

62564-1

62564-1

NO. 62564-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JORGE HOLGIN,

Appellant.

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOAN DUBUQUE

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**BRIEF OF RESPONDENT**

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**A. ISSUES**

Has the defendant failed to show prosecutorial misconduct when the prosecutor attacked the defense argument and emphasized how that argument was incorrect?

Has the defendant failed to show prosecutorial misconduct when the prosecutor characterized the defense argument and then explained why that argument was incorrect?

Has the defendant waived his right to challenge the prosecutor's comments by failing to object below?

Has the defendant failed to show remand is appropriate considering that the trial court considered an exceptional sentence, but properly concluded that it had no factual or legal basis to provide one?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

By amended information, the State charged defendant Jorge Holgin in King County Superior Court with Rape of a Child in the First Degree and, in the alternative, Child Molestation in the First Degree. CP 25-26. The jury found him guilty on both counts. CP 53-54. At sentencing, the court sentenced Holgin on only the Rape of a Child in the

First Degree conviction. CP 55. The court sentenced Holgin to a standard range sentence of 93 months. CP 55-64. Holgin appeals. CP 65.

## 2. SUBSTANTIVE FACTS

In August 2001, the de Campos family — Jorge (father), Maria (mother), Kay (six-year-old daughter), and K.D. (four-year-old son) — lived in an apartment complex in Burien, Washington, just across the street from Highline High School. 6RP 8-9, 24-25.<sup>1</sup> At the time, Holgin was a 14-year-old and had recently arrived to the United States from Mexico. 6RP 26. Holgin and his younger sisters stayed with the de Campos family in the summer of 2001, and Holgin's aunt would often babysit Kay and K.D. 6RP 27.

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<sup>1</sup> The verbatim report of proceedings is cited as follows:

1RP (Aug. 18, 2008)  
2RP (Aug. 19, 2008)  
3RP (Aug. 20, 2008)  
4RP (Aug. 25, 2008)  
5RP (Aug. 26, 2008)  
6RP (Aug. 27, 2008)  
7RP (Aug. 28, 2008)  
8RP (Sept. 2, 2008)  
9RP (Sept. 3, 2008)  
10RP (Sept. 4, 2008)  
11RP (Sept. 8, 2008)  
12RP (Oct. 10, 2008)

Both Jorge de Campos and Maria worked. 6RP 27. Holgin generally had free access to the de Campos home and was allowed to come and go as he chose. 6RP 27.

On August 24, 2001, Maria de Campos was preparing to give K.D. a bath. 9RP 69. Prior to the bath, K.D. sat on the toilet because he needed to go to the bathroom. 9RP 72. After he got off, Maria observed a red, mucous substance in the toilet. 9RP 72.

After going to the bathroom, Maria started to put K.D. in the bathtub. 9RP 69. When Maria told K.D. to wash his bottom, he said no because it hurt. 9RP 69-70. Maria looked at Holgin's anus and noticed that it was very red and sore. 9RP 71. K.D. then got nervous and started to cry. 9RP 71.

Maria then took K.D. to her bedroom and sat with him on the bed. 9RP 71. While there, Maria asked K.D. why his bottom was sore and expressed to him that if something had happened, he could tell her. 9RP 71. K.D. told his mother that Holgin had brought him to the bathroom, covered his mouth, and "put his tail in his butt." 9RP 71-73. At that time, K.D. referred to "penis" as "tail." 6RP 35. K.D. told his mother that it was not his fault. 9RP 81.

Not surprisingly, this information hit Maria like a bombshell. 6RP 32. She was distraught and uncertain what to do next. 9RP 79. She did not want to call 911, as her English was poor, and she wanted to be sure that

the allegation against Holgin was correct. 9RP 75, 79, 92. She finally called her good friend Melba Estrada and told her what had happened. 9RP 75.

Maria was hysterical on the phone call, and she was crying terribly. 8RP 60. She told Estrada that K.D. had been molested by the boy who lived with them. 8RP 6-63. Estrada immediately went to the de Campos's house. 8RP 63-64.

Upon arriving at the house, Estrada found Maria with K.D. 8RP 64. Estrada then talked with 911 to report what had happened. 8RP 64. She then called Holgin, who was still at the house, a "bastard" and "mother fucker," and told him that the police were coming. 8RP 71, 75, 91. Holgin said that he was "sorry" and Estrada overheard him say that "he did not know why he did it." 8RP 68, 72-73. Holgin then fled the house. 9RP 76.

K.D.'s father returned to the house and asked K.D. what occurred. 6RP 34. K.D. told his father that Holgin showed him his "tail with hair" and Holgin had asked K.D. to touch it. 6RP 34.

The police arrived shortly and Estrada helped Maria tell officers what had happened. 8RP 79. The family then took K.D. to the hospital for a sexual assault examination. 8RP 81.

At the hospital, K.D. met with a social worker, Laurie Sterling. 9RP 127-28. Sterling interviewed K.D. with an interpreter. 9RP 134-35. K.D. told her that Holgin had taken him into a bathroom and had locked

them both inside. 9RP 135. K.D. told Sterling that Holgin “took out his tail and put it over him and it hurt.” 9RP 135. He further indicated that Holgin “put his tail inside of him.” 9RP 135.

K.D. was also seen by Dr. Vinning at HMC. 7RP 28. K.D. repeated to Dr. Vinning that Holgin had taken him into a bathroom and locked the door. 7RP 103. K.D. then said that Holgin removed K.D.'s clothes and put K.D. on his lap. 7RP 103. Holgin removed his own clothes until his "tail" was out. 7RP 104. Holgin then put his tail “in or on” K.D.'s bottom. 7RP 103. K.D. told the doctor that Holgin was not wearing “any sock, hat or shirt” on his “tail” during the incident. 7RP 104. Dr. Vinning examined K.D. and concluded that he was suffering from a moderate tear of the anus. 7RP 115-16.

The police collected K.D.'s underwear from the family clothes hamper. 8RP 48-49. A Washington State Patrol forensic scientist examined the boy's underwear and found one sperm present in the crotch of the underwear. 7RP 179. The amount of cellular material was too small for the lab to obtain a profile from the sperm. 8RP 23.

By his own account, Holgin fled to Las Vegas and then Mexico the day that Maria discovered that Holgin had anally raped her son. 10RP 124-33. Holgin did not even tell his mother, who lived in Seattle, that he was going to Mexico. 10RP 112-13, 125-26.

Holgin returned from Mexico to the United States sometime in 2003. 10RP 137. In October 2007, more than six years after the incident, Holgin was arrested on a warrant related to this case. 8RP 205-06.<sup>2</sup> When he was arrested, the officer told him that he had a warrant for a rape of a child. 8RP 205-06. Upon hearing that information, Holgin said that that was not him and that someone must be using his name. 8RP 206.

After being arrested, Holgin obtained fraudulent documents purporting to show that he had been in Mexico in August of 2001, the time that the rape occurred. 8RP 163-64. Holgin provided those documents to his lawyer and, on Holgin's instructions, she represented to the State that the documents showed that the State had the wrong person. 10RP 26-29.

After presenting the false documents to the State, and several months into his incarceration on this charge, Holgin, on his own and against the advice of his counsel, requested a meeting with the prosecutor on the case. 10RP 143-50; 8RP 147. Holgin did not tell his attorney what he wanted to discuss in the meeting or why he wanted to meet. Against his counsel's advice, Holgin met with the prosecutor and the case detective, Casey Johnson of the Seattle Police Department. 10RP 143-50.

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<sup>2</sup> The trial in this case occurred in August and September of 2008; Holgin was 21 at the time of the trial and was tried as an adult.

During that meeting, Holgin said that he had told his attorney several lies. Specifically, he said he lied when he told his attorney that he did not know the de Campos family. 8RP 151-54. He also said that he lied when he provided fraudulent documents purporting to show that he was in Mexico during the time of the incident. 8RP 163-64.

During trial, Holgin testified on his own behalf. Holgin admitted that the documents from Mexico were false, that he knew about the false documents, and that he wanted to provide those false documents in an effort to get out of custody. 11RP 16-17. Holgin also conceded that he was staying at the de Campos house when the rape occurred. 10RP 145.

### C. ARGUMENT

#### 1. **HOLGIN'S PROSECUTORIAL MISCONDUCT CLAIM FAILS.**

A defendant who alleges prosecutorial misconduct must show both (1) improper conduct and (2) its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established if there is substantial likelihood that the misconduct affected the jury's verdict. Id. A prosecutor's allegedly improper remarks must be reviewed in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v.

Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error unless the remark is deemed to be so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

Here, Holgin claims that the State committed two separate acts of misconduct during closing arguments: (1) the prosecutor disparaged defense counsel; and (2) the prosecutor said that in order to acquit Holgin, the jury would have to find that K.D. was lying. As explained below, these arguments fail. First, the State did not commit any misconduct. Second, even if misconduct occurred, Holgin has failed to show that any misconduct could not have been cured by an instruction or that the misconduct affected the jury's verdict.

**a. Holgin Has Failed To Show The Challenged Conduct Was Improper.**

**i. The prosecutor did not disparage defense counsel.**

During the investigation and the trial, Holgin and his attorney focused on three themes to try to show that Holgin was not guilty. First, Holgin asserted that he was in Mexico at the time of the rape.

8RP 163-64. Second, Holgin implied that even if he were in Washington at the time, that someone else possibly raped K.D. 8RP 181-89 (defense counsel questioning the detective on why he did not investigate other suspects). Third, K.D. presented evidence that K.D. could have been merely constipated. 10RP 83 (defense calling doctor who testified that tear on anus could have come from K.D. being constipated). In closing, the prosecutor challenged these three defense themes:

Well, let me talk to you a little bit about the various defense 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 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 very subtle way of producing to you the notion, or creating in your mind the notion that maybe someone else raped [K.D.]. 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 K.D. is just constipated. He made everything else up. Those are the three logical defenses that the defense – or not logical, but those are the 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.

11RP at 78-79.

Defense counsel did not object to any of these statements. Now, however, Holgin contends that these comments, especially the assertion that “let’s just throw it all up in front of the jury and so see what sticks,” improperly disparaged defense counsel. This argument fails.

A prosecutor should refrain from personally attacking defense counsel, impugning the character of defendant’s lawyer, or disparaging defense lawyers in general as a means of imputing guilt to the defendant. State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984). Comments that permit the jury “to nurture suspicions about defense counsel’s integrity” can deny a defendant’s right to effective representation. State v. Neslund, 50 Wn. App. 531, 562, 749 P.2d 725 (1988).

In this case, the State did not disparage *defense counsel*, but rather criticized the *defense* by emphasizing that the three proffered defenses were inconsistent and were without merit. Indeed, the prosecutor even couched his argument that these were the “various defense[s] that the *defendant* has put forward” and, at other times, criticized the strategy not of defense counsel, but “the defense.” The prosecutor’s criticism of the defense, not defense counsel, was entirely appropriate and within the bounds of proper legal argument.

In State v. Guizzotti, 60 Wn. App. 289, 298, 803 P.2d 808 (1991), this Court ruled that statements less tied to the evidence than the

comments here did *not* constitute misconduct. There, the prosecutor characterized the defense counsel's argument "as a little bit of smoke" and that the defense attorney "attempted to confuse the argument." Id. at 297. Although finding the word choice unfortunate, this Court held that the prosecutor was merely trying to say that "the defense argument was unfounded." Id. at 298. This Court should conclude that the same here: that the prosecutor's basic argument was that the defense theories did not make sense and were not supported by the evidence, and this argument did not constitute prosecutorial misconduct.

Holgin relies on State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008), but that case is inapposite. In Warren, the prosecutor said in closing that there were "a number of mischaracterizations" in defense counsel's argument as "an example of what people go through in a criminal justice system when they deal with defense attorneys." Id. at 29. The prosecutor continued to describe 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 it out what in fact they are doing." Id. The court concluded that those statements improperly disparaged defense counsel's role in the trial. Id. at 29-30.

In this case, however, the prosecutor's statements come *nowhere close* to what was said in Warren. Unlike the situation in Warren, the prosecutor here did not comment on the specific defense attorney, defense attorneys in general, and or assert that Holgin's attorney was hoping that the jury was not intelligent enough to understand the issues. Warren does not apply, and Holgin has failed to provide any case where a court concluded that statements similar to what the prosecutor did here were improper.

**ii. Holgin has failed to show that the State shifted the burden of proof.**

In closing arguments, defense counsel argued that the victim was not raped, but that he suffered his injuries from constipation. 11RP 109-10, 118-19. And regarding his statements that Holgin raped him, the defense counsel's theme was that those statements from K.D. were false.

In rebuttal, the prosecutor responded:

Let's be very clear about what [defense counsel] was telling you. Number one, she is saying that K.D. lied. There's no other way to cut it, that K.D. 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 he lied to the doctor.

11RP 129. Holgin did not object to these statements. Holgin now argues that the prosecutor improperly shifted the burden of proof by allegedly

arguing that to acquit Holgin, the jury must conclude that K.D. had lied. Br. of App. at 10. This argument fails.

A prosecutor commits misconduct by arguing 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). This is because by doing this, the prosecutor is presenting to the jury a “false choice” between believing the State’s witnesses and acquitting the defendant. State v. Wright, 76 Wn. App. 811, 823-24, 888 P.2d 1214 (1995). The reasoning is that the jury does not have to believe that the State’s witnesses are lying or mistaken; all that they needed was to entertain a reasonable doubt, based on whatever reason, that the defendant committed the crime. Id. at 822-23.

In this case, however, the prosecutor *never* argued that to acquit Holgin, the jury must find the State’s witnesses were *lying*. To the contrary, the prosecutor merely characterized the defense counsel’s argument as saying that K.D. lied, and then explained why the evidence showed that K.D. was not lying. This was appropriate. Holgin argued in closing that K.D.’s allegations were not accurate, and that K.D. was not raped by Holgin. The prosecutor emphasized, however, that K.D. told several individuals that Holgin anally raped him, K.D. had a tear in his

anus, consistent with a sexual assault, and Holgin confessed and then fled the country the day Maria realized what had occurred. 11RP 129-37.

Further, the prosecutor never presented the jury with a “false choice.” Indeed, the prosecutor left open the possibility that the jury could conclude that K.D. was not lying, but merely made a mistake, or did not remember well, and still acquit Holgin. Holgin’s attempt to bring this case into the Fleming line of cases fails.

**b. Holgin Cannot Raise The Issue Of Misconduct For The First Time On Appeal.**

A claim of prosecutorial misconduct may not be raised for the first time on appeal unless a proper objection, request for a curative instruction, or a motion for a mistrial was made at trial, or the misconduct was so flagrant and ill-intentioned that no curative instruction could have obviated the prejudice. State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995). As this Court noted:

One of the reasons for placing the burden on the defense to object in the course of argument is that the defendant and defense counsel are the persons most acutely attuned to perceive the possible prejudice of the prosecutor’s remarks.

State v. Klok, 99 Wn. App. 81, 85, 992 P.2d 1039 (2000). “Thus, in order for an appellate court to consider an alleged error in the State’s closing argument, the defendant must ordinarily move for a mistrial or request a

curative instruction.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Indeed, the “absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” Id. The rule requiring the defense to object at trial discourages counsel from remaining “silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.” Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

In this case, the two challenged comments from the State’s closing arguments, even if impermissible, were not “flagrant and ill-intentioned.” The statement about “seeing what sticks” did not comment on defense attorneys’ role in the criminal justice system and this Court has held that far more questionable statements were appropriate in closing arguments. See Guizzotti, 60 Wn. App. at 298. Further, in Warren, the court held that the prosecutor’s statements about defense counsel, although improper, were *not* flagrant and ill-intentioned, and those statements were more disparaging than anything the prosecutor said here.

And although this Court has held the State commits flagrant misconduct when it argues that in order to acquit the jury must find the State witnesses lying, the prosecutor here never provided the jury with a

“false choice,” but merely characterized defense counsel’s argument.

When viewed in context, it becomes clear that, even if inappropriate, none of the challenged comments constitute clear, flagrant, and ill-intentioned misconduct.

Further, Holgin *never* objected to the comments from the prosecutor and has failed to show that the alleged misconduct had such an enduring and resulting prejudice that an objection and curative instruction would not have been sufficient to correct any irregularity. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995) (jurors are presumed to follow instruction). For example, the statements that Holgin claims constitute improper disparaging of defense counsel and improper burden shifting *take several sentences*. If Holgin had merely made an objection, he could have prevented the prosecutor from continuing these arguments. In short, none of these comments were so egregious to believe that a curative instruction by the court would not have remedied any possible prejudice.

**c. The Defendant Cannot Show That The Verdict Was Based On Anything But An Evaluation Of The Evidence.**

A conviction will be reversed upon a claim of misconduct only if there is a substantial likelihood that the alleged misconduct affected the verdict. Russell, 125 Wn.2d at 86. Whatever minor prejudice the

appellant can ascribe to the alleged misconduct, the evidence against Holgin on his sole conviction was strong. The prosecutor did nothing so egregious that would suggest that the jury's verdict was based upon anything other than the facts and the jury's independent determination of the credibility of the witnesses. See e.g., State v. Wilson, 16 Wn. App. 348, 356-57, 555 P.2d 1375 (1976) (prosecutor improperly expressed his personal opinion and made inflammatory remarks but the court did not find there was a substantial likelihood the remarks affected the verdict). This is especially true considering that these comments were limited to closing arguments and did not permeate the trial, the court specifically told the jury that the statements by the attorneys were not evidence, and Holgin failed to object to the statements and did not even request a mistrial. Swan, 114 Wn.2d at 635 (failure to object during trial supports conclusion that statements did not appear prejudicial to defense counsel). CP 37 (lawyers' arguments not evidence).

This conviction was based on the consistent statements from K.D. to his mother, his father, the social worker, and the doctor that he had been raped by Holgin, the physical evidence showing a tear in K.D.'s anus, K.D.'s demeanor after the incident, Holgin's confession that "he did it," Holgin's flight to Mexico immediately after the accusation, and Holgin's admission that he lied several times, including presenting false documents

to the State, in an effort not to go to jail. Given the damning evidence against Holgin, he has failed to demonstrate that there is a substantial likelihood that but for the alleged misconduct, the jury's determination of the credibility of the witnesses and analysis of the facts would have been different.

Because Holgin has failed to show that the challenged remarks were flagrant and ill-intentioned, that they could not be cured by an instruction, and that these comments would have likely changed the verdict, he has waived his right to challenge those comments here, and this Court should affirm.

**2. THE TRIAL COURT PROPERLY REJECTED HOLGIN'S REQUEST FOR AN EXCEPTIONAL SENTENCE.**

Holgin argues that this case should be remanded to the trial court because the trial court incorrectly believed that it lacked authority to impose an exceptional sentence downward. This argument fails. The trial court rejected Holgin's request for an exceptional sentence, and correctly concluded that Holgin did not raise a proper basis for a downward departure of the sentencing range. Accordingly, Holgin cannot appeal his standard range sentence, and this Court should affirm the trial court.

**a. Relevant Facts**

After his conviction, Holgin's standard range was 93 to 123 months. Holgin requested an exceptional sentence of 12 months. 12RP 9. Holgin argued that an exceptional sentence was legally authorized for four reasons: (1) Holgin's age at the time of the offense; (2) the amount of time in confinement that Holgin would have served if he were sentenced as a juvenile; (3) his lack of criminal history; and (4) the inability of juveniles to fully appreciate the wrongfulness of their actions. 12RP 9-13. The parties then briefed and made oral arguments to the trial court about whether the court could legally issue an exceptional sentence based on any of these grounds.<sup>3</sup>

The court ruled that Holgin had failed to provide the court with any legal justification for an exceptional sentence:

I have read both of the briefs that have been provided to the Court in support of and in opposition to the exceptional sentence, and I read the article that was also attached to defense counsel's brief. And I have to state 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.

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<sup>3</sup> The written briefs apparently were not filed with the superior court.

12RP 21. The court then sentenced Holgin to 93 months, the minimum of the standard range.

**b. Summary Of The Law**

RCW 9.94A.535 allows the court to impose a sentence outside the standard range sentence only if there exists “substantial and compelling” reasons to justify it and those reasons do not “duplicate factors already considered in computing the standard range.” State v. Sanchez, 69 Wn. App. 255, 259, 848 P.2d 208 (1993). The statute allows the trial court to impose a downward departure from the standard range if it finds “that mitigating circumstances are established by a preponderance of the evidence.” RCW 9.94A.535(1). The statute then lists several factors that the court can consider, but notes that the list is “illustrative only” and is not “intended to be exclusive reasons for exceptional sentence.” Id. Although the “statutory mitigating factors are only illustrative” and the trial court “may allow other factors to be used in mitigation, the asserted mitigating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category.” State v. Ha’mim, 132 Wn.2d 834, 843, 940 P.2d 633 (1997).

Under the Sentencing Reform Act (“SRA”), a sentence within the standard range generally is not appealable. The statute, however, does not

prevent a defendant from challenging *the procedure* used by the court to impose a standard range sentence. State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719 (1986). In this sense, a sentence within the standard range may only be appealed “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). For example, a trial court’s refusal to grant an exceptional sentence is reviewable if the court refused to exercise its discretion to depart from the standard range “because it erroneously believed it lacked the authority to do so.” State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002). A trial court, however, has exercised its discretion, and its decision is thus not reviewable, if it has “considered the facts and concluded there is no legal or factual basis for an exceptional sentence.” Id.

If the trial court did not exercise its discretion, a remand is often appropriate to allow the trial court to properly exercise its discretion. McGill, 112 Wn. App. at 100. A remand, however, is not appropriate “when the reviewing court is confident that the trial court would impose the same sentence” once the error is corrected. Id.

**c. Holgin's Sentence Is Not Reviewable Because The Trial Court Properly Exercised Its Discretion In Refusing To Depart From A Standard Range Sentence.**

In this case, the trial court here exercised its discretion because it “considered the facts and concluded that there is no legal or factual basis for an exceptional sentence.” McGill, 112 Wn. App. at 100. In fact, the trial court considered briefing and oral arguments on four separate grounds for an exceptional sentence, but concluded that, based on the facts of the case, none of the legal grounds were appropriate in this case.

The trial court properly exercised its discretion. Even if the four reasons provided by Holgin could possibly justify an exceptional sentences, the facts did not warrant an exceptional sentence for Holgin. Although Holgin was 14 at the time of the offense, Holgin failed to provide any evidence that he was unable to appreciate the wrongfulness of his conduct. To the contrary, his actions, including his flight to Mexico and the covering of K.D.'s mouth during the incident, suggest that Holgin clearly knew that anally raping K.D. was wrong. Further, his lack of criminal history prior to this incident is not a compelling reason for a departure; Holgin had only lived in the United States for a short time before the rape, and a trial court could reasonably expect that a 14-year-old would lack a criminal history. Finally, the fact that Holgin

would receive a longer sentence as an adult rather than a juvenile also does not support an exceptional sentence. In this case, the only reason why Holgin was tried as an adult was because of his own flight to Mexico and his failure to turn himself in when he returned. Under these facts, the trial court did not abuse its discretion by rejecting Holgin's claims for a downward departure.

The actions by the trial court are similar to what occurred in Garcia-Martinez, 88 Wn. App. at 330. There, the trial court expressed its concerns about the length of the sentence and considered whether to impose an exceptional sentence downward. The court however sentenced the defendant within the standard range because it concluded "there was no factual basis to justify imposing a sentence below the standard range." Id.

On appeal, this Court affirmed. This Court noted that the trial court ruled that there was not an "adequate factual or legal basis to permit it to step outside the standard range," which was an appropriate exercise of discretion and not subject to appellate review. Id. at 331.

This Court should reach the same conclusion here. In this case, the trial court did not say that it never could provide an exceptional sentence against an individual convicted of Rape in the Second Degree. To the contrary, like the situation in Garcia-Martinez, the court heard arguments

and concluded that Holgin failed to provide an “adequate factual or legal basis to permit it to step outside the standard range.” Garcia-Martinez, 88 Wn. App. at 330. This was an appropriate exercise of discretion and is not subject to appeal.

On this specific argument, Holgin relies entirely on McGill, 112 Wn. App. at 100, but that reliance is misplaced. In McGill, the defendant was convicted of three drug convictions and, at sentencing, the court expressed its desire to seriously consider an exceptional sentence downward. Id. at 98-99. The court, however, did not provide an exceptional sentence downward because it incorrectly concluded that it did not have the authority to do so. Id. The trial court, however, *did have* the authority and discretion to impose an exceptional sentence under the multiple offense policy of the SRA. Id. at 99. Since the trial court expressed a desire to consider an exceptional sentence downward if it had the authority, this Court remanded the case to the trial court to consider an exceptional sentence. Id. at 100-01.

McGill, however, is factually distinguishable. Unlike the court in McGill, the trial court here understood that it *could possibly* impose an exceptional sentence based on the factors listed in the SRA or any other factors. The court, however, considered the factors presented by Holgin,

and concluded that Holgin failed to present any legal justification under the facts of this case.

Further, in McGill, the trial court clearly did not realize that the multiple offense policy provided it with the legal authority to provide a downward departure from the standard range. In this case, however Holgin has failed to provide this Court with *any basis* not already considered by the trial court for which the trial court could have provided an exceptional sentence.

Holgin asserts that although none of the enumerated reasons for an exceptional sentence listed in RCW 9.94A.535(1) exists in this case, that list is non-exhaustive. That may be so, but although the court may allow non-listed “factors to be used in mitigation, the asserted mitigating factors to be used must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category.” Ha’ mim, 132 Wn.2d at 843. Although Holgin vaguely states that the trial court could have imposed an exceptional sentence, he fails to provide *even one reason* that would legally justify the trial court to depart from a standard range sentence that the court did not already consider and reject. Unlike the situation in McGill, the trial court here did not have a legal basis to depart from the standard range sentence that it already did not consider.

Here, this was not a situation where the trial court had authority to impose a downward departure but simply did not realize it had the authority; rather, the court considered Holgin's arguments, and ruled that the facts of his case did not meet the legal justifications. This was well within its power, and Holgin has failed to present this court with any convincing reason to disturb that ruling.

**D. CONCLUSION**

For the foregoing reasons, the State respectfully asks this Court to affirm the trial court.

DATED this 18<sup>th</sup> day of August, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Carolyn Morikawa, the attorney for the appellant, at Washington Appellate Project, 1511 Third Ave., Suite 701, Seattle, WA 98101, containing a copy of the Brief of Respondent, in State v. Jorge Holgin, Cause No. 62564-1-I, in the Court of Appeals, Division I. of 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.

W Brame  
Name  
Done in Seattle, Washington

8/18/09  
Date

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