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Court of Appeals
Division III
State of Washington

No. 32599-7-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

MEGHAN BRADFORD SANDVIG,
Defendant/Appellant.

APPEAL FROM THE KITTITAS COUNTY SUPERIOR COURT
Honorable Scott R. Sparks, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in imposing multiple punishments for the same offense in violation of constitutional, statutory and common law protections against double jeopardy.

2. The court erred in relying on the aggravating factor that the current offense was a major economic offense because it involved multiple incidents per victim.

3. The court abused its discretion when it imposed a sentence upon Ms. Sandvig that was clearly excessive.

4. The record does not support the finding Ms. Sandvig has the current or future ability to pay the imposed discretionary legal financial obligations.

5. The court erred by failing to consider Ms. Sandvig's ability to pay the minimum monthly payment ordered towards restitution.

Issues Pertaining to Assignments of Error

1. Where the prosecution alleged an ongoing and calculated scheme to obtain money from an employer over a course of years, and the legislature established a singular unit of prosecution for the offenses, did the trial court err by imposing an exceptional sentence for these multiple counts of theft?

2. Did the court err in imposing an exceptional sentence based on the aggravating factor that the offense involved multiple incidents per victim, where the incidents were separately charged and already included in the offender score?

3. Was the exceptional sentence imposed by the court clearly excessive?

4. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, should the matter be remanded for the sentencing court to make individualized inquiry into Ms. Sandvig's current and future ability to pay before imposing LFOs?

5. Did the court abuse its discretion by ordering a minimum monthly payment towards restitution without considering Ms. Sandvig's ability to pay, as required by RCW 9.94A.753(1)?

B. STATEMENT OF THE CASE

Meghan Bradford Sandvig pleaded guilty as charged to thirty (30) counts of first degree theft. CP 21–28, 38–39. In her Statement on Plea of Guilty, Ms. Sandvig stated: “[During the four-year period] [b]etween September 15, 2009, and September 27, 2013, in my capacity as a bookkeeper for Premier Paint, I stole an amount of over \$5,000 each time I took money.” CP 36. The charging document alleged counts of theft

taking place during the shorter two year period of June 10, 2011 through September 27, 2013. CP 21–28. According to the State, the theft involved unauthorized telephone transfers of the company’s money into Ms. Sandvig’s personal bank account. CP 43–44. Ms. Sandvig agreed to pay restitution in the amount of \$577, 228.60¹, and subsequently placed a lien on her house to help secure repayment. CP 100, 102–03; RP 59.

Based upon Ms. Sandvig’s scheme of multiple thefts from her employer, the State alleged as aggravating factors:

[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) ...

[T]he current offense was a major economic offense because it involved multiple incidents per victim, it involved actual monetary loss substantially greater than typical for the offense, and the defendant used her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense ... [RCW] 9.94A.535(3)(d).

CP 28. Ms. Sandvig stipulated there was a factual basis for the two aggravators but not that an aggravated sentence should be imposed. CP 36.

¹ This amount consists of restitution to the company owners of \$526,228.60 (stolen money) and \$16,000 (cost for accounting firm), and \$35,000 to the insurance company for insurance payout. CP 104.

Ms. Sandvig had no prior criminal history. The sentencing court declined defense counsel's requests to find the multiple thefts were same criminal conduct and to waive standard range sentencing under the first-time offender waiver provision. The standard range using an offender score of zero (0) would have been 0 to 90 days. Using an offender score of 9+, which has a standard range of 43 to 57 months, the court imposed an exceptional sentence of 90² months. RP 70–73.

In support of the exceptional sentence, the court made a finding of fact that, “The defendant was the office manager/bookkeeper for the business and did enjoy a position of trust, which she used in order to take the money and to evade detection over a course of years.” CP 94.

The sentencing court imposed Legal Financial Obligations (LFO) of \$850, consisting of \$600 in mandatory fees and \$250 in discretionary fees. CP 85. The parties entered an agreed order for restitution in the amount of \$577, 228.60. CP 102–04, 105–07. The court ordered Ms. Sandvig to pay \$100 per month towards the LFOs commencing upon her release from custody. CP 86.

The Judgment and Sentence contained the following language:

² The court stated, “[T]he idea is three months per count.” RP 70–73.

¶ 2.5 **Legal Financial Obligations/Restitution.** The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. ...

CP 83. When imposing the LFOs, the court did not inquire into Ms. Sandvig's financial resources or consider the burden payment of LFOs would impose on her. In setting the minimum monthly payment, the court further did not consider the total amount of restitution owed or availability of any assets. RP 70–74.

This appeal followed. CP 79.

C. ARGUMENT

1. The court erred in imposing multiple punishments for the same offense in violation of constitutional, statutory and common law protections against double jeopardy.

Both the Fifth Amendment and article I, section 9 of the Washington Constitution protect against multiple punishments for the same offense. *U.S. Const.* amend V; *Const.* art. I, sec. 9; *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). When a defendant is convicted of violating one statute multiple times, “[t]he proper inquiry ... is what ‘unit of prosecution’ has the Legislature intended as the punishable act under the specific criminal statute.” *State v. McReynolds*, 117 Wn. App. 309,

334, 71 P.3d 663 (2003), citing *Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed. 905 (1955); *State v. Mason*, 31 Wn. App. 680, 685-87, 644 P.2d 710 (1982). The Legislature has the power, limited by the Eighth Amendment, to define criminal conduct and set out the appropriate punishment for that conduct. *Bell*, 349 U.S. at 82, 75 S.Ct. 620.

When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime. *See Bell*, 349 U.S. at 83-84, 75 S.Ct. 620 (double jeopardy violated when defendant convicted on two counts of transporting women across state lines when two women were transported at the same time); *In re Snow*, 120 U.S. 274, 7 S.Ct. 556, 30 L.Ed. 658 (1887) (double jeopardy violated when defendant convicted on multiple counts of plural cohabitation when the cohabitation was continuous and ongoing). The unit of prosecution issue is unique in this aspect. While the issue is one of constitutional magnitude on double jeopardy grounds, the issue ultimately revolves around a question of statutory interpretation and legislative intent. *See Peter Westen & Richard Drubel, Toward a General Theory of Double Jeopardy*, 1978 Sup.Ct. Rev. 81, 113; Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 313 (1965). This is a constitutional challenge that may be raised

for the first time on appeal. *State v. O'Connor*, 87 Wn. App. 119, 123, 940 P.2d 675 (1997). Appellate review of an alleged double jeopardy violations is de novo. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

The first step in determining the proper unit of prosecution is to examine the language of the statute. *State v. Ose*, 156 Wn.2d 140, 144, 124 P.3d 635 (2005). Statutory construction is a question of law reviewed de novo. *State v. Fisher*, 139 Wn. App. 578, 583, 161 P.3d 1054 (2007). The court first looks to the statute's plain meaning to determine legislative intent. *Ose*, 156 Wn.2d at 144, 124 P.3d 635. "Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Elmore*, 143 Wn. App. 185, 177 P.3d 172, 173 (2008). Statutes are construed as a whole to harmonize and give effect to all provisions when possible. *State v. Young*, 125 Wn.2d 688, 696, 888 P.2d 142 (1995). "A statute is ambiguous if it can be reasonably interpreted in more than one way." *State v. Mullins*, 128 Wn. App. 633, 642, 116 P.3d 441 (2005).

If the Legislature has failed to specify the unit of prosecution in a criminal statute, the ambiguity should be construed in favor of lenity. *Bell*,

349 U.S. at 84; *State v. Knutson*, 64 Wn. App. 76, 80, 823 P.2d 513 (1991); see also *United States v. Universal C.L.T. Credit Corp.*, 344 U.S. 218, 221-22, 73 S.Ct. 227, 97 L.Ed. 260 (1952). The United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges. *Brown v. Ohio*, 432 U.S. 161, 169, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) ("The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."); *Snow*, 120 U.S. at 282 (if prosecutors were allowed arbitrarily to divide up ongoing criminal conduct into separate time periods to support separate charges, such division could be done ad infinitum, resulting in hundreds of charges).

Ms. Sandvig is charged with violating the same first degree theft statute a number of times, and the multiple convictions can withstand double jeopardy challenge only if each is a separate "unit of prosecution." In making this determination, we apply the rules of statutory construction to the statute at issue. If there is any ambiguity, then "the ambiguity should be construed in favor of lenity." *Adel*, 136 Wn.2d at 632–35. In *State v. Turner*, the court examined the first degree theft statute and

concluded thefts by various means from the same person did not support multiple convictions. 102 Wn. App. 202, 209, 6 P.3d 1226 (2000).

The first degree theft statute makes no mention of schemes or plans in distinguishing the seriousness of the crime from other degrees of theft. And there is no wording in the statute that indicates any other relevant distinction between multiple acts of theft committed against the same person over the same period of time.

Turner, 102 Wn. App. at 209–10; compare *State v. Tili*, 139 Wn.2d 107, 113–14, 985 P.3d 365 (1999) (statutory definition of sexual intercourse indicates separate units of prosecution).

The *Turner* Court found that the lack of clarity in the first degree theft statute creates ambiguity as to whether multiple schemes or plans constitute separate units of prosecution under the first degree theft statute. Thus, the rule of lenity dictated that the Court construe this ambiguity in favor of the accused. *Turner*, 103 Wn. App. at 210–11.

We note that the unit of prosecution analysis is designed in part to avoid overzealous charging by the prosecution. While the record shows that the prosecutor here sought to divide the acts of theft into schemes or plans for clarity of presentation to the jury, not in a fit of prosecutorial zeal, the reason for the rule applies with equal force here. We seriously doubt that the Legislature could have intended to delegate to the prosecution the discretion to define the punishable act in this way.

Turner, 102 Wn. App. at 102; see also *State v. Hoyt*, 79 Wn. App. 494, 496-97, 904 P.2d 779 (1995), rev. denied, 129 Wn.2d 1004 (1996).

Washington law is clear, however, that:

where successive takings are the result of a single, continuing criminal impulse or intent and are pursuant to the execution of a general larcenous scheme or plan, such successive takings constitute a single larceny regardless of the time which may elapse between each taking.

State v. Dash, 163 Wn. App. 63, 68, 259 P.3d 319 (2011) (emphasis added) (quoting *State v. Vining*, 2 Wn. App. 802, 808-09, 472 P.2d 564 (1970)); *State v. Currier*, 36 Wn. App. 755, 757, 677 P.2d 768 (1984).

"If the impulse continues, the crime is not complete until the continuing impulse has been terminated." *State v. Mermis*, 105 Wn. App. 738, 745, 20 P.3d 1044 (2001) (noting the doctrine originates at common law, citing *State v. Ray*, 62 Wash. 582, 114 P. 439 (1911) and *State v. Dix*, 33 Wash. 405, 74 P. 570 (1903)). The resulting convictions represent a "single larceny" and the double jeopardy bar limits the punishment which can be imposed. *Turner*, 102 Wn. App. at 209.

Where Washington's first degree theft statute does not define the unit of prosecution, it is ambiguous as to whether multiple transactions in support of the same criminal enterprise may be punished separately. The

state charged thirty counts against a single victim spanning an approximate two year period, Ms. Sandvig acknowledged the thefts occurred over a four-year period, the state said it “ended up” with thirty counts³ only because “that’s where we stopped,” and based on the scheme of thefts the state alleged the aggravating factors of major economic offense and current offenses going unpunished. CP 21–28, 36, 94; RP 8. Double jeopardy bars this form of multiple punishment and Ms. Sandvig is entitled to relief in the form of a new sentencing hearing.

2. The court erred in relying on the aggravating factor that the current offense was a major economic offense because it involved multiple incidents per victim.

The imposition of an exceptional sentence is a two-step process. *State v. Rowland*, 160 Wn. App. 316, 330, 249 P.3d 645 (2011), *aff’d*, 174 Wn.2d 150, 272 P.3d 242 (2012). First, a jury makes a factual determination beyond a reasonable doubt that facts exist to support an exceptional sentence. *Id.* Second, a judge exercises discretion to determine, given the aggravating facts, whether an exceptional sentence is warranted and, if so, its length. *Id.*

³ “And there could have been more, but we arbitrarily picked 30, because at some point – an Information is – too long and too cumbersome to even go through the court. This one is long enough and cumbersome enough as it is.” RP 37–38.

When reviewing an exceptional sentence on appeal, the Court views the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating facts beyond a reasonable doubt. *State v. Zigan*, 166 Wn. App. 597, 601–02, 270 P.3d 625, rev. denied, 174 Wn.2d 1014, 281 P.3d 688 (2012). The Court reviews *de novo* whether the trial court’s reasons for imposing the exceptional sentence are justified. *State v. Alvarado*, 164 Wn.2d 556, 560–61, 192 P.3d 345 (2008).

It is well-established that a court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard range. *State v. Alexander*, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995). Criminal history is already taken into account in computing the offender score for sentencing purposes and therefore may not be considered in imposing a sentence outside the presumptive range. *State v. Bartlett*, 128 Wn.2d 323, 333, 907 P.2d 1196 (1995). Courts may not use the fact of a prior conviction alone to justify an exceptional sentence. *Id.*

In *State v. Fisher*, 108 Wn.2d 419, 426, 739 P.2d 683 (1987), the Supreme Court held that the multiplicity of incidents cannot support an exceptional sentence where the incidents relied upon constitute the counts

of which the defendant was separately convicted. That is because those facts were necessarily accounted for in computing the presumptive range.

Id.

Here, the court imposed an exceptional sentence based on the finding that the crime was a major economic offense manifested by multiple incidents. CP 94. Yet the only evidence of multiple incidents was the thirty (30) counts of first degree theft alleged in the Amended Information. CP 21–28. Ms. Sandvig pleaded guilty to those counts. CP 38–39. Pursuant to the SRA's provision on sentencing for multiple current convictions, RCW 9.94A.589(1)(a), those convictions were included in the offender score for the current sentencing. Therefore, the court could not rely on those incidents as a reason to impose an exceptional sentence.

Fisher, 108 Wn.2d at 426; *Alexander*, 125 Wn.2d at 725; *Bartlett*, 128 Wn.2d at 333.

Remand for resentencing is necessary where a sentencing court imposes an exceptional sentence by placing significant weight on an improper aggravating factor. *State v. Ferguson*, 142 Wn.2d 631, 649 & 649 n.81, 15 P.3d 1271 (2001). Here, the court imposed an exceptional sentence based on two aggravating factors including sub-factors. RP 70–73. Neither the court's oral ruling nor the written findings of fact and

conclusions of law speak to the amount of the court's reliance on this improper factor. *Id.*; CP 93–96. The exceptional sentence must be reversed and remanded for resentencing.

3. A sentence for seven and one-half years, thirty times the top end of the presumptive range had the thefts been charged as one count, is clearly excessive.

An appellate court analyzes the appropriateness of an exceptional sentence by asking: (1) Are the reasons given by the sentencing judge supported by the record under the clearly erroneous standard? (2) Do the reasons justify a departure from the standard range under the *de novo* review standard? and (3) Is the sentence clearly too excessive or too lenient under the abuse of discretion standard? *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005) (quoting *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)); RCW 9.94A.585(4). A "clearly excessive" sentence is one that is clearly unreasonable, "i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken." *State v. Ritchie*, 126 Wn.2d 388, 393, 894 P.2d 1308 (1995) (quoting *State v. Oxborrow*, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986), *cert. denied*, 493 U.S. 942, 110 S.Ct. 344, 107 L.Ed.2d 332 (1989)). When a sentencing court does not base its sentence on improper

reasons, appellate courts will still find a sentence excessive if its length, in light of the record, "shocks the conscience." *State v. Vaughn*, 83 Wn. App. 669, 681, 924 P.2d 27 (1996) (quoting *Ritchie*, 126 Wn.2d at 396, 894 P.2d 1308), rev. denied, 131 Wn.2d 1018, 936 P.2d 417 (1997).

RCW 9.94A.535 states in relevant part:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury when it finds "[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). A defendant may stipulate to aggravating circumstances that otherwise would require proof to a jury beyond a reasonable doubt, such as the major economic offense at play herein. RCW 9.94A.537(3).

A defendant's standard range sentence reaches its maximum limit at an offender score of nine. RCW 9.94A.510.

Property crimes are, of course, subject to exceptional sentences. The Legislature's intent that property crimes involving multiple acts or

victims, resulting in a loss substantially greater than typical for the offense, occurring over a long period of time, or committed while in a position of trust, be punished more severely is evident from the plain language of RCW 9.94A.535(3)(d). However, where the trial court properly acted within its authority to impose an exceptional sentence, that sentence may still be unlawfully excessive.

As argued above, Washington's first degree theft statute is ambiguous as to whether multiple transactions in support of the same criminal enterprise may be punished separately. Ms. Sandvig's successive takings pursuant to the execution of a general larcenous scheme constituted a single theft for which multiple punishments are barred by double jeopardy protections. This is true regardless whether the decision to charge separately or as one charge is within prosecutorial discretion. *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141, 1143 (1990); *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The facts of Ms. Sandvig's offense and the severity of the sentence imposed are easily distinguished from those cases in which the appellate court found sentences for property crimes were not clearly excessive.

For example, in *State v. Knutz*, the defendant preyed on an elderly man living in an assisted living home, convincing him to give her

\$347,000 in increments as small as \$470 over the course of three years. 161 Wn. App. 395, 399, 253 P.2d 436 (2011). The State charged one count of first degree theft. The defendant's prior criminal history resulted in an offender score yielding a standard range of 2 to 6 months. Based on jury findings of three aggravating factors, the trial court imposed an exceptional sentence of five years. The sentence was only ten times the top of the standard range.

In *State v. Oxborrow*, the defendant created an elaborate pyramid scheme in which he defrauded investors of over \$58 million. 106 Wn.2d at 526–27. Of the amount stolen, \$13 million was never returned. *Id.* at 527. Losses to individuals were as high as \$2.4 million and over 500 of the investors lost everything. *Id.* at 527. Given that the theft occurred in the early 1980s, these numbers are even more striking if one accounts for inflation. The State charged Oxborrow with one count of first degree theft and one count of willful violation of a cease and desist order concerning the sale of securities. He had no prior criminal history. The court upheld the defendant's exceptional sentence, finding that 180 months, or 15 times the top of the standard range, was not clearly excessive given the enormity of the amount stolen. *Id.* at 534.

In comparison, the state charged Ms. Sandvig with thirty counts of

first degree theft. She had no prior criminal history. Had the thefts been charged as one count, Ms. Sandvig's offender score of zero would result in a standard range of 0 to 90 days. The trial court's imposition of a 90-month sentence was thirty (30) times the top of that presumptive standard range. The amount of time imposed is shocking in light of the facts of the case. The sentence was harsher than the typical exceptional sentence for similar property crimes. The sentence was clearly excessive and an abuse of discretion. It must be reversed and the case remanded for resentencing. *Ritchie*, 126 Wn.2d at 392.

4. Since the directive to pay LFOs was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into Ms. Sandvig's current and future ability to pay before imposing LFOs.

a. *This court should exercise its discretion and accept review.*

Ms. Sandvig did not make this argument below. However, the Washington Supreme Court has held the ability to pay legal financial LFOs may be raised for the first time on appeal by discretionary review. *State v. Blazina*, __Wn.2d__, 344 P.3d 680, 683 (March 12, 2015). In *Blazina* the Court felt compelled to accept review under RAP 2.5(a) because "[n]ational and local cries for reform of broken LFO systems

demand ... reach[ing] the merits” *Blazina*, 344 P.3d at 683. The Court reviewed the pervasive nature of trial courts’ failures to consider each defendant’s ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this Court. Indigent defendants who are saddled with wrongly imposed LFOs have many “reentry difficulties” that ultimately work against the State’s interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 344 P.3d at 684. Availability of a statutory remission process down the road does little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the *Blazina* Court bluntly recognized, one societal reality is “the state cannot collect money from defendants who cannot pay.” *Blazina*, 344 P.3d at 684. Requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal is a financially wasteful use of administrative and judicial process. A more efficient use of state resources would result from this court’s remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. This Court should embrace its obligation to uphold and enforce the Washington Supreme Court’s decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant’s current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685; see also *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 867–68, 120 P.3d 616, 634 (2005) rev’d in part sub nom. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (The principle of stare decisis—“to stand by the thing decided”—binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Ms. Sandvig’s case regardless of her failure to object. See, *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259–60, 255 P.3d 696, 701 (2011) (“Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation.”) (citations omitted).

The sentencing court's signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. *Blazina*, 344 P.3d at 685. Post-*Blazina*, one would expect future trial courts to make the appropriate ability to pay inquiry on the record or defense attorneys to object in order to preserve the error for direct review. Ms. Sandvig respectfully submits that in order to ensure she and all indigent defendants are treated as the LFO statute requires, this Court should reach the unpreserved error and accept review. *Blazina*, 344 P.3d at 687 (FAIRHURST, J. (concurring in the result)).

b. *Substantive argument.*

There is insufficient evidence to support the trial court's finding that Ms. Sandvig has the present and future ability to pay legal financial obligations. Courts may require an indigent defendant to reimburse the state for costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay without proof the defendant has the ability to

pay, violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12 and United States Constitution, Fourteenth Amendment. *Fuller v. Oregon*, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685. “This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.” *Id.* The remedy for a trial court's failure to make this inquiry is remand for a new sentencing hearing. *Id.*

Blazina further held trial courts should look to the comment in court rule GR 34 for guidance. *Id.* This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. *Id.* (citing GR 34). For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (citing comment to GR 34 listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. *Id.*

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability

to pay." *Id.* at 915-16. The individualized inquiry must be made on the record. *Blazina*, 344 P.3d at 685.

Here, the judgment and sentence contains a boilerplate statement that the trial court has "considered" Ms. Sandvig's present or future ability to pay legal financial obligations. CP 84. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.' "

Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted).

Here, despite the boilerplate language in paragraph 2.5 of the judgment and sentence, the record does not show the trial court took into account Ms. Sandvig's financial resources and the potential burden of imposing LFOs on her. RP 70–74. Nevertheless, the Court ordered Ms. Sandvig to pay \$100 per month commencing upon her release from custody. CP 86.

The boilerplate finding that Ms. Sandvig has the present or future ability to pay LFOs is simply not supported by the record. Therefore, the matter should be remanded for the sentencing court to make an individualized inquiry into Ms. Sandvig's current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

5. The court abused its discretion by ordering a minimum monthly payment towards restitution without considering Ms. Sandvig's ability to pay, as required by RCW 9.94A.753(1).

A trial court's authority to impose restitution is granted by statute. *State v. Moen*, 129 Wn.2d 535, 543, 919 P.2d 69 (1996). RCW 9.94A.753(5) requires the court to order restitution “whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property.” The legislation grants broad power to the trial court to order restitution. *State v. Enstone*, 137 Wn.2d 675, 679, 974 P.2d

828 (1999). Although a sentencing court's authority to order restitution is purely statutory, when authorized, the court has discretion to determine the total amount of restitution owed and the minimum monthly payment required. RCW 9.94A.753(1). A properly authorized restitution award will not be disturbed on appeal absent an abuse of discretion. *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991).

Ms. Sandvig concedes the court has the authority to require an indigent defendant to pay restitution. *State v. Huddleston*, 80 Wn. App. 916, 929, 912 P.2d 1068 (1996). However, when setting the minimum monthly payment an offender is required to make toward the total restitution ordered, the court must consider the offender's ability to pay it. The statute states in relevant part: “The court shall then set a minimum monthly payment that the offender is required to make towards the restitution that is ordered. The court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.” RCW 9.94A.753(1).

The record does not show the trial court considered these statutory factors when setting the minimum monthly payment amount. The court

abused its discretion in setting \$100 as the minimum monthly payment required of Ms. Sandvig.

D. CONCLUSION

For the reasons stated, the exceptional sentence should be stricken and the matter remanded for re-sentencing, and to make an individualized inquiry into Ms. Sandvig's current and future ability to pay before imposing LFOs and setting the minimum monthly payment.

Respectfully submitted on June 28, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 28, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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