

No. 34728-1-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

THE STATE OF WASHINGTON,

Respondent

v.

MATTHEW HENRY DEVORE,

Appellant

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 14-1-01303-9

---

BRIEF OF RESPONDENT

---

ANDY MILLER  
Prosecuting Attorney  
for Benton County

Emily K. Sullivan, Deputy  
Prosecuting Attorney  
BAR NO. 41061  
OFFICE ID 91004

7122 West Okanogan Place  
Bldg. A  
Kennewick WA 99336  
(509) 735-3591

TABLE OF CONTENTS

TABLE OF AUTHORITIES .....ii-iii

I. RESPONSE TO ISSUES PRESENTED .....1

II. STATEMENT OF FACTS .....1

III. ARGUMENT .....4

    A. The Aggravating Factor of Impact on Others is appropriate in the present case based on the unique facts. ....4

    B. The aggravating factor permitting an exceptional sentence if an offense “involved a destructive and foreseeable impact on persons other than the victim” is not unconstitutionally vague as applied to Mr. DeVore’s case. ....9

        1. Even after *Blakely*, the void-for-vagueness doctrine does not apply to aggravating factors that increase a sentence beyond the standard range based on factual findings. ....9

        2. The “destructive and foreseeable impact” aggravating factor does not allow for arbitrary enforcement and provides citizens a fair warning of the conduct it punishes. ....12

    C. Mr. DeVore’s exceptional sentence is not clearly excessive. ....13

    D. The court has discretion to impose appellate costs and should use its discretion in deciding whether to impose costs. ....17

IV. CONCLUSION.....19

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<i>State v. Baldwin</i> , 150 Wn.2d 448, 78 P.3d 1005 (2003).....	9-12
<i>State v. Blank</i> , 131 Wn.2d 230, 930 P.2d 1213 (1997).....	17-18
<i>State v. Blazina</i> , 182 Wn.2d 827, 334 P.3d 680 (2015).....	18
<i>State v. Chanthabouly</i> , 164 Wn. App. 104, 262 P.3d 144 (2011).5-7, 10-12	
<i>State v. Cuevas-Diaz</i> , 61 Wn. App. 902, 812 P.2d 883 (1991).....	5
<i>State v. Davis</i> , 182 Wn.2d 222, 340 P.3d 820 (2014).....	5
<i>State v. Gaines</i> , 122 Wn.2d 502, 859 P.2d 36 (1993).....	14
<i>State v. Grewe</i> , 117 Wn.2d 211, 813 P.2d 1238 (1991) .....	14
<i>State v. Johnson</i> , 124 Wn.2d 57, 873 P.2d 514 (1994).....	6-7
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	12
<i>State v. Lundy</i> , 176 Wn. App. 96, 308 P.3d 755 (2013) .....	18
<i>State v. Mahone</i> , 98 Wn. App. 342, 989 P.2d 583 (1999).....	17
<i>State v. Nordby</i> , 106 Wn.2d 514, 723 P.2d 1117 (1986).....	14
<i>State v. Oxborrow</i> , 106 Wn.2d 525, 723 P.2d 1123 (1986).....	15
<i>State v. Ritchie</i> , 126 Wn.2d 388, 894 P.2d 1308 (1995).....	14-15
<i>State v. Ross</i> , 71 Wn. App. 556, 861 P.2d 473 (1993), <i>review denied</i> , 123 Wn.2d 1019, 875 P.2d 636 (1994).....	15
<i>State v. Scott</i> , 72 Wn. App 207, 866 P.2d 1258 (1993) .....	15-16
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3d 612 (2016).....	17
<i>State v. Tierney</i> , 74 Wn. App. 346, 872 P.2d 1145 (1994).....	14
<i>State v. Vaughn</i> , 83 Wn. App. 669, 924 P.2d 27 (1996).....	13-15
<i>State v. Watson</i> , 160 Wn.2d 1, 154 P.3d 909 (2007).....	12
<i>State v. Williams</i> , 144 Wn.2d 197, 26 P.3d 890 (2001).....	12
<i>State v. Woodward</i> , 116 Wn. App. 697, 67 P.3d 530 (2003).....	18

### UNITED STATES SUPREME COURT CASES

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	11
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	9, 11
<i>Fuller v. Oregon</i> , 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974)..	18

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I .....12  
U.S. Const. amend XIV .....12

WASHINGTON STATUTES

RCW 9.94A.120(2).....14  
RCW 9.94A.120(2) (2000) .....10  
RCW 9.94A.120(2)(d) (2000).....10  
RCW 9.94A.320.....13  
RCW 9.94A.360.....13  
RCW 9.94A.390(2)(d) (2000).....10  
RCW 9.94A.505.....10  
RCW 9.94A.515.....13  
RCW 9.94A.525.....13  
RCW 9.94A.535.....10  
RCW 9.94A.535(3)(r).....4  
RCW 10.01.160(3).....18  
RCW 10.73.160 ..... 17-18  
RCW 10.73.160(4).....18

## **I. RESPONSE TO ISSUES PRESENTED**

- A. The Aggravating Factor of Impact on Others is appropriate in the present case based on the unique facts.
- B. The aggravating factor permitting an exceptional sentence if an offense “involved a destructive and foreseeable impact on persons other than the victim” is not unconstitutionally vague as applied to Mr. DeVore’s case.
- C. Mr. DeVore’s exceptional sentence is not clearly excessive.
- D. The court has discretion to impose appellate costs and should use its discretion in deciding whether to impose costs.

## **II. STATEMENT OF FACTS**

On November 24, 2014, Thomas Christian and Brenda Losey were together at Biomat to donate plasma. CP 17-19. At the time, they were in a relationship. RP 09/09/2016 at 33. While they were sitting with each other, the defendant, who was the estranged husband of Ms. Losey, entered the lobby, walked directly to Mr. Christian, and stabbed him. RP 09/09/2016 at 13. Ms. Losey made frantic efforts to protect Mr. Christian during the stabbing and its aftermath, and then comforted him as he died. RP 09/09/2016 at 13-14, 34.

The defendant was charged with Murder in the Second Degree with the Aggravating Factor of Impact on Others. CP 1-2. At arraignment,

the defendant stated that he was going to plead guilty to both Murder in the Second Degree and the aggravating factor, and the State attempted to file an amended Information of Murder in the First Degree with the Aggravating Factor of Impact on Others. CP 66. The trial judge allowed the defendant to plead guilty to both Murder in the Second Degree and the Aggravating Factor of Impact on Others. CP 69. The trial judge later reversed itself and allowed the State to file an amended Information. CP 70. That decision was reversed by Division III of the Court of Appeals. CP 82-98. At no time during this process did the defendant challenge the constitutionality of the Aggravating Factor of Impact on Others. RP 12/10/2014; RP 12/22/2014; RP 12/29/2014; RP 01/09/2015; RP 01/21/2015.

At the sentencing hearing on September 9, 2016, a video of the stabbing was admitted into evidence and played for the court. RP 09/09/2016 at 12. The video showed approximately 30 seconds of the couple sitting together and holding hands before the defendant entered. RP 09/09/2016 at 12. Ms. Losey and Mr. Christian see the defendant for a moment and then the defendant takes out his knife and stabs Mr. Christian. RP 09/09/2016 at 13. The video shows that Mr. Christian is immediately disabled, however Ms. Losey is able to react. RP 09/09/2016 at 13. Ms. Losey gets in between the defendant and Mr. Christian in an effort to save

Mr. Christian and she does so knowing the defendant has a knife. RP 09/09/2016 at 13. The defendant acts like he may continue the stabbing and Ms. Losey pushes him, is removed at one time, and then returns a second time in an effort to save Mr. Christian. RP 09/09/2016 at 13.

The court heard testimony from Ms. Losey about the severe impact the death of Mr. Christian had on her life. RP 09/09/2016 at 32-36. She explained that on the day of the stabbing, she saw the knife and thought that she was next. RP 09/09/2016 at 34. After the defendant walked out of the door, she went straight to Mr. Christian, realized he was stabbed, and could not stop the bleeding. RP 09/09/2016 at 34. She was holding him, talking to him, and telling him not to leave her. RP 09/09/2016 at 34. She stated, "I can't get the blood out of my head, out of my heart, off my hands. Though you don't see it, it's still there. I relive this every day." RP 09/09/2016 at 34.

The standard range sentence for the charge of Murder in the Second Degree with an offender score of zero is 123 months to 220 months. CP 101. Based on the aggravating factor, the State asked for 330 months. RP 09/09/2016 at 16.

The trial court judge, Judge Mitchell, imposed a sentence of 220 months with 110 months for the Aggravating Factor of Impact on Others for a sentence of 330 months. CP 129; RP 09/09/2016 at 58. Judge

Mitchell considered what a just sentence would be and what is commensurate with the nature of the defendant's action. CP 128; RP 09/09/2016 at 57-58. Judge Mitchell found that this is a heinous crime that the defendant has pleaded guilty to and has been convicted of. CP 128; RP 09/09/2016 at 55. Specifically, the court highlighted the video that showed the nature of the crime and the horrific impact it had on Mr. Christian and Ms. Losey. CP 128; RP 09/09/2016 at 55.

While Judge Mitchell heard from other people who spoke about how the death of Mr. Christian impacted their lives, he focused on the severe impact this had on Ms. Losey. CP 129; RP 09/09/2016 at 55.

The court based the sentence on the defendant's guilty plea to the Aggravating Factor of Impact on Others, the evidence in the hearing including the video of the murder, and the statement of Ms. Losey. CP 129.

### III. ARGUMENT

**A. The Aggravating Factor of Impact on Others is appropriate in the present case based on the unique facts.**

A trial court may impose an exceptional sentence if the offense involves a "destructive and foreseeable impact on persons other than the victim." RCW 9.94A.535(3)(r). Exceptional sentences are intended to impose additional punishment where the particular offense at issue causes

more damage than that contemplated by the statute defining the offense. *State v. Davis*, 182 Wn.2d 222, 229, 340 P.3d 820 (2014). The Court of Appeals in *State v. Cuevas-Diaz*, 61 Wn. App. 902, 906, 812 P.2d 883 (1991), stated: “To provide support for an exceptional sentence, the defendant’s actions must have had an impact on . . . ‘other persons’ of a destructive nature that is not normally associated with the commission of the offense in question and this impact must be foreseeable to the defendant.” The court may sentence the defendant to a term of confinement up to the statutory maximum for the underlying conviction if it finds that there are substantial and compelling reasons justifying an exceptional sentence. *State v. Chanthabouly*, 164 Wn. App. 104, 143, 262 P.3d 144 (2011).

In the Division II case, *State v. Chanthabouly*, the defendant contended that the State did not prove in this case that the impact was more severe than the average murder that takes place in public. 164 Wn. App. at 142. The Court disagreed. *Id.*

Chanthabouly was found guilty of second degree murder with the aggravating factor that the murder involved a destructive and foreseeable impact on persons other than the victim. *Id.* at 126. The trial court sentenced the defendant to 220 months, the maximum sentence within the standard range, plus a 60-month firearm enhancement. *Id.* at 127.

Additionally, based on the jury's special verdict, the trial court sentenced him to an exceptional sentence of lifetime community custody. *Id.* The facts presented at trial included students and staff at Henry Foss High School in Tacoma returning to school after winter vacation. *Id.* at 109. The defendant, a Foss student, approached another student in a school hallway before the beginning of first period, pulled out a gun, and shot him in the head from a distance of about one foot. *Id.* He then fired two more shots at his body and walked out of the building. *Id.* Several students, teachers, and administrators who saw or heard the shooting testified at trial. *Id.* at 125. Five adults and one student testified how the shooting affected them. *Id.*

In *Chanthabouly*, the court found that any rational trier of fact could have found that the shooting involved a "destructive impact" on the students, teachers, and administrators at Foss. *Id.* at 144. The court reasoned that the shooting occurred in a public hallway populated with students and staff. *Id.* The court also found this destructive impact was "both unique and foreseeable." *Id.* Specifically, the court stated that the defendant killed a fellow student at his school in front of his schoolmates. *Id.* Several teachers and administrators heard the shooting and tried to save the victim. *Id.* The court further found that this was an even more traumatizing experience for non-victims than in *Johnson*, a case where the Washington Supreme Court affirmed the exceptional sentence of a

defendant who “discharge[d] a deadly weapon at persons fleeing in automobiles in the immediately vicinity of a public elementary school while classes [were] in session.” *Id.* (quoting *State v. Johnson*, 124 Wn.2d 57, 75, 79, 873 P.2d 514 (1994)). The *Chanthabouly* court agreed with *Johnson* and found that the individual who discharges the weapon in such circumstances “should reasonably foresee that other persons, that is, children and their parents, who are not necessarily the intended victims, would be traumatized by those actions.” *Id.* at 144-45 (quoting *Johnson*, 124 Wn.2d at 75).

In the present case, defense argues that the court’s findings of fact in support of the exceptional sentence discuss the effect of the murder on Mr. Christian’s entire family. Brief of Appellant – Corrected at 4. While the court acknowledges the impact on the entire family, it specifically made findings about the severe impact on Ms. Losey. CP 128-29.

Finding of fact 5 states:

The video also showed the significant impact on Ms. Brenda Losey who was present at the time of the stabbing. The Court found that it was difficult to watch the video and that to actually have been present, as Ms. Losey was, would have an extremely significant impact on her.

CP 128.

Finding of Fact 13 states:

The Court considered the severe impact that the crime had, particularly, on Ms. Losey and how it has impacted not only her, but her family, Mr. Christian's family, and even the defendant's family. The Court heard testimony from Ms. Losey at sentencing about the severe impact it has had on her life.

CP 129.

The court, in its Conclusions of Law, states:

Based on the above findings of fact, the defendant's guilty plea to the aggravated factor of Impact on Others, the evidence in the hearing including the video of the murder, and the statement of Brenda Losey, the Court concludes that there are substantial and compelling reasons justifying an exceptional sentence of 330 months, which is fifty percent higher than the top of the sentencing range.

CP 129.

This impact is not one that is present in all murder cases, as argued by the defendant. Defense argues that the legislature accounts for those family members and close friends who have been affected by the murder, but what the legislature does not account for is a loved one who was present at the time of the murder, witnessed the murder, tried to stop the murder from happening, and then tried to save the victim from dying.

Here, there is an impact on another person of a destructive nature that is not normally associated with the commission of the offense in question and it was foreseeable to the defendant. The loved one of a murder victim who witnesses the murder, believes they may be next,

intervenes, and then tries to save the victim is not normally associated with the commission of Murder in the Second Degree. Additionally, the defendant must have foreseen this impact on Ms. Losey. He was aware she was in a romantic relationship with Mr. Christian. The video shows Ms. Losey and Mr. Christian sitting next to each other and holding hands. The defendant would foresee that killing him in front of her would have a destructive impact on her.

**B. The aggravating factor permitting an exceptional sentence if an offense “involved a destructive and foreseeable impact on persons other than the victim” is not unconstitutionally vague as applied to Mr. DeVore’s case.**

**1. Even after *Blakely*,<sup>1</sup> the void-for-vagueness doctrine does not apply to aggravating factors that increase a sentence beyond the standard range based on factual findings.**

The defendant argues that the Impact on Others aggravating factor is unconstitutionally vague. However, the Washington Supreme Court has held that aggravating factors are not subject to a vagueness challenge. *State v. Baldwin*, 150 Wn.2d 448, 78 P.3d 1005 (2003). The *Baldwin* court found that the “sentencing guideline statutes” at issue there were “not subject to a vagueness analysis” because they did not create a constitutionally protectable liberty interest. 150 Wn.2d at 459, 461. There,

---

<sup>1</sup> *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)

the sentencing statutes at issue were former RCW 9.94A.120(2)<sup>2</sup> (2000), which provided for the imposition of a standard range sentence unless the trial court found substantial and compelling reasons to impose an exceptional sentence, and former RCW 9.94A.390(2)(d)<sup>3</sup> (2000), which characterized a crime that was a “major economic offense” as an aggravating circumstance that could justify an exceptional sentence under former RCW 9.94A.120(2)(d) (2000). *Baldwin*, 150 Wn.2d at 458-59. The *Baldwin* court stated that “the due process considerations that underlie the void-for-vagueness doctrine” did not apply to these sentencing guideline statutes because these statutes did not (1) define conduct, (2) allow for arbitrary arrest and criminal prosecution, (3) inform the public of penalties attached to criminal conduct, or (4) vary the legislatively imposed maximum and minimum penalties for any crime. *Id.* at 459. Because nothing in these guideline statutes “require[d] a certain outcome,” they did not create a constitutionally protectable liberty interest. *Id.* at 461.

The defendant concedes that his argument has been rejected in *State v. Chanthabouly* and asks that this Court not follow it. Br. of Appellant – Corrected at 8, n.4. However, the logic in *Chanthabouly* is sound.

---

<sup>2</sup> Recodified as RCW 9.94A.505 in 2001.

<sup>3</sup> Recodified as RCW 9.94A.535 in 2001.

The *Chanthabouly* court relied on *Baldwin* and found that the sentencing guidelines statutes were not subject to a vagueness analysis because they did not create a constitutionally protectable liberty interest. *Id.* (citing *Baldwin*, 150 Wn.2d at 458). The court in *Chanthabouly* stated:

Chanthabouly argues, without authority or significant discussion, that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), might affect *Baldwin*'s holding. Even assuming without deciding, that these cases apply, there would be no constitutional violation here because the jury found the aggravating circumstances beyond a reasonable doubt.

164 Wn. App. at 142.

Therefore, the courts have ruled on whether the statute is unconstitutionally vague and have decided it is not.

The defendant also failed to raise this issue at the trial court level. Rather, the defendant argued to the trial court and the Court of Appeals to accept his guilty plea to the charge of Murder in the Second Degree with the Aggravating Factor of Impact on Others. In the defendant's "Motion, Affidavit, and Argument Confirming Matthew DeVore's Plea of Guilty to Murder in the Second Degree," he asked the court to accept his guilty plea and acknowledged the plea was made knowingly, intelligently, and voluntary. CP 26-32. At no time did the defendant argue that the Aggravating Factor of Impact on Others was unconstitutionally vague and

conversely argued to the court to accept his guilty plea to the aggravating factor.

To raise an issue for the first time on appeal, the defendant must show manifest error. *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). The defendant did not address this in his brief.

**2. The “destructive and foreseeable impact” aggravating factor does not allow for arbitrary enforcement and provides citizens a fair warning of the conduct it punishes.**

Under the due process clause of the Fourteenth Amendment, a statute is void for vagueness if either: (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *State v. Watson*, 160 Wn.2d 1, 6, 154 P3d 909 (2007) (quoting *State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001)). If the statute at issue does not involve First Amendment rights, then a vagueness challenge is to be evaluated by examining the statute as applied under the particular facts of the case.

Again, the *Baldwin* and *Chanthabouly* decisions control and the defendant’s argument that the aggravating factor is void for vagueness

fails. With disregard of these findings, the defendant argues that the statutory language “leaves the fact finder guessing as to several key questions: should a sentence for a murder be higher because the victim was particularly loved by his/her family? Is this true even though all families would be affected by the murder of a loved one?” Br. of Appellant – Corrected at 12.

What defense fails to acknowledge is that although many of Mr. Christian’s family and loved ones were affected by the murder, Ms. Losey, Mr. Christian’s romantic partner, was sitting next to him when he got stabbed by her estranged husband. Not only was she sitting next to him, she attempted to fight off the defendant, believed she was possibly going to be stabbed next, and comforted Mr. Christian as he died in her hands.

**C. Mr. DeVore’s exceptional sentence is not clearly excessive.**

The Sentencing Reform Act of 1981 created presumptive sentencing ranges for most felonies based on the seriousness of the crime and the offender’s criminal history. RCW 9.94A.320 – .360.<sup>4</sup> Under the Sentencing Reform Act, a trial court must impose a sentence within the standard range unless it finds substantial and compelling reasons to justify a departure. *State v. Vaughn*, 83 Wn. App. 669, 674, 924 P.2d 27 (1996)

---

<sup>4</sup> Recodified as RCW 9.94A.515 - .525.

(citing RCW 9.94A.120(2)); *State v. Grewe*, 117 Wn.2d 211, 214, 813 P.2d 1238 (1991). The court in *Vaughn* found that the appellate courts independently determine as a matter of law whether the trial court's reasons justify imposing a sentence outside the presumptive range. *Vaughn*, 83 Wn. App. at 675 (citing *State v. Nordby*, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986)). The reasons must be "substantial and compelling" and must take into account factors other than those which are necessarily considered in computing the presumptive range for the offense. *Nordby*, 106 Wn.2d at 518. A court cannot base an exceptional sentence on a fact that does not distinguish the defendant's behavior from that inherent in all crimes of that type. *Vaughn*, 83 Wn. App. at 675 (citing *State v. Tierney*, 74 Wn. App. 346, 354, 872 P.2d 1145 (1994)). The court will uphold an exceptional sentence if it finds any of the sentencing court's reasons for imposing the sentence valid. *Vaughn*, 83 Wn. App. at 675 (citing *State v. Gaines*, 122 Wn.2d 502, 512, 859 P.2d 36 (1993)). Additionally, even if the court decides that any of the reasons are invalid, remand is necessary only if it is not clear whether the sentencing court would have imposed the same sentence based on the valid factors alone. *Vaughn*, 83 Wn. App. at 675 (citing *Gaines*, 122 Wn.2d at 512).

The length of an exceptional sentence is reviewed only for abuse of the trial court's discretion. *State v. Ritchie*, 126 Wn.2d 388, 392, 894

P.2d 1308 (1995). If the reasons for the exceptional sentence are supported by the record and justify an exceptional sentence upward, a reviewing court must find that the sentence is one no reasonable person would have imposed (i.e., it is based on untenable grounds or imposed for untenable reasons). *Vaughn*, 83 Wn. App. at 681 (citing *Ritchie*, 126 Wn.2d at 392-93; *State v. Oxborrow*, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986)). If the trial court did not base its sentence on an improper reason such as race, then the sentence is excessive only if its length, in light of the record, “shocks the conscience.” *Vaughn*, 83 Wn. App. at 681 (quoting *Ritchie*, 126 Wn.2d at 396; *State v. Ross*, 71 Wn. App. 556, 571, 861 P.2d 473 (1993), *review denied*, 123 Wn.2d 1019, 875 P.2d 636 (1994)).

The record and the findings made by the trial court support the sentence of 330 months. This is 150% of the standard range sentence. The defendant has not cited any case where a sentence of 150% of the top end of the sentencing guidelines has been reversed for being excessive. Our courts have upheld exceptional sentences where the court imposed more than 150% of the standard range. *Oxborrow*, 106 Wn.2d 525; *State v. Ross*, 71 Wn. App. 556, 861 P.2d 473 (1993); *State v. Scott*, 72 Wn. App. 207, 866 P.2d 1258 (1993). In the *Scott* case, the defendant was charged and convicted of Murder in the First Degree. 72 Wn. App. at 210. The court made findings and conclusions of law setting forth the reasons for its

departure, specifically (1) abuse of trust, (2) the victim's vulnerability, (3) deliberate cruelty, and (4) multiple injuries inflicted in the commission of the crime. *Id.* The defendant's offender score was a zero. *Id.* His standard sentencing range was 240 to 320 months. *Id.* The court imposed an exceptional sentence of 900 months. *Id.* The court affirmed the sentence. *Scott*, 72 Wn. App. at 221.

In the present case, the trial court, in its findings, stated that the video of the murder was viewed at the sentencing. CP 128. The trial court found that the video showed the nature of the crime and the impact it had on Mr. Christian. CP 128. Specifically, the trial court found that the video showed the "significant impact on Ms. Brenda Losey who was present at the time of the stabbing. The Court found that it was difficult to watch the video and that to actually have been present, as Ms. Losey was, would have an extremely significant impact on her." CP 128. The court also made findings that it heard from other family members who, although not present at the time of the murder, were significantly impacted by this event. The trial court again made a finding that it considered the severe impact that the crime had, particularly on Ms. Losey and how it has impacted not only her, but her family, Mr. Christian's family, and even the defendant's family. CP 129. The trial court included that it heard

testimony from Ms. Losey at sentencing about the severe impact it has had on her life. CP 129. The trial court's Conclusions of Law stated:

Based on the above findings of fact, the defendant's guilty plea to the aggravated factor of Impact on Others, the evidence in the hearing including the video of the murder, and the statement of Brenda Losey, the Court concludes that there are substantial and compelling reasons justifying an exceptional sentence of 330 months, which is fifty percent higher than the top of the sentencing range.

CP 129.

Here, the trial court did not base its sentence on an improper reason. Rather, the reasoning for the exceptional sentence is justified by the trial court's viewing of the video that showed the murder and the statement made by Ms. Losey at the sentencing hearing about how severely she was impacted by witnessing the murder of her loved one.

**D. The court has discretion to impose appellate costs and should use its discretion in deciding whether to impose costs.**

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn. App. 342, 989 P.2d 583 (1999).

*State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), provides guidance. First, the *Sinclair* court noted that while it may be necessary to remand a case to the trial court to determine if the defendant can pay costs,

that is not an appropriate remedy for the appellate courts. The statute imposing trial court costs (RCW 10.01.160(3)) is different from the statute authorizing appellate court costs (RCW 10.73.160). Ability to pay is one factor an appellate court can consider, but not the only one, and facts relevant to an exercise of discretion can be set out in a brief.

The defendant has the initial burden to show indigence. *See State v. Lundy*, 176 Wn. App. 96, 104 n.5, 308 P.3d 755 (2013). Defendants who claim indigence must do more than plead poverty in general terms in seeking remission or modification of LFOs. *See State v. Woodward*, 116 Wn. App. 697, 703-04, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. *See Blank*, 131 Wn.2d at 236-37 (quoting *Fuller v. Oregon*, 417 U.S. 40, 53-54, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974)).

In *State v. Blazina*, 182 Wn.2d 827, 334 P.3d 680 (2015), the court instructed that trial courts should carefully consider a defendant's financial circumstances as required by RCW 10.01.160(3) before imposing discretionary LFOs. However, the legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *See RCW 10.73.160(4)*.

In the present case, the trial court did not believe that the defendant had the ability or would likely have the ability in the foreseeable future to pay legal financial obligations, other than those that are mandatory. RP 09/09/2016 at 58. Additionally, the defendant filed a Motion & Order of Indigency. CP 74-75. The State does not have any evidence that the defendant's financial circumstances have changed and, if the State prevails, is not asking this Court to impose any appellate costs.

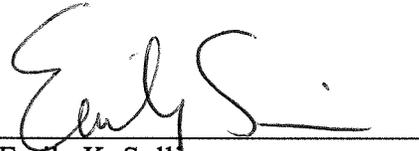
#### IV. CONCLUSION

At the sentencing hearing, the trial court viewed the video of the murder, heard testimony from Mr. Christian's family members, and heard testimony from Ms. Losey, who was present and not only witnessed her estranged husband stab her loved one, but also tried to save Mr. Christian and watched him die in her hands. The trial court sentenced the defendant to 220 months for the Murder in the Second Degree charge and an additional 110 months for the Impact on Others Aggravating Factor. The exceptional sentence is justified because the impact on Ms. Losey is not the type of impact the legislature intended when setting the standard range for Murder in the Second Degree. The aggravating factor statute is not unconstitutionally vague. This has already been decided by the courts in *Baldwin* and *Chanthabouly*. The sentence was not excessive. The record and findings are clear to support the sentence imposed by the trial court.

If the State does prevail, it will not seek appellate costs based on the record made by the trial court, the length of the sentence, and the Motion & Order of Indigency filed by the defendant.

**RESPECTFULLY SUBMITTED** this 20th day of June, 2017.

**ANDY MILLER**  
Prosecutor

A handwritten signature in cursive script, appearing to read "Emily K. Sullivan", written over a horizontal line.

Emily K. Sullivan,  
Deputy Prosecuting Attorney  
Bar No. 41061  
OFC ID NO. 91004

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

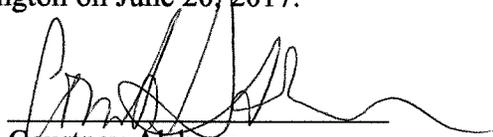
Skylar Brett  
Law Office of Skylar Brett  
P.O. Box 18084  
Seattle, WA 98118

E-mail service by agreement was made to the following parties:  
skylarbrettlawoffice@gmail.com

Lise Ellner  
Attorney at Law  
P.O. Box 2711  
Vashon, WA 98070-2711

E-mail service by agreement was made to the following parties:  
liseellnerlaw@comcast.net

Signed at Kennewick, Washington on June 20, 2017.

  
\_\_\_\_\_  
Courtney Alsbury  
Appellate Secretary

**BENTON COUNTY PROSECUTOR'S OFFICE**

**June 20, 2017 - 5:02 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 34728-1  
**Appellate Court Case Title:** State of Washington v. Matthew Henry De Vore  
**Superior Court Case Number:** 14-1-01303-9

**The following documents have been uploaded:**

- 347281\_Briefs\_20170620165630D3877728\_9121.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was 347281 Devore Respondents Brief.pdf*

**A copy of the uploaded files will be sent to:**

- Liseellnerlaw@comcast.net
- andy.miller@co.benton.wa.us
- prosecuting@co.benton.wa.us
- skylarbrettlawoffice@gmail.com
- valerie.skylarbrett@gmail.com

**Comments:**

---

Sender Name: Courtney Alsbury - Email: courtney.alsbury@co.benton.wa.us

**Filing on Behalf of:** Emily Kay Sullivan - Email: emily.sullivan@co.benton.wa.us (Alternate Email: )

Address:  
7122 W. Okanogan Place  
Kennewick, WA, 99336  
Phone: (509) 735-3591

**Note: The Filing Id is 20170620165630D3877728**