

COA No. 31099-0-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

SOPHIA MARIE GONZALEZ, Appellant.

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**AMENDED BRIEF OF RESPONDENT**

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## ANSWERS TO ASSIGNMENTS OF ERROR

1. The trial court erred by not completing Section 2.4 in the Judgment and Sentence that substantial and compelling reasons justified an exceptional sentence nor attaching written findings of fact and conclusions of law. But the issue has been rendered moot because the appellant was released from prison on September 16, 2013 in the absence of any challenge of the sufficiency of the evidence. In addition, the court made oral findings, and no reasonable argument can be made that the sentence was excessive considering the burns the barely 3-year-old toddler suffered at the hands of his stepmother – the appellant.
2. The court did not err in ordering the appellant to pay \$3,500 in legal financial obligations at a rate of \$50 per month commencing upon the appellant's release when the "issue" of whether the appellant has the ability to pay is not ripe for review, and the Department of Corrections (DOC) advised in its Pre-Sentence Investigation (PSI) that the appellant claimed to make as high as \$3,000/month and as low as \$1,500 as the "sole provider for her family."
3. The issue of whether the sentencing court did or did not have statutory authority to impose a variable term of community custody has been rendered moot by the Department of Corrections (DOC) which concluded on August 20, 2013 that the appellant is "not eligible for supervision by the Department of Corrections."
4. The court did not err by orally ordering the appellant to participate in parenting classes with the child victim while both ordering the appellant in the Judgment and Sentence and signing a Domestic Violence No-Contact Order prohibiting the appellant from having contact with the child victim because the written orders trump the oral order, and the court was speaking in the context of the pending dependency action over which the court advised the appellant it would also retain jurisdiction.

### STATEMENT OF THE CASE

On August 2, 2013, a jury convicted the appellant, Sophia Gonzalez, of Assault of a Child in the Third Degree – Domestic Violence and Criminal Mistreatment in the Second Degree – Domestic Violence for negligently burning her 2-year-old stepson (Joey Sanchez) in the bathtub on his buttocks and scrotum and around his anus to “scare him” after getting frustrated for his failure to submit to potty training and then waiting 53 hours before taking him to the ER where the child spent his 3<sup>rd</sup> birthday being treated for second degree burns. CP 368-380. 08/31/12 685-702.

The jury also answered “yes” to the special allegation, for each crime, that the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance. CP 368-380, 329, 332, 335, 338.

At sentencing, on August 31, 2013, the State of Washington recommended that the court sentence the appellant to two consecutive 5 year sentences, for a total of 10 years in prison. The Department of Corrections (DOC), prepared a Pre-Sentence Investigation (PSI), recommending that the court sentence the appellant to 48 months in prison. CP 368-380, 359-367. 08/31/12 RP 685-702.

After hearing from appellant and her attorney, the court sentenced the appellant to 3 months above the standard range (1-3 months) for the assault and 12 months above the standard range (6-12 months) for the criminal mistreatment for a total sentence of 30 months, less 242 days for credit for time served. CP 368-380, 381. 08/31/12 686-703.

The appellant has been released from prison as of September 16, 2013. CP 140.

The Judgment and Sentence reflected that the jury returned a special verdict for both counts. However, the sentencing court did not complete Section 2.4, finding substantial and compelling reasons to justify an exceptional sentence nor attach findings of fact and conclusions of law. CP 368-380, 335, 329, 332, 338.

The court found, on the record, that it was sentencing the appellant to (24 months, 12 months above the standard range), the exact sentence to which it had previously sentenced the father for his failure to take his own son to the hospital after it was evident that the child had been seriously burned. The court noted the “slight difference” between the appellant and the father; noting the appellant did eventually take the child to the hospital, albeit 53 hours after the scalding injury. However, the court also found that: “These injuries to Joey (are) significant and they’re going to be with him forever.” 08/31/12 RP 698--700.

In addition, the court ordered the appellant to pay \$4,100 in legal financial obligations of which \$600 included a mandatory victim assessment (\$500) and DNA collection fee (\$100). In addition, the court ordered the appellant to pay \$200 in court costs, \$3,250 in fees for the appellant's court appointed attorney, and a \$50 booking fee. CP 368-380.

Under Financial, the PSI reported: "While seasonally employed with Twin City foods, Ms. Gonzalez claims to have been making \$3000.00 per month. When not with Twin City she would bring in about \$1200.00 per month. Her husband was not working and she was the sole provider for the family." CP 363.

The court also ordered the appellant to spend 12 months on community custody. However, on August 20, 2013, DOC advised that the appellant is not eligible for community custody upon her release. CP 139..

Last, in the Judgment and Sentence, the court ordered the appellant to: (1) "complete a parenting class," (2) "not have contact with the victim Jose "Joey" Sanchez," and (3) checked a box noting that "(a) separate Domestic Violence No-Contact Order . . . is filed concurrent with this Judgment and Sentence." CP 368-380. The court also signed the Domestic Violence No-Contact Order prohibiting the appellant from having contact with the child victim for five years. CP 382-384.

In its remarks, the court stated:

There was a parenting class. I'll require you to participate in classes with Joey and I'll keep jurisdiction over the case and the dependency docket so it's - - its might come a time when we'll remove that requirement. I'll not impose the condition that Mr. Barr recommended to keep you away from other children. I will, again, I am keeping jurisdiction of their cases as well. And if it's appropriate to have you have contact with them, we'll do that. If it's not, we won't. It's as simple as that. 08/31/12 RP 700-701.

This appeal followed.

## ARGUMENT

1. **The trial court erred by not completing Section 2.4 in the Judgment and Sentence that substantial and compelling reasons justified an exceptional sentence nor attaching written findings of fact and conclusions of law. But the issue has been rendered moot because the appellant was released from prison on September 16, 2013 in the absence of any challenge of the sufficiency of the evidence. In addition, the court made oral findings, and no reasonable argument can be made that the sentence was excessive considering the burns the barely 3-year-old toddler suffered at the hands of his stepmother – the appellant.**

RCW 9.94A.585 provides that:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

RCW 9.94A.585 (4) provides, in relevant part, that:

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

Further, subsection (5) provides: A review, under this section, shall be made solely upon the record that was before the sentencing court.

In this case, the State of Washington recommended that the court impose two consecutive 5 year sentences, for a total of 10 years in prison. DOC, which prepared a Pre-Sentence Investigation, recommended that the court sentence the appellant to 48 months in prison.

After hearing from all parties, the court sentenced the appellant to 3 months above the standard range (1-3 months) for the crime of Assault of a Child in the Third Degree and 12 months above the standard range (6-12 months) for the crime of Criminal Mistreatment in the Second Degree for a total sentence of 30 months, less 242 days for credit for time served. The appellant is scheduled to be released from prison on September 16, 2013. Therefore, in the absence of any challenge of the sufficiency of the evidence to prove the crimes charged, any issue of the exceptional sentence will soon be rendered moot, if not moot, by the time this court has an opportunity to review and issue a decision on appeal.

Otherwise, while the Judgment and Sentence accurately reflects that the jury returned a special verdict for both counts, finding that “the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance (per RCW 9.94A.535 (3) (b)) the State of Washington concedes that the sentencing court did not complete Section 2.4, finding substantial and compelling reasons to justify an exceptional sentence, nor did the court attach the legally required findings of fact and conclusions of law.

But the court did find on the record that it was sentencing the appellant to (24 months, 12 months above the standard range), the exact sentence to which it sentenced the father for his complete failure to take his own son to the hospital after it was evident that the child had been burned. The court noted the “slight difference” between the appellant and victim’s father was that the appellant eventually took the child to the hospital. However, the court also noted that: “These injuries to Joey (are) significant and they’re going to be with him forever. (emphasis added)” SEE Sentencing Transcript page 16. The court then sentenced the appellant to 3 months above the standard range for the assault. 08/31/12 RP 686-703.

In reviewing the sentence, it can hardly be argued that imposition of a sentence 15 months above the standard range, for both convictions, is

clearly excessive in light of the fact that the jury found the appellant guilty for negligently scalding the barely 3-year-old child when he failed to submit to potty training and then waited 53 hours before taking him to the emergency room on his 3<sup>rd</sup> birthday.

Therefore, given the appellant's anticipated release date and reviewing the sentence, in light of the facts of the case, and the actual sentence imposed, there is no sentence to reverse or commute or remand for entry of findings.

- 2. The court did not err in ordering the appellant to pay \$3,500 in legal financial obligations at a rate of \$50 per month commencing upon the appellant's release when the "issue" of whether the appellant has the ability to pay is not ripe for review and the Department of Corrections (DOC) advised in its Pre-Sentence Investigation (PSI) that the appellant claimed to make as high as \$3,000/month and as low as \$1,500 as the "sole provider for her family."**

The express language of RCW 10.01.160 (2) does not require the trial court, at sentencing, to determine the offender's present or future ability to pay costs by evaluating the defendant's financial resources and the nature of the burden that payment of costs will impose, particularly an offender sentenced to prison. The answer is obvious. How could a trial court, at sentencing, make any determination of a person's present or future ability to pay costs until the person is released from prison?

In addition, both RCW 10.01.160 and 9.94A.760 permit a defendant, ordered to pay legal financial obligations, or the court clerk and/or the Department of Corrections, which monitor a defendant's payments, the ability to petition the court to modify a defendant's repayment schedule.

The appellant principally relies upon State v. Calvin 2013 WL 2325121 (May 2013), in which Division I held that the record did not support the trial court's finding that the defendant had the ability to pay court costs when it made no inquiry, at sentencing, into the defendant's resources or employability.

However, the case law prior to Calvin, explaining the application of RCW 10.01.160, provides that it is premature, at sentencing, for a court to make a determination whether a defendant has or will have the ability to pay during initial imposition of court costs because it is "speculative;" the time to examine a defendant's ability to pay is when the government seeks to collect on the obligation. State v. Smits (2009) 152 Wash.App. 514, 216 P.3d 1097 (Division I).

State v. Crook is the leading Division III case on this matter, providing that constitutional principles will be implicated if the government seeks to enforce collection of the costs when the defendant is unable, through no fault of his own, to comply; it is at the point of

collection, when an indigent is faced with payment or imprisonment, that she may assert a constitutional objection on the ground of her indigency. State v. Crook (2008) 146 Wash.App. 24, 189 P.3d 811, review denied 165 Wash.2d 1044, 205 P.3d 133.

Inquiry into a defendant's ability to pay costs incurred by the state in prosecuting him is appropriate when the state enforces collection under the judgment or imposes sanctions for nonpayment, but a defendant's indigent status at the time of sentencing does not bar an award of costs. State v. Crook (2008) 146 Wash.App. 24, 189 P.3d 811, review denied 165 Wash.2d 1044, 205 P.3d 133.

In State v. Langford, another Division III case, the trial court ordered a defendant convicted of felony-murder to pay financial assessments, even though he claimed he lacked ability to pay. The court ruled that the interests of defendants were adequately safeguarded because they can request a hearing to modify their payments. State v. Langford, 67 Wash.App. 572, 837 P.2d 1037 (1992), review denied 121 Wash.2d 1007, 848 P.2d 1263, certiorari denied 114 S.Ct. 118, 510 U.S. 838, 126 L.Ed.2d 83, certiorari denied 114 S.Ct. 148, 510 U.S. 850, 126 L.Ed.2d 110.

In this case, the trial court ordered the appellant to pay a total of \$4,100 in legal financial obligations of which \$600 included a mandatory victim assessment (\$500) and DNA collection fee (\$100). In addition, the

court ordered the appellant to pay \$200 in court costs, \$3,250 in fees for the appellant's court appointed attorney, and a \$50 booking fee.

The appellant is not contesting the mandatory victim assessment or DNA collection fee totaling \$600. The appellant contests imposition of the \$3,500 in "discretionary costs" because the court did not take into account the appellant's ability to pay.

The court did not expressly, on the record, inquire as to the appellant's ability to pay. However, the court did have DOC's PSI which noted that the appellant was "seasonally employed" but "claim(ed)" to make as high as "\$3000 per month" and as low as \$1,200 month."

Therefore, the court had some information demonstrating the appellant's employability by her own statement, presuming "seasonal" work continues.

However, even if this court finds that the PSI is insufficient to support the court ordering the appellant to pay her legal financial obligations or that the court did not make an adequate determination, at sentencing, as to the appellant's present or future financial resources to make payments, the issue is simply not ripe for review.

The court ordered the appellant to begin making payments "upon release" at a rate of \$50/month. That constitutes a consideration of the appellant's presumptive inability to make payments while in prison.

In addition, it can hardly be argued that requiring the appellant to pay \$50/month for costs incurred, following her release from prison, is an exorbitant amount of money, unless the appellant demonstrates her indigency.

However, since the appellant has yet to be released, there is no means to know if the appellant can or cannot begin making payments at \$50/month.

As noted, the appellant did not raise the issue at sentencing, even if she can raise the issue on appeal.

But upon the appellant's release or thereafter, if the appellant or the clerk of the court (since DOC will not be supervising the appellant), decide that \$50/month is too burdensome, one or both can petition the court to modify the payment per month.

Therefore, the State of Washington would strongly encourage Division III not to follow Division I's lead when the appellant, ordered to pay legal financial obligations, already has legal recourse to petition the court to modify her payments "upon (her) release" on September 16, 2013.

3. **The issue of whether the sentencing court did or did not have statutory authority to impose a variable term of community custody has been rendered moot by the Department of Corrections (DOC) which concluded on August 20, 2013 that the appellant is “not eligible for supervision by the Department of Corrections.”**

SEE August 20, 2013 Court-Special Supervision Closure declining to supervise the appellant. CP 139.

4. **The court did not err by orally ordering the appellant to participate in parenting classes with the child victim while both ordering the appellant in the Judgment and Sentence and signing a Domestic Violence No-Contact Order prohibiting the appellant from having contact with the child victim because the written orders trump the oral order, and the court was speaking in the context of the pending dependency action over which the court advised the appellant it would also retain jurisdiction.**

At sentencing, the court signed a Judgment and Sentence which ordered the appellant to: (1) “complete a parenting class,” (2) “not have contact with the victim Jose “Joey” Sanchez,” and (3) checked a box noting that “(a) separate Domestic Violence No-Contact Order . . . is filed concurrent with this Judgment and Sentence.” The court also signed the Domestic Violence No-Contact Order prohibiting the appellant from having contact with the child victim for five years. CP 368-380, 382-384.

Clearly, the written Judgment and Sentence and the Domestic Violence No-Contact Order prohibit the appellant from contacting the

child victim. The Judgment and Sentence also orders the appellant to complete a parenting class. But neither the Judgment and Sentence nor the Domestic Violence No-Contact Order, authorize an exception to contact the child-victim for purposes of completing the parenting class.

While the court did state that it would “require” the appellant to “participate in classes” with the child victim, it was stated in the context of the on-going dependency action. “These injuries to Joey (are) significant and they’re going to be with him forever.” 08/31/12 RP 686-703..

Therefore, there is no need to remand for clarification. Once the appellant is released from prison on September 16, 2013, the court will make the appropriate amendments to the Judgment and Sentence and the No Contact Order to authorize contact for purposes of completing the parenting class.

### **CONCLUSION**

Based upon the foregoing legal analysis and application of the facts in evidence at appellant’s trial and sentencing, the State of Washington is respectfully requesting that this court deny the appellant’s request to remand for re-sentencing to enter findings of fact and conclusions of law, reduce legal financial obligations, or clarify the no contact order. The issue regarding community custody is moot.

Dated this 20th day of September 2013.

Respectfully submitted,

GREG ZEMPEL  
Kittitas County Prosecuting Attorney

  
\_\_\_\_\_  
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Kittitas County Deputy Prosecuting Attorney  
Attorney for Respondent

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION III

	)	
	)	No. 31099-0-III
STATE OF WASHINGTON	)	
vs.	)	PROOF OF SERVICE
	)	
SOPHIA M. GONZALEZ,	)	
_____	)	

STATE OF WASHINGTON )  
 ) ss.  
 County of Kittitas )

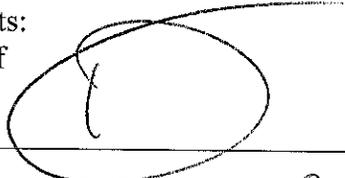
The undersigned being first duly sworn on oath, deposes and states:

That on the 20<sup>th</sup> day of September, 2013, affiant filed Amended Respondent's Brief electronically per agreement to serve by e-mail to:

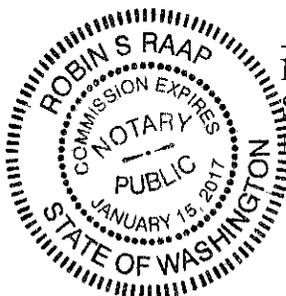
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containing copies of the following documents:

- (1) Amended Respondent's Brief
- (2) Proof of Service



SIGNED AND SWORN to (or affirmed) before me on this 20<sup>th</sup> day of September, 2013 by INGRID BUTLER.



Robin S Raap  
 NOTARY PUBLIC in and for the  
 State of Washington.  
 My Appointment Expires: 1/15/17