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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CURTIS K.K. ESCALANTE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Bryan E. Chushcoff

No. 14-1-05085-4

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where the plea agreement's terms called for the prosecution and defense to make individual, non-agreed upon, separate sentencing recommendations, and where the prosecution was entitled to recommend the high end of the standard range, did the prosecution commit a material breach by advocating for its high-end recommendation?
2. Did the trial court abuse its sentencing discretion when it considered the defendant's evidence and argument in support of an exceptional sentence, did not categorically reject the defense recommendation, but instead imposed a sentence within the standard range sentence that was more than a year less than the sentence recommended by the prosecution?

B. STATEMENT OF THE CASE.

On December 19, 2014, Appellant Curtis K.K. Escalante (the "defendant"), along with a co-defendant, was charged with eight sexual exploitation offenses involving three teenage victims. CP 1-5. The victims were identified as fifteen year old RMO, sixteen year old AMA, and eighteen year old CAL. CP 103-05. The case was pending trial for nearly two years before the parties entered into plea agreements that resolved both cases. The pre-trial proceedings included an interlocutory appeal of a discovery ruling to this court that was denied on October 13, 2015. CP 106-14. The plea acceptance and voluntariness hearing for the defendant was held on February 13, 2017. 02/13/2017 RP 4, *et.seq.*

The terms of the plea agreement in the defendant's case included both a reduction of the charges and non-agreed upon, individualized sentencing recommendations. CP 12-13, 15-24, p. 4 of 10. The defendant pleaded guilty to two sex trafficking charges, namely two counts of Human Trafficking in the Second Degree. *Id.* Each count included a statutory exceptional sentence allegation that the victim was a minor at the time of the offense. *Id.*

The authorized sentencing recommendations were different for the prosecution and the defense. CP 15-24, p. 4 of 10. The standard range was agreed upon and listed as 162-216 months. CP 15-24, p. 2. The prosecution was authorized by the plea agreement to recommend the high end of the range. CP 15-24, p. 4 of 10. Meanwhile the defendant was authorized to "request exceptional sentence downward." *Id.* During the plea colloquy, the trial court specifically asked the defendant if he understood that two sentencing recommendations were going to be made, but that the court did not have to follow either one of them. 02/13/2017 RP 16. The defendant acknowledged that he understood. *Id.* Thereafter the court accepted the defendant's guilty pleas but set over sentencing. 02/13/2017 RP 17.

The sentencing hearing was set over for several express purposes. First of all the trial court suggested that, "If you are seeking an exceptional

downward, you may be wanting to file a memo associated with that.”

02/13/2017 RP 17-18. In discussing the date for the sentencing hearing, the state, with the tacit agreement of the defense, the prosecution requested that time be allotted for an evidentiary hearing:

Your Honor, I request that they be on the same day because potentially, of course, the victims will be permitted to testify.

Additionally, you know, the State is asking for high end on both defendants. If defense is requesting an exceptional downward, that is a legal issue. If this is going to be contested factually, which it sounds like it may, that may require some time. I'm asking that we have the same day and have some period of time to get this done on that day.

02/13/2017 RP 18-19.

At no time during the plea hearing did the defense object to the evidentiary hearing. Furthermore, before the sentencing hearing the defense submitted a twenty-three page legal memorandum which referenced evidence outside the facts admitted in the guilty plea. CP 28-50. Much of the information submitted to the court concerned the behavior of the victims during the charging period, during the police investigation and during the pre-trial phase of the prosecution. *Id.* This information was submitted as support for the defendant's exceptional sentence recommendation. That recommendation was premised on the defense argument that:

All of the evidence obtained indicates that the minor victims wanted to be involved in prostitution before they met Mr. Escalante and that they had already been active prostitutes or had started taking steps to do so. The evidence further shows they conspired with the defendant to commit prostitution and continued as prostitutes within days of Mr. Escalante's arrest. In other words they were willing participants if not initiators and most certainly conspirators.  
CP 28-50, p. 5.

The state likewise submitted a legal memorandum before the evidentiary hearing. CP 68-74. The state disputed the factual submission of the defendant as to the teenage victims having culpability for their own exploitation. *Id.* The state also re-affirmed its sentencing recommendation and stated specifically that, "This court should sentence both Escalante and Williams to the high end of the range not just for being yet another abusive male in the victims' lives but because of their criminal history." *Id.*, p.7. The state did not request an exceptional sentence above the standard range and made no argument that could be interpreted as supporting more prison time than the 216 month high-end sentence it was bound to recommend under the plea agreement. *Id.*

On March 10, 2017, the trial court convened the sentencing hearing. The prosecution called a single witnesses, a task force officer with the FBI Child Exploitation Task Force. 03/10/2017 RP 9, *et.seq.* It also facilitated one of the victims' mothers to give an impact statement

and acknowledged the presence of the other victim. Victim AMA at first indicated that she did not wish to address the court but later changed her mind. 03/10/2017 RP 28, 86. During the colloquy the prosecution provided the court with a description of statements that AMA had made concerning her fear and the reasons for being reluctant “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 in any way impact her, revictimize her. . . .” 03/10/2017 RP 28. Again in connection with discussing the embarrassment that would attend any on-the-record statement about the sexual exploitation experiences of the victim, the prosecution did not use his comments as a vehicle to ask for a higher than the high-end sentence he was recommending.

After considering the defense request for an exceptional sentence below the range, and the prosecution request for the high-end, the trial court rejected both recommendations. 03/10/2017 RP 96. Instead it went with a less than high-end sentence totaling 200 months, that is it imposed a sentence which was more than a year below the prosecution’s high-end recommendation. *Id.* CP 53-67, p. 6 of 12.

The defendant did not file any post-sentencing motions. During the sentencing hearing he did not object to the prosecutions factual submissions or argument, and did not move to withdraw his guilty plea. Thus, the trial court was not asked to rule on the question of whether the

prosecution had committed a material breach. Instead this appeal was timely filed on March 31, 2017. CP 81-94.

C. ARGUMENT.

1. THE PROSECUTION DID NOT COMMIT A MATERIAL BREACH OF THE PLEA AGREEMENT BY ADVOCATING IN FAVOR OF THE HIGH-END SENTENCING RECOMMENDATION IT HAD AGREED TO IN THE PLEA BARGAIN.

Due process requires that the prosecutor adhere to the terms of a plea bargain agreement reached with the criminal defendant. *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). Ferguson, 13 Wash. Prac., *Criminal Practice & Procedure* § 3418 (3d ed. 2017). The terms of a plea agreement and the reasons for it are also required to be part of the record and made available to the trial court at the plea acceptance, voluntariness hearing. CrR 4.2(e). “If a plea agreement has been reached by the prosecutor and the defendant pursuant to RCW 9.94A.421, they shall at the time of the defendant's plea state to the court, on the record, the nature of the agreement and the reasons for the agreement.” RCW 9.94A.431(1).

The question of whether a party breached a plea agreement necessarily depends on the terms of the plea agreement. “The State breaches a plea agreement when it ‘undercut[s] the terms of the agreement explicitly or implicitly by conduct evidencing an intent to circumvent the

terms of the plea agreement.’ ” *State v. Ramos*, 187 Wn.2d 420, 455–56, 387 P.3d 650 (2017), quoting *State v. Carreno–Maldonado*, 135 Wn. App. 77, 83, 143 P.3d 343 (2006). For example where a prosecutor agrees to make a particular sentencing recommendation, a breach occurs where “[the prosecutor] called and vigorously examined a probation counselor and a parole officer on aggravating factors supporting an exceptional disposition based on manifest injustice.” *State v. Sledge*, 133 Wn.2d 828, 830, 947 P.2d 1199 (1997). But where the state’s comments are offered with “the intention and effect of providing the court a full picture of the facts underlying the offense at issue”, no breach occurs. *State v. Ramos*, 187 Wn.2d at 457.

Where a defendant alleges breach, the issue is constitutional and is reviewed *de novo*. The court must determine in light of the “sentencing record as a whole . . . whether the plea agreement was breached.” *State v. Ramos*, 187 Wn.2d at 433, quoting *State v. Carreno–Maldonado*, 135 Wn. App. at 83. Review is of “the State’s actions objectively, focusing ‘on the effect of the State’s actions, not the intent behind them.’ ” *Id.*, quoting *State v. Sledge*, 133 Wn.2d at 843. There is also a requirement of preservation: “A defendant may not complain on appeal that the state failed to abide by a plea bargaining agreement unless he moved to withdraw his guilty plea upon discovering the state’s change of position, or

sought to have the agreement specifically enforced by the trial court.” Ferguson, 13 Wash. Prac., *Criminal Practice & Procedure* § 3418 (3d ed. 2017), citing *State v. Giebler*, 22 Wn. App. 640, 591 P.2d 465 (1979), *State v. Music*, 40 Wn. App. 423, 698 P.2d 1087 (1985), and *State v. Shineman*, 94 Wn. App. 57, 971 P.2d 94 (1999).

In this case the defendant did not object to the state’s sentencing presentation and did not move to withdraw the plea. Thus it can be said that the defendant “may not complain on appeal” where he did not preserve the issue. *Id.* More importantly however the terms of the plea agreement allowed each party to argue in favor of non-agreed upon, individual sentencing recommendations. Thus the state’s advocacy was not a breach.

The terms of the plea agreement permitted each party of advocate in favor to their respective positions. This can be seen (1) in the plea documents submitted at the plea acceptance hearing [CP 14, 15-24.]; (2) the sentencing memoranda submitted by the parties in advance of the sentencing hearing [CP 28-50, 68-74,]; and (3) in the colloquy and argument at the sentencing hearing [03/10/2017 RP 4, *et.seq.*]. In short the defense reserved the right to argue for an exceptional sentence below the standard range and against the state’s high-end standard range sentence. The state likewise reserved the right to argue for a high-end

standard range sentence and against the defense below-the-range-exceptional-sentence recommendation. *Id.*

The state adhered to the terms of the plea agreement. The prosecutor committed in the plea agreement to recommend a high-end standard range sentence and did so: “State will request 216 [months]. Defense may request exceptional sentence downward.” CP 15-24, p. 4 of 10. At sentencing the prosecutor advocated in favor of the standard range sentence orally and in writing. 03/10/2017 RP 32. CP 68-74. In doing so he necessarily advocated also against the exceptional, below the range sentence, that was being requested by the defense. 03/10/2017 RP 4, *et.seq.* By the same token the defense also advocated against the high-end sentence requested by the prosecution and in favor of the exceptional sentence. 03/10/2017 RP 32 *et.seq.* Neither recommendation was a breach of the plea agreement; the arguments of both parties were authorized and required by the plea agreement’s express terms.

The defendant argues that the prosecution breached the plea agreement by arguing against the defense recommendation. Where the plea agreement expressly called for each party to make a separate recommendation, and where the recommendations were so dramatically different, there is little support for this argument. The prosecution advocated for its recommendation as did the defense. This was not only

permitted by the express terms of the agreement, it finds support in this court's review of similar plea agreements.

A prosecutor may submit and argue facts in support of a high-end sentence recommendation. "But the State does not breach the agreement when it reiterates certain facts necessary to support a high-end standard range recommendation." *State v. Carreno-Maldonado*, 135 Wn. App. 77, 84, 143 P.3d 343 (2006). This court in *Carreno-Maldonado* found that the state had breached its low-end sentence recommendation for certain charges. Nevertheless with respect to a mid-range recommendation for other counts, the court noted that the state had more, though not unlimited, freedom to advocate: "As to the mid-point sentencing recommendations for each of the second degree rapes, we recognize that it may be necessary to recount certain potentially aggravating facts in order to safeguard against the court imposing a lower sentence. But a prosecutor must use great care in such circumstances, and the facts presented must not be of the type that make the crime more egregious than a typical crime of the same class." *Id.*

The restrictions on a prosecutor's advocacy are even more relaxed where the plea agreement calls for a high-end sentencing recommendation. *State v. Monroe*, 126 Wn. App. 435, 440, 109 P.3d 449 (2005), *remanded on other grounds*, 157 Wn.2d 1016 (2006). "The State's argument in

support of that [high-end] recommendation necessarily included facts sufficient to justify the court in setting [the defendant's] minimum sentence at the top rather than the bottom of his 384 to 511 month standard range. And while the prosecutor had to guard against undercutting the plea agreement by emphasizing facts generally considered only in imposing an exceptional sentence, he was not muted simply because [the defendant's] crimes arouse natural indignation." *Id.*, citing *State v. Rice*, 110 Wn.2d 577, 606, 757 P.2d 889 (1988), *cert. denied*, 519 U.S. 873 (1996), and *State v. Fleetwood*, 75 Wn.2d 80, 84, 448 P.2d 502 (1968).

In the case before the court, the prosecutor no more undercut the plea bargain than did the defense. The individual sentencing recommendations allowed by the plea agreement meant that both parties would advocate in favor of their individual recommendations. Surely the defendant would not argue that the defense undercut the prosecution's recommendation by asking for an exceptional sentence below the range. The recommendation was not agreed upon so the defendant was free to seek a below-the-range sentence and express the reasons why that sentence was appropriate. The same holds true of the prosecutor's high-end sentence recommendation. At no time did the prosecutor ask for, nor did the trial court impose an exceptional sentence above the range. Both

the recommendation and the ultimate sentence were therefore consistent with the express terms of the plea agreement.

The defendant also argues that the prosecutor's comments about one of the victims constituted a breach. The defendant fails to acknowledge that the victim was hesitant to speak at first but ultimately did expressly request permission to do so, albeit late in the proceeding. 03/10/2017 RP 86. Thus, in context and in light of the high-end sentencing recommendation, the prosecutor did not engage in impermissible advocacy by conveying to the court statements she had made to the prosecution during the pendency of the prosecution and the reasons for them: "Your Honor, as I told you, [victim AMA] is here. [Victim AMA] 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." 03/10/2017 RP 28-29.

The difficulty any young woman might have in talking about sexual misadventures under the bright lights of a court room is universally understandable. For the prosecutor to convey to the court that a victim has experienced fear and embarrassment did not in any way undercut the plea

agreement. It was an obvious component of the charges just as fear and embarrassment is an understandable component of most sexual offenses.

The prosecution's sentencing recommendation in this case was exactly what was agreed to. The prosecutor did nothing more than was authorized by *Carreno-Maldonado*, that is he exercised the state's prerogative "to safeguard against the court imposing a lower sentence." *State v. Carreno-Maldonado*, 135 Wn. App. at 84. The state did not breach and the defendant's conviction and sentence should be affirmed.

2. THE TRIAL COURT DID NOT ABUSE ITS SENTENCING DISCRETION, WHERE IT ACKNOWLEDGED THAT THAT AN EXCEPTIONAL SENTENCE COULD BE REQUESTED BUT DECLINED TO IMPOSE THE REQUESTED SENTENCE FOR REASONS SPECIFIC TO THIS CASE.

In general, a defendant sentenced within the standard range may not appeal his sentence. RCW 9.94A.585(1). A defendant may however "appeal a standard range sentence if the sentencing court failed to comply with procedural requirements of the SRA or constitutional requirements." *State v. Osman*, 157 Wn.2d 474, 481–82, 139 P.3d 334 (2006). One such requirement is that a trial court must at least consider imposing a below the standard range sentence and may not exclude the possibility under any and all circumstances. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

When a trial court refuses to exercise its statutory discretion, it can be said to have abused its discretion. *Id.* “A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range.” *State v. Garcia–Martinez*, 88 Wn. App. at 330. However the converse is not an abuse of discretion. Where a trial court considered “[the defendant’s] request for application of a mitigating factor, heard extensive argument on the subject, and then exercised its discretion by denying the request. . . [the defendant] may not appeal that ruling.” *State v. Cole*, 117 Wn. App. 870, 881, 73 P.3d 411 (2003).

In the case before the court the trial court did not reject an exceptional sentence on the basis that it did not have the power to impose it. One of the best indicators of this is the sentencing hearing itself. The sentencing hearing translated into nearly one hundred pages of transcript. 03/10/2017 RP 6-*et.seq.* At the outset when the prosecution explained that it wished to submit a factual rebuttal to the mitigation information submitted by the two defendants, the court permitted the hearing to proceed. *See* 03/10/2017 RP 6-69. If the court had been of the mistaken view that an exceptional sentence was categorically unavailable, it would have had no need to consider any of the evidence submitted by the parties

in writing and orally concerning the victims' supposed participation in their own exploitation. It would have proceeded directly to sentencing.

The court's comments during the prosecution's presentation provide further support that it had not categorically excluded the possibility of an exceptional sentence. Before the defendants even submitted their arguments the trial court acknowledged those arguments:

THE COURT: I was talking about -- Mr. Jordan was saying that to a significant degree, the victims were initiator, willing participant, provoker. For purposes of establishing mitigating circumstances, it's a different legal thought than to what extent somebody is a co-conspirator or accomplice for evidentiary purpose. 03/10/2017 RP 68.

The trial court's openness to the defense argument is telling. As the hearing proceeded, after considering the prosecution's evidentiary presentation and argument about the legal issues, the trial court went on to hear colloquy, argument and allocution for nearly another twenty pages from the defense before coming to a decision. *See* 03/10/2017 RP 68-86. Then in announcing its decision it started by announcing its view that mitigation was indeed a possibility even though the ages of the victims could also be viewed as aggravating circumstances:

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 or because like some of the other ones. Just as example, before detection of the defendant compensated or made good faith effort to compensate the victim. The defendant committed the crime under duress, coercion, threat, or compulsion. The defendant with no apparent predisposition to do so was induced by others to participate in the crime.  
03/10/2017 RP 87-88.

The court also acknowledged that for both the defendants and the victims, youth played a role in this case. This was information highlighted by the defense in its argument: “[By Ms. High] I want you -- when you think about everyone involved in this, how young they are and how much future there is for all of them, I want Michael to be one of those individuals that has a future as well.” 03/10/2017 RP 57. The court took the defense argument to heart and in doing so also referenced the wealth of current penology development information that supports the notion that “children are different” and cases involving youthful participants can and should take youth into account. *See Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 2470, 183 L. Ed. 2d 407 (2012), *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409 (2017). In light of the youthfulness of the participants the trial court then weighed the appropriateness of extraordinary leniency based on the actions of the young teenage victims. 03/10/2017 RP 90-91. It weighed the harshness of the standard range penalty in light of the vulnerability of teenage victims. 03/10/2017 RP 92-

93. Finally, while speaking to the mother of one of the teenage girls whose lives and actions were being weighed in the balance, the court stated:

I know you blame yourself a little bit, Ms. Hunt. You said as much. I'm not sure there is anything else you could have much done beyond what you did do.

Anyway, I don't think that there is a basis for an exceptional downward. The Legislature has decided what this ought to be. There has been no dispute as to what the standard ranges are here.

03/10/2017 RP 95.

The trial court's ruling does not support the defense argument about abuse of discretion. The trial court knew and accepted that the victims likely had been willing participants. It simply did not believe that the actions of the girls in this case were sufficient to warrant an exceptional sentence below the range. Its reference to there not being "a basis for an exceptional downward" had everything to do with the particular facts of the case and not a thing to do with any categorical, legal exclusion.

The defendant is likely to argue in response that the court misunderstood its discretionary authority because of the particular charges. The human trafficking offense and the aggravating factor with which the defendant was charged both included a requirement that the victims be under the age of eighteen. CP 12-13. The court acknowledged

that requirement but never suggested that the victim's minority precluded an exceptional sentence. For instance, it never said anything that suggested an exceptional sentence is not available in human trafficking cases. Instead, the court focused on the particular circumstances of the particular victims in the case before it:

So another set of individuals here who don't have complete brain development, if you will, are the girls. It may well be that they were willing to do these things, but they weren't in a position to make wise choices about all of that. Instead, there were older people around who were willing to exploit the fact that they were willing to do those things and take money out of it. They weren't doing what we think about as a looking out for your neighbor and saying, you know what? This is a bad thing for you. They didn't care enough about those girls to stop them or at least try. It may well be that they couldn't have stopped them, but contributing to it wasn't certainly any help either. I don't know what happens to the personality of those girls. Whether or not they can really trust people again or men or they can very well or whether they can do it very successfully or whether their lives or their complete happiness might be compromised by this.  
03/10/2017 RP 90-91.

A facet of any vice crime is that it involves willing participation by a victim. There will always be room to blame the victim. But to say that the victim is blameworthy is not necessarily to say that the defendant is deserving of an exceptional leniency. The trial court said so specifically when it passed sentence on this defendant:

I was persuaded to some extent by what he had to say here today and by what Mr. Jordan had to say as well. It may not be entirely fair to him, but I don't think we are talking about below the standard range sentence. He is looking at a long time in prison regardless. I'm going to make it 200 months.

03/10/2017 RP 96.

In its ruling the trial court rejected the prosecution's argument for a high-end sentence and instead sentenced the defendant to less than the high-end. This was an example of a trial court knowing what its options were and deciding that justice required something different than what was recommended by either the prosecution or the defense. In coming to the decision about how much time in prison the defendant should serve, the court exercised and did not abuse its discretion. Its decision should be upheld and the defendant's sentence should be affirmed.

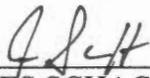
D. CONCLUSION.

For the foregoing reasons the state respectfully requests that the court affirm the defendant's conviction and sentence. Insofar as costs are

Concerned, in light of the length of the defendant's prison sentence it is unlikely that the state will submit a cost bill.

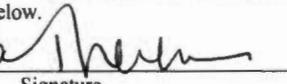
DATED: January 30, 2018.

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The undersigned certifies that on this day she delivered by <sup>e</sup>U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/31/18   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**January 31, 2018 - 10:23 AM**

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