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No. 62564-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

FILED
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STATE OF WASHINGTON
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STATE OF WASHINGTON

Respondent,

v.

JORGE HOLGIN,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL

Jorge Holgin was convicted of rape of a child in the first degree and child molestation in the first degree for an incident occurring seven years prior to trial when he was fourteen years old. In his appeal, Mr. Holgin argues prosecutorial misconduct denied him a fair trial where the prosecutor disparaged his defense counsel and by improperly arguing to acquit him the jury had to find that victim was lying. Mr. Holgin also argues his sentence is unlawful because the trial court refused to exercise its discretion when he requested an exceptional sentence.

B. ASSIGNMENT OF ERROR.

1. Prosecutorial misconduct deprived Mr. Holgin of a fair trial.
2. The court erred when it refused to consider an exceptional sentence based on the erroneous premise that the Sentencing Reform Act limited the mitigating factors that can justify an exceptional sentence.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. A prosecutor commits misconduct when he disparages defense counsel and argues that the defense theory is the State's witness is lying. Did the prosecutor

commit misconduct when he argued defense counsel was arguing three inconsistent defenses and was “just throw[ing] it all up in front of the jury [to] see what sticks?” Did the prosecutor commit misconduct when he argued that in order to believe the defense, the jury had to find the complaining witness was lying?

2. A trial court has the discretion to impose an exceptional sentence. The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. Is a sentence erroneous where the trial court denies a request for an exceptional sentence based on the mistaken belief only certain pre-determined factors support an exceptional sentence?

D. STATEMENT OF THE CASE.

In August 2001, Jorge Holgin and his mother were living with Mr. and Mrs. D.¹ and their two children, Kay and Kamal. 8/27/08 RP 9, 25. At that time Jorge was 14 years old and Kamal was 4 years old. 9/4/08 RP 103; 9/3/08 RP 59.

¹ Initials are used to conceal the identity of the minor complaining witness.

Jorge testified that on August 24, 2001 he returned to the apartment where he was living and was suddenly confronted by Kamal's mother. He thought she was accusing him of annoying Kamal. 9/4/08 RP 110. But he became frightened when she accused him of raping Kamal. 9/4/08 RP 111. Jorge grabbed his wallet and ran to a phone across the street. 9/4/08 RP 112, 115. He did not know the work phone numbers for his mother or aunt, so he called Mexico to talk to a trusted adult. 9/4/08 RP 113. After being unable to contact his father, he called his neighbor, Martine. 9/4/08 RP 113-14. Martine told Jorge to go back to the apartment and explain the misunderstanding. 9/4/08 RP 117. Kamal went back to the apartment, but Mrs. D.'s friend, Melba Estrada, prevented him from entering the apartment. 9/4/08 RP 119. She grabbed his hand and said they were calling the police. 9/4/08 RP 119. Kamal ran off, called back Martine and explained what happened. 9/4/08 RP 123. Martine told Kamal he could not go back and that he was going to bring him to Mexico. 9/4/08 RP 123. Jorge walked to the airport where a plane ticket was waiting for him. 9/4/08 RP 124-26.

Prior to Jorge returning to the apartment, Mrs. D. was giving Kamal a bath when he complained of a sore bottom. 9/3/08 RP 69-

70. After questioning by his mother, Kamal said that Jorge “played with his tail” and “put his tail in his butt.” Mrs. D. then called her friend, Melba Estrada, told her what happened and asked for her help. 9/3/08 RP 75. Ms. Estrada came to Mrs. D.’s house and called 911. 9/3/08 RP 75. While Ms. Estrada was there, Jorge returned and Ms. Estrada angrily confronted him, asking “why had he done it, why had he hurt Kamal.” 9/3/08 RP 76. According to Mrs. D., Jorge asked for forgiveness and ran out. 9/3/08 RP 76.

Mr. D. was notified that something upsetting happened to Kamal. 8/27/08 RP 31. He drove home from work, spoke to Mrs. D. about what happened and then spoke to Kamal. 8/27/08 RP 34. Kamal was “very nervous” when his father spoke to him. 8/27/08 RP 33. Mr. D. asked him “if Jorge tried to kiss him,” “if he tried to put his thing on him or if he had tried to have him touch his thing.” 8/27/08 RP 33. Kamal told Mr. D. that Jorge “put his thing behind him” and had given “little kisses in his mouth.” 8/27/08 RP 34.

A little over a year later Jorge returned to the United States. 9/4/08 RP 137. He was arrested September 1, 2007. 9/4/08 RP 138.

The State charged Jorge with child molestation in the first degree and rape of a child in the first degree. CP 25-26. At trial,

the State's witness testified that Kamal's injuries could have been caused by constipation. 8/28/08 RP 134. The defense theory was that Kamal's statements alleging sexual abuse were not credible because they were obtained through highly suggestive questioning. 9/8/08 RP 101-03. The jury found Jorge guilty of both charges. CP 53, 54. He appeals. CP 65.

E. ARGUMENT

PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENTS DENIED MR. HOLGIN A FAIR TRIAL.

1. The prosecutor has a duty to ensure a fair trial. A criminal defendant's right to due process of law ensures the right to a fair trial. U.S. Const. amend. 14²; Wash. Const., art. 1, § 3³, 22⁴. The prosecutor, as a quasi-judicial officer, must act impartially and solely in the interests of justice to the end that each defendant receives a fair trial. State v. Reed, 25 Wn.App. 46, 48, 604 P.2d 1330 (1979). The prosecutor's duty is to ensure a verdict free of

² No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

³ No person shall be deprived of life, liberty, or property, without due process of law.

⁴ In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases

prejudice and based on reason. State v. Claffin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). “Prosecutorial misconduct may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial.” State v. Charleton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial. State v. Cheatham, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). Prejudice occurs if “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899, (2005). Where the prosecutor’s remarks were not objected to reversal is still appropriate if the misconduct is so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

Here, the prosecutor committed misconduct by disparaging Mr. Holgin’s attorney and arguing the defense theory was that the victim, Kamal, was a liar.

2. The prosecutor committed misconduct by disparaging Mr. Holgin’s defense attorney. A prosecutor may not disparage

defense counsel or her role. State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008). When a prosecutor disparages defense counsel, it is misconduct because it denies the defendant's constitutional right to representation of counsel. State v. Neslund, 50 Wn.App. 531, 562, 749 P.2d 725 (1988). Here, the prosecutor committed misconduct by denigrating the defense theory and accusing defense counsel of trying to trick the jury. In closing argument the prosecutor argued:

Well, let me talk to you a little bit about the various defenses that the defendant has put forward in this case. The first was I have an alibi. You heard him testify to that this morning. I have an alibi. I was in Mexico. It couldn't have been me. It had to have been someone else. Well, that defense doesn't fly. Okay. He admits that a lie is a lie but some other guy did it. And how do we know that that's the defense? It wasn't expressly stated by Ms. MacDonald in her opening, but you saw it in her cross-examination of Detective Johnson, why didn't we look at anyone else? Why didn't we look at the father? Why didn't we look at other suspects? It's a very subtle way of producing to you the notion, or creating in your mind the notion maybe someone else raped Kamal. All right. (sic) So that's defense number two.

Defense number three. All right. (sic) Well, if you don't believe some other guy did it, maybe we can believe that Kamal is just constipated. He made everything else up.

Those are three logical defenses that the defense – or not logical, but those are the three defenses that the defense has put forward and you will see that they are

internally inconsistent because you can't have one without the other. So what's occurring here is, well, let's just throw it all up in front of the jury and so see what sticks.

9/8/08 RP 78-79.

In Warren, the prosecutor described defense counsel's argument as a "classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing." Id. at 29. The court found the comments improper because they commented on defense counsel's role. Id. at 30.

Like Warren, the prosecutor's remarks that defense counsel argued three inconsistent defense theories "to see which one would stick" was improper because it disparaged Mr. Holgin's attorney by accusing her of throwing the kitchen sink in a desperate ploy to trick the jury and gain an acquittal. Moreover, it suggested to the jury that defense counsel was forced to "throw it all up in front of the jury [and] see what sticks" because she believed Mr. Holgin did not have a legitimate defense to the State's charges. This was improper.

3. The prosecutor committed misconduct by arguing Mr. Holgin's defense was that Kamal was a liar. "This court has

repeatedly held that it is misconduct 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, 921 P.2d 1076 (1996) (citing State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 180 P.2d 74 ("it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying"), review denied, 118 Wn.2d 1007, 822 P.2d 287 (1991); State v. Wright, 76 Wn.App. 811, 826, 888 P.2d 1214, review denied 127 Wn.2d 1010, 902 P.2d 163 (1995); State v. Barrow, 60 Wn.App. 869, 874-75, 809 P.2d 209, review denied, 118 Wn.2d 1007, 822 P.2d 288 (1991).

In Fleming, the prosecutor argued in closing argument:

Ladies and gentlemen of the jury, for you to find the defendants, Derek Lee and Dwight Fleming, not guilty of the crime of rape in the second degree, with which each of them have been charged, based on the unequivocal testimony of [D.S.] as to what occurred to her back in her bedroom that night, you would have to find either that [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom.

83 Wn.App. at 213 (court's emphasis).

This court held the prosecutor's arguments misstated the law and misrepresented both the role of the jury and the burden of

proof because the jury was required to acquit unless it had an abiding conviction in the truth of the State's testimony.

In the instant case, defense counsel argued that Kamal's statements that he was sexually assaulted were the result of suggestive questioning and, therefore, were not reliable. 9/8/08 RP 101-03. She also argued the physical injury and soreness Kamal complained about were the result of constipation. 9/8/08 RP 118-19. In response to the defense counsel's argument, the prosecutor accused Mr. Holgin's attorney of calling Kamal a liar. He argued in rebuttal:

Let's be very clear about what Ms. MacDonald was telling you. Number one, she is saying that Kamal lied. There's no other way to cut it, that Kamal lied about the defendant raping him. She's saying that he lied to his mother, he lied to his father, he lied to the social worker, and lied to the doctor.

9/8/08 RP 129.

Like Fleming, the prosecutor's arguments also pitted the defendant's testimony against Kamal's testimony and argued that to believe Mr. Holgin the jury would have to find that Kamal lied. See Fleming, 83 Wn.App. at 213. Moreover, the prosecutor's arguments mischaracterized the defense theory as counsel did not assert that Kamal lied. Rather, the defense was that Kamal's

claims that he was sexually abused by Mr. Holgin were a result of suggestive questioning. The prosecutor's arguments were improper.

4. The prosecutorial misconduct demands reversal.

Reversal is required if there is a substantial likelihood the instances of misconduct affected the jury's verdict. State v. Boehning, 127 Wn.2d 511. Here, the defense was that Kamal's statements about being sexually abused were obtained through suggestive questioning to which a four-year-old is particularly vulnerable. The prosecutor's arguments disparaged defense counsel and her role and mischaracterized the defense theory. By making these improper arguments, particularly during rebuttal when the defense cannot respond, there was a substantial likelihood the misconduct affected the jury's verdict and no instruction could have obviated the prejudice. Therefore, reversal is required.

MR. HOLGIN'S SENTENCE MUST BE REMANDED
BECAUSE THE TRIAL COURT'S REFUSAL TO
CONSIDER AN EXCEPTIONAL SENTENCE WAS
LEGALLY ERRONEOUS.

1. The trial court denied Mr. Holgin's request for an exceptional sentence. The parties agreed that Mr. Holgin's standard sentence range was 93 to 123 months. 10/10/08 RP 9,

CP 56. At sentencing Mr. Holgin requested an exceptional sentence based on his age at the time of the offense, the amount of time in confinement he would have served if he had been adjudicated as a juvenile, his lack of criminal history and the inability of juveniles to fully appreciate the wrongfulness of their actions. 10/10/08 RP 9-13.

The trial court declined to impose an exceptional sentence.

The court reasoned:

And I have to state that that I do not believe the court has been given a legal basis to impose an exceptional sentence, because, as you know, *for the court to impose an exceptional sentence, it has to be based upon the criminal offense that was committed, the defendant's culpability, and also can take into account the defendant's prior criminal history.* The factors that I'm being asked to consider do not relate to any of those bases.

10/10/08 RP 21. (emphasis added)

The court's reasoning for denying the exceptional sentence was erroneous as the Sentencing Reform Act does not limit mitigating factors on which to base an exceptional sentence.

2. The trial court has the authority to impose an exceptional sentence. The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of the chapter, that there are substantial and compelling reasons

justifying an exceptional sentence. RCW 9.94A.535. The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. RCW 9.94A.535(1). RCW 9.94A.535(1) provides mitigating factors on which a court may base an exceptional sentence. Contrary to the court's ruling, the list of mitigating factors are "not intended to be exclusive reasons for exceptional sentences." RCW 9.94A.535(1). Thus, the court's ruling that an exceptional sentence must be based exclusively on the crime, defendant's culpability and his criminal history was erroneous.

3. Mr. Holgin's sentence may be challenged for the first time on appeal. Generally, a sentence within the standard range is not appealable. RCW 9.94a.585(1). However, an illegal or erroneous sentence may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Here, the trial court erred because it failed to recognize it had the authority to impose an exceptional sentence.

In State v. McGill, the defendant was convicted of three drug convictions. The trial court, unaware of the multiple offense policy

permitting the court to impose an exceptional sentence below the standard range⁵, stated:

I'm sure you are aware that the legislature has decided that judges should not have discretion beyond a certain sentencing range on these matters. And sometimes some of these drug cases, it seems like, when you compare them to some of the really violent and dangerous offenses, it doesn't seem to be justified. But it's not my call to determine the standard range. The legislature has done that for me.

So I have no option but to sentence you within the range on these of 87 months to 116 months. But I do get to decide where in that range the sentence is appropriate.

112 Wn.App. 95, 98-99, 47 P.3d 173, (2002) (court's emphasis).

The State argued that because the defendant's sentence was within the standard range, he could not appeal his sentence. Id. at 99. This court disagreed, holding that challenges to a standard range sentence can be reviewed in "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." Id. at 99-100 (citing State v. Garcia-Martinez, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997)). This court further held the trial court refused to exercise its discretion to consider an exceptional sentence because it erroneously believed it lacked the authority to do so. Id. at 100.

⁵ State v. Sanchez, 69 Wn.App. 255, 848 P.2d 208, review denied, 122 Wn.2d 1007, 859 P.2d 604 (1993).

Here, the trial court considered the defense's request for an exceptional sentence. However, the trial court failed to recognize it had the discretion to consider other factors in determining whether to impose an exceptional sentence. The court mistakenly believed the basis for an exceptional sentence must be "based upon the criminal offense that was committed, the defendant's culpability, and also can take into account the defendant's prior criminal history." 10/10/08 RP 21. Like the court in McGill, it refused to exercise its discretion to impose an exceptional sentence because it erroneously believed it lacked the authority to do so. This court can review Mr. Holgin's sentence.

4. Mr. Holgin's sentence must be remanded. The State asked the court to impose 100 months of confinement, 7 months more than the minimum of the standard range. 10/10/08 RP 5. Mr. Holgin requested an exceptional sentence downward. Defense counsel reasoned that Jorge was 14 years old at the time of the offense and his sentence, had he been adjudicated as a minor, would have been significantly less than 93 months. 10/10/08 RP 9-13. And, although he left the state before being questioned by

police, there was no evidence that he knew he was formally charged until his arrest seven years later.⁶

Defense counsel also argued that his tender age at the time of the offense made him unable to appreciate the wrongfulness and gravity of his actions. 10/10/08 RP 9-13. The Washington Supreme Court recognizes that age may be relevant in imposing an exceptional sentence where it may affect the defendant's capacity to appreciate the wrongfulness of his conduct. State v. Ha'min, 132 Wn.2d 834, 940 P.2d 633 (1997); RCW 9.94A.535(1)(e).

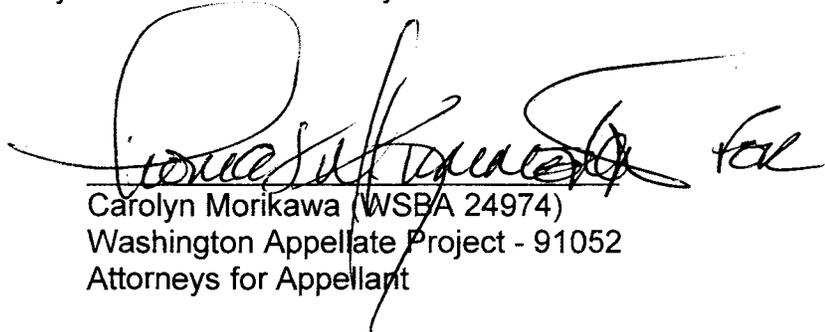
There are substantial and compelling reasons to impose an exceptional sentence. Remand is necessary as the trial court refused to exercise its discretion because it erroneously believed it did not have the authority to consider an exceptional sentence based on the reasons provided by the defense. Moreover, because the court impose the minimum time of confinement of 93 months, despite the State's request to impose more, this court cannot be certain the trial court would have imposed the same sentence had it known an exceptional sentence was an option.

⁶ Jorge obtained an identification card and driving instruction permit after returning to the U.S. 9/4/08 RP 137. When he turned 18, he obtained his driver's license. 9/4/08 RP 137. There was no evidence that he was notified there was a warrant for his arrest in connection with this incident until he was arrested September 1, 2007. 9/4/08 RP 138.

F. CONCLUSION.

Based on the aforementioned reasons, Mr. Holgin respectfully requests this court to reverse his conviction. In the alternative, he requests his sentence be remanded.

Respectfully submitted this 26th day of June 2009.



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

STATE OF WASHINGTON,)
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 JORGE HOLGIN,)
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 Appellant.)

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SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF JUNE, 2009.

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