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FILED
Aug 26, 2016
Court of Appeals
Division I
State of Washington

NO. 73411-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARIA GONZALES ESQUIVEL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES D. CAYCE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether Esquivel has established reversible misconduct in the State's rebuttal argument, where the State directly responded to defense counsel's argument that the State's witnesses were lying in order to better their chances in a civil suit by demonstrating that the theory was implausible?

2. Whether the trial court properly imposed a no-contact order protecting Esquivel's minor child as a crime-related prohibition, where that child was victimized by Esquivel's conduct and provided crucial testimony leading to Esquivel's conviction?

3. Whether Esquivel may challenge the "deliberate cruelty" aggravating circumstance as unconstitutionally vague, contrary to binding precedent, and whether, if so, the circumstance is impermissibly vague?

4. Whether this Court should accept the State's concession that the indeterminate sentence imposed for Esquivel's first-degree assault conviction is improper, and whether resentencing is necessary where the appropriate sentence would be subsumed within or consecutive to her sentence for second-degree rape?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Maria Gonzales Esquivel with several domestic violence offenses: assault in the first degree, rape in the second degree, and four counts of assault in the second degree. CP 151-55. The State alleged that Esquivel abused members of the Chagoya family while they lived in her home. CP 7-12. The State further alleged that each of the offenses was aggravated by more than one of the following factors: the offense was part of an ongoing pattern of psychological, physical or sexual abuse of the same victim or multiple victims manifested by multiple incidents over a prolonged period of time; the offense manifested deliberate cruelty to the victims; the offenses involved a destructive and foreseeable impact on persons other than the victim; the offenses occurred within sight or sound of the victim's or offender's minor child; and the defendant used her position of trust to facilitate the offense. CP 151-55.

Following a lengthy jury trial, Esquivel was convicted as charged and the jury found each of the aggravating factors. CP 351-76. The State recommended an exceptional sentence in which Esquivel would serve the high-end standard range sentence of 277

months for the first-degree assault, consecutive to a low-end standard range sentence of 185 months for the second-degree rape, all to be served concurrent to high-end standard range sentences of 70 months for each of the three second-degree assault convictions, for a total term of 462 months' confinement. Supp. CP __ (Sub. No. 311); RP 4851-54.¹ In light of Esquivel's diagnosed mental illness, the defense recommended an exceptional downward sentence of 180 months for the first-degree assault and second-degree rape, to be served concurrently with each other and with 53-month sentences for each of the second-degree assault convictions. CP 472; RP 4861-62.

Characterizing Esquivel's conduct as "prolonged and brutal torture [that] went on for almost two years," the trial court rejected both parties' sentencing recommendations and imposed the maximum punishment for each offense, to be served consecutively. RP 4868. Thus, for both the first degree assault and the second degree rape, the court imposed "life." RP 4868; CP 504, 521. The court told Esquivel, "I just want the Department of Corrections to be clear and the Court of Appeals to be clear that I believe that for

¹ The verbatim report of proceedings consists of 61 consecutively-paginated volumes. The State refers to the material by page number only.

what you did, you should serve the rest of your life in prison.” RP 4868.

2. SUBSTANTIVE FACTS

Maria Gonzalez Esquivel befriended Veronica and Rafael Chagoya in 1996, shortly before Rafael was disabled by a car accident and left the military. RP 4001-07. Esquivel read tarot cards and held herself out as a healer and practitioner of Santeria.² RP 4015, 4025-26. Over several years, Esquivel offered to cure the Chagoyas and their children of various ailments and predilections and charged large sums of money for her services. RP 3599-3600, 4027-30. For example, Esquivel charged them about \$40,000 to “cure” their eldest son’s autism. RP 3025, 4026. When the cure did not work, Esquivel blamed Rafael for failing to pay for more healing. RP 3344-45. By 2006, the Chagoyas owed Esquivel tens of thousands of dollars for ineffective supernatural remedies.³ RP 4023, 4029.

² The Santeria religion originated in the 19th century as an amalgam of Roman Catholicism and the traditional religion of the Yoruba people, who were brought to Cuba as slaves. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). The faith teaches that every individual has a destiny from God that is fulfilled with the aid and energy of spirits, to whom adherents may make sacrifices to cure the sick and for other purposes. Id. at 524-25.

³ Esquivel also provided ineffective non-supernatural healings. For example, Esquivel attempted to cure one of the Chagoya children’s eczema by pouring diesel fuel on the affected area and scraping it with a rock or knife. RP 3325-26.

Veronica and Rafael had several children together between 1991 and 2003: VC (1991), DC (1993), AC (1997), RC (2003), and ASC (2004). RP 2952-53, 3574. In 2002, Veronica also had a daughter, RG, with another man.⁴ RP 3000, 3630-31, 4022. This exacerbated problems in the marriage, and when she was four years old, RG was sent to live with Esquivel and Esquivel's slightly younger daughter, EG. RP 3005-09, 3630.

Rafael divorced Veronica in 2006, but they continued to live together for the sake of the children. RP 3011-12, 4023-24. When Veronica separated from the family on occasion, her eldest daughter, VC, took over her household responsibilities. RP 3590-91, 3594. Tension between VC and her parents about this and other matters prompted Esquivel to invite VC to move in, which she did in January of her sophomore year of high school. RP 3618-19.

Soon after VC moved in, Esquivel began a bizarre campaign of control and abuse. Esquivel disapproved of VC attending school regularly and prevented it, in part, by forcing VC to drink "an insane amount of beer every morning before eating anything," which Esquivel claimed would keep VC from becoming an addict. RP 3624, 3627, 3647-51. When VC predictably became sick or drunk,

⁴ Esquivel was present when RG was born and falsified official documents to reflect that she, not Veronica Chagoya, was RG's mother. RP 2206-09.

Esquivel kept her out of school for fear that someone would investigate. RP 3624. VC was eventually withdrawn from school altogether. RP 3651.

Esquivel also forbade VC to sleep in a bedroom, although one was available, and did not allow VC to acknowledge RG as her sister or to show RG any affection. RP 3521, 3629. Esquivel did not allow VC to shower regularly, insisted that VC not sleep for days at a time, controlled the phones, and forbade VC from leaving the house alone. RP 3653-55, 3663, 3674. She eventually began hitting VC. RP 3634-36.

Veronica and Rafael fell on financial hard times in 2009, largely because of their debt to Esquivel for healing. They moved the entire family in with Esquivel. RP 3309, 3614, 4032, 4036. Rafael gave all of his earnings and disability benefits to Esquivel for rent and healing. RP 3460-61, 3687, 4038-39.

Esquivel verbally abused Veronica, and eventually kicked her out of the house. RP 3313, 3667, 4041. Once Veronica was gone, Esquivel became more violent, aggressive, and abusive to the Chagoyas. RP 3314, 4045, 4047. She withheld food, hygiene,

and medicine, allowing them to eat only food that had begun to rot.⁵ RP 3326, 3376, 3392-93, 3666, 3674, 3677, 3796-98, 4056, 4232-33. While the Chagoya family was starving, Esquivel had multiple cosmetic surgeries and spent exorbitant sums for beauty treatments. RP 3673, 3675, 3677, 4250, 4534, 4536, 4611.

Of the Chagoya children, VC bore the brunt of Esquivel's abuse. Esquivel beat her daily with kitchen utensils, including a large wooden rolling pin and the sharp edges of spatulas and ladles, electrical wires and cables, sticks, a rubber mallet, as well as her bare hands. RP 3333, 3343, 3351, 3361, 3400, 3690-93, 3702-04, 3708, 3723, 3738, 3742, 4061, 4068-69. If VC cried during the abuse, she would be beaten harder. RP 3711. When Esquivel's hands became sore from beating VC, she forced Rafael or AC to strike VC, beating them if they refused. RP 3358, 3408-09, 3742-43, 3748.

As a result of Esquivel's abuse, VC constantly had black eyes, bruises, open sores, and swelling. RP 2213, 2222, 2253-54, 3363, 3361-63, 3371, 3374, 3709-10, 3712-14, 4060. At one point, her lip was completely split in two, requiring three layers of stitches,

⁵ An exception was for fresh hot chiles. Esquivel occasionally forced Chagoya family members to eat dozens of serrano and habanero peppers, without water, until they vomited. RP 3694-95, 3701, 4229-31.

and her ear drum was perforated. RP 3724, 3775, 3784, 3793. In addition to her own beatings, VC was forced by Esquivel to abuse her father and younger siblings. RP 3702, 3682, 4084-85, 4161.

Esquivel threatened that if VC told anyone about the abuse, her parents would go to jail, her siblings would be split up in the foster system, and she would never see any of them again. RP 3714-16. As a result of constant and escalating abuse, VC believed she would die in Esquivel's home, and she attempted suicide more than once. RP 3713-14, 3768, 3771. By the time of trial, VC still had scars "[o]n my back, on my buttocks, on my legs, on my arms, on my lip, on my clavicle, nearby my neck, my shoulder, and on my face." RP 3741. See Exs. 58, 81, 99, 194.

The abuse of VC escalated again on March 29, 2011, when Esquivel announced that she would cure VC of herpes.⁶ VC testified that Esquivel forced her to undress, beat her until she opened her legs, poured cane alcohol over her genitals, saturated a kitchen scrub-sponge with the alcohol, inserted the scrub-sponge into her vagina and anus and twisted it around inside. RP 2749-55. VC screamed and begged Esquivel to stop. RP 3755. Esquivel responded by telling VC "to shut up, to stop it, that it wasn't painful,

⁶ There is no evidence that VC ever had herpes.

that [she] was enjoying it.” RP 3755. Esquivel then shoved the scrub-sponge back into VC's vagina, told her to keep it there overnight, and forced VC to sleep on Esquivel's bedroom floor to make sure she did so. RP 3757. The next day, Esquivel repeated the “treatment,” but because VC had discarded the bloody scrub-sponge, Esquivel used a dirty scrub-sponge used for washing dishes. RP 3760-65. Esquivel planned to charge VC for this “cure.” RP 3759.

Following the two rapes, and confronted with Esquivel's plan to move the family to Texas, VC escaped. RP 3770-71. She ran to a church and was taken in by one of the parishioners. RP 3776-82. She did not disclose Esquivel's abuse to authorities for a few months, until she saw her obviously-wounded father and autistic younger brother and feared that her departure was making things worse for the siblings she left behind. RP 3789.

Esquivel's other major target was Rafael. She hit him with various kitchen utensils, tools, and with his own cane. RP 2255-56, 3332-33, 4091-94, 4112. She bludgeoned his hands and shins with a rolling pin, resulting in emergency surgery, skin grafts, a month-long hospitalization, and a substantial risk of losing his legs. RP 3333, 3349, 4063, 4068-69, 4079-80, 4147, 4288. By the time of

trial, Rafael's legs had still not fully healed. RP 4087. On one occasion, Esquivel broke Rafael's nose with a punch, then hit him on both sides of his ribcage with a rubber mallet, causing fractures, a punctured lung, and a lacerated spleen. RP 3368, 4111. On his 44th birthday, Esquivel hit Rafael in the eye with a medicine bottle, which ruptured his eye globe, resulted in multiple surgeries, and left him permanently blind in that eye. RP 4197, 4201-02, 4209-11. Another time, Esquivel beat him in the head with a sharp metal instrument, necessitating emergency treatment and three staples in his head. RP 4156. Repeated head injuries caused Rafael to suffer subdural hematoma, intracranial hemorrhage, and two strokes. RP 4256-61.

In one particularly gruesome episode, Esquivel beat Rafael's penis with a wooden stick "endlessly, until a hole formed." RP 4170-72. At that point, Esquivel forced VC to squeeze Rafael's testicles – swollen at the time with sepsis -- until blood and fluid poured out. RP 3729-33, 4168-73. Esquivel then forced Rafael to clean up the bloody mess while she continued to punch him in the face. RP 4172-74. When Rafael could not move the following morning, Esquivel allowed the children to call an ambulance. RP

4176-77. He was treated at Harborview for rib fractures, leg injuries, and a "macerated penis." RP 4160.

Rafael was repeatedly hospitalized for his injuries. RP 4080, 4082, 4114, 4190-91, 4196, 4212, 4256. But the injuries would not heal because Esquivel continuously beat the injured areas and forbade Rafael to bathe. RP 2258, 3353, 4090, 4139, 4148-49. Esquivel also took Rafael's prescription pain medications for her own recreational use. RP 3666, 4129-30.

Rafael lied about his injuries whenever contacted by the authorities because he was afraid of Esquivel's purported supernatural powers, and because Esquivel threatened to hurt his children and to accuse him of things he had not done. RP 4102, 4125, 4136, 4158-59, 4263. He did not take his children and leave because he had no money, nowhere to go, and could find no shelters for a man with five children. RP 4051, 4066-67. Additionally, before the abuse started, Rafael had signed papers purporting to give Esquivel guardianship over the children. RP 4243. Rafael believed that if he tried to take the children away, he would be committing kidnapping. RP 4052, 4101, 4242-44. When Rafael tried to escape on his own, Esquivel made VC and AC help her recapture him and made him "pay" by inflicting the genital

injuries described above. RP 4167. Esquivel also made Rafael beat his own children. RP 2268, 2271.

Although Rafael and VC were beaten the most often, all of the Chagoyas were physically abused by Esquivel. She ordered Rafael to hit DC, who is autistic, when he had tantrums or ate food without permission. RP 3451-52. Esquivel slapped and hit AC and DC. RP 2259, 2266. She kicked the youngest kids, RC and ASC, in the shins. RP 4046, 4060-61. She left marks on their faces, elbows, backs and bottoms. RP 3320, 3322, 3406. VC testified that "On one particular occasion, [ASC] had a gash on his head and he was bleeding because Esquivel had grabbed a metal ladle and hit him on his head. And using that same metal ladle, she nearly sat on him and beat on his legs until they were black and blue, and did the same thing with [RC] to the extent that we thought he might have had his foot broken." RP 3691. Whenever possible, AC and VC would take abuse meant for their younger siblings. RP 3406, 3693, 3694. But other times, Esquivel forced VC and AC to hit the younger siblings. RP 2271, 3406, 3409, 3682.

Esquivel's 11-year-old daughter, EG, testified against her mother at trial. RP 2235. EG confirmed that Esquivel regularly beat the Chagoyas. RP 2252-59. EG witnessed this abuse despite

her mother's efforts to hide it by locking EG in her room with the TV on. RP 2248, 2251-52. This happened 7-9 times per week; every time, EG heard screaming and crying as well as "the whips of wires or the hits of punching." RP 2250-52. It sounded to her as though Esquivel was intentionally hurting the Chagoyas. RP 2249. And while Esquivel generally treated RG better than the other children, EG described one occasion on which Esquivel beat RG with a wire cable for "quite a long time" without explanation. RP 2260-61. EG testified that that she was afraid that she might end up like the Chagoyas. RP 2251.

Esquivel testified at trial, categorically denying that any abuse occurred in her home. RP 4455-4697.

C. ARGUMENT

1. THE PROSECUTOR'S REBUTTAL ARGUMENT WAS NOT IMPROPER.

Esquivel contends that the prosecutor committed reversible misconduct in closing argument by suggesting that the jury could only acquit her if it found that the State's witnesses were lying. Esquivel misrepresents the State's argument. Because the State did not present the jury with the false choice between believing the State's witnesses or acquitting Esquivel, there was no misconduct.

Taken in context, the argument was a fair response to defense counsel's closing argument.

a. Relevant Facts.

Esquivel testified at trial that none of the abuse described by the Chagoyas and numerous other witnesses, including Esquivel's own daughter, actually happened. In closing, the defense suggested an explanation for the conflicting versions of the facts. Referencing the Chagoya children's lawsuit against CPS, which resulted in an \$8 million settlement, and a second lawsuit against Sound Mental Health (see RP 3820-21), Esquivel's counsel argued the Chagoyas had incentive to make false statements about Esquivel and had the opportunity to collaborate on the same:

The other point is the lawsuit. I don't want to – nobody's going to make up a complete story because of a lawsuit, but what a lawsuit does is cause people sometimes to exaggerate testimony or they will minimize the testimony. And it can cause embellishment or creation of helpful facts.

RP 4782. During her testimony, Esquivel herself did not suggest this motive for the Chagoyas to lie.

In rebuttal, the State responded to the defense argument by demonstrating the extreme lengths the Chagoyas would have had to go through to fabricate their allegations to support a lawsuit:

Now, the defense also wanted to talk to you about somehow the Chagoyas must have – after all was said and done, must have come together and concocted this grandiose story to tell you. That in those couple times between [VC] leaving and their testimony they were able to come together and make this plan to implicate the defendant as the person who had done all of these injuries against them.

But in order for that to be true, you'd have to believe that they had some motive to pick the one person that cared for them, that took them in, that put a roof over their head and supposedly cared for them, gave them food, gave them clothes, and offered them a place to stay when they had nowhere to go. And that story would have to have stuck with them over the course of the years that has gone by since the defendant's arrest in August of 2011. It would have to involve a myriad of people.

First, it would have to include an 11-year-old girl, [EG], the defendant's own daughter. It would have to include her father, Juan Pineda. And he would have to get up here and she would have to get up here and tell you things that were not true. They also would have to get other people to agree to this masterful story that the people who had come in contact with Ms. Esquivel and how she related to people like [VC] and get them to agree to characterize their relationship as somehow unfavorable.

You would have to believe, then, that the Chagoyas would have to get somebody like [CPS investigator/social workers] Adair Ellison or Albert Lewis to testify falsely about the times the defendant wouldn't leave when they asked to speak to [VC] alone. You'd have to believe that they had asked people like Adair Ellison to talk about that time when the defendant spoke in Spanish with [VC] during that interview, and the times that she would talk about the abuse that was happening. You'd have to get – they'd have to get somebody like Detective Priebe-Olson to agree to testify falsely about all the defendant's statements that she made

during the course of her time with her and all the contacts that she had made with her that was contradicted by the evidence that you have. This plan would have been completely impossible to execute over the course of this long trial involving that many people.

This notion of – that this family must have come together to talk about and create this story is unreasonable and implausible. There's nothing about them that you've learned that would give you the impression that they were able to make this plan come together and come to life. They're not that sophisticated.

RP 4799-4803. The State also pointed out that neither Rafael nor Veronica were beneficiaries of the CPS settlement. RP 4803.

b. There Was No Misconduct.

A defendant who alleges prosecutorial misconduct bears the burden of establishing that the conduct complained of was both improper and prejudicial. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established only where there is a substantial likelihood that the misconduct affected the jury's verdict. Id. The allegedly improper statement must be viewed in the context of the entire case. State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

The "failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Thorgerson,

172 Wn.2d at 443 (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). If any prejudice could have been cured by a jury instruction, but none was requested, reversal is not required. Russell, 125 Wn.2d at 85.

It is improper for a prosecutor to argue that in order to *acquit* a defendant, the jury must find that the State's witnesses are either *lying* or *mistaken*. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). Such a comment mischaracterizes the burden of proof because the jury must acquit unless it has an abiding conviction in the truth of the State's evidence. Id. It is also improper for a prosecutor to argue that, in order to *believe* the defendant, the jury must find that the State's witnesses are *lying*. State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995). That argument is misleading because the jury could believe the defendant and find the State's witnesses were truthful but mistaken. Id.

The State made neither of these forbidden arguments in this case. Rather, the prosecutor argued that the defense theory that the *Chagoyas* all lied was implausible, in part because it failed to account for the numerous witnesses who corroborated the *Chagoyas'* testimony.

Where, as here, the parties present the jury with conflicting versions of the facts and the credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other. This argument is well within the "wide latitude" afforded to the prosecutor "in drawing and expressing reasonable inferences from the evidence." State v. Hoffman, 116 Wn.2d 51, 95, 804 P.2d 577 (1991).

State v. Wright, 76 Wn. App. 811, 825, 888 P.2d 1214, 1222

(1995). The State did not present the jury with a false choice between believing Esquivel or believing the State's witnesses, or between believing the State's witnesses or acquitting Esquivel. The State did not mislead the jury about its role or the burden of proof.

c. Error, If Any, Does Not Require Reversal.

Because Esquivel did not object to the State's argument at trial, she has waived the issue unless she can show that the alleged misconduct was "so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Thorgerson, 172 Wn.2d at 443.

Esquivel argues that the prosecutor's closing argument merits reversal in spite of her failure to object because Washington law has long condemned "in order to find the defendant not guilty"

arguments. Brief of Appellant at 13. As argued above, however, the prosecutor did not argue that the jury had to do anything “in order to find Esquivel not guilty” and did not tell the jury that it would have to find that any other witness was lying “in order to believe Ms. Esquivel.” Indeed, Esquivel did not testify that the Chagoyas made up the abuse to support a lawsuit. Rather, the State’s argument did no more than state the obvious: that in order to accept defense counsel’s theory that the Chagoyas conspired to falsely accuse Esquivel of abuse to support a lawsuit, they must believe that all of the witnesses who corroborated the abuse were complicit.

Even if that argument was improper, it is not reversible error if it was made in direct response to a defense argument, went no further than necessary to respond to the defense, brought no matters outside the record before the jury, and was not so prejudicial that an instruction could not cure them. State v. LaPorte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961).

Esquivel fails to explain why no curative instruction could possibly have neutralized any prejudice. In State v. Barrow, 60 Wn. App. 869, 809 P.2d 209 (1991), this Court held it was misconduct for a prosecutor to argue that the defendant had effectively called

the police witnesses liars by giving contradictory testimony and by telling the jury that “in order for you to find the defendant not guilty ... you have to believe his testimony and you have to completely disbelieve the officers’ testimony. You have to believe that the officers are lying.” Id. at 874-75. The improper argument did not require reversal, however, because defense counsel did not further object, request that the arguments be stricken, or ask for a curative instruction. Id. at 876. As this Court observed, “Counsel clearly could have minimized the impact of this argument if he had taken any of these steps. A curative instruction particularly could have obviated any prejudice engendered by these remarks.” Id. at 876. If a curative instruction would have neutralized the prejudice of a true “in order to acquit” argument, the same would certainly be true of the argument made in this case.

Esquivel has not shown a substantial likelihood that the remarks affected the jury's verdict. To call the evidence in this lengthy trial overwhelming would be a significant understatement. Numerous witnesses – including medical personnel, school teachers, salon workers, CPS investigators, and Esquivel's own daughter -- gave consistent testimony corroborating the Chagoyas' extraordinary allegations of abuse and neglect. Their injuries were

contemporaneously documented. See, e.g., Ex. 58, 81, 99, 193, 197. This was not a close case in which an erroneous prosecution argument was likely to sway an undecided jury toward conviction.

In Barrow, this Court concluded that the prosecutor's improper argument was harmless by comparing the "in order to find the defendant not guilty ... [y]ou have to believe that the officers are lying" argument made there to misconduct in other cases. 60 Wn. App. 877. Here, the State's argument was even less inflammatory than in Barrow, because it did not link acquitting Esquivel (or believing her testimony) to believing the State's witnesses were lying or mistaken. It follows that this argument was also not substantially likely to have affected the jury's verdict in light of the overwhelming evidence of guilt. This Court should affirm.

2. THE NO-CONTACT ORDER PROTECTING ESQUIVEL'S DAUGHTER IS REASONABLY NECESSARY TO PROTECT HER FROM FURTHER HARM.

Esquivel contends that the sentencing condition prohibiting her from contacting her daughter EG must be stricken because it violates her fundamental right to parent. Because this crime-related condition is reasonably necessary to protect EG from further harm, this Court should affirm the 20-year no-contact order.

A sentencing court is authorized to impose and enforce crime-related prohibitions. RCW 9.94A.505(9); State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192 (2009). “Crime-related prohibitions” are orders directly related to “the circumstances of the crime” for which the offender has been convicted, and may include no-contact orders. RCW 9.94A.030(10); State v. Armendariz, 160 Wn.2d 106, 113, 156 P.3d 201 (2007). A causal link between the condition imposed and the crime committed is not necessary as long as the condition relates to the crime’s circumstances. State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). “[B]ecause the imposition of crime-related prohibitions is necessarily fact-specific and based upon the sentencing judge’s in-person appraisal of the trial and the offender, the appropriate standard of review [is] abuse of discretion.” In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010). Under that standard, a crime-related prohibition will be reversed only if it is “manifestly unreasonable” such that no reasonable person would adopt the trial court’s view. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

When a sentencing condition interferes with a fundamental constitutional right, reviewing courts engage in a more careful

review of the condition. Warren, 165 Wn.2d at 32. Such conditions “must be ‘sensitively imposed’ so that they are ‘reasonably necessary to accomplish the essential needs of the State and public order.’” In re Rainey, 168 Wn.2d at 374.

Parents have a fundamental liberty interest in the care, custody, and companionship of their children. In re Rainey, 168 Wn.2d at 374; Warren, 165 Wn.2d at 34. However, parental rights are not absolute; the State has a compelling interest in protecting children from witnessing domestic violence and from actions that would jeopardize their physical or mental health. In re Rainey, 168 Wn.2d at 378; Warren, 165 Wn.2d at 34. Sentencing courts can restrict the fundamental right to parent by conditioning a criminal sentence if the condition is reasonably necessary to further the State’s compelling interest in preventing harm and protecting children. State v. Ancira, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001).

The condition barring Esquivel from contact with EG is reasonably necessary to further the State’s compelling interest in preventing further harm to that child. Esquivel agrees that the State has that interest, but argues that prohibiting her contact with EG is not reasonably necessary “in light of the fact that this child was not

a victim of Ms. Esquivel's offenses." Brief of Appellant at 19. This assertion is plainly false.

"Victim' means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged." RCW 9.94A.030(54). Although there was no testimony that Esquivel beat EG like she did every other member of her household, EG was forced to witness extreme violence by her mother against the Chagoyas. EG testified that Esquivel locked her in her room 7-9 times per week while she physically abused the Chagoyas. RP 2248-51. Through the closed door, EG heard "the whips of wires or the hits of punching" and listened to the Chagoyas scream, yell, and cry. RP 2249-50. She also saw Esquivel beat VC more than a dozen times, and saw VC's bleeding wounds and scars. RP 2252-54. EG saw Esquivel hit Rafael, AC, and DC. RP 2254-59, 2266. And she was just steps away when Esquivel beat RG with a wire cable for "quite a long time" and for no apparent reason, leaving the young girl with "a lot of wounds on her arms and everywhere." RP 2260-64. She saw Esquivel force Rafael to beat his own children and force the older children to beat the younger ones. RP 2268-71. EG testified that she was afraid that the Chagoyas would be seriously hurt, and,

importantly, she was afraid that she might end up like them. RP 2251. EG's father testified that he was worried for his daughter when she lived with Esquivel and expressed concern for EG's psychological state even after she left Esquivel's home. RP 2218, 2230. EG was clearly a victim of Esquivel's offenses.

No-contact orders entered as part of crime-related prohibitions need not be limited to the direct victims of the crime. In Warren, our supreme court upheld an order prohibiting the defendant from having contact with his wife and mother of the children against whom he sexually offended, even though she was not a victim of the crimes. 165 Wn.2d at 34. The court held that prohibiting contact with the wife was reasonably crime-related because, among other things, she "testified against Warren resulting in his conviction of the crime." Id. Similarly here, EG testified against her mother and provided crucial corroboration of the Chagoyas' testimony. Thus, protecting EG from contact with Esquivel was an appropriate crime-related prohibition.

Esquivel argues that "the trial court completely failed to consider any less restrictive alternatives to a lifetime no-contact order." Brief of Appellant at 19. To the contrary, while the trial court imposed lifetime no-contact orders as to Rafael, VC, DC, AC,

RC, ASC and RG, it limited the no-contact order with EG to 20 years. CP 504. The record contains no discussion about the relative duration of the no-contact orders, but the obvious inference is that the trial court imposed a much shorter no-contact order as a less restrictive condition in recognition of Esquivel's fundamental right to parent. Esquivel demonstrates no abuse of discretion.

3. THIS COURT SHOULD REJECT ESQUIVEL'S VAGUENESS CHALLENGE.

Esquivel argues that the "deliberate cruelty" aggravating circumstance in RCW 9.94A.535(3)(h)(iii) is unconstitutionally vague under the Due Process Clause and as applied to her. However, our supreme court has held that aggravating circumstances are not subject to a due process vagueness challenge because they do not define conduct or allow for arbitrary arrest and criminal prosecution by the State. Further, even if Esquivel could make a due process vagueness challenge to the statute, her claims should be rejected. The terms used in defining the aggravating circumstance are ones of common understanding. Under the particular facts of this case, Esquivel was on notice that her criminal conduct was aggravated when she relentlessly

battered the entire Chagoya family, causing multiple serious and permanent injuries.

a. Exceptional Sentence Aggravating Circumstances Are Not Subject To Due Process Vagueness Challenges.

Under the Due Process Clause, a statute defining an offense is void for vagueness if (1) it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or (2) it does not provide standards sufficiently specific to prevent arbitrary enforcement. State v. Duncalf, 177 Wn.2d 289, 296-97, 300 P.3d 352 (2013). Both prongs of the vagueness doctrine focus on laws that prohibit or require conduct. State v. Baldwin, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003).

In Baldwin, our supreme court held that aggravating circumstances are not subject to vagueness challenges under the Due Process Clause because they “do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State.” 150 Wn.2d at 459. “A citizen reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct because the guidelines do not set penalties.” Id. Further, “[t]he guidelines are intended only to structure discretionary decisions affecting

sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest.” Id. at 461.

Esquivel argues that, in light of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), Baldwin is no longer good law. But the only pertinent change resulting from Blakely is that a jury, rather than a judge, must determine whether the facts exist to support an exceptional sentence.⁷ Esquivel fails to explain why this change undermines the reasoning of Baldwin.

The Baldwin court’s analysis remains valid after Blakely. The aggravating circumstances in RCW 9.94A.535 do not purport to define criminal conduct. Instead, the statute lists accompanying circumstances that may justify a trial court’s imposition of a higher sentence. But a jury’s finding of an aggravating circumstance does not automatically result in an exceptional sentence. The trial court must still exercise discretion to decide whether the aggravating

⁷ Another change post-Blakely was the 2005 codification of then-existing common law aggravating factors and elimination of trial court discretion to impose an exceptional sentence for aggravating circumstances other than those codified. Laws of 2005, ch. 68, §1, 3.

circumstance is a substantial and compelling reason to impose an exceptional sentence.⁸ RCW 9.94A.535.

Esquivel asserts that Blakely changes the analysis because an aggravating circumstance changes the maximum penalty for an offense. But this was also true when our supreme court decided Baldwin. There is only one thing different after Blakely and the resulting statutory amendments to the Sentencing Reform Act (SRA): the jury now decides beyond a reasonable doubt the facts supporting an exceptional sentence – a function that once belonged to the sentencing judge.

Esquivel has not demonstrated that Baldwin is no longer good law. And given the opportunity in a case challenging a different aggravating circumstance, our Supreme Court has declined to so rule. Duncalf, 177 Wn.2d at 296 (“Duncalf urges us to reconsider [Baldwin] in light of Blakely. We find it unnecessary to address the broad question of whether Baldwin survives Blakely. Even assuming the vagueness doctrine applies in this case, Duncalf’s challenge to RCW 9.94A.535(3)(y) is unavailing”). Baldwin is therefore binding on this Court. See State v. Burkins, 94

⁸ For example, the jury in State v. Siers found the existence of an aggravating factor but the trial court declined to impose an exceptional sentence. 174 Wn.2d 269, 271, 274 P.3d 358 (2012).

Wn. App. 677, 701, 973 P.2d 15 (1999) (“unless our Supreme Court decides to overrule itself, this court is bound by its rulings”).

b. The Statute Is Not Unconstitutionally Vague.

Even if the aggravating circumstance is subject to a vagueness challenge, Esquivel’s claim fails. The party challenging a statute under the “void for vagueness” doctrine bears the burden of overcoming a presumption of constitutionality; “a statute is presumed to be constitutional unless it appears unconstitutional beyond a reasonable doubt.” State v. Halstein, 122 Wn.2d 109, 118, 857 P.2d 270 (1990).

A statute fails to provide the required notice if it forbids the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application. State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). However, a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which her actions would be classified as prohibited conduct. Id.

Because Esquivel’s challenge does not implicate the First Amendment, she must demonstrate that the aggravating circumstance is unconstitutionally vague as applied to her conduct.

City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). The challenged statute “is tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the ordinance’s scope.” Douglass, 115 Wn.2d at 182-83. The deliberate cruelty aggravating circumstance is not unconstitutionally vague when considered in the context of Esquivel’s actions.

To find the deliberate cruelty aggravating circumstance, the jury had to find that the offense involved domestic violence and “[t]he offender’s conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.” RCW 9.94A.535(3)(h)(iii). “Deliberate cruelty consists of gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself.” State v. Scott, 72 Wn. App. 207, 214, 866 P.2d 1258 (1993).

It would be difficult to imagine conduct more shockingly cruel than what was proven in this case. The evidence showed that Esquivel viciously beat Rafael and VC on a near-daily basis for over a year, causing substantial and permanent injuries. She continually beat the same parts of their bodies, compounding their

pain. She interfered with their healing by withholding hygiene, food, and sleep and by taking Rafael's pain medication for her own recreational use. RP 4129-30. She inflicted extreme emotional injuries by forcing Rafael and VC to beat each other and the younger Chagoya children. She forced them to eat hot chiles until they vomited. She vaginally and anally raped VC with an alcohol-soaked scrub sponge -- *twice*. She macerated Rafael's penis.

A person of common intelligence would not have to guess that this objectively monstrous behavior could expose her to a possible exceptional sentence under RCW 9.94A.535(3)(h)(iii). The statute is not unconstitutionally vague.

4. THE STATE CONCEDES THAT THE SENTENCE IMPOSED FOR THE FIRST-DEGREE ASSAULT WAS ERRONEOUS.

The trial court imposed an exceptional "life" sentence for Esquivel's conviction for the first-degree assault of Rafael. CP 504. Esquivel correctly points out that the SRA generally requires determinate sentences, and that this sentence is not determinate because it fails to "state[] with exactitude the number of actual years, months, or days of total confinement." RCW 9.94A.030(18). The State concedes that the sentence for the first-degree assault is erroneous on this basis.

Esquivel contends that this error entitles her to resentencing. However, any sentence for the first-degree assault will necessarily be subsumed the minimum sentence (life) for the aggravated second-degree rape, which has not been challenged. In this unusual circumstance, it is unnecessary to commit considerable judicial and administrative resources to a new sentencing hearing. In the alternative, the State respectfully suggests this Court remand to amend the judgment and sentence to reflect a determinate sentence of 277 months – the high end of the standard range. The resulting legal sentence would still honor the trial court's intent that Esquivel "serve the rest of [her] life in prison." RP 4868.

**5. THIS COURT SHOULD ADOPT DIVISION THREE'S
GENERAL ORDER PERTAINING TO APPELLATE
COSTS.**

Esquivel asks this Court to deny the State appellate costs if she does not prevail in her appeal. She asserts that the trial court entered an "order of indigency and findings supporting its order," but fails to designate that order for this Court's review. In fact, the ex parte order contains no findings and any declaration submitted in support of the order is not in the record. Supp. CP __ (Sub. No. 315).

Esquivel also points to her age and life sentence as reasons that there is no realistic possibility that she will be released from prison in a position to find gainful employment. That is undoubtedly so; however, there is no information in the record about Esquivel's existing assets, if any. Testimony at trial demonstrated that Esquivel was receiving \$3000 per month in Rafael's disability benefits, that Veronica Chagoya gave her \$40,000 to cure DC's autism, that Esquivel fraudulently obtained public assistance by falsely claiming that Rafael lived elsewhere and underreporting her income, and that she regularly paid large sums of money for cosmetic surgery and luxury salon services. RP 3025, 3673, 3675, 3687, 4104, 4320, 4403-04, 4638-39, 4643, 4646-47. Even if she was unable to finance her appeal in advance, it is possible that Esquivel has the resources to pay a modest appellate cost award despite her life sentence. Without more complete information, a preemptive decision to prohibit an award of appellate costs would be unreasonable and arbitrary.

A better practice would be to require any appellant wishing to avoid an award of appellate costs on the basis of indigence to provide the information this Court needs to reasonably decide the issue. To that end, this Court should adopt Division Three's

recently published general order, attached, which would provide at least some basis on which to decide her ability to pay costs.

D. CONCLUSION

For the reasons expressed above, the State respectfully requests this Court affirm Esquivel's conviction and exceptional sentence and deny her request to preemptively deny appellate costs.

DATED this 26th day of August, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

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Appendix





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General Orders of Division III

IN RE THE MATTER OF COURT ADMINISTRATION ORDER RE; REQUEST TO DENY COST AWARD

*The Court of Appeals
of the
State of Washington
Division III*

IN RE THE MATTER OF COURT) GENERAL COURT ORDER
ADMINISTRATION ORDER RE:)
REQUEST TO DENY COST AWARD)
_____)
)

For an adult offender convicted of an offense who wishes the court to exercise its discretion not to award costs in the event the State substantially prevails on appeal, effective immediately,

IT IS HEREBY ORDERED:

- (1) Under RAP 14.2, the commissioner or clerk will award costs to the party that substantially prevails on review, "unless the appellate court directs otherwise in its decision terminating review." In most cases, the decision terminating review (which is defined in RAP 12.3 (a)) is the court's decision on the merits.
- (2) An adult offender convicted of an offense who wishes this court to exercise its discretion not to award costs in the event the State substantially prevails on appeal must make the request and provide argument in support of the request, together with citations to legal authority and references to relevant parts of the record, in the offender's opening brief or by motion as provided in Title 17 of the Rules on Appeal. Any such motion must be filed and served no later than 60 days following the filing of the appellant's opening brief. RAP 17.3 and 17.4 apply to the motion's content, filing and service and to the submission and service of any answer or reply.
- (3) If inability to pay is a factor alleged to support the request, then the offender should include in the record on appeal the clerk's papers, exhibits, and the report of proceedings relating to the trial court's determination of indigency and the offender's current or likely ability to pay discretionary financial obligations. The offender shall also file a report as to continued indigency and likely future inability to pay an award of costs on the form set forth below. The original report, signed by the offender under penalty of perjury, shall be filed with the court and a copy shall be served on the respondent no later than 60 days following the filing of the appellant's opening brief.
- (4) The panel issuing the opinion shall address the request or decide the motion in the opinion. Its decision may direct the commissioner or clerk to award costs subject to criteria identified by the panel.

Dated this 10th day of June, 2016

FOR THE COURT:

GEORGE B.FEARING
CHIEF JUDGE

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Thomas Kummerow, the attorney for the appellant, at Tom@washapp.org, containing a copy of the Brief of Respondent, in State v. Maria Gonzales Esquivel, Cause No. 73411-3, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 26th day of August, 2016.



Name:

Done in Seattle, Washington