent “per se” status pursuant to RCW 10.01.160(3) and RCW 10.101.010(3)(a)-(c) qualify to eliminate all discretionary legal financial obligations. The record supports, and the State concedes, Velazquez meets the criteria of indigent “per se.”²

The 2018 amendments apply to defendants whose appeals were pending — i.e., their cases were not yet final — when the amendment was enacted. *State v. Ramirez*, 191 Wn.2d 732, 747-49, 426 P.3d 714 (2018).

Pursuant to RCW 43.43.7541, effective June 7, 2018, and retroactively applied to Velazquez, the imposition of the DNA-

² The State would note the record which supports this is the Motion for Indigency, which was actually submitted at the time of formal entry, after sentencing occurred but when the paperwork was handed in and signatures were put on the judgment and sentence. CP 33-37. At Velazquez’s sentencing hearing he stated he did construction work. RP 48. Yet, the State also acknowledges the inquiry conducted would not meet the scrutiny necessary under *Ramirez* and GR 34, as simple questions such as whether Velazquez was on public assistance, currently had income, and what debts he may owe were not asked. RP 48.

collection fee is required “unless the state has previously collected the offender’s DNA as a result of a prior conviction.” The State’s records show Velazquez’s DNA was previously collected and is on file with the Washington State Patrol Crime Lab.³ The State respectfully asks this Court to remand this case to the superior court to amend the judgment and sentence to strike the imposition of the \$100 DNA fee.

Velazquez is indigent because he was on public assistance when not in custody and he had no income at the time of his sentencing. CP 34-35. Income is defined as,

Salary, wages, interest, dividends, and others earnings which are reportable for federal income tax purposes, and cash payments such as reimbursements received from pensions, annuities, social security, and public assistant programs. It includes any contribution received from any family member or other person who is domiciled in the same residence as the defendant and who is heling defray the defendant’s basic living costs.

RCW 10.101.010 (2)(b).

Per the statutory amendments of 2018, the filing fee is no longer a nondiscretionary legal financial obligation if a defendant qualifies for indigency under RCW 10.101.010(3)(a)-(c). RCW

³ The State acknowledges the record on appeal is lacking this information, but the undersigned deputy prosecutor can attest if this case is remanded to strike the fee, this information would be put into the trial record.

36.18.020(h). Further, only if a defendant is indigent “per se” under RCW 10.101.010(3)(a)-(c) shall the sentencing court not order a defendant to pay costs. RCW 10.01.160(3).

(3) "Indigent" means a person who, at any stage of a court proceeding, is:

(a) Receiving one of the following types of public assistance: Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, medicaid, or supplemental security income; or

(b) Involuntarily committed to a public mental health facility; or

(c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level;

RCW 10.101.010(3)(a)-(c). A person in Velazquez’s situation is therefore indigent, as he had no income at the time of his sentencing and had previously been on public assistance prior to being incarcerated. The State concedes this Court should remand this matter back to the trial court to strike the DNA fee and the \$200 filing fee.

IV. CONCLUSION

The trial court’s imposition of an exceptional sentence due to Velazquez’s multiple current offenses leaving one of his Vehicular

Assault counts going unpunished was supported by law and fact. Therefore, the trial court did not abuse its discretion when it imposed an exceptional sentence of 120 months. Velazquez due to his lack of income and prior public assistance, was indigent per se on the date of sentencing, therefore the State concedes the discretionary legal financial obligations should be stricken. Further, the DNA fee does not apply to Velazquez, as the State has previously collected his DNA. Therefore, this Court should affirm the exceptional sentence, but remand the case to the trial court to strike the erroneous legal financial obligations.

RESPECTFULLY submitted this 19th day of February, 2019.

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