

No. 29057-3-III

Korsmo, A.C.J. (concurring) — The victim was not a willing participant in the knifing that constituted this crime. He likewise did not provoke that crime by destroying another person's property earlier in the evening. If there was a valid mitigating factor here, it arose because of the victim's minor injuries. Because I am convinced that the trial court would impose the same sentence at a resentencing, I concur in the result.

After a night of drinking, the defendant and his sister returned home to find that her boyfriend, José Moncivaiz, had destroyed some of her property. The sister arrived home first, saw the shattered property, and renewed an argument with Mr. Moncivaiz from earlier in the evening. Ten minutes later, Mr. Chavez returned home and saw the argument. He then punched the victim, who stumbled back into the kitchen. Mr. Chavez pursued him into the kitchen, armed himself with a knife, and stabbed Mr. Moncivaiz. It was at that point that the victim started to defend himself by striking Mr. Chavez back. The mutual combat continued until the police were called. Although bleeding extensively, Mr. Moncivaiz did not require any medical treatment for what turned out to

be superficial wounds.

Nothing in those events showed that the victim provoked or joined in the assault.¹ Rather, he was compelled to fight back once deadly force was used against him. Thus, the statutory mitigating factor found in RCW 9.94A.535(1)(a) is simply not applicable. Where this factor has been properly applied, the victim's conduct was a primary cause of the defendant's behavior. *E.g., State v. Whitfield*, 99 Wn. App. 331, 994 P.2d 222 (1999) (victim loudly and repeatedly yelling at defendant and his girl friend until he assaulted her).

An exceptional sentence is appropriate when the facts of a case are atypical and result in a harm either more or less egregious than the norm. *E.g., State v. Akin*, 77 Wn. App. 575, 892 P.2d 774 (1995) (escape was less egregious than typical, justifying mitigated sentence); *State v. Harmon*, 50 Wn. App. 755, 750 P.2d 664, *review denied*, 110 Wn.2d 1033 (1988) (rape was more egregious than typical, justifying aggravated sentence).

The injuries suffered by the victim were minor for a stabbing case, making this an atypical second degree assault. In light of the victim's support for a mitigated sentence, there is little doubt that the trial court would impose the same sentence on remand. In

¹ Whether the victim's action in destroying the property was provocative in the sense that it provided a motive for Mr. Chavez to avenge his sister, it was not an invitation to a knife fight hours later.

No. 29057-3-III
State v. Chavez

that circumstance, there is no reason to order a resentencing. *Akin*, 77 Wn. App. at 587.

Accordingly, I concur in the result.

Korsmo, A.C.J.