Supreme Court No. 96632-0

In the

Supreme Court of the State of Washington

STATE OF WASHINGTON,

Respondent,

v.

CURTIS K. K. ESCALANTE,

Appellant.

PETITION FOR DISCRETIONARY REVIEW

Court of Appeals No. 50169-4-II; Pierce County District Court No. 14-1-05085-4

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I. IDENTITY OF PETITIONER

Curtis K. K. Escalante ("Mr. Escalante") is the Petitioner in this Petition for Discretionary Review. Mr. Escalante pleaded guilty to two counts of human trafficking in the second degree. On March 10, 2017, Mr. Escalante was sentenced to 200 months in prison.

II. DECISION

Mr. Escalante seeks this Court's review of the decision of the Court of Appeals, Division II, in Case No. 50169-4-II, dated October 16, 2018, and the Court of Appeals' Order Denying Motion for Reconsideration, dated November 13, 2018. A true copy of the Court of Appeals' decision is appended hereto as ***Attachment "A"***, and a true copy of the court's Order Denying Motion for Reconsideration is appended hereto as ***Attachment "B"***.

III. ISSUE PRESENTED FOR REVIEW

Mr. Escalante seeks review of the Court of Appeals' decisions pursuant to RAP 13.4 based on the following issues:

1. DO THE DECISIONS OF THE COURT OF APPEALS CONFLICT WITH DECISIONS OF THIS COURT AND THE COURT OF APPEALS WITH RESPECT TO THE COURT OF APPEALS' CONCLUSION THAT THE STATE DID NOT BREACH THE PLEA AGREEMENT AT SENTENCING BY SPEAKING ON BEHALF OF THE VICTIM, EMPHASIZING AGGRAVATING FACTORS, COMPARING THE OFFENSE TO SECOND DEGREE MURDER, AND FAILING TO

ARTICULATE THE STATE'S AGREED-UPON SENTENCING RECOMMENDATION?

2. DO THE DECISIONS OF THE COURT OF APPEALS CONFLICT WITH DECISIONS OF THIS COURT AND THE COURT OF APPEALS WITH RESPECT TO THE COURT OF APPEALS' FAILURE TO RECOGNIZE ITS DISCRETION TO IMPOSE A DOWNWARD EXCEPTIONAL SENTENCE BASED ON THE MITIGATING FACTOR OF THE MINOR VICTIMS' WILLING PARTICIPATION IN THE CRIMES.

IV. STATEMENT OF THE CASE

A. Trial Court Proceedings.

Mr. Escalante was charged, along with Michael Williams, with multiple counts related to human trafficking. Clerk's Papers (CP) 1-5. On February 13, 2017, Mr. Escalante waived his trial rights and pleaded guilty to a third amended information charging him with two counts of second degree human trafficking, contrary to RCW 9A.40.100(1)(a)(i)(A), 9A.40.100(3)(a), and 9.94A.535(3)(1). Feb. 13, 2017 Report of Proceedings at 9-21.

Under the information as amended pursuant to the plea agreement, Mr. Escalante faced a standard sentencing range of 162 to 216 months. CP 28-50. The State agreed to recommend that Mr. Escalante be sentenced to 216 months prison, 18 months' community supervision, and legal financial obligations. CP 18. The plea agreement provided further "[d]efense may request exceptional sentence downward." CP 18.

Prior to the March 10, 2017 sentencing hearing, defense counsel

filed a sentencing memorandum in support of an exceptional sentence below the standard range. CP 28-50. The basis of this argument was that the minor victims, A.M.A. and R.M.O., were willing participants and co-conspirators in the crime, as they were either active in prostitution or wanted to be involved in that activity before meeting Mr. Escalante. CP 32-33. The specific facts supporting this argument were that A.M.A. and R.M.O. both agreed to organize and operate a prostitution ring with Mr. Escalante and Mr. Williams, without the co-defendants employing any force or coercion. CP 28-30.

At sentencing, one of the victims was present but declined to speak. Nonetheless, the State spoke on behalf of this victim, telling the court:

> [A.M.A.] is here. [She] does not want to talk to the court. I think---and she has told me and others as well that she is afraid. I think that is very understandable considering not just this case, but everything else that she would probably start talking about and then maybe not stop. I briefed it. I'm not going to say it out loud, the stuff that I have said about her. I don't want to embarrass her. I don't want to any way impact her, revictimize her. I do want to emphasize that she is afraid. Why wouldn't she be, you know, of these two men right here, of who they represent, of their attitude here today, of not taking responsibility, of not being contrite and remorseful about what they did. Her fears, I'm confident, come from a long, long time ago when she was very, very young, and the court and defense understand what I'm talking about, and they continue. Why wouldn't they continue? The court knows what's happened throughout the pendency of this case, but she

> is here. That says a lot, too, I think. I want the court to acknowledge---I know that the court has-her presence here today. She does support the State's recommendation, which is going to be a high end.

March 10, 2017 Report of Proceedings (RP) 28-29. The State then proceeded to present a gratuitous and graphic account of the mechanics of prostitution, including the acronyms and names used for specific sex acts. RP 30-31.

Further signaling that Mr. Escalante received a particularly lenient plea deal under the circumstances, the prosecutor argued that Mr. Escalante actually committed many more serious uncharged offenses, telling the court that one of the victims "by legal definition, is being raped every single day, and these guys are the accomplices to rape. Every single count of these guys, they are an accomplice to Rape Child III." RP 64-65. Along the same lines, the State added that human trafficking offenses are "the equivalent" of second degree murder because first degree human trafficking and second degree murder are ranked with the same seriousness level in the SRA. RP 67; CP 72.

The prosecution also stressed that the fact the victims were minors is an aggravating factor under RCW 9.94A.535(3)(1), which authorizes upward departures from the sentencing guidelines. RP 68-69; CP 70. The State went on undercut its own recommendation further by stating:

> I think it's beyond appalling that these two defendants,

> by virtue of their attorneys, have filed briefs that both have said, in essence, that their clients are the victims here; these girls at the time were sophisticated, were aggressors, were initiators, were willing participants.

RP 7.

The State declined during the hearing to articulate the 216 month recommendation it agreed to make in the plea agreement, saying instead only "I have briefed the recommendation" and "I don't think I need to say it out loud."[1] RP 32.

After hearing arguments, the court stated:

> I don't think, for instance, that there are mitigating circumstances here because I don't think the kind of willingness, if you will, or able to - willingness to cooperate or be an initiator, willing participant, or something applies in the circumstances where the victim is a minor at least in these types of circumstances.

RP 93-94. The court rejected Mr. Escalante's request for an exceptional downward sentence for the reason it believed it had no authority to consider an exceptional sentence based on the mitigating factor of willing participation when the victim/participants were minors. The court imposed a standard range sentence of 200 months. RP 96; CP 58.

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[1] The deputy prosecutor did not explicitly state the recommendation of 216 months, but merely made a fleeting and tangential reference to the recommendation; during argument he stated that A.M.A. "does support the State's recommendation, which is going to be the high end" and the recommendation, "as I have briefed, [i]s the high end." 3.10.2017 RP 29, 32.

B. Appellate Proceedings.

Mr. Escalante timely filed his notice of appeal on March 31, 2017. CP 81-94. On appeal, Mr. Escalante argued that (1) the State breached the plea agreement by virtue of its conduct at sentencing, (2) the trial court abused its discretion in declining to impose a downward exceptional sentence on the basis of the victims' willing participation, and (3) the trial court abused its discretion in failing to recognize the existence of discretion to rely upon the mitigating factor of willing participation in cases involving minor victims. On October 16, 2018, the Court of Appeals entered its decision rejecting each of these arguments and affirming the trial court's judgment and sentence. Attach. A.

With respect to Mr. Escalante's argument that the State breached the plea agreement by ridiculing his request for an exceptional sentence, the Court of Appeals concluded "[t]he State properly advocated for a standard range sentence, as agreed to in the plea agreement, and did not have to join Escalante's request for an exceptional sentence." Attach. A. at 5. With respect to the other factors supporting Mr. Escalante's breach argument, the Court of Appeals held only, without analysis or reference to applicable authority, that:

> The State's advocacy regarding the seriousness of the crimes, the charged aggravating factor to which Escalante admitted, and A.M.A' s reluctance to speak at the sentencing hearing did not constitute a breach.

Attach. A at 5.

As to Mr. Escalante's argument that the court abused its discretion or failed to recognize the existence of discretion with respect to his request for a downward exceptional sentence, the appellate court held the trial court properly concluded that "based on the victims' age and immaturity they were not initiators, willing participants, aggressors, or provokers." Attach. A at 7. Following entry of the court's decision on appeal, Mr. Escalante moved for reconsideration, arguing that the Court of Appeals failed to properly consider and analyze the relevant authorities raised in the parties' briefs, specifically with respect to State v. Carreno-Maldonado, 135 Wn. App. 77, 143 P.3d 343 (2006). See Attach. B. The Court of Appeals denied this motion on November 13, 2018. Attach. B. Mr. Escalante now respectfully requests this Court's review of the Court of Appeals' decisions pursuant to RAP 13.4.

V. ARGUMENT

A. The State Breached the Plea Agreement at Sentencing in Violation of Mr. Escalante's Due Process Rights.

The Court of Appeals erred in rejecting Mr. Escalante's argument that the State breached the plea agreement. The State improperly spoke on behalf of a victim who declined to speak, refused to articulate its agreed upon recommendation, emphasized the presence of aggravating factors and the seriousness of the offenses, and compared the offenses to second

degree murder. By making these statements, and expressly refusing to articulate its recommendation, the State undermined the plea agreement and implicitly asked the court to impose an upward exceptional sentence exceeding the agreed-upon recommendation. This conduct breached the plea agreement and deprived Mr. Escalante of his due process rights, necessitating review, reversal, and remand.

A plea agreement is a contract under which the defendant gives up fundamental constitutional rights. State v. Sledge, 133 Wn.2d 828, 838-839, 947 P.2d 1199 (1997); State v. Van Buren, 101 Wn. App. 206, 211, 2 P.3d 991, *review denied*, 142 Wn.2d 1015, 16 P.3d 1265 (2000). "Because [plea agreements] concern fundamental rights of the accused, constitutional due process considerations come into play." Sledge, 133 Wn.2d at 839. In light of the fundamental rights at stake, due process requires the prosecutor to strictly adhere to the terms of plea agreements. U.S. Const amend. XIV; Santobello v. New York, 404 U.S. 257, 261-63, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); Sledge, 133 Wn.2d at 839. Thus, a plea agreement obligates the prosecutor to recommend to the court the sentence contained in the agreement. State v. Talley, 134 Wn.2d 176, 183, 949 P.2d 358 (1998).

"Although the State need not enthusiastically make the sentencing recommendation, '[it] is obliged to act in good faith…'" Carreno-

Maldonado, 135 Wn. App. at 83 (quoting Talley, 134 Wn.2d at 183). This good faith obligation requires that the State "not undercut the terms of the agreement ***explicitly or implicitly*** by conduct evidencing an intent to circumvent the terms of the plea agreement." Id. (citing Sledge, 133 Wn.2d at 840; State v. Jerde, 93 Wn. App 774, 780, 970 P.2d 781, *review denied*, 138 Wn.2d 1002 (1999)) (emphasis added); see also State v. Williams, 103 Wn. App. 231, 236, 11 P.3d 878 (2000)). Neither good motivations nor a reasonable justification will excuse a breach. Van Buren, 101 Wn. App. at 213. When determining whether the State's comments breached a plea agreement, appellate courts apply an objective standard, looking at the sentencing record as a whole. Jerde, 93 Wn. App. at 780-82.

A breach occurs where the prosecutor offers unsolicited information or argument that undermines an agreed sentence recommendation. State v. Halsey, 140 Wn. App. 313, 320, 165 P.3d 409 (2007). A breach also occurs where the State offers unsolicited information via "report, testimony, or argument that undercuts the State's obligations under the plea agreement." Carreno-Maldonado, 135 Wn. App. at 83.

In Sledge, the prosecutor insisted on an evidentiary hearing, notwithstanding a guilty plea. 133 Wn.2d at 831. At the hearing, the State

announced its standard range sentencing recommendation but then called as witnesses a probation officer and parole officer, both of whom testified regarding aggravating factors supporting an exceptional disposition. Id. at 831. The State then reiterated this evidence during argument. Id. at 837. The Supreme Court held that the State's conduct breached the plea agreement. Id. at 843.

In Carreno-Maldonado, the State's sentencing recommendation was agreed to by both parties. The agreed recommendation was for the low end of the standard range on a first degree rape charge and a mid-range sentence on additional second degree rape charges. Id. At sentencing, the prosecutor made the agreed-upon recommendations but also focused on aggravating factors concerning the rapes. Id. at 80-81. The prosecutor also indicated to the court that she wanted to speak "on behalf" of victims who were present but did not wish to address the court. Id. The prosecutor described facts supporting aggravating factors, and the court imposed high end sentences on all counts. Id. at 82.

On appeal, the Court of Appeals held that the State breached the plea agreement. As the court explained, because the State agreed to recommend a low end sentence, "there was no need for the State to recite potentially aggravating facts." Id. at 84. And while the Court acknowledged that the State had more leeway on the midrange

recommendation to do so, the prosecutor's remarks "went beyond what was necessary" to support the midrange recommendation. Id. at 84-85. The court further held that the State breached its plea agreement by making unsolicited remarks on a victim's behalf that undermine the State's plea agreement, and that the Washington State Constitution does not give the State the right to speak for victims when they have decided not to speak for themselves and when they have not requested the State's assistance in otherwise communicating with the court. Id. at 86.

In State v. Xavier, the State agreed to recommend a 240-month standard range sentence in exchange for Xavier's guilty plea to multiple sex offenses. 117 Wn. App. 196, 69 P.3d 901 (2003). After making the recommendation, the prosecutor "proceeded to (1) emphasize the graveness of the situation; (2) reiterate the charges that the State did not bring; (3) note that the State had forgone the opportunity to ask for a 60-year exceptional sentence; and (4) highlight aggravating circumstances that would support an exceptional sentence." Id. at 198. The Court of Appeals found that, by highlighting aggravating facts with unsolicited remarks, the prosecutor signaled lack of support for a standard range sentence and undercut the plea agreement. Id. at 200-201.

In both Van Buren and Jerde, the State agreed to recommend a standard range sentence while the presentence investigation report

recommended an exceptional sentence. In Van Buren, the prosecutor acknowledged the agreed recommended sentence but also noted that, if the court were considering an exceptional sentence, the grounds for doing so were contained in the presentence report. Van Buren, 101 Wn. App. at 207-209. The Court of Appeals found a breach because the prosecutor had downplayed the agreed recommendation and, instead, focused on applicability of the aggravating factors. Id. at 215-217.

In Jerde, prosecutors indicated at sentencing they were maintaining their request for standard range sentences for Jerde and one of his codefendants, but emphasized the aggravating factors contained in the report and mentioned an additional factor for the court's consideration. Id. at 777-778 n.2-3. The Court of Appeals found a breach because the State unnecessarily highlighted aggravating factors. Id. at 782.

1. The State improperly emphasized aggravating factors.

As was condemned in the foregoing cases cited herein, the State in Mr. Escalante's case consistently recited unsolicited, aggravating facts including gratuitous, lurid details of the mechanics of prostitution and the purported aggravating factor of the victims' status as minors. RP 30-31. The State told the court that Mr. Escalante was in fact guilty as an accomplice to Rape Child III "every single day", suggesting culpability far beyond that suggested by the two counts of human trafficking. RP 64-65.

Most importantly, and most directly condemned in each of the cases cited above, the State stressed to the court that the age of the victims constituted an aggravating factor under RCW 9.94A.535(3)(1), which authorizes upward departures from the sentencing guidelines. RP 68-69; CP 70. Of course, the court did not need to find an aggravating factor in order to impose the standard range sentence the State agreed to recommend. Thus, as in Carreno-Maldonado, Sledge, Xavier, Van Buren, and Jerde, the State gratuitously emphasized facts and aggravating factors that served only to advocate for imposition of a sentence more severe than that contemplated in the plea agreement. As recognized in each of those cases, such conduct undermines the plea agreement and constitutes a breach and due process violation, necessitating reversal. Due to the conflict between the appellate ruling and the foregoing published appellate decisions, review is proper under RAP 13.4(b)(2).

2. The State improperly spoke on behalf of the victim.

The State breached the plea agreement, or contributed to a breach of the plea agreement in light of the whole record, by speaking on behalf of the victim, who was present and declined to speak, specifically citing the victim's decision to not speak as an indicator of her fear of the co-defendants. Speaking at sentencing on behalf of victims who have chosen

not to speak in order to support a harsher sentence has been condemned by the Court of Appeals. See Carreno-Maldenado, 135 Wn. App. at 80-81.

Like in Carreno-Maldonado, the State in Mr. Escalante's case spoke on behalf of the victims in order to underscore the severity of the offense. RCW 7.69.030 provides the victims the right to speak or not speak on their own behalf, but does not provide the State with the right to speak for a victim when he or she has decided not to speak and have not requested assistance in otherwise communicating with the court such as by presenting a victim impact statement. Carreno-Maldonado, 135 Wn. App. at 86. Where a prosecutor merely helps a victim exercise her constitutional and statutory right to communicate information to the sentencing court, such assistance does not breach a plea agreement by that conduct alone. Id. at 86, (citing Talley, 134 Wn.2d at 186-87).

Here, however, the record shows the prosecutor's belief that A.M.A. is "afraid" of Mr. Escalante constitutes impermissible advocacy. As was the case in Carreno-Maldonado, the record does not show that the prosecutor made the challenged statement as a court officer answering the court's questions or assisting the victim to assert her rights under RCW 7.69.030. Instead, the statement was a breach of the plea agreement because it was unsolicited advocacy suggesting aggravating factors and

therefore "contrary to the State's sentencing recommendation." Carreno-Maldonado, 135 Wn. App. at 86.

Despite this issue having been fully briefed in the proceedings below, the Court of Appeals failed to cite, much less distinguish, Carreno-Maldonado. See Attach. A. The Court of Appeals' decision is erroneous and cannot be reconciled with Carreno-Maldonado, making review proper under RAP 13.4(b)(2).

3. The State improperly compared the offenses to second degree murder.

The State's suggestion that Mr. Escalante's human trafficking offenses are equivalent to second degree murder was further incorrect and misleading and undercut the State's agreed-upon recommendation. The offenses charged, with Mr. Escalante's offender score of 6, carried standard sentencing ranges of 162 to 216 months in prison. Second degree murder with an offender score of 6, on the other hand, carries a much higher range of 195 to 295 months. The difference on the high end between these two offenses is thus more than 6.5 years. Thus, the State's suggestion that these are comparable crimes warranting comparable punishment, coupled with the other factors discussed herein, establish that the State was implicitly asking the court to impose an exceptional sentence upward.

4. The State improperly refused to state its sentencing recommendation during sentencing.

At sentencing, the State is required to recommend to the court the sentence contained in the agreement. Talley, 134 Wn.2d at 183. It failed to meet this basic obligation in Mr. Escalante's case. Instead, the State did everything it could to undercut its recommendation and signal its lack of support for the recommendation by expressly declining to state the recommendation of 216 months out loud during sentencing. RP 29, 32.

The State's statement to the court that "I have briefed the recommendation" and "I don't think I need to say it out loud" was a clear and direct expression of the prosecutor's sentiment that he did not agree with the sentence the State was obligated to recommend. RP 32. This statement was a repudiation, not a recommendation as required. This explicit refusal to endorse the recommendation in the plea agreement goes far beyond the breaches at issue in Carreno-Maldonado, Sledge, Xavier, Van Buren, and Jerde. Therefore, review is proper under RAP 13.4(b)(1) and (2) and the lower courts' decisions should be reversed.

5. The combined impact of the State's improper comments implicitly asked the judge to impose an exceptional sentence upward, thereby breaching the plea agreement and violating Mr. Escalante's due process rights.

The State's conduct at sentencing can only be viewed in one way – the State was signaling to the court that it believed Mr. Escalante received

an unduly favorable plea agreement under the circumstances and deserved a much harsher punishment than the recommendation the State agreed to make. The State's conduct fell well short of the "good faith" requirement to abstain from "implicitly or explicitly" undermining the plea agreement. See Carreno-Maldonado, 135 Wn. App. 77. The Court of Appeals' contrary holding is incompatible with the foregoing authorities, thus warranting review under RAP 13.4(b)(1) and (2). Review, reversal, and remand are necessary to enforce Mr. Escalante's due process rights.

6. The error was structural, and Mr. Escalante is entitled to elect his remedy on remand.

A breach of a plea agreement constitutes structural error because it "infects the entire proceeding". Carreno-Maldonado, 135 Wn. App. at 88. Consequently, such an error is not subject to harmless error review. Id. Additionally, when the prosecutor breaches a plea agreement with the defendant, the defendant has a choice of remedies: withdraw of guilty plea or demand specific performance of the plea agreement. State v. Harrison, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003); Sledge, 133 Wn.2d at 846. Because the State breached the plea agreement, and such error is structural, Mr. Escalante is entitled to reversal and the opportunity to elect his remedy.

B. The Trial Court Abused Its Discretion in Failing to Recognize its Discretion to Impose an Exceptional Sentence Based on the Victims' Willing Participation in the Crimes.

In cases in which a defendant appeals a sentencing court's denial of his request for an exceptional sentence below the standard range, "review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). "The failure to consider an exceptional sentence is reversible error." State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); see also Garcia-Martinez, 88 Wn. App. at 329 (holding that a trial court's erroneous belief that it lacks the discretion to depart downward from the standard sentencing range is itself an abuse of discretion warranting remand).

In making a sentencing decision, sentencing courts may consider mitigating circumstances enumerated in the SRA, as well as other factors, provided that they are consistent with the purposes of the SRA and are supported by the evidence. See RCW 9.94A.535. One enumerated mitigating factor is where to a significant degree the victim was an initiator, willing participant, aggressor, or provoker of the incident. RCW 9.94A.535(l)(a).

At sentencing, Mr. Escalante requested an exceptional sentence downward based on this factor. RP 33-48; RCW 9.94A.535(l)(a). However, the sentencing court mistakenly concluded this factor was inapplicable because the victims were minors. RP 93-94. The "willing participant" mitigating factor does not provide an exception for minors. A person does not have to actually commit the crime or even be capable of committing the crime to be a "willing participant." See State v. Clemons, 78 Wn. App. 458, 898 P.2d 324 (1995).

In Clemons, the Court of Appeals affirmed a mitigated exceptional sentence downward for an 18-year-old boy for third degree rape, after pleading to having had consensual sex with a 14-year-old girl, finding that she was a willing participant to the criminal act. The basis for the downward sentence was that the victim was an initiator and a willing participant. Id. at 462. That the child was legally incapable of consenting to sexual intercourse with Clemons did not mean that the willing participant exception was inapplicable. Id. at 467-68; see also State v, Rife, 789 So.2d 288 (Fla.2001) (victim's status as a minor was not a defense but was a mitigating factor at sentencing); State v. Rush, 24 Kan. App. 2d 113, 942 P.2d 55 (1997) (under 14 year-old victim's sexual aggressiveness was a mitigating factor at sentencing in statutory rape case).

The court's reasons for declining to impose an exceptional sentence, namely the status of the victims as minors, is incompatible with the prior holding in Clemons. Clemons stands unequivocally for the proposition that the "willing participant" mitigating factor applies to adults as well as minors. In this case, Mr. Escalante' s sentence should be reversed and remanded for a resentencing hearing with the court using its discretion to consider an exceptional sentence downward. The Court of Appeals' decision to the contrary cannot be reconciled with the holding in Clemons, thereby warranting review under RAP 13.4(b)(2).

VI. CONCLUSION

For the foregoing reasons, this Court should grant discretionary review of the appellate court's denial of Mr. Escalante's appeal under RAP 13.4 and remand with instructions to allow Mr. Escalante to withdraw his guilty plea or be resentenced with the State abiding by its plea agreement obligations. Alternatively, this matter should be remanded for resentencing with instructions to the court to properly consider Mr. Escalante's request for a downward exceptional sentence.

Respectfully submitted this 12th day of December, 2018.

LAW OFFICE OF COREY EVAN PARKER

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CERTIFICATE OF SERVICE

I, Corey Evan Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on December 12, 2018, I caused to be served the document to which this is attached to the parties listed below in the manner shown below:

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Attachment “A”

Filed
Washington State
Court of Appeals
Division Two

October 16, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CURTIS K. K. ESCALANTE, Appellant.	No. 50169-4-II UNPUBLISHED OPINION

MELNICK, J. — Curtis K. K. Escalante appeals the standard range sentence imposed following his guilty plea to two counts of human trafficking in the second degree. Escalante contends the State breached the parties' plea agreement and the sentencing court abused its discretion by not considering the mitigating factor he presented in support of an exceptional sentence downward. We affirm.

FACTS

I. PLEA AGREEMENT

The State originally charged Escalante with two counts of human trafficking in the first degree, one count of kidnapping in the first degree, one count of intimidating a witness, two counts of promoting commercial sexual abuse of a minor, one count of child molestation in the third degree, and one count of promoting prostitution in the second degree. The offenses involved multiple minor victims. One of the victims was A.M.A.

Following plea negotiations, Escalante agreed to plead guilty to two counts of human trafficking in the second degree with the aggravating factor that "any victim was a minor at the time of the offense." Clerk's Papers (CP) 12 & 13. Escalante's had a standard sentencing range sentence of 162-216 months. The State agreed to "request 216 mos." and Escalante was free to "request exceptional sentence downward." CP at 18.

During the guilty plea hearing, the trial court asked Escalante if he understood that the court did "not have to follow the recommendations of either the State or the defense when determining [Escalante's] sentence." Report of Proceedings (RP) (Feb. 13, 2017) at 16. Escalante responded, "I understand." RP (Feb. 13, 2017) at 16.

II. SENTENCING HEARING

At the sentencing hearing, the State requested that Escalante be sentenced to the "high end" of the standard range sentence, or 216 months. RP (Mar. 10, 2017) at 29. In its sentencing memorandum, the State asserted that "Escalante ha[d] 6 points and a range of 162-216 months" and recommended a sentence of "216 months." CP at 69.

The State stated, "The legislature determined human trafficking in the second degree to be a Level XII offense, which is equivalent to an assault in the first degree level." CP at 72. It also told the court that second degree human trafficking of children "is . . . deplorable" and an aggravating factor under RCW 9.94A.535(3)(l).[1] CP at 72.

[1] RCW 9.94A.535(3)(l) provides that it is an aggravating factor if "[t]he current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense."

A.M.A. attended the sentencing hearing, but did not want to speak. The State commented, "I do want to emphasize that I think she is afraid. Why wouldn't she be, you know, of [Escalante], of who [he] represent[s], of [his] attitude here today, of not taking responsibility, of not being contrite and remorseful about what [he] did." RP (Mar. 10, 2017) at 29.

Escalante requested an exceptional sentence downward, arguing the victims were willing participants. The court acknowledged Escalante's argument and stated that the mitigating factor was whether, "to a significant degree, the victims were initiator, willing participant, provoker. For purposes of establishing mitigating circumstances." RP (Mar. 10, 2017) at 68. The court later clarified, "With respect to whether or not the victim is a willing initiator, willing participant, aggressor, or provoker of the incident, again, in a particular crime, one might excuse the defendant's conduct at least in some part that it was less immoral because of something like that." RP (Mar. 10, 2017) at RP 87-88. The court continued by discussing the age of the victims and that they "don't have . . . the developed brain, if you will, to make [good] choices." RP (Mar. 10, 2017) at 92. Ultimately, the court concluded:

> I don't think, for instance, that there are mitigating circumstances here because I don't think the kind of willingness, if you will, or able to—willingness to cooperate or be an initiator, willing participant, or something applies in the circumstances where the victim is a minor at least in these kinds of circumstances.

RP (Mar. 10, 2017) at 93-94. Lastly, the court stated, "Anyway, I don't think that there is a basis for an exceptional downward." RP (Mar. 10, 2017) at 95.

The sentencing court sentenced Escalante to a standard range sentence of 200 months. Escalante appeals.

ANALYSIS

I. BREACH OF PLEA AGREEMENT

Escalante argues that the State breached the parties' plea agreement by (1) arguing that the penalty for human trafficking is the equivalent of first degree assault; (2) arguing that second degree human trafficking of minors is an aggravating factor, (3) only tangentially and fleetingly referring to the State's 216 month recommendation, and (4) impermissibly speaking on behalf of A.M.A. We disagree.

Whether a breach of a plea agreement has occurred is a question of law we review de novo. *State v. Neisler*, 191 Wn. App. 259, 265, 361 P.3d 278 (2015). A defendant may raise the issue of a prosecutor's breach of a plea agreement for the first time on appeal. *State v. Xaviar*, 117 Wn. App. 196, 199, 69 P.3d 901 (2003). Because a defendant gives up important constitutional rights by agreeing to a plea bargain, due process considerations come into play. *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). "Due process requires a prosecutor to adhere to the terms of the agreement." *Sledge*, 133 Wn.2d at 839. While the recommendation need not be made enthusiastically, "the State has a concomitant duty not to undercut the terms of the agreement explicitly or by conduct evidencing an intent to circumvent the terms of the plea agreement." *Sledge*, 133 Wn.2d at 840.

In determining whether a prosecutor has breached a plea agreement's terms, we review the sentencing record as a whole using an objective standard. *State v. Carreno-Maldonado*, 135 Wn. App. 77, 83, 143 P.3d 343 (2006). "When the prosecutor breaches a plea agreement, the appropriate remedy is to remand for the defendant to choose whether to withdraw the guilty plea or specifically enforce the State's agreement." *State v. Jerde*, 93 Wn. App. 774, 782-83, 970 P.2d 781 (1999).

Escalante argues that the State breached the plea agreement by undermining Escalante's argument for an exceptional sentence below the standard range. The record, however, is to the contrary.

Escalante agreed to plead guilty to two counts of human trafficking in the second degree, with the aggravating factor that the victims were minors. The State agreed to drop several charges and recommend a standard range sentence. The State requested the high end of a standard range sentence both in its sentencing memorandum and during the sentencing hearing as agreed to in the plea agreement.

Additionally, per the plea agreement, Escalante could argue for an exceptional sentence below the standard range. Nowhere in the plea agreement did the State agree to support an exceptional sentence. The State does not breach a plea agreement by participating in a sentencing hearing. *State v. Talley*, 134 Wn.2d 176, 187, 949 P.2d 358 (1998). The State properly advocated for a standard range sentence, as agreed to in the plea agreement, and did not have to join Escalante's request for an exceptional sentence. The State's advocacy regarding the seriousness of the crimes, the charged aggravating factor to which Escalante admitted, and A.M.A's reluctance to speak at the sentencing hearing did not constitute a breach.

Because the State adhered to the terms of the parties' plea agreement, Escalante's argument fails.[2]

II. CONSIDERATION OF MITIGATING FACTOR

Escalante next argues that the sentencing court abused its discretion by failing to recognize its own authority to impose an exceptional sentence downward. We disagree.

[2] For this reason, we do not address Escalante's argument that he is entitled to choose his remedy on remand.

Generally, sentences within the standard sentence range are not appealable. RCW 9.94A.585(1); *State v. Osman*, 157 Wn.2d 474, 481, 139 P.3d 334 (2006). A court has discretion to sentence a defendant within the standard sentence range, and so long as the sentence falls within the standard sentence range, there can be no abuse of discretion as to the sentence's length. RCW 9.94A.530(1); *State v. Williams*, 149 Wn.2d 143, 146-47, 65 P.3d 1214 (2003). But every "defendant *is* entitled to ask the trial court to consider [an exceptional] sentence and to have the alternative actually considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Thus, a court that refuses categorically to consider such a request abuses its discretion. *Grayson*, 154 Wn.2d at 342.

Escalante requested an exceptional sentence below the standard range because, he argued, "'[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.'" CP at 32 (quoting RCW 9.94A.535(1)). At the sentencing hearing, the court recognized Escalante's argument that "to a significant degree, the victims were initiator, willing participant, provoker. For purposes of establishing mitigating circumstances." RP (Mar. 10, 2017) at 68. The court later clarified, "With respect to whether or not the victim is a willing initiator, willing participant, aggressor, or provoker of the incident, again, in a particular crime, one might excuse the defendant's conduct at least in some part that it was less immoral because of something like that." RP (Mar. 10, 2017) at 87-88. The court continued by discussing the age of the victims and that they "don't have . . . the developed brain, if you will, to make [good] choices." RP (Mar. 10, 2017) at 92. Ultimately, the court concluded, "I don't think, for instance, that there are mitigating circumstances here." RP (Mar. 10, 2017) at 93-94. The court explained "I don't think the kind of willingness, if you will, or able to—willingness to cooperate or be an initiator, willing participant, or something applies in the circumstances where the victim is a minor at least in these

types of circumstances." RP (Mar. 10, 2017) at 94. Lastly, the court concluded, "Anyway, I don't think that there is a basis for an exceptional downward." RP (Mar. 10, 2017) at 95.

The court acknowledged and considered Escalante's request for an exceptional sentence, but concluded that based on the victims' age and immaturity they were not initiators, willing participants, aggressors, or provokers. Thus, the sentencing court did not fail to recognize the scope of its discretion, nor did it abuse its discretion.

III. APPELLATE COSTS

Escalante asks that we decline to impose appellate costs if the State prevails on appeal. If the State makes a request for appellate costs, Escalante may challenge that request before a commissioner of this court under RAP 14.2.2.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Worswick, P.J.

Johanson, J.

Attachment “B”

Filed
Washington State
Court of Appeals
Division Two

November 13, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CURTIS K. K. ESCALANTE, Appellant.	No. 50169-4-II ORDER DENYING MOTION TO RECONSIDER

Appellant moves for reconsideration of the Court's October 16, 2018 unpublished opinion. Upon consideration, the Court denies the motion for reconsideration. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Johanson, Melnick

FOR THE COURT.

Melnick J.

MELNICK, J.

LAW OFFICE OF COREY EVAN PARKER

December 12, 2018 - 11:56 AM

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