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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JORGE HERNÁNDEZ AGUILAR,

Petitioner.

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

The Honorable David A. Kurtz, Judge

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Petitioner Jorge Hernández Aguilar, the appellant below, seeks review of the Court of Appeals decision in State v. Hernández Aguilar, noted at \_\_\_ Wn. App. 2d \_\_\_, 2021 WL 5177679, No. 81078-2-I (Nov. 8, 2021).

B. ISSUE PRESENTED FOR REVIEW

In the midst of her testimony, the complaining witness stated that Mr. Hernández Aguilar climbed on top of her, solicited sex, and touched her “intimate parts,” which did not pertain to the charged conduct and was a surprise to the defense, the prosecution, and the trial court. Although the trial court sustained the defense objection to this testimony and told the jury to disregard it, the trial court recognized that the testimony as improper and serious and that there was no other comparable evidence presented to the jury. This case involved allegations of domestic violence based in part on the complainant leaving Mr. Hernández Aguilar because of his jealousy and control pertaining to his perception of the sexual

infidelities. Did the trial court err when it denied Mr. Hernández's motion for a mistrial and does the Court of Appeals' cursory analysis conflict with Washington Supreme Court and Court of Appeals precedent intended to protect the state and federal constitutional rights to a fair trial, such that review should be granted pursuant to RAP 13.4(b)(1), (2), and (3)?

C. STATEMENT OF THE CASE

In the evening of June 16, 2018, neighbors in a Bothell neighborhood heard cries for help and witnessed a bleeding woman run into the street and collapse. RP 544-46, 580-81, 588-90. Neighbors responded, applied towels to the woman's wounds, and called 911. RP 581, 591-92.

The woman had a one-and-a-half centimeter wound in the right front side of the base of her neck, which transected her jugular vein and also injured the vertebral artery along her spine. RP 570-71. Both injuries were "tied off" to stop the bleeding. RP 572, 574.

The injured woman was Ana Gabriella Sosa Gutiérrez, who lived with her husband, Jorge Hernández Aguilar, their three children, her niece, her brother, and her brother's friend. RP 677-79, 689-90, 695-96. Mr. Hernández's sister, Elsa Hernández Aguilar, had also lived with them but moved out in May 2018. RP 690.

According to Ms. Sosa Gutiérrez, Mr. Hernández Aguilar and she had longstanding marital problems stemming from Mr. Hernández's jealousy and suspicions of infidelity. RP 680-81. About seven months before the June 2018 incident, Ms. Sosa reported that Mr. Hernández threatened her when she told him she wanted to separate; she said that Mr. Hernández stated, "He would rather see us all dead than for me to leave the house." RP 681-83. About a month before the incident, the couple continued to argue about potential separation, they no longer slept in the same bed, and Ms. Sosa told Mr. Hernández that she did not love him anymore. RP 685-86. Ms. Sosa confirmed that she was planning on leaving Mr. Hernández Aguilar in the days before

the June 2018 incident and confirmed that their separation with both imminent and definite the night before. RP 694-95, 727.

On June 16, 2018, Mr. Hernández had gone to work, got home in the early afternoon, and was performing some yardwork at the house. RP 1062. According to Ms. Sosa, he again asked whether their separation was final and Ms. Sosa said yes. RP 727. Ms. Sosa testified that Mr. Hernández said “if I wasn’t going to be his, I wasn’t going to be anybody’s.” RP 727, 730. The couple’s two boys were in the living room and Ms. Sosa’s niece had taken their daughter upstairs. RP 729.

Ms. Sosa testified that Mr. Hernández grabbed a knife from the drawer, approached her, and put the knife in front of her. RP 730-32. Ms. Sosa said she “told him to think what he was about to do. And to think of the children,” and Mr. Hernández put the knife away and went to the living room. RP 732. According to Ms. Sosa, Mr. Hernández then came back with the knife and did not say anything, she grabbed his hands, and he cut her neck as she screamed, “Don’t do that” and “Think of the



children.” RP 732-33. They struggled, her hands were around his hands and wrist, and she said she attempted to exit the kitchen door. RP 735-36. Ms. Sosa said that he grabbed her, pushed her up against the stove, threw her against the refrigerator, and that she was injured with small cuts on her chest and also injured her arm and hands during the struggle. RP 736-39. Ms. Sosa said Mr. Hernández had also thrown her to the ground and was kneeling over her and kned her in the neck. RP 739-40. The couple’s oldest son came and told Mr. Hernández to let Ms. Sosa go. RP 740-41. Mr. Hernández took their son to his room and Ms. Sosa took ran out the kitchen door and out into the street. RP 741.

Ms. Sosa’s niece ran to a neighbor’s house and pounded on the door; the children arrived at the neighbor’s at some point as well. RP 611-14, 1074-75. The oldest child repeatedly said that “his dad was trying to sacrifice his mom” and showed the neighbor a stabbing motion with a pen when she asked him what happened. RP 617-18. The son testified he saw a knife and

knew that his father was hurting his mother with a knife, but testified he thought it was accidental and did not want to hurt her. RP 808. The niece and responding officers indicated that the inside of the house where the struggle between Mr. Hernández and Ms. Sosa occurred was covered in blood. RP 893, 1070.

Responding officers saw Mr. Hernández exit the house. RP 855. They told Mr. Hernández to put up his hands and walk backwards towards them, and Mr. Hernández cooperated. RP 856, 861. Mr. Hernández had blood on his forearms, hands, and the pants he was wearing. RP 890. According to officers at the scene, Mr. Hernández said various things unprompted, including, “I love my [w]ife, I love my kids. I’m sorry,” “Is my wife dead?” and “she was with another man or there was another man.” RP 857, 892-93.

The prosecution charged Mr. Hernández Aguilar with first degree assault. CP 202. The information alleged aggravating circumstances that the crime was committed by one household or family member and occurred within sight or sound of children.

CP 202. It also alleged Mr. Hernández was armed with a deadly weapon, the knife. CP 202.

At trial, during Ms. Sosa's direct examination, Ms. Sosa stated that the night before the incident, she was having an asthma attack and told Mr. Hernández that she did not want to have him close to her. RP 694. When she told him that their separation was definite, Ms. Sosa said "he was almost on top of me, I told him to step back, and he went down almost to my feet, and he hit the mattress with his fist." RP 698. Ms. Sosa stated that Mr. Hernández accused her of infidelity with her brother's friend, Raúl, who lived in the house. RP 699. When the prosecutor asked if there was a point where he confronted her about her underwear, Ms. Sosa stated, "He just came on top of me. He wanted me to spend the night with him. And I told him that I don't want to. He touched my intimate parts." RP 699.

Defense counsel objected to this testimony and the trial court sustained the objection, struck the testimony and said, "the jury will disregard." RP 699. The jury was excused and the

defense moved for a mistrial: “aside from having to defend my client against an assault one with a deadly weapon with several enhancements, now I have to somehow in the middle of the trial undo a potential rape allegation. And I don’t believe it’s fair for my client at this point.” RP 700-01.

The prosecution responded that it was unaware that this would be Ms. Sosa’s testimony, indicating that in pretrial interviews Ms. Sosa had just referred to Mr. Hernández touching her underwear and noting they were wet. RP 706. Defense counsel responded that the jury “didn’t hear one word about wet panties. They heard intimate part,” which she had never talked about before. RP 711. Counsel also asserted that the nature of her forceful objection was itself prejudicial, asserting that a mistrial was necessary. RP 712.

The trial court agreed that the testimony was “improper,” but noted it immediately sustained the defense objection and advised the jury that the testimony was stricken. RP 714. The court stated, “While serious, it was still limited and somewhat

ambiguous. And in my view the jury can follow the Court's instructions under these circumstances." RP 715. The trial court granted the defense request not to discuss any aspect of the wet underwear further during the trial, noting that the state's loss of the wet underwear evidence "does serve to mitigate to at least some degree any potential prejudice to the defendant in an overall sense." RP 720.

The jury returned a guilty verdict for first degree assault and returned special verdicts that Mr. Hernández was armed with a deadly weapon, that he and Ms. Sosa were household or family members, and that the assault occurred within sight or sound of their minor children. CP 67-69, 71; RP 1269-74.

Mr. Hernández Aguilar appealed. CP 9-11. He argued, among other things,<sup>1</sup> that the trial court erred in denying his

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<sup>1</sup> The Court of Appeals agreed with Mr. Hernández that the trial court erred in imposing an exceptional sentence without written findings of fact and conclusions of law, vacated his exceptional sentence, and remanded. Hernández Aguilar, slip op. at 8-9. The Court of Appeals also remanded to strike the Department of Corrections community custody supervision fees from the

motion for mistrial, given the seriousness and noncumulative nature of the Ms. Sosa's sexual assault allegations made in front of the jury. Without substantive analysis of the three mistrial review factors, the Court of Appeals rejected Mr. Hernández's mistrial arguments on prejudice grounds. Hernández Aguilar, slip op. at 8.

D. ARGUMENT IN SUPPORT OF REVIEW

**The Court of Appeals decision conflicts with Supreme Court and Court of Appeals precedent pertaining to review of unsuccessful mistrial motions intended to honor federal and state constitutional rights to a fair trial, meriting review**

Under ER 404(b), evidence of “other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” State v. Wade, 98 Wn. App. 326, 333, 989 P.2d 576 (1999). ER 404(b) is read in conjunction with ER 403. State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). Even relevant evidence is inadmissible if

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judgment and sentence, consistent with the trial court's stated intent. Hernández Aguilar, slip op. at 9-10. These issues are not discussed further.

its probative value is substantially outweighed by the risk of unfair prejudice. ER 403; State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

The trial court's denial of a mistrial motion is reviewed for abuse of discretion. State v. Rodríguez, 146 Wn.2d 260, 45 P.3d 541 (2002). In considering whether a motion for mistrial should have been granted, the reviewing court considers (1) the seriousness of the claimed irregularity; (2) whether the information imparted was cumulative of other properly admitted evidence, and (3) whether admission of the illegitimate evidence can be cured by a jury instruction. State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983); State v. Escalona, 49 Wn. App. 251, 253, 742 P.2d 190 (1987). Here, mistrial was required, as Mr. Hernández satisfies all the factors.

First, the introduction by Ms. Sosa that Mr. Hernández climbed on top of her and touched her intimate parts was extremely serious. The trial court itself recognized that the testimony was improper and serious. RP 714-15. Indeed, Ms.

Sosa's testimony indicated that, not only did Mr. Hernández assault her with a knife, but prior to that assault he had also sexually assaulted her. This addition of uncharged, sexual misconduct was extremely serious in a trial that should have pertained only to the first degree assault charged by the prosecution.

The trial court indicated that the evidence was "limited and somewhat ambiguous." RP 715. Yet Ms. Sosa stated that Mr. Hernández was "on top" and "wanted me to spend the night with him," a euphemism for sex. RP 699. When she said she did not want to, Ms. Sosa indicated he forced the issue by touching her vulva. RP 699. There was nothing limited or ambiguous about her statements to the jury—she was describing a sexual assault. The seriousness of this testimony amply establishes the first Weber/Escalona factor in support of a mistrial.

The second factor also favors Mr. Hernández Aguilar. Ms. Sosa's description of a sexual assault was not cumulative of any other testimony. No other testimony about sexual assault was



introduced at trial and, in fact, the evidence showed that Ms. Sosa and Mr. Hernández were *not* having any sexual contact. See RP 687 (couple stopped sleeping in same bed two months prior), 691 (Ms. Sosa testifying Mr. Hernández’s sister Elsa had told her to “take care of my husband like a woman should,” i.e., with sex). The evidence was not cumulative; it was the only evidence of sexual violence on the part of Mr. Hernández.

Third, the trial court’s sustaining of the objection and telling the jury it “will disregard” the testimony did not mitigate the prejudice. While juries are presumed to follow the court’s instructions to disregard testimony, Weber, 99 Wn.2d at 166, no instruction can “remove the prejudicial impression [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself on the minds of the jurors,” Escalona, 49 Wn. App. at 255 (alteration in original) (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). In domestic violence cases, “[m]uch like in cases involving sexual crimes,” “the risk of unfair prejudice is very high.” State v. Gunderson, 181 Wn.2d 916,

925, 337 P.3d 1090 (2014). Ms. Sosa’s testimony that Mr. Hernández sexually assaulted her was likely to impress itself on the minds of the jury irrespective of the trial court’s instruction to disregard it. This is particularly true in a case where the complainant repeatedly claimed her husband was jealous, controlling, and constantly suspicious of her sexual infidelity. See, e.g., RP 680-71, 684-86. In other words, the sexual assault evidence served to corroborate Ms. Sosa’s account of Mr. Hernández’s attempts to control her based on sexual insecurity, fitting into that narrative perfectly. The sexual assault evidence was not something that could be readily disregarded by the jury.

The trial court reasoned that the prejudice was “mitigated” by the fact that it would not permit the prosecution to introduce additional evidence about the underwear. RP 719-20. But this is a non sequitur, as the correct focus should have been on the impact the improper testimony likely had on the jury in the context of the case. As discussed, this impact would have been substantial given Ms. Sosa’s and the prosecution’s narrative

describing Mr. Hernández as a sexually jealous and controlling man.

On balance, all three of the Weber/Escalona factors support mistrial. The trial court erred in denying Mr. Hernández Aguilar's motion for a mistrial, requiring reversal and remand for a fair trial at which only competent evidence is presented.

Although it recites the three mistrial review factors, the Court of Appeals decision fails to apply them. Indeed, the decision contains no analysis of the seriousness of the sexual assault allegation or noncumulative nature of this evidence. Hernández Aguilar, slip op. at 7-8. Instead, the decision merely states that because other, non-sexual assault evidence was strong, there was no prejudice.

This analysis conflicts with Weber, Escalona, Gunderson, and Miles, which sets out the correct mistrial review factors and acknowledge the prejudicial effect of serious, noncumulative, and improper evidence of sexual assault. These conflicts with

Supreme Court and Court of Appeals precedent merit RAP 13.4(b)(1) and (2) review.

In addition, the Court of Appeals has recently shown itself capable of thoroughly engaging in the correct analysis. E.g., State v. Taylor, 18 Wn. App. 2d 568, 579-84, 490 P.3d 263 (2021) (carefully analyzing and then balancing each Weber/Escalona factor). The Court of Appeals decision conflicts with Taylor and numerous other decisions in which the Court of Appeals undertakes the correct three-part analysis. This merits review under RAP 13.4(b)(2).

Finally, the whole point of conducting a thorough mistrial analysis is to ensure that the defendant receives a fair trial pursuant to the state and federal constitutions. Rodríguez, 146 Wn.2d at 270; Taylor, 18 Wn. App. at 2d at 579. By failing to conduct this analysis, the Court of Appeals betrays its indifference to whether Mr. Hernández received a constitutionally fair trial after he was accused by his wife of an uncharged sexual assault in front of the jury. The Court of

Appeals' failure to engage in the correct analysis should also be reviewed under RAP 13.4(b)(3) to address how the improper evidence deprived Mr. Hernández of a constitutionally fair trial.

E. CONCLUSION

Because Mr. Hernández Aguilar satisfies RAP 13.4(b)(1), (2), and (3) review criteria, he asks that this petition for review be granted.

DATED this 8th day of December, 2021.

**Per RAP 18.17, I certify this document contains 2,935 words.**

Respectfully submitted,

NIELSEN KOCH, PLLC

A handwritten signature in black ink, appearing to read "K March", written over a horizontal line.

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# APPENDIX

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
JORGE HERNANDEZ AGUILAR,  
  
Appellant.

No. 81078-2-I  
  
DIVISION ONE  
  
UNPUBLISHED OPINION

APPELWICK, J. — A jury convicted Hernandez Aguilar of first degree assault with several aggravators after a brutal incident in which he cut his wife’s throat with a knife. During trial, an improper statement prompted the defense to move for a mistrial. The court denied the motion and Hernandez Aguilar now appeals. The exceptional sentence imposed was not supported by written findings of fact and conclusions of law. Community custody supervision fees imposed under the judgment and sentence were inconsistent with the court’s order. We affirm the conviction, but vacate his sentence and remand for resentencing.

**FACTS**

One evening, Nancy Cumming was outside with some neighbors when she heard somebody yell for help. Cumming looked in the direction of the noise and saw a woman, Ana Sosa Gutierrez, running toward her from a nearby house. Sosa Gutierrez was frantic and appeared to be bleeding. She collapsed in the road next to the sidewalk. Cumming ran to Sosa Gutierrez and then ran to the neighbors

screaming for them to call 911. Cumming returned to Sosa Gutierrez who was covered in blood. She was actively bleeding with blood beginning to pool around her. Cumming asked Sosa Gutierrez, "Who did this to you?" and she replied, "My husband." Sosa Gutierrez began panicking and screaming, "My babies, my babies." Cumming tried to reassure her and apply pressure to stop the bleeding. Cumming stayed with Sosa Gutierrez until the ambulance and police responded.

Sosa Gutierrez arrived at the hospital in unstable condition, having lost a significant amount of blood from a neck wound. During surgery, the surgeon discovered the wound, about the depth of her neck, went through the jugular vein and then back toward her spine, injuring the vertebral artery. Sosa Gutierrez received transfusions of two and half liters of blood, approximately half the blood volume of her body. She survived her injuries, but she would have bled to death at the scene if Cumming and the paramedics had not maintained pressure on the wound.

While Sosa Gutierrez received aid, the police arrested her husband, Jorge Hernandez Aguilar. As the police handcuffed him, Hernandez Aguilar said, "I love my wife, I love my kids, I'm sorry." He continued to repeat, "I'm sorry, I love my wife." He also asked if his wife was dead. Hernandez Aguilar had blood on his arms and hands.

The State charged Hernandez Aguilar with first degree assault with a domestic violence aggravator and a deadly weapon enhancement.

Several witnesses testified about the events of that day. The landlord who lived on the property testified about seeing the three children after the stabbing.



The youngest child was shaking and had blood on his arm and shirt. The oldest child said that his parents had been fighting and kept repeating, "My dad was trying to sacrifice my mom." The boy mimed a stabbing motion and said that his mom's hands were up to protect her neck but his dad "got her in the neck. And that's how he knew his dad was trying to sacrifice his mom."

When the oldest child, a nine year old boy, testified, he talked about watching television and hearing his mom call for help from the kitchen. The boy made his way to the kitchen and told his dad to stop. His dad was sitting on the ground next to his mom with a knife nearby. He remembered telling the police that his dad had been holding the knife. He saw blood on the ground in the kitchen, on the living room walls, and on his mother.

Sosa Gutierrez's niece, Heydi Sosa Gamez, testified that her aunt and Hernandez Aguilar had been arguing in the kitchen when she heard a drawer open. Hernandez Aguilar yelled that if Sosa Gutierrez was not with him, she would not be with anyone else. Hernandez Aguilar then shouted at Sosa Gamez to take care of the three children. When Sosa Gamez went into the kitchen she saw, "Jorge had my aunt thrown down onto the floor. Half of the body was leaning up against the jamb of the door. And he was like on top of her."

Sosa Gutierrez testified that she and Hernandez Aguilar were married for 10 years. During their marriage, he had "jealousy episode[s]." He accused her of seeing other people. When Sosa Gutierrez went to the store, he always wanted to know who she saw and talked to there. One night, about seven months before the stabbing, Hernandez Aguilar again accused Sosa Gutierrez of having an affair

with someone. This time, she threatened to leave him. Hernandez Aguilar told her he would rather see them all dead than for her to leave the house.

The marriage deteriorated. Sosa Gutierrez began sleeping in the children's bedroom, they were not talking, and Hernandez Aguilar was drinking and spending more and more time outside the house. About a month before the incident, Sosa Gutierrez told Hernandez Aguilar she would leave him if things did not change. Eventually Sosa Gutierrez made the decision to leave and told Hernandez Aguilar she wanted to separate.

The night before the incident, Sosa Gutierrez was lying in the children's room when Hernandez Aguilar came in and asked if their separation was definite. Sosa Gutierrez testified, "When I told him that it was definite, because he was almost on top of me, I told him to step back, and he went down almost to my feet, and he hit the mattress with his fist. He was angry." Hernandez Aguilar accused her of having a relationship with her brother's friend. The testimony continued:

Q. Did there come a point in your conversation that night when he accused you of infidelity?

A. He asked me if I knew Raul [Figueroa], and I told him that I did not. And he told me that, yes, I did—yes, I knew him. But I didn't know him.

Q. Did he accept that?

A. No.

Q. Did there come a point where he confronted you with your underwear?

A. Yes.

Q. Would you describe when that happened during the course of the conversation?

A. He just came on top of me. He wanted me to spend the night with him. And I told him that I don't want to. He touched my intimate parts.

The defense objected to this testimony. The court sustained the objection, ordered the statement stricken from the record, and instructed the jury to disregard it. The defense then moved for a mistrial:

We have interviewed this witness. She's been interviewed several times. We have transcripts of those interviews. Never, not once, has she ever alleged any touching of an intimate area. So aside from having to defend my client against an assault one with a deadly weapon with several enhancements, now I have to somehow in the middle of the trial undo a potential rape allegation. And I don't believe it's fair for my client at this point. The jury's already heard it despite you asking them quickly to disregard it. It's there. And at this point it is so prejudicial that there is no way at this point for me to rehabilitate her in any way during cross.

The trial court noted the ambiguity of the testimony and recessed to allow the parties to speak with Sosa Gutierrez for clarification. After the recess, the parties reported that Sosa Gutierrez meant that Hernandez Aguilar had touched her on her underwear. After much discussion, the court found the testimony improper, "[i]f for no other reason, it was a surprise and involved some type of physical contact." But, the defense immediately objected and the court sustained and struck the testimony. The jury was advised the testimony was stricken. The trial court determined the jury could follow the court's instructions and denied the motion for mistrial.

In deciding how to continue, the court offered the opportunity for the State to ask questions to clarify the testimony or leave the "this whole area about underwear alone." Hernandez Aguilar chose to leave the subject alone. As the

trial court observed, the testimony “is still limited and somewhat ambiguous.” The trial continued with no further discussion of Sosa Gutierrez’s underwear.<sup>1</sup>

Sosa Gutierrez testified that she and Hernandez Aguilar had argued immediately before the incident. She was in the kitchen washing dishes when he came in and told her that she would not belong to anyone else. He opened a drawer and grabbed a knife. According to Sosa Gutierrez, “He approach me and he put it in front of me. And I told him to think what he was about to do. And to think of the children. And he turn around, and he put it back inside the drawer. And then he went to the living room.” Hernandez Aguilar returned and took the knife out and held it out in front of her again. She asked him to think of the children but he cut “into [her] neck.” He was looking at her, and she described him as angry, with eyes full of hatred. “I struggle a lot because he wanted to get me with the knife deeply.”

Sosa Gutierrez briefly managed to get away and tried to escape but Hernandez Aguilar pulled her back by the shirt, pushed her back against the stove, and tried to continue stabbing her. They continued to struggle until Sosa Gutierrez began to lose strength. She told Hernandez Aguilar to take care of the children but he said he was going to stab himself. Then their oldest son came into the room and told Hernandez Aguilar to let her go. Hernandez Aguilar told his son to go up to his room, but the boy was frozen in place. Hernandez Aguilar took the boy to his room. Sosa Gutierrez ran out of the house where the neighbors helped her.

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<sup>1</sup> The State hoped to use the underwear testimony to underscore Hernandez Aguilar’s jealousy. Hernandez Aguilar would examine Sosa Gutierrez’s dirty underwear and accuse her of being unfaithful.

A jury convicted Hernandez Aguilar of first degree assault and found that he was armed with a deadly weapon at the time of the crime, that he and Sosa Gutierrez were members of the same family or household, and that the crime occurred within the sight or sound of their minor child. The standard sentence range for first degree assault with the deadly weapon enhancement was 117 to 147 months. The trial court imposed an exceptional sentence of 159 months. The court also waived all discretionary legal financial obligations (LFOs). Hernandez Aguilar appeals.

## DISCUSSION

### I. Mistrial

Hernandez Aguilar claims the trial court erred by denying his motion for a mistrial. Trial courts should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure a fair trial. State v. Rodriguez, 146 Wn.2d 260, 270, 45 P.3d 541 (2002). In considering a motion for a mistrial, the court examines “(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.” State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). We review a trial court’s denial of a motion for mistrial for abuse of discretion. Rodriguez, 146 Wn.2d at 269. “A trial court’s denial of a motion for mistrial will be overturned only when there is a ‘substantial likelihood’ that the error prompting the request for a mistrial affected

the jury's verdict." Id. at 269-70 (internal quotation marks omitted) (quoting State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)).

As the trial court noted, Sosa Gutierrez's statement that Hernandez Aguilar touched her private parts was improper. Despite this, the denial of the motion for mistrial was not an abuse of discretion. The statement was immediately stricken and the jury was told to disregard the evidence. The evidence was overwhelming as to Hernandez Aguilar's guilt. Sosa Gutierrez's testimony was graphic and detailed. Her depiction of the events was confirmed by statements from other witnesses including her niece and young son. A single statement about Hernandez Aguilar touching her private parts was insignificant in light of the thorough description of their argument, his threats, and the brutal attack. There is no likelihood that the improper statement affected the jury's verdict.

## II. Exceptional Sentence

Hernandez Aguilar argues his sentence should be vacated and the matter remanded for resentencing because the trial court failed to enter findings of fact and conclusions of law supporting the exceptional sentence.

The Sentencing Reform Act of 1981 (SRA) allows a trial court to deviate from a standard range sentence if "there are substantial and compelling reasons." RCW 9.94A.535. When imposing an exceptional sentence, the trial court "shall set forth the reasons for its decision in written findings of fact and conclusions of law." RCW 9.94A.535. "[T]he SRA's written findings provision requires exactly that—written findings." State v. Friedlund, 182 Wn.2d 388, 394, 341 P.3d 280 (2015). "Verbal reasoning" does not satisfy the requirements of the statute. Id.

Here, the trial court appended the jury's special verdicts for the aggravating factors to the judgment and sentence. The court also discussed the facts and its reasons for imposing an exceptional sentence at the sentencing hearing. But, the trial court failed to enter any written findings of fact and conclusions of law as required by RCW 9.94A.535. We vacate the sentence and remand to the trial court for resentencing with the appropriate findings of fact and conclusions of law, if an exceptional sentence is again imposed.

III. Discretionary Legal Financial Obligations

Hernandez Aguilar also requests we strike community custody supervision fees erroneously imposed because he is indigent.

Community custody supervision fees are discretionary LFOs that can be waived by the trial court. State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199, review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020); RCW 9.94A.703(2)(d). "Where the record demonstrates that the trial court intended to impose only mandatory LFOs but inadvertently imposed supervision fees, it is appropriate for us to strike the condition of community custody requiring these fees." State v. Peña Salvador, 17 Wn. App. 2d 769, 791-92, 487 P.3d 923 (2021). The trial court recognized that Hernandez Aguilar is indigent and noted that it would "try to minimize the financial aspects [of the sentence]." To that end, the trial court expressly limited the LFOs to \$600, comprised of the mandatory \$500 victim penalty and \$100 DNA (deoxyriboneucleic acid) fee. Because the record supports that the court intended to impose only the mandatory LFOs, we remand for the trial

court to strike the community custody supervision fees from the judgment and sentence.

We affirm the conviction, but vacate his sentence and remand for resentencing.

Lippelwick, J.

WE CONCUR:

Bunman, J.

Chun, J.



**NIELSEN, BROMAN & KOCH, PLLC**

**December 08, 2021 - 11:54 AM**

**Transmittal Information**

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**Appellate Court Case Title:** State of Washington, Respondent v. Jorge Hernandez Aguilar, Appellant  
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