

NO. 50169-4-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CURTIS K. K. ESCALANTE,

Appellant.

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

The Honorable Bryan Chushcoff, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

TABLE OF CONTENTS

	<u>Page</u>
<u>Table of Authorities</u>	iv
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ...	1
C. STATEMENT OF THE CASE	2
D. ARGUMENT	5
1. THE PROSECUTOR UNDERCUT THE PLEA AGREEMENT IN SEVERAL WAYS, VIOLATING MR. ESCALANTE’S RIGHT TO DUE PROCESS	5
a. An issue of constitutional magnitude can be raised for the first time on appeal.....	5
b. Plea agreements are contracts that are interpreted in light of due process.. ..	6
c. The prosecutor was bound by his plea agreement to recommend 219 months	7
d. The prosecutor breached the plea agreement with Mr. Escalante.....	12
e. Mr. Escalante is entitled to choose his remedy upon remand.....	16
2. IN THE ALTERNATIVE, THE TRIAL COURT ABUSED ITS DISCRETION BECAUSE IT MISTAKENLY BELIEVED IT LACKED AUTHORITY TO IMPOSE AN EXCEPTIONAL SENTENCE DOWNWARD BASED ON THE “WILLING PARTICIPANT” MITIGATING FACTOR BECAUSE THE VICTIMS WERE MINORS.....	17

3. THIS COURT SHOULD EXERCISE ITS DISCRETION
AND DENY ANY REQUEST FOR COSTS.21

E. CONCLUSION23

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>State v. Brown</i> , 139 Wn.2d 757, 991 P.2d 615 (2000).....	22
<i>State v. Carreno–Maldonado</i> , 135 Wash.App. 77, 143 P.3d 343 (2006).....	8, 9, 10, 12, 13, 16
<i>State v. Clemons</i> , 78 Wn.App. 458, 898 P.2d 324 (1995)	20
<i>State v. Garcia–Martinez</i> , 88 Wn. App. 322, 944 P.2d 1104 (1997)..	18, 19
<i>State v. Grayson</i> , 154 Wn.2d 333, 111 P.3d 1183(2005).....	18
<i>State v. Halsey</i> , 140 Wn. App. 313, 165 P.3d 409 (2007)	8
<i>State v. Harrison</i> , 148 Wn.2d 550, 61 P.3d 1104 (2003).....	16, 17
<i>State v. Herzog</i> , 112 Wash.2d 419, 771 P.2d 739 (1989).....	18
<i>State v. Jerde</i> , 93 Wash.App. 774, 970 P.2d 781 (1999).....	6, 7, 9, 11, 12
<i>State v. MacDonald</i> , 183 Wash.2d 1, 346 P.3d 748 (2015).....	7
<i>State v. McFarland</i> , 127 Wash.2d 322, 899 P.2d 1251 (1995).....	6
<i>State v. McGill</i> , 112 Wn. App. 95, 47 P.3d 173 (2002)	19-20
<i>State v. Nolan</i> , 141 Wn.2d 620, 8 P.3d 300 (2000).....	22
<i>State v. Osman</i> , 157 Wn.2d 474, 139 P.3d 334 (2006).....	18, 20
<i>In re Palodichuk</i> , 22 Wash.App. 107, 589 P.2d 269 (1978), review denied, 138 Wash.2d 1002, 984 P.2d 1033 (1999).....	6, 8
<i>State v. Pascal</i> , 108 Wash.2d 125, 736 P.2d 1065 (1987).....	18
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3d 612 (2016).....	22
<i>State v. Sledge</i> , 133 Wn.2d 828, 947 P.2d 1199 (1997)	6, 7, 8, 16
<i>State v. Talley</i> , 134 Wash.2d 176, 949 P.2d 358 (1998).....	6, 7, 16
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	22
<i>State v. Van Buren</i> , 101 Wash.App. 206, 2 P.3d 991 (2000).....	6, 8, 9, 11, 12, 17
<i>State v. Williams</i> , 103 Wash.App. 231, 11 P.3d 878 (2000).....	7-8, 9
<i>State v. Williams</i> , 137 Wash.2d 746, 975 P.2d 963 (1999).....	5-6
<i>State v. Williams</i> , 149 Wn.2d 143, 65 P.3d 1214 (2003).....	17
<i>State v. Xavier</i> , 117 Wn.App. 196, 69 P.3d 901 (2003).....	9, 10, 17
<u>UNITED STATES CASES</u>	<u>Page</u>
<i>Santobello v. New York</i> , 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).....	6

<u>OTHER AUTHORITIES</u>	<u>Page</u>
<i>State v. Rife</i> , 789 So.2d 288 (Fla.2001).....	20-21
<i>State v. Rush</i> , 24 Kan.App.2d 113, 942 P.2d 55 (1997).....	21

<u>REVISED CODE OF WASHINGTON</u>	<u>Page</u>
RCW 7.69.030	15
RCW 9A.40.100(1)(a)(i)(A)	2
RCW 9A.40.100(3)(a)	2
RCW 9.94A.535	18
RCW 9.94A.535((1)(a)	19
RCW 9.94A.535(3)(l)	2, 4, 13
RCW 9.94A.585(1).....	0
RCW 10.73.160(1).....	22

<u>CONSTITUTIONAL PROVISIONS</u>	<u>Page</u>
U.S. Const. Amend. XIV	6

<u>COURT RULE</u>	<u>Page</u>
CrR 3.5.....	2, 15
RAP 2.5(a)(3)	5
RAP 14.2.....	22
RAP 15.2(f).....	21

A. ASSIGNMENTS OF ERROR

1. The State breached its plea agreement with appellant, Curtis Escalante, by undercutting its promised sentencing recommendation.

2. The trial court abused its discretion when it refused to use its discretion to consider Mr. Escalante's request for an exceptional sentence downward.

3. The trial court erred in failing to recognize it could impose an exceptional sentence downward.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant gives up several important constitutional rights when he enters a plea of guilty, and his constitutional right to due process is violated when the prosecuting attorney breaches a plea agreement. Where a prosecutor agrees to make a particular sentencing recommendation in return for a guilty plea, the prosecutor cannot thereafter do anything to undercut that recommendation at sentencing. Mr. Escalante waived his trial rights and agreed to plead guilty in exchange for the State's promise to recommend a sentence of 219 months. Defense gave notice it would request an exceptional sentence below the standard range. At sentencing, the prosecutor argued the punishment for second degree human trafficking was comparable to first degree assault, that trafficking a minor constituted an aggravating factor, that Mr. Escalante did not show remorse, and did not explicitly state its 219 month recommendation. Must this case be remanded for Mr. Escalante's choice of specific performance or

withdrawal of his guilty plea in light of the prosecutor's breach of the State's plea agreement? Assignment of Error 1.

2. Did the trial court abuse its discretion where it erroneously believed it lacked authority to impose an exceptional sentence downward on the basis that the minor victims were willing participants in the crime? Assignments of Error 2 and 3.

C. STATEMENT OF THE CASE

Curtis Escalante was charged, along with Michael Williams, with multiple counts of human trafficking. Clerk's Papers (CP) 1-5. Mr. Williams pleaded guilty to one count of second degree human trafficking on February 8, 2017. Report of Proceedings¹ (RP) (2/9/17) at 7. The court began a CrR 3.5 suppression hearing in Mr. Escalante's case on February 9, 2017, but did not conclude the hearing on that day. RP (2/9/17) at 36-77. A twenty-two minute DVD of Mr. Escalante's police interview was played during the hearing. RP (2/9/17) at 74, Exhibit 2.

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)(l). RP (2/13/17) at 9-21. In return for Mr. Escalante's plea, the State agreed to recommend that Mr. Escalante be

¹The record of proceedings consists of the following transcribed hearings: February 9, 2017 (CrR 3.5 suppression hearing), February 13, 2017 (change of plea hearing), and March 10,

sentenced to 216 months—the high end of the standard range, 18 months’ community supervision, and legal financial obligations. CP 18. The plea agreement states “[d]efense may request exceptional sentence downward.” CP 18.

Mr. Escalante and Mr. Williams came on for sentencing on March 10, 2017, before the Honorable Bryan Chushcoff. RP (3/10/17) at 4-98. Defense counsel filed an extensive sentencing memorandum in support of an exceptional sentence below the standard range of 162 to 216 months. CP 28-50. Counsel argued that the minor victims—A.M.A. and R.M.O.—were either active in prostitution or wanted to be involved in that activity before meeting Mr. Escalante. CP 32-33. Counsel argued that A.M.A. and R.M.O. were willing participants and co-conspirators in the offenses, and both agreed to organize and operate a prostitution ring with Mr. Escalante and Mr. Williams, and that neither defendant used force or coercion to engage A.M.A. and R.M.O. in prostitution. CP 28-30.

At sentencing, Detective Maurice Washington from the Seattle Police Department testified regarding the mechanics of the prostitution subculture, which he said is called “the game.” RP (3/10/17) at 9-22.

The State argued that the punishment for second degree human trafficking is “the equivalent” of first degree assault because both offenses are ranked with a Seriousness Level of XII in the Sentencing Guidelines. RP

(3/10/17) at 67); CP 72. The prosecution also argued that second degree human trafficking of minors is an aggravating factor under RCW 9.94A.535(3)(l). RP (3/10/17) at 68; CP 72. During argument the prosecutor did not explicitly state his agreed recommendation of 216 months, saying “I have briefed the recommendation” and “I don’t think I need to say it out loud.”² RP (3/10/17) at 32. Instead of specifically acknowledging its recommendation at the hearing, the State extensively undercut its own recommendation and ridiculed the defense’s request for a downward departure.

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 (3/10/17) at 7.

The State proceeded with a lurid, graphic account of the mechanics of prostitution, including the acronyms and names used for specific sex acts. RP (3/10/17) at 30-31.

The court rejected the argument for an exceptional downward sentence, implying that it had no authority to consider an exceptional sentence because the victims were minors. The court, after referring to the State’s argument

²The deputy prosecutor did not explicitly state the recommendation of 219 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”. RP (3/10/17) at 29.

that the penalties for the offenses are comparable to second degree murder and first degree assault, 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 (3/10/17) at 93-94.

After denying the request for a downward departure, the court imposed a standard range sentence of 200 months. RP (3/10/17) at 96; CP 58. The court also imposed legal financial obligations including \$500.00 for crime victim assessment, \$200.00 in court costs, and \$100.00 felony DNA fee. CP 56.

Timely notice of appeal was filed March 31, 2017. CP 81-94. This appeal follows.

D. ARGUMENT

1. THE PROSECUTOR UNDERCUT THE PLEA AGREEMENT IN SEVERAL WAYS, VIOLATING MR. ESCALANTE'S RIGHT TO DUE PROCESS

a. An issue of constitutional magnitude can be raised for the first time on appeal.

An issue may be raised for the first time on appeal if the appellant can demonstrate prejudice arising from “manifest error affecting a constitutional right.” RAP 2.5(a)(3). *State v. Williams*, 137 Wash.2d 747, 975 P.2d 963

(1999); *State v. McFarland*, 127 Wash.2d 322, 333, 899 P.2d 1251 (1995); “[A] defendant gives up important constitutional rights by agreeing to a plea bargain[.]” *State v. Jerde*, 93 Wash.App. 774, 780, 970 P.2d 781 (citing *State v. Talley*, 134 Wash.2d 176, 183, 949 P.2d 358 (1998); *In re Palodichuk*, 22 Wash.App. 107, 109-110, 589 P.2d 269 (1978), review denied, 138 Wash.2d 1002, 984 P.2d 1033 (1999)).

b. Plea agreements are contracts that are interpreted in light of due process.

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 Wash.2d at 839. Not only do contract principles bind the State to the terms of the agreement, due process also requires adherence. *Sledge*, 133 Wn.2d at 839.

Because plea agreements concern fundamental rights, due process requires the prosecutor to strictly adhere to the terms of the agreement. 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. *Talley*, 134 Wn.2d at 183. Nevertheless, it does not require the State to make the sentencing recommendation enthusiastically. *Talley*, 134 Wash.2d at 183; *Sledge*, 133 Wash.2d at 840.

When determining whether the State's comments breached the plea agreement, appellate courts apply an objective standard, looking at the sentencing record as a whole. *Jerde*, 93 Wash.App. at 780, 782. The test is whether the State's words or conduct, without looking to the intent behind them, contradict the State's recommendation. *Id.* at 780, 970 P.2d 781. If the State breaches a plea agreement, harmless error review is not applicable. *State v. MacDonald*, 183 Wash.2d 1, 346 P.3d 748 (2015). Rather, the appropriate remedy is to remand for the defendant to choose whether to withdraw the guilty plea or seek enforcement of the State's agreement. *Jerde*, 93 Wash.App. at 782–83.

c. The prosecutor was bound by his plea agreement to recommend 219 months

A breach of the plea agreement occurs when the State offers unsolicited information or argument that undercuts the agreement. The State may not undercut the plea bargain “either explicitly or implicitly through conduct indicating an intent to circumvent the agreement.” *State v. Williams*, 103

Wash.App. 231, 236, 11 P.3d 878 (2000).⁴ The State can undercut a plea agreement either explicitly or implicitly through conduct indicating an intent to circumvent the agreement. *Sledge*, 133 Wash.2d at 840, 947 P.2d 1199; *Jerde*, 93 Wash.App. at 780, 970 P.2d 781; *Palodichuk*, 22 Wash.App. at 110, 589 P.2d 269.

Neither good motivations nor a reasonable justification will excuse a breach. *Van Buren*, 101 Wash.App. at 213. 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).

Washington case law illustrates the point that it constitutes a breach where a prosecutor agrees to make a particular recommendation within the standard range, makes that recommendation, but also focuses on aggravating factors warranting an exceptional sentence.

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.” *State v. Carreno–Maldonado*, 135 Wash.App. 77, 83, 143 P.3d 343 (2006); see, e.g., *id.* at 84–85, 143 P.3d 343 (breach where the State described the crime as more egregious than a typical crime of the same class, thus going beyond what was necessary to support the mid-range sentencing

recommendation); *State v. Xavier*, 117 Wash.App. 196, 200–02, 69 P.3d 901 (2003) (breach where the State referred to aggravating sentencing factors, other charges not pursued, and called the defendant “one of the most prolific child molesters” indicated lack of support for standard range sentence); *Williams*, 103 Wash.App. at 236–39 (breach where the State's sentencing memorandum and oral argument suggested the court go beyond the high-end recommendation and made unsolicited references to statutory aggravating factors, which trial judge adopted in order to impose an exceptional sentence); *Van Buren*, 101 Wash.App. at 217 (breach where the State downplayed mid-range sentencing recommendation, focused the court's attention on two aggravating factors contained in the presentence report, proposed an aggravating factor not addressed in the report, and argued the validity of one of the aggravating factors); *Jerde*, 93 Wash.App. at 782 (breach where the State emphasized aggravating factors when obligated to make a mid-range sentence recommendation).

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. At sentencing, the prosecutor made these recommendations but also focused on aggravating factors concerning the

rapes. *Carreno–Maldonado*, 135 Wash.App. at 80-81. The prosecutor indicated to the court that she wanted to speak “on behalf” of victims who were present but did not wish to address the court. The prosecutor then described facts supporting aggravating factors, and the court imposed high end sentences on all counts. *Id.* at 82. On appeal, Division 2 held that the State breached the plea agreement. As this 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 mid-range recommendation. *Id.* at 84-85. This Court further noted that the prosecutor’s remarks “were not a response to argument by defense counsel or an attempt to provide information which the court solicited.” *Id.* at 85.

In *State v. Xavier*, 117 Wn.App. 196, 69 P.3d 901 (2003), the State agreed to recommend a 240-month standard range sentence in exchange for Xavier’s guilty plea to multiple sex offenses. 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. Division 1 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, supra*, the State agreed to recommend a standard range sentence while the presentence investigation report recommended an exceptional sentence. In *Van Buren*, the defendant pleaded guilty to murder in exchange for the State’s recommendation that she receive a mid-standard range sentence of 292 months. *Van Buren*, 101 Wn. App. at 207-209. 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 a presentence report. The prosecutor listed applicable aggravating factors, including one not contained in the report, and expressed agreement with one factor in particular. The sentencing court imposed an exceptional sentence. *Id.* at 209-210. Division 2 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*, the defendant pleaded guilty to murder in the second degree in exchange for the State’s recommendation that he receive a mid-standard range sentence of 346 months. Prior to sentencing, a presentence report writer filed a report recommending an exceptional sentence of 688 months. *Jerde*, 93

Wn. App. at 777. At sentencing, prosecutors indicated they were maintaining their request for standard range sentences for Jerde and one of his co-defendants, but emphasized the aggravating factors contained in the report and even added an additional factor for the court's consideration. *Id.* at 777-778 n.2-3.

The sentencing court imposed an exceptional 497-month sentence. *Id.* at 779. This Court found a breach because prosecutors had unnecessarily highlighted aggravating factors. *Id.* at 782.

In both *Van Buren* and *Jerde*, this Court held that the prosecutor's conduct amounted to a breach of the plea agreement because the prosecutor unnecessarily highlighted aggravating factors proposed in the presentence report without any prompting by the court. This Court found particularly egregious that in both cases the prosecutors referenced additional aggravating factors not mentioned in the presentence investigation report.

d. The prosecutor breached the plea agreement with Mr. Escalante

The facts of the case at bar are even stronger than that found in *Carreno-Maldonado, Xavier, Van Buren, and Jerde*. In each of those cases, the prosecutor at least referred the agreed standard range recommendation at sentencing. In Mr. Escalante's case, however, the State did everything it could

to undercut its recommendation and signal its lack of support of the recommendation by ridiculing the defense request for an exceptional sentence, and by distancing itself from its recommendation by failing to explicitly state the recommendation of 216 months out loud during sentencing, and instead merely saying that A.M.A. approved of the recommendation of the high end of the range. RP (3/10/17) at 29, 32.

The State breached its plea agreement in four significant ways. First, the State argued that the penalty for human trafficking is “the equivalent” of first degree assault because it is a Level XII offense in the Sentencing Reform Act. RP (3/10/17) at 67); CP 72. The prosecution also argued that second degree human trafficking of minors is an aggravating factor under RCW 9.94A.535(3)(l). RP (3/10/17) at 68; CP 72. Third, the State only tangentially and fleetingly referred to its agreed recommendation of 216 months. RP (3/10/17) at 29. Last, the State impermissibly spoke on behalf of A.M.A. when she decided not to speak and did not request assistance in communicating with the court. RP (3/10/17) at 28.

As was condemned in *Carreno-Maldonado*, the State consistently recited unsolicited, aggravating facts including gratuitous, lurid details of the mechanics of prostitution. RP (3/10/17) at 30-31. The State ridiculed the defense request for a downward departure, and alluded to uncharged offenses,

again unsolicited by the court, by arguing:

These are the girls, again—they are not out there getting anything, Judge, other than, as Ms. Hunt said, raped every day. They are underage. Actually, to be fair, on a Rape Child III, [A.M.A.] is 16, one week shy of 15 — or latter part of 15. Certainly [R.M.O.], by legal definition, is being raped every single day, and these guys are the accomplice to the rape. Every single count of these guys, they are an accomplice to Rape Child III.

RP (3/10/17) at 64-65.

In its responsive sentencing memorandum the State continued its attack on the defense's argument for downward departure.

Over and over again, Escalante and Williams state AMA and RMO were in the "game" from a very young age, since as young as 12 or 13 years of age, and continued to prostitute for pimps well after the defendants were charged. If this becomes a point in favor of mitigation of these defendant's sentence, then the world is simply upside down.

CP 73.

The State's sentencing memorandum also asserted that Mr. Escalante showed no remorse:

Escalante and Williams are not victims. In fact they are pimps who pimped two juvenile victims/girls. The facts support it is the young, teen victims/girls who were made to go to seedy motels in other cities to engage in sex with strange men in exchange for money over and over again, and then give all of the money to the defendants, not the other way around.

It is clear Escalante and Williams have expressed no remorse for their sexual exploitation of AMA and RMO. It is

not believable that they do not understand the significance of the crimes they committed and why the sentencing range is what it is. They continue, as stated, to play the game.

CP 74.

The sentencing judge was apparently receptive to the State's recitation of aggravating facts and stated, in reference to the twenty-two minute police interview of Mr. Escalante played at the partially-completed CrR 3.5 hearing that in Mr. Escalante's interview with the police he "was pretty cold." RP (3/10/17) at 91-92.

Also during sentencing, the prosecutor told the court that A.M.A., who was present in the courtroom, that she did not want to talk to the court and that she told the prosecutor that she is "afraid." RP (3/10/17) at 28. The prosecution then continued:

I do want to emphasize that I think she is afraid. Why wouldn't she be, you know, of these two men right there, 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.

RP (3/10/17) at 30.

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. *Carreno-Maldonado*, 135 Wn.App. at 86, (citing *Talley*, 134 Wash.2d at 186–87). Here, however, the record shows the deputy prosecutor’s belief that A.M.A. is “afraid” of Mr. Escalante and Mr. Williams constitutes impermissible advocacy. As was the case in *Carreno-Maldonado*, the record does not support that the deputy prosecutor made the challenged statement as a court officer answering the court’s questions or assisting the victim to assert her right under RCW 7.69.030. Instead, the statement was a breach of the plea agreement because it was unsolicited advocacy and therefore “contrary to the State’s sentencing recommendation.” *Carreno-Maldonado*, 135 Wn.App. at 86.

e. Mr. Escalante is entitled to choose his remedy upon remand.

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. If the defendant chooses

the later, he is entitled to a new sentencing hearing before a different judge where the prosecutor will present the agreed-upon sentencing recommendation without equivocation. *Harrison*, 148 Wn.2d at 557.

The State breached its agreement with Mr. Escalante by arguing the presence of an aggravating factor, by arguing that the penalty for second degree human trafficking is “the equivalent” of first degree assault, by failing to explicitly state its agreed recommendation of 216 months in open court, by striving to consistently belittle and undercut the request for a downward departure at every opportunity at sentencing, and by engaging in unsolicited advocacy on behalf of a victim. This case should be remanded for Mr. Escalante to make his choice of the two available remedies. See *Xavier*, 117 Wn. App. at 202; *Van Buren*, 101 Wn. App. at 217-218

2. IN THE ALTERNATIVE, THE TRIAL COURT ABUSED ITS DISCRETION BECAUSE IT MISTAKENLY BELIEVED IT LACKED AUTHORITY TO IMPOSE AN EXCEPTIONAL SENTENCE DOWNWARD BASED ON THE “WILLING PARTICIPANT” MITIGATING FACTOR BECAUSE THE VICTIMS WERE MINORS

A defendant generally cannot appeal a standard range sentence such as the sentence imposed on Mr. Escalante. RCW 9.94A.585(1); *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). The legislature entrusted sentencing courts with considerable discretion under the Sentencing Reform

Act (SRA), including the discretion to determine if the offender is eligible for an alternative sentence and, significantly, whether the alternative is appropriate. *State v. Pascal*, 108 Wash.2d 125, 137, 736 P.2d 1065 (1987). However, an offender may always challenge the procedure by which a sentence was imposed. *State v. Herzog*, 112 Wash.2d 419, 423, 771 P.2d 739 (1989).

Under the SRA, sentencing courts may impose exceptional sentences below the standard sentencing range where there are "substantial and compelling reasons" to do so. RCW 9.94A.535. 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). See also, *State v. Osman*, 157 Wn.2d 474, 482, 139 P.3d 334 (2006). "The failure to consider an exceptional sentence is reversible error." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183(2005).

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. One such mitigating circumstance identified by the

legislature is where to a significant degree the victim was an initiator, willing participant, aggressor, or provoker of the incident. RCW 9.94A.535 (1)(a).

At sentencing, Mr. Escalante requested an exceptional sentence downward based on the statutory mitigating factor that the victims were willing participants in the crime. RP (3/10/17) at 33-48; RCW 9.94A.535(1)(a).

The sentencing court did not consider "willing participant" as a mitigating factor, apparently concluding that it had no authority to depart from the standard range because the victims were minors.

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 (3/10/17) at 93-94.

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. *State v. Garcia-Martinez*, 88 Wn. App. 322, 329-30, 944 P.2d 1104 (1997).

A trial court refuses to consider an exceptional sentence when it erroneously believes it lacks the authority to impose one. *State v. McGill*, 112

Wn. App. 95, 98-99, 47 P.3d 173 (2002). A trial court "abuses its discretion if it categorically refuses to impose a particular sentencing or if it denies a sentencing request on an impermissible basis." *Osman*, 157 Wn.2d at 482.

Here, the court mistakenly believed it had no authority to impose an exceptional sentence downward on the basis that the victims were minors. Although a victim's willing participation is not a defense to the crime, it may serve as the basis for an exceptional sentence downward. The "willing participant" mitigating factor does not preclude a minor from being a "willing participant in a crime. A person does not have to actually commit the crime or even be capable of committing the crime to be a "willing participant."

State v. Clemons, 78 Wn.App. 458, 898 P2d 324 (1995), is instructive.

In *Clemons*, Division 2 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.

This reasoning has been followed by other jurisdictions. For instance, the Florida Supreme Court held in *State v. Rife*, 789 So.2d 288 (Fla.2001),

that in a case involving the willing participation of a 17-year-old female victim in a statutorily prohibited sexual relationship, consent was not a defense but was a mitigating factor supporting downward departure from guidelines in a sentence for sexual battery on a minor by a person in custodial authority. *Rife*, 789 S.2d at 296.

The Kansas Court of Appeals held in *State v. Rush*, 24 Kan.App.2d 113, 942 P.2d 55 (1997), that the victim was a sexual aggressor toward defendant, which constituted a mitigating circumstance in support of a downward departure sentence of 40 months' imprisonment, in a conviction for sexual intercourse with child under 14. *Rush*, 24 Kan.App.2d at 115.

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.

3. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

If Mr. Escalante does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. At sentencing, the court imposed fees, including \$500.00 victim assessment, \$200.00 in court costs, and \$100.00 felony DNA collection fee. CP 56. The trial court found him indigent for purposes of this appeal. CP 97-98. There has been no order finding Mr. Escalante's financial condition has improved or is likely to improve. Under RAP 15.2(f), "The

appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

This Court has discretion to deny the State's request for appellate costs. Under RCW 10.73.160(1), appellate courts "may require an adult offender convicted of an offense to pay appellate costs." "[T]he word 'may' has a permissive or discretionary meaning." *State v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. Thus, this Court has discretion to direct that costs not be awarded to the State. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the concept that discretion should be exercised only in "compelling circumstances." *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

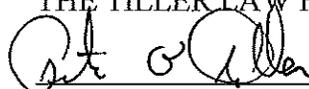
In *Sinclair*, the Court concluded, "it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief. *Sinclair*, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. *Id.* at 392-94. Based on Mr. Escalante's indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

E. CONCLUSION

Because the State breached its plea agreement, this Court must remand the matter to the lower court for his choice of remedy— in this case, withdrawal of his plea. Alternatively, Mr. Escalante is entitled to be re-sentenced at a hearing at which the trial court exercises its principled discretion in considering whether to impose an exceptional sentence downward.

DATED: October 6, 2017.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835

ptiller@tillerlaw.com

Of Attorneys for Curtis Escalante

CERTIFICATE OF SERVICE

The undersigned certifies that on October 6, 2017, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, and to Michelle Hyer, Pierce County Prosecutor and copies were mailed by U.S. mail, postage prepaid, to the following appellate, Curtis Escalante:

Michelle Hyer
Pierce County Prosecutor
930 Tacoma Ave S Rm 946
Tacoma, WA 98402-2102
PCpatcecf@co.pierce.wa.us

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Mr. Curtis K.K. Escalante
DOC #376429
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362
LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on October 6, 2017.



PETER B. TILLER

THE TILLER LAW FIRM

October 06, 2017 - 1:49 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50169-4
Appellate Court Case Title: State of Washington, Respondent v Curtis KK Escalante, Appellant
Superior Court Case Number: 14-1-05085-4

The following documents have been uploaded:

- 5-501694_Briefs_20171006134313D2817790_2654.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 20171006134358311 brief.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us

Comments:

Sender Name: Becca Leigh - Email: bleigh@tillerlaw.com

Filing on Behalf of: Peter B. Tiller - Email: ptiller@tillerlaw.com (Alternate Email: bleigh@tillerlaw.com)

Address:
PO Box 58
Centralia, WA, 98531
Phone: (360) 736-9301

Note: The Filing Id is 20171006134313D2817790