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Court of Appeals
Division II
State of Washington

NO. 53736-2-II
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CYNTHIA MARIE GUZMAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-00880-0

BRIEF OF RESPONDENT

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DATED May 27, 2020, Port Orchard, WA *Elizabeth Allen*
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I. COUNTERSTATEMENT OF THE ISSUES

Whether the trial court abused its discretion in setting a payment schedule for the payment of a mandatory legal financial obligation?
(CONCESSION OF ERROR)

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Cynthia Marie Guzman was charged by information filed in Kitsap County Superior Court with first degree robbery and second degree unlawful possession of a firearm. CP 1.¹

Later, a first amended information charged nineteen counts:

Count I, first degree burglary with special allegations of armed with a firearm and armed with a deadly weapon;

Count II, first degree kidnapping (victim April Alvarez) with special allegation of armed with a deadly weapon;

Count III, first degree kidnapping (Lamont Matson) with special allegation of armed with a deadly weapon;

Count IV, attempted first degree kidnapping (Anthony Harris) with special allegation of armed with a deadly weapon;

¹ References in this section of the brief are to the certified record in Guzman's first appeal of this case.

Count V, first degree kidnapping (David Garcia) with special allegations of armed with a firearm and armed with a deadly weapon;

Count VI, first degree kidnapping (Daniel Smith) with special allegations of armed with a firearm and armed with a deadly weapon;

Count VII, first degree kidnapping (Jessica Brackens) with special allegations of armed with a firearm and armed with a deadly weapon;

Count VIII, first degree robbery (April Alvarez) with special allegation of armed with a deadly weapon;

Count IX, first degree robbery (David Garcia) with special allegations of armed with a firearm and armed with a deadly weapon;

Count X, first degree robbery (Daniel Smith) with special allegations of armed with a firearm and armed with a deadly weapon;

Count XI, first degree robbery (Jessica Brackens) with special allegations of armed with a firearm and armed with a deadly weapon;

Count XII, second degree assault (April Alvarez) with special allegation of armed with a deadly weapon;

Count XIII, second degree assault (David Garcia) with special allegations of armed with a firearm and armed with a deadly weapon;

Count XIV, second degree assault (Daniel Smith) with special allegations of armed with a firearm and armed with a deadly weapon;

Count XV, second degree assault (Jessica Brackens) with special allegations of armed with a firearm and armed with a deadly weapon;

Count XVI, second degree unlawful possession of a firearm;

Count XVII, intimidating a witness;

Count XVIII, tampering with a witness.

CP 27-44.

Guzman was found guilty on all counts. CP 515-519. The jury gave affirmative answers to all special allegations. CP 520-544. Other than firearm or deadly weapon enhancements, the jury announced special verdicts finding that for each of the kidnapping counts Guzman or an accomplice held each of the victims as a shield or hostage, with intent to facilitate first degree robbery, and with intent to inflict bodily injury on her. CP 522 (Count II); CP 524 (count III); CP 526 (count IV); CP 528 (count V); CP 530 (count VI); CP 532 (count VII). Regarding count XII, second degree assault, the jury found that Guzman assaulted April Alvarez with intent to commit first degree robbery (CP 538); similarly with regard to the other second degree assaults count XIII against David Garcia (CP 540), count XIV against Daniel Smith (CP 542), and count XV against Jessica Brackens. CP 544.

The nineteen convictions and attendant enhancements placed

Guzman's total standard range at 1015.25-1145 months. CP 554. She was sentenced to 1016 months. CP 575.

On direct appeal, this Court affirmed most of Guzman's convictions but reversed four second degree assault convictions because they should have merged into the four first degree robbery convictions. The matter was remanded for resentencing. The only aspect of that resentencing here placed in issue is the trial court setting of a \$100 monthly payment on a mandatory \$500 crime victim penalty assessment.

B. FACTS

The facts of the incident are lengthy and add nothing to the analysis of the present issue. In sum, the incident involved an aggressive home-invasion robbery wherein firearms were used and taken.

II. ARGUMENT

A. THE PAYMENT SCHEDULE PROVISION OF THE JUDGEMENT AND SENTENCE SHOULD BE RECONSIDERED.

Guzman argues that the trial court abused its discretion by imposing a payment schedule for mandatory legal financial obligations (LFO) that did not take into consideration her indigency at the time of sentencing. For the reasons stated, the state concedes error.

First, factually, the state concedes that the trial court did not consider indigency or, apparently, any other aspect of the payment

schedule at sentencing. This under circumstances where indigency compelled the imposition of mandatory LFO only. RP, 5/21/19, 21. The court and the parties were focused on the 1016 months of incarceration, not LFO payments. The error here is oversight.

Second, the state is not unmindful that Guzman's argument may not be reviewable because unpreserved. RAP 2.5(a). The oversight of this payment provision extended to the defense as well. Guzman cites to *State v. Blazina*². Opening Brief at 3. But the *Blazina* matter considered the due process implications of imposing discretionary LFO on indigent defendants, not the payment of mandatory impositions. The preservation issue was given an unusual treatment because of the Supreme Court's desire to resolve the underlying issue. Here, the trial court followed *Blazina* in assessing the mandatory assessment only.

However, the *Blazina* Court also made clear that "RAP 2.5(a) grants appellate courts discretion to accept review of claimed error not appealed as a matter of right." *State v. Blazina*, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015). The state concedes that this discretion should be exercised in favor of review and the error should be corrected.

Trial courts must impose mandatory LFO's. See RCW 9.94A.760(1); *State v. Malone*, 193 Wn. App. 762, 765, 376 P.3d 443

(2016). And the statute generally grants the trial court discretion in determining how that money is to be paid. RCW 10.01.170(1) (sentencing court “may” order installment payments). But the statute expressly requires (“shall”) that a longer period-of-time for payment or an installment schedule be permitted in the case of an indigent person. *Id.*

Moreover, RCW 9.94A.760(1) also requires the sentencing court to set a payment schedule: “the court is also to set a sum that the offender is required to pay on a monthly basis.” If the sentencing court does not, the Department of Corrections may set an amount during active supervision or the Clerk’s office “shall set an amount.”³ *Id.*

Here, again, the state is not unmindful that the trial court here abided the statutory commands. That is, the trial court is to set a payment schedule and it did. The authority of the trial court to do what it did is clear. Even while commanding to permit a payment schedule in case of an indigent convict, RCW 10.01.170 is silent on the size of the installment schedule set.

Here, then, the statutory command results in the exercise of discretion. And Guzman accurately argues that discretion is abused when a decision is manifestly unreasonable, based on untenable grounds, or

² 182 Wn.2d 827, 344 P.3d 680 (2015).

³ RCW 9.94A.760(6) proscribes a procedure that DOC is to engage in setting payments.

based untenable reasons. Opening Brief at 3-4, citing *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.3d 1362 (1997). Guzman concludes that the trial court's payment schedule is untenable because it lacked "sufficient factual justification." Opening Brief at 4.

The present order seems on its face to be manifestly unreasonable. The state concurs with Guzman's sentiment that "The court had no reason to believe Ms. Guzman could make the 100 dollar payment." *Id.* This concession may alone warrant remand. But the state believes there is one more important unaddressed piece to the analysis. The line of cases finding essentially an abuse of discretion in the failing to exercise it. *See, e.g., In re Mulholland*, 161 Wn.2d 322, 332, 166 P.3d 677 (2007) (trial court's failure to recognize its discretion to act is error and "fundamental defect" under personal restraint law).

Here, the failure to exercise discretion cases apply because the record shows no evidence that a payment schedule, or the size of it, was considered at the time. The matter should be remanded for that purpose.

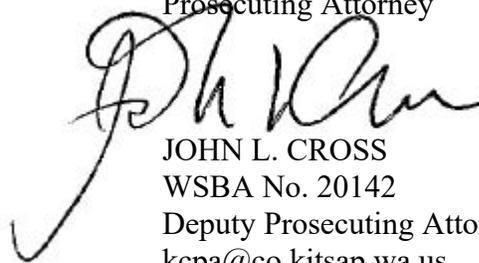
III. CONCLUSION

For the foregoing reasons, the matter should be remanded to allow consideration of Guzman's indigency in setting a payment schedule.

DATED May 27, 2020.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "John L. Cross", is written over the typed name and title of the Deputy Prosecuting Attorney.

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