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IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DEBRA J. SHOEMAKER

Appellant.

APPEAL FROM THE CHELAN COUNTY SUPERIOR COURT

Cause No. 16-1-00490-4

The Honorable Lesley A. Allan

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF THE ARGUMENT

Debra Shoemaker appeals the trial court's denial of a Drug Offender Sentence Alternative on the grounds that the court failed to follow proper procedure during the sentencing hearing and violated Ms. Shoemaker's due process rights. During the sentencing hearing, the court allowed the victim to present untested, adjudicative facts about the details of the crime. However, victims do not have this right to intervene under the Washington Constitution or State Victim's Rights statutes. By allowing introduction of this unreliable evidence and using it as the foundation of its decision, the trial court violated Ms. Shoemaker's due process rights. Ms. Shoemaker's counsel was also ineffective for failing to object to this evidence at the sentencing hearing. The remedy is to remand for resentencing before a different trial judge.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by allowing the victim to present untested adjudicative facts at the sentencing hearing and by relying on these facts in making its decision to deny a DOSA sentence.
2. Ms. Shoemaker's counsel did not provide effective assistance because he failed to object to the unproven, contested facts presented by the victim.
3. The trial court violated the appearance of fairness doctrine.

ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Neither Article I, section 35 of the Washington State Constitution nor Victim's rights statutes, such as RCW 7.69.030, give victims the right to present evidence or unproven, unacknowledged adjudicative facts for the court to consider during a sentencing hearing.
2. The trial court violated Ms. Shoemaker's due process rights by allowing a representative of the victim to present new, unproven evidence at sentencing and by relying on this evidence in denying the DOSA sentence.
3. The introduction of this evidence at trial is not harmless error, as the trial court relied on this unreliable information in making a decision.

4. Ms. Shoemaker's failure to object to the introduction of this evidence does not mean she waived this issue on appeal.
5. Alternatively, if an objection was required, defense counsel's performance was deficient for failing to object to the unproven, contested facts, and Ms. Shoemaker was prejudiced because the trial court denied the DOSA sentence based on these unproven facts.
6. The trial court violated the appearance of fairness doctrine by knowingly allowing in the unproven facts and by expressing an opinion that Ms. Shoemaker deserves to be punished once she heard the facts.

C. STATEMENT OF THE CASE

On January 24, 2016, Appellant Debra Shoemaker burglarized a home on Canyon Creek Dr. in Wenatchee, Washington. According to Ms. Shoemaker's guilty plea and the police report, she broke into the home with Cindy Simpson to take prescription medication for Ms. Simpson to sell. (CP 45) The women entered the residence through the side garage door by hitting it with their shoulders until it broke. (CP 1) Ms. Simpson also packed a duffle bag with personal belongings of the homeowner. (CP 45) Ms. Shoemaker carried the duffle bag out of the house. (CP 45) They put the items into the homeowner's vehicle and drove to Ms. Simpson's home and unloaded. (CP 1)

Police found a latex glove and women's knit hat at the residence. (CP 1) DNA on the latex glove matched Ms. Shoemaker. (CP 1) Ms. Shoemaker was arrested at her residence on July 13, 2016. (CP 1) She told police that Ms. Simpson had set her up. (CP 1) Police found methamphetamine and a glass pipe for smoking in Ms. Shoemaker's purse at the time of her arrest. (CP 1) Ms. Shoemaker was taken to the police station where she agreed to a recorded interview. (CP 1)

Ms. Shoemaker knew that Ms. Simpson would try to sell the stolen items for less than \$750.00. (CP 45) Ms. Shoemaker committed the crime because she felt sorry for Ms. Simpson and because she had been losing badly at gambling. (CP 1)

On or around July 18, 2016, Ms. Shoemaker was charged with residential burglary, theft of a motor vehicle, malicious mischief in the third degree, theft in the third degree, and unlawful possession of a controlled substance - methamphetamine. (CP 8-11)

Within the first few months of being charged, Ms. Shoemaker's attorney questioned Ms. Shoemaker's competency to stand trial, and believed that Ms. Shoemaker was potentially incapable of aiding counsel in her defense and that she may have suffered from a mental disease or defect at the time of the alleged crime. (CP 12-13) Counsel explained that Ms. Shoemaker was diagnosed with schizophrenia and was either in-

between medications or off her medications at the time of the incident.

(CP 13) He suspected that she continued to be off her medication as she was fairly incoherent during their meeting on July 25, 2016. (CP 13)

The court ordered a mental health evaluation. (CP 14-19) A licensed psychologist at Eastern State Hospital diagnosed Ms. Shoemaker with possible Bipolar Disorder by History, polysubstance use disorder, borderline personality features, and posttraumatic stress disorder. (CP 24-25) The psychologist found that Ms. Shoemaker had the capacity to understand the proceedings and assist in her own defense. (CP 24) But the psychologist also opined that Ms. Shoemaker should be evaluated by a designated mental health provider due to her self-injurious behavior and borderline personality features. (CP 29) On October 5, 2016, the court found Ms. Shoemaker competent to stand trial. (CP 30)

Ms. Shoemaker entered into plea negotiations with the State. (CP 33-34) On April 3, 2017, Ms. Shoemaker pleaded guilty to burglary in the second degree (Count 1) and theft in the third degree (Count 2), as laid out in the second amended information. (CP 35-36) Ms. Shoemaker stated that she understood the standard range sentence for second degree burglary with an offender score of 5 was 17-22 months, and third degree theft was 0-364 days. (CP 38) In return for the guilty plea, the prosecutor recommended a residential Drug Offender Sentencing Alternative

(DOSAs), standard financial obligations, and restitution to be determined.
(CP 40, 50)

Ms. Shoemaker was screened and found eligible for a DOSA sentence. (CP 49, 54-57) A treatment bed date and appointment was scheduled for July 19, 2017, around the same day as sentencing. (CP 54)

A sentencing hearing was held on July 17, 2017, before the Honorable Lesley Allan. The State recommended a residential DOSA sentence with 24 months community custody for the second degree burglary charge and a suspended jail sentence for the third degree theft charge. (7/17/17 RP 5-6) The State noted that the crime stemmed from a combination of chemical dependency and mental illness, and based on these factors, considered the DOSA to be a correct sentence. (7/17/17 RP 6)

The court allowed a friend of Mr. Harmon's family, Steve Myers¹, to speak on behalf of the family. Starting with information about the

¹ Mr. Myers was introduced to the court as an attorney from Portland. (7/17/17 RP 6) Mr. Myers informed the court that he was a criminal defense attorney working in Washington and Oregon. (7/17/17 RP 8) When asked by the court if he ever practiced in Washington, he told the court that he had. (7/17/17 RP 22) However, a search of the Washington State Bar Association attorney directory does not show anyone named Steve Myers as a licensed attorney in Washington. He clarified at the sentencing hearing that he was not representing the family. (7/17/17 RP 8) Since Mr. Myers does not appear to be an attorney in Washington, he

victim's deceased wife, Mr. Myers presented the court with information supplemental to what was in the police report. (7/17/17 RP 8) The court acknowledged that she did not have this information and allowed Mr. Myers to proceed. (7/17/17 RP 8) Mr. Myers told the court that for the last 18 months, with the help of a private investigator, had reconstructed the case. (7/17/17 RP 10) He said that he retrieved video from a 7-Eleven showing Ms. Shoemaker making telephone calls, and that he was able to determine that the recipient was Mr. Harmon's phone. (7/17/17 RP 10) Mr. Myers said the video from the 7-Eleven had a positive identification of both perpetrators of the crime. (7/17/17 RP 14)

Mr. Myers used the facts from his investigation to argue that Ms. Shoemaker intended to take the items and that she had no remorse. He said Ms. Shoemaker and Ms. Simpson were donning caps and burglary tools, and taking one car over "because they obviously had intent to steal the car as well, went over to the house after confirming he was gone, and essentially took gunnysacks and took virtually all mementos—heirlooms, jewelry clothing—that belonged to his wife including—this, I think, is a reflection of the depravity that was exhibited by both of them frankly – the

could not act in that capacity by introducing evidence and testimony at the sentencing hearing.

his-and-hers watches, and his-and-hers diamond rings.” (7/17/17 RP 10-11)

Mr. Myers continued into specific details about how Ms. Shoemaker and Ms. Simpson broke into the home by cracking the double-bolted garage door, the specific steps they went through to steal and hide the car by disassembling the key fob and wiping down the vehicle, and how they took a file with specific identifying information from Mr. Harmon’s home, including a death certificate. (7/17/17 RP 12-13)

Mr. Myers also presented hearsay statements from Ms. Shoemaker when he argued that she gave them no real help in trying to recover items from the home. (7/17/17 RP 13-14) Mr. Myers said Mr. Harmon was steadfast in Ms. Shoemaker going to prison. (7/17/17 RP 23)

Ms. Shoemaker’s attorney argued against the facts presented by the victim, stating that Ms. Shoemaker had been honest with what had happened and that someone else had returned to the home after she left. (7/17/17 RP 16-17) Her attorney also pointed out that she suffers from mental illness and “ping-pongs” from thought to thought during conversations. (7/17/17 RP 17) Ms. Shoemaker was surprised when she found out what had been taken from the house. (7/17/17 RP 17-18)

Sharon Clifner, a Psychiatric-Mental Health Nurse Practitioner and Ms. Shoemaker’s psychiatric provider, spoke on Ms. Shoemaker’s behalf

and wrote a letter to the court. In her letter, Ms. Clifner wrote to the court about concerns for Ms. Shoemaker's safety at home. (CP 64) Ms. Shoemaker was a victim of long-standing domestic violence and last year her husband broke her arm in a fight. (CP 64) At the hearing, Ms. Clifner addressed Ms. Shoemaker's mental illness and the value of a DOSA sentence. She stressed that Ms. Shoemaker was not stable, and that she needed to start another medication for stability. (7/17/17 RP 20) She believe that the DOSA was the very best thing for Ms. Shoemaker, her patient. (7/17/17 RP 20) Ms. Clifner reasoned that the DOSA would keep Ms. Shoemaker safe and it would put her in a treatment program to resolve some of her underlying mental health issues that may have contributed to the crime. (7/17/17 RP 20)

Ms. Shoemaker apologized to Mr. Harmon and his family for her senseless actions and the fear she caused. (7/17/17 RP 20-21) She acknowledged her mental health and gambling issues and her need for treatment. (7/17/17 RP 21) She accepted full responsibility and stated that she did not want to be that person who makes bad choices again. (7/17/17 RP 21)

In issuing its sentence, the court said that Mr. Harmon's circumstances were more compelling than others' based on the details that were beyond the police report. (7/17/17 RP 28) The court noted that Mr.

Myers provided information not in the file, including that Mr. Harmon's wife died about a month and a half before the incident, that the defendants took essentially all of the mementos that he had with his wife of 64 years—clothing, jewelry, rings, watches, hearing aids, and death certificates. (7/17/17 RP 28) The court said that people like to get information on other people, such as “Social Security numbers and the whatnot” to use them for identity theft. (7/17/17 RP 28) Importantly, the court stated,

It appears to the Court, Ms. Shoemaker, that this was a very calculated crime. I was aware that there was a hat that was found at the scene. I was aware that there was a Latex glove that was found at the scene. I was not aware, I don't think, that the car had been found all wiped down and vacuumed and with the disassembled key fob. I wasn't aware until today of the nature of the things that had been taken.

(7/17/17 RP 29)

Ms. Shoemaker contested the trial court's finding that she didn't help the victim. She attempted to explain to the court that she worked with the family to get all the things back and asked Ms. Simpson to return it. (7/17/17 RP 29) She also contested the fact that she took anything from the house. (7/17/17 RP 30)

The court questioned Ms. Shoemaker about her involvement in getting the items returned and about Ms. Shoemaker's call to the police the day after the burglary to report the location of the car. (7/17/17 RP 30-32) The court also asked questions to the prosecutor and the family's attorney about facts regarding the return of the car and if either could determine if Ms. Shoemaker called the police after the incident. (7/17/17 RP 32-33) The family's attorney admitted that a call was made, but did not know if it was Ms. Shoemaker. (7/17/17 RP 32-33) The court found that Ms. Shoemaker did not take action in the few days after the crime. (7/17/17 RP 33-35)

Ultimately, the court placed significant weight on the input from the victim. (7/17/17 RP 34) The court found that all his mementos were gone and that Ms. Shoemaker could have done something to help, but she did nothing. (7/17/17 RP 34-35) Ms. Shoemaker again disagreed. (7/17/17 RP 35) While the court stated that in some ways a residential DOSA would be good for Ms. Shoemaker, it continued by saying that one of the reasons that people are sentenced is for punishment and community protection. (7/17/17 RP 33-34) The court concluded that Ms. Shoemaker was going to be held accountable for her crime. (7/17/17 RP 35)

For these reasons, the court denied a residential DOSA sentence and ordered the high range sentence of 22 months in prison for Count 1, and 364 days suspended for Count 2. (7/7/17 RP 35, 37)

Defense counsel asked the court if it would consider a prison-based DOSA for Ms. Shoemaker, which the State confirmed would be possible even with the length of Ms. Shoemaker's prison sentence. (7/7/17 RP 36-37) The Court responded that it was still not issuing a DOSA sentence. (7/7/17 RP 37)

Ms. Shoemaker appeals. The trial court violated its statutory authority and Ms. Shoemaker's due process rights by allowing the victim's representative to present unproven adjudicative facts at the hearing. This error was not harmless, as the trial court relied on these facts as the basis for its decision. Alternatively, Ms. Shoemaker's counsel's assistance was ineffective, as he failed to object to the introduction of these contested facts, which affected the outcome of Ms. Shoemaker's sentence. The errors combined with the appearance of fairness doctrine warrants a new sentencing hearing before a new trial judge.

D. ARGUMENT

1. The trial erred by allowing a family representative to present unproven, contested facts at the sentencing hearing and by basing

its sentencing decision on this unreliable information

Generally, a court's decision to impose a standard range sentence, and not a DOSA, is not appealable. *State v. Conners*, 90 Wn. App. 48, 53, 950 P.2d (1998); see RCW 9.94A.585(1). But, a standard range sentence may be challenged on constitutional grounds. *State v. McNeair*, 88 Wn. App. 331, 336-37, 944 P.2d 1099 (1997). Also, a defendant may appeal the trial court's procedure in imposing his sentence. *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986).

Here, the trial court committed legal error by allowing the victim representative to present evidence at the sentencing hearing without authority to intervene in the criminal trial and in violation of Ms. Shoemaker's due process rights.

- a. Neither Article I, section 35 of the Washington State Constitution nor Victim's rights statutes, such as RCW 7.69.030, give victims the right to present evidence or unproven, unacknowledged adjudicative facts for the court to consider during a sentencing hearing.

Crime victims are not allowed to introduce unproven, unadmitted, adjudicative facts regarding the circumstances of the crime at a sentencing hearing. Establishing adjudicative facts is reserved for the parties in the case, and crime victims do not have the right to intervene in such matters.

The rights of crime victims are addressed in Article I, section 35 of the Washington Constitution. The victim of a crime charged as a felony has the right to make a statement at sentencing and at any proceeding where the defendant's release is considered, subject to the same rules of procedure which govern the defendant's rights. WA CONST. ART. I, § 35. Washington courts have interpreted article 1, section 35 to mean that a crime victim or their representative is allowed to make a statement unless there is a constitutional impediment. *State v. Gentry*, 125 Wn.2d 570, 628-29, 888 P.2d1105 (1995).

RCW 7.69.030 lists the enumerated rights of crime victims. Victim rights at sentencing hearings are as follows:

- (12) With respect to victims and survivors of victims, to be informed by the prosecuting attorney of the date, time, and place of the trial and of the sentencing hearing for felony convictions upon request by a victim or survivor;
- (13) To submit a victim impact statement or report to the court, with the assistance of the prosecuting attorney if requested, which shall be included in all presentence reports and permanently included in the files and records accompanying the offender committed to the custody of a state agency or institution;
- (14) With respect to victims and survivors of victims, to present a statement personally or by representation, at the sentencing hearing for felony convictions; and
- (15) With respect to victims and survivors of victims, to entry of an order of restitution by the court in all felony cases, even when the offender is sentenced to confinement, unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment.

RCW 7.69.030(12)-(15); *See State v. A.W.*, 181 Wn. App. 400, 410, 326 P.3d 737 (2014).

Correspondingly, RCW 9.94A.500(1) states, “The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.”

However, RCW 7.69.030 does not give the victim the right to intervene in a criminal trial. *State v. A.W.*, 181 Wn. App. 400, 411, 326 P.3d 737 (2014). “[T]he power to prosecute criminal acts is vested in the public prosecutors.” *Id.* at 410, *quoting Protect the Peninsula’s Future v. City of Port Angeles*, 175 Wn. App. 201, 213, 304 P.3d 914 (2013).

Courts are required to hold hearings on adjudicative facts. *State v. Grayson*, 154 Wn.2d 333, 340, 111 P.3d 1183 (2005). “Adjudicative facts are usually those facts that are at issue in a particular case,” and must be developed. *Grayson*, 154 Wn.2d at 340, *quoting Korematsu v. United States*, 584 F. Supp. 1406, 1414 (N.D. Cal. 1984). “In a criminal case, adjudicative facts generally relate to the facts of the crime and the

defendant, ... *that directly affects the litigants before the court and are properly placed in contest by the parties.*” *Grayson*, 154 Wn.2d at 340 (emphasis added).

In *A.W.*, the court concluded that a victim, as a private party, had no right to intervene in criminal proceedings unless a specific authority granted them that right. *Id.* at 410. And, while the victim’s right statute, RCW 7.69.030, allowed for the submission of a victim impact statement, present a statement at sentencing hearings for felonies, and have the court enter an order of restitution in felony cases, it did not include the right to intervene. *A.W.* at 410-11.

Here, the trial court erred by allowing the victim to introduce unproven adjudicative facts, which as noted in *Grayson*, is reserved for *parties* in the case. The court allowed the victim’s representative to testify to information that was supplemental to what was in the police report and guilty plea, including: (1) information on the victim’s deceased wife (7/17/17 RP 8); (2) that video surveillance footage obtained through the family’s investigation showed Ms. Shoemaker making a telephone call and that the family determined that the call was to Mr. Harmon (7/17/17 RP 10, 14); (3) details on what Ms. Shoemaker took from the home, including personal information (7/17/17 RP 10-11, 13); (4) the steps the family determined that Ms. Shoemaker went through to get into the home

and later hide the car (7/17/17 RP 12-13); and (5) hearsay statements to show Ms. Shoemaker's lack of cooperation in recovering items from the home. (7/17/17 RP 13-14) Both Ms. Shoemaker and her attorney contested Ms. Shoemaker's involvement in the crime. (7/17/17 RP 17-18) Ms. Shoemaker contested that she took the items from the home, arguing that she was surprised to hear what was missing and that someone else returned to the home. (7/17/17 RP 17-18, 30) She also argued that she helped the victim and asked Ms. Simpson to return everything that was taken. (7/17/17 RP 30)

While the Washington constitution and corresponding statutes give victims and their representatives the right to present victim impact statements and argument in regard to an appropriate sentence, these authorities do not give the victims or their representatives the right to present evidence to establish unproven, contested facts regarding the circumstances of the crime at a sentencing hearing.

A victim impact statement is not an opportunity for the victim to present evidence. A "victim impact statement" is statutorily defined as "a statement submitted to the court by the victim or a survivor, individually or with the assistance of the prosecuting attorney if assistance is requested by the victim or survivor, which may include but is not limited to information assessing the financial, medical, social, and psychological

impact of the offense upon the victim or survivors.” RCW 7.69.020(4). A victim impact statement describes the effect of the crime on the victim and his family. *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). It is designed to show instead each victim's uniqueness as an individual human being. *Id.* at 823.

Thus, the statutory definition of a victim impact statement describes a statement recounting the effect of the offense on the victim. They are not avenues for victims to intervene in a case and provide the court with facts about how or why the crime was committed, as the victim's representative did here.

Prior court decisions addressing the rights of victims at sentencing have allowed participation when the victim's statement or argument is directly associated with the impact the crime had on the victim. In *State v. Lindahl*, 114 Wn. App. 1, 56 P.3d 589 (2002), the court found no error with the victim's attorney presenting both a sentencing memorandum and oral argument recommending an exceptional sentence for the defendant. *Id.* at 15. At no point under the facts of *Lindahl* did the victim's family attempt to introduce new evidence or information that was not admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. See *Id.* Instead, the family members spoke briefly about the impact of the victim's death and their attorney argued for an

exceptional sentence upward. *Id.* at 7. Similarly, *In State v. Hixson*, 94 Wn. App. 862, 973 P.2d 496 (1999), the court found no error with the victim's attorney presenting argument for an exceptional sentence at the sentencing hearing. *Id.* at 865-66. However, there is no indication in *Hixson* that the attorney relied on or presented facts not already before the court. See *Id.* These cases are unlike Ms. Shoemaker's sentencing hearing, where the victim's representative went beyond the scope of a victim impact statement or argument based on that statement.

Neither of the parties in the case- the State or Ms. Shoemaker- sought to have an evidentiary hearing on the adjudicative facts, as they agreed on the facts to be presented. The victim representative at Ms. Shoemaker's sentencing hearing intervened in the criminal trial by presenting adjudicative facts to the court, none of which were before the court prior to being introduced by the representative. The court erred by allowing the presentation of this evidence. RCW 7.69.030 allows for narrow participation in criminal trials, including the right to submit victim impact statements and present an argument at felony sentencing hearings. It does not permit a victim to act as a party and present facts regarding the circumstances of the crime for the court to consider when issuing a sentence.

b. The trial court's admission of the new, unproven adjudicative

facts during sentencing by the victim representative violated

Ms. Shoemaker's due process rights

On appeal, the court reviews issues of constitutional magnitude de novo. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

A victim's rights under the Washington State Constitution and through statutes must be considered together with a defendant's due process rights. *State v. McDonald*, 183 Wn.2d 1, 16, 346 P.3d 748 (2015). "In the event that the crime victim's rights impede the defendant's due process rights, the court must make every reasonable effort to harmonize these distinct rights and give meaning to all parts of the Washington State Constitution." *Id.* "To the extent that these rights are irreconcilable, federal due process rights supersede rights arising under Washington statutes or constitution." *Id.* Any action taken by the sentencing court that fails to meet constitutional due process requirements is impermissible. *State v. Herzog*, 112 Wn.2d 419, 426, 771 P.2d 739 (1989).

"Constitutional and statutory procedures protect defendants from being sentenced on the basis of untested facts. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). "[F]undamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is

unsupported in the record.” *State v. Ford*, 137 Wn.2d 472, 481, 973 P.2d 452 (1999) (superseded by statute).

RCW 9.94A.530(2) limits the evidence that the sentencing court can consider in determining standard range sentences and alternative sentences:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point....

RCW 9.94A.530(2).

One purpose of RCW 9.94A.530(2) is to prevent judges from sentencing on speculative facts. *Grayson*, 154 Wn.2d at 340. “Underlying this statutory procedure is the principle of due process. The court should only consider adjudicative facts that the parties in an adversarial context have ‘the opportunity to scrutinize, test, contradict, discredit, and correct.’” *Id.* at 340, quoting George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge’s Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision*

Making Process, 72 ST. JOHN'S L.REV. 291, 319 (1998). At sentencing, the facts relied upon “must have some basis in the record.” *Ford*, 137 Wn.2d at 482 (emphasis omitted) (quoting *State v. Bresolin*, 13 Wn. App. 386, 396, 534 P.2d 1394 (1975)).

In *Grayson*, the trial court erred by relying on extrajudicial information at the sentencing hearing. *Grayson*, 154 Wn.2d at 338. The court cited to the underfunding of the DOSA program as the main reason for denying the sentence to the defendant, which it raised sua sponte. *Id.* at 337. The Appeals court found the trial court's finding regarding funding to be adjudicative, and had the defendant disputed the fact, he was entitled to an evidentiary hearing or for the court not to consider the disputed fact. *Id.* at 341.

Here, as stated above, the court knowingly relied on more information than what was admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, in violation of RCW 9.94A.530(2). Violating this statutory requirement violated Ms. Shoemaker's due process rights because the court relied on adjudicative facts that the parties in an adversarial context did not have the opportunity to scrutinize, test, contradict, discredit, and correct.

Furthermore, the facts introduced by the victim's representative lacked a minimum indicia of reliability and was unsupported in the record.

The victim's representative presented no evidence to support its bare assertions and hearsay statements, such as video evidence, witnesses, or transcripts of conversations with Ms. Shoemaker. Additionally, the unproven information from the victim representative was not given via a sworn statement. Last, the victim's representative was not appearing as an attorney nor did he say he was a licensed attorney in Washington. His presentation of adjudicative facts to be used in a sentencing proceeding could not be relied upon by the trial court, as he was not authorized to practice law in this state. Just as the State cannot meet its burden to prove facts through bare assertions that are unsupported by evidence, in this situation, nor can the victim of the crime. See *Ford*, 137 Wn.2d at 482.

It should be noted that both Ms. Shoemaker's due process rights and the rights of the victim under Article 1, section 35 of the Washington State Constitution can be harmonized. The rights of victims can be accomplished without the introduction of new, unproven adjudicative facts that would violate Ms. Shoemaker's due process right. The victim or survivor, or representative of either, retains the right to present a statement explaining the financial, medical, social, and psychological impact of the offense upon the victim or survivors. Likewise, Ms. Shoemaker retains her right to have the court base its decision on information with some indicia of reliability, meaning information that is admitted by the plea agreement,

or admitted, acknowledged, or proved in a trial or at the time of sentencing.

Thus, when victim impact evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. *Payne*, 501 U.S. at 825. Here, disguised as part of the victim impact statement, the court considered “more information than was admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. RCW 9.94A.530(2). The due process clause requires that a defendant in a sentencing hearing be given an opportunity to refute the evidence presented and that the evidence be reliable. *State v. Strauss*, 119 Wn.2d 401, 419, 832 P.2d 78 (1992). The presentation of unproven, unacknowledged, and unadmitted adjudicative facts at the sentencing hearing violated Ms. Shoemaker’s due process rights.

- c. The admission of this untested, unreliable information was not harmless error

“When, ... the defendant claims that his due process rights were violated by the sentencing court's reliance on materially false information, the defendant must establish not only that the disputed information is materially false or unreliable, but also that the sentencing judge relied on the information.” *U.S. v. Giltner*, 889 F.2d 1004, 1007 (1989). Due

process requires that for any information presented at sentencing, the defendant should have an opportunity to refute it and that it must bear minimal indicia of reliability. *Id.* at 1007.

Again, the information before the court was unreliable because the parties did not have the opportunity to scrutinize, test, contradict, discredit, and correct the information in an adversarial context. The adjudicative facts presented by the victim were not presented or supported by either party or the record.

Ms. Shoemaker challenged the facts, yet the court relied on the speculative facts. The court stated that Mr. Myers provided information not in the file about the victim's wife's death a month and a half before the burglary. (7/17/17 RP 28) The court also said it was unaware that the car had been found wiped down, vacuumed, and with a disassembled key fob, and was unaware of the nature of the things taken until the sentencing hearing. (7/17/17 RP 28) The court said it found Mr. Harmon's circumstances more compelling based on details outside of Ms. Shoemaker's file. (7/17/17 RP 28) The court also believed the victim, over Ms. Shoemaker's objection, that Ms. Shoemaker did nothing to help. (7/17/17 RP 29-30, 34-35) Based on these additional facts presented by the victim's representative, the court found that Ms. Shoemaker's crime

was very calculated and that Ms. Shoemaker needed to be punished for her crime. (7/17/17 RP 29, 34)

Thus, the sentencing judge clearly based her sentencing decision on unreliable information. The error was not harmless. The trial court violated Ms. Shoemaker due process rights.

d. Ms. Shoemaker's failure to object to the introduction of this evidence does not mean she waived this issue on appeal.

When an adjudicative fact is disputed by a defendant, the court must not consider the fact or grant an evidentiary hearing on the point. RCW 9.94A.530(2). However, ordinarily, the defendant must object to the adjudicative fact or ask for an evidentiary hearing. *State v. Handley*, 115 Wn.2d 275, 282, 796 P.2d 1266 (1990) (citing former RCW 9.94A.370(2)). In order to challenge the information, the objection must be both timely and specific. *Id.* at 286. If no objection is raised to the information presented or considered during sentencing, then that information is considered "acknowledged". *Id.* at 283.

Here, Ms. Shoemaker told the court that it did not agree with the facts presented by the victim representative. This was timely and sufficient to put the court on notice that the statements by the victims were contested.

In the event that her objection was not specific she did not lose the ability to raise this issue on appeal. A defendant may raise an issue for the first time on appeal under the “manifest error affecting a constitutional right” standard. RAP 2.5(a)(3). Here, the court error in relying on unproven, unreliable facts in determining the sentence was a manifest error. Additionally, the court’s action violated Ms. Shoemaker’s due process rights. Under RAP 2.5(a)(3), this court can review this issue and provide relief to Ms. Shoemaker.

Furthermore, in *Grayson*, the court recognized that there may be instances where the failure to immediately object might not be fatal to challenge the sentence. *Grayson*, 154 Wn.2d at 341. The court noted the instance when a defendant may not have much time to formulate an objection because of the trial court’s vigorous interruption during the prosecutor’s suggested enrichment of the record. *Id.* The court found that under these circumstances, a party may be relieved of the duty to object. *Id.*

No objection is necessary because due process and Washington statutes limited the court’s authority to consider this information from a non-party in the case. The court could not base its decision on these untested adjudicative facts presented by the victim.

2. Ms. Shoemaker’s counsel did not provide effective assistance because he failed to object to the unproven, contested facts

presented by the victim

This court reviews claims for ineffective assistance of counsel de novo. *State v. Sutherbv*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). “To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant.” *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). “To establish ineffective representation, the defendant must show that counsel's performance fell below an objective standard of reasonableness. To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different.” *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (citation omitted). Failure to establish either prong of the test is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700.

Deficient performance: “[S]crutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness.” *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). “The defendant alleging ineffective assistance of counsel ‘must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.’” *In re Pers. Restraint of*

Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002). “In this regard, the court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy.” *In re Personal Restraint of Rice*, 118 Wn.2d 87, 888-89, 828 P.2d 1086 (1992).

Prejudice: Prejudice occurs if “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. A reasonable probability of a different result exists where counsel's deficient performance “undermine[s] confidence in the outcome.” *Id.* The defendant “need not show that counsel's deficient conduct more likely than not altered the outcome in the case.” *Id.* at 693. Instead, the defendant “has ... the burden of showing that the decision reached would reasonably likely have been different absent the errors.” *Id.* at 696. This standard requires evaluating the totality of the record. *Id.* at 695.

Defense counsel's failure to object fell below an objective standard of reasonableness and constituted deficient performance. There was no tactical reason for his failure to object. The unproven information was presented by the non-party to persuade the court to not to follow the sentencing agreement between the State and Ms. Shoemaker, which was contrary to Ms. Shoemaker's interests. Had the objection been raised, the

court would not have been able to consider the untested information without an evidentiary hearing. *State v. Crockett*, 118 Wn. App. 853, 78 P.3d 658 (2003). Defense counsel was deficient by not raising a timely and specific objection to the sentencing court's consideration of the allegedly improper information. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993).

Ms. Shoemaker was prejudiced by the failure to object because there is a reasonable probability that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different. The trial court expressly stated that it relied on the information presented by the victim representative when deciding that Ms. Shoemaker needed to be sent to prison as punishment, rather than the agreed upon DOSA sentence. (7/17/17 RP 28) Had the court not heard the unproven facts, it would have been bound by the information in the police report and plea agreement.

Furthermore, even if an evidentiary hearing would have occurred, there is a strong likelihood that the unproven facts from would have been excluded. First, the victims would not have had the right to intervene in the fact finding part of the sentencing hearing. Moreover, the adjudicative facts presented by the victim lacked reliability, since most of the information was based on an independent investigation by the victim, and

not a trusted source like law enforcement. The State, as the party, would have been required to prove facts asserted by the victim representative, even though the State had no involvement in the family's investigation.

As noted by the trial court, until it heard the information provided by the victim's representative, she was not aware of the calculated nature of Ms. Shoemaker's crime and the specifics of the mementos that were taken. (7/17/17 RP 29) Defense counsel did not object, and this failure resulted in the court relying on the unproven facts in making a decision. Absent the failure to object, the decision reached would reasonably likely have been different because the information likely would have been excluded. The remedy is to remand for resentencing.

3. Appearance of fairness doctrine

A judicial proceeding satisfies the appearance of fairness doctrine if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674, 675 (1995). We analyze whether a judge's impartiality might reasonably be questioned under an objective test that assumes a reasonable person to know and understand all relevant facts. *Sherman v. State*, 128 Wn.2d 164, 205–06, 905 P.2d 355 (1995). The party must produce sufficient evidence demonstrating actual or potential bias, such as personal or pecuniary interest on the part of the

judge; mere speculation is not enough. *In re Pers. Restraint of Haynes*, 100 Wn. App. 366, 377 n. 23, 996 P.2d 637 (2000).

Here, the judge already heard the untested information from the victim's family and determined that the details were so compelling that Ms. Shoemaker deserved punishment. This knowledge and deep rooted feeling cannot be undone. The judge indicated her level of partiality and bias toward Ms. Shoemaker by believing, without proof, that Ms. Shoemaker did not do anything to help the victim's family. The trial court also denied, without explanation, the suggestion that Ms. Shoemaker serve a prison based DOSA rather than residential, even though the judge was aware that Ms. Shoemaker needed treatment for her mental health issues and the DOSA sentence would provide that help. (7/17/17 RP 34, 37)

Thus, because of the extent of the unreliable evidence considered by the judge, the judge's partiality to the victim based on this information, and the judge's bias toward Ms. Shoemaker, a reasonably prudent and disinterested person would conclude that Ms. Shoemaker would not get a fair, impartial, and neutral hearing on remand before the same trial court judge. In the event that Ms. Shoemaker is resentenced due to the trial court's or counsel's errors, she asks that a different trial court judge preside over her hearing.

E. CONCLUSION

Victims do not have the right to present untested, adjudicative facts at a sentencing hearing. The trial court erred by allowing the victim to present this information contrary to statute and in violation of Ms. Shoemaker's right to due process. The error was not inconsequential, as the trial court based its decision on this unreliable information. Furthermore, even if permissible, Ms. Shoemaker's counsel was ineffective for failing to specifically object to the unproven facts. Resentencing before a different, impartial judge is needed.

Respectfully submitted this 26th day of December, 2017.

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CERTIFICATE OF SERVICE

The undersigned states the following under penalty of perjury under the laws of the State of Washington. On the date below, I personally e-filed and emailed and/or placed in the United States Mail the foregoing Appellant's Opening Brief with postage paid to the indicated parties:

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