

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

STATE OF WASHINGTON,)	
)	No. 64369-0-I
Respondent,)	
)	
v.)	
)	
CARLOS DIAZ-GALVIN,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: December 20, 2010
_____)	

Per Curiam — Carlos Diaz-Galvin appeals from the sentence imposed after a jury found him guilty of first degree assault. The jury also entered special verdicts finding two aggravating circumstances: (1) that Diaz-Galvin knew the victim was pregnant, RCW 9.94A.535(3); and (2) that the offense involved domestic violence and occurred “within sight or sound” of the victim’s minor children, RCW 9.94A.535(3)(h)(ii). The trial court imposed an exceptional sentence of 240 months. On appeal, Diaz-Galvin contends that the evidence was insufficient to support the “sight or sound” aggravating circumstance and that the trial court erred in failing to instruct the jury on the State’s burden to prove aggravating circumstances beyond a reasonable doubt.

The State concedes that defense counsel’s failure to propose an instruction identifying the burden of proof for aggravating circumstances was both deficient

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representation and prejudicial. Given the jury's request for clarification of the aggravating circumstance, the limited and ambiguous supporting evidence, and the sentencing court's failure to indicate that it would have imposed an exceptional sentence based solely on the "pregnancy of the victim" aggravating circumstance,¹ we accept the State's concession of ineffective assistance of counsel. Because the State has informed the court and defense counsel that it will not attempt to reprove the "sight or sound" aggravating circumstances on remand, we need not address Diaz-Galvin's challenge to the sufficiency of the evidence. Accordingly, we reverse Diaz-Galvin's sentence and remand for resentencing without consideration of the "sight or sound" aggravating circumstance.

Reversed and remanded.

FOR THE COURT:

Becker, J.

Grosse, J.

Edenfor, J.

¹ Diaz-Galvin does not challenge this aggravating circumstance.