No. 90021-3

(Court of Appeals No. 69272-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW BRUCH,

Petitioner.

PETITION FOR REVIEW
OF COURT OF APPEALS DECISION TERMINATING REVIEW

ELAINE L. WINTERS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Matthew Bruch, defendant and appellate below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Bruch seeks review of the Court of Appeals decision affirming his conviction and sentence for two counts of child molestation in the second degree and two counts of rape of a child in the third degree. State v. Matthew Bruch, No. 69272-1-I. A copy of the Court of Appeals decision, dated January 27, 2013, is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. The Sentencing Reform Act requires the trial court to impose a determinate sentence that does not exceed the maximum term. For crimes with a maximum term of 10 years, Mr. Bruch was sentenced to 116 months incarceration and community custody for at least 4 months plus any earned early release time he had accrued. RCW 9.94A.701(9) requires the sentencing court, and not the Department of Corrections (DOC), to set the term of community custody. State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012). Based upon its pre-Boyd decision in State v. Winkle, 159 Wn. App. 323, 245 P.3d 249 (2001), rev. denied, 173 Wn.2d 1007 (2012), the Court of Appeals upheld Mr. Bruch's sentence on the

grounds that DOC was required by statute to convert earned early release time to community custody.

a. Does Mr. Bruch's sentence violate RCW 9.94A.701(9)?

b. Is the court's imposition of a term of community custody controlled by RCW 9.94A.701(9), a statute directed to the sentencing court, or RCW 9.94A.729(5), a statute directed to DOC?

2. The accused has the constitutional right to a jury trial, to be represented by counsel, and to confront the witnesses against him. U.S. Const. amends. VI, XIV; Const. art. I § 22. The prosecutor may not comment on a defendant's exercise of these constitutional rights. Over objection, the prosecutor in Mr. Bruch's case argued that the teenage complaining witness was victimized by being required to testify and submit to cross-examination. Is there a substantial likelihood that the misconduct affected the jury verdict in Mr. Bruch's case?

3. The prosecutor is a representative of the State, and prosecutorial misconduct may deny the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I §§ 3, 22. In his closing argument to the jury, the prosecutor (1) commented on Mr. Bruch's exercise of his constitutional rights by arguing how difficult it was for the teenage complaining witness, J.B., to testify and undergo cross-examination, (2) appealed to the jurors' sympathy for J.B., and (3) disparaged defense counsel. Where the case

hinged on the jury's evaluation of J.B.'s credibility, was the prosecutor's repeated misconduct so flagrant and ill-intentioned that no objection or instruction would have cured the prejudice?

D. STATEMENT OF THE CASE[1]

Matthew Bruch is the father of daughter J.B. (dob 1/26/95) and son Matthew (Matt), who was a year older than J.B. 1RP 101-02.[2] Due to their mother's drug and alcohol use, Mr. Bruch raised the children by himself. 1RP 103.

The Snohomish County Prosecutor's Office charged Mr. Bruch by amended information with two counts of child molestation in the second degree and two counts of rape of a child in the third degree based upon statements made by J.B.[3] CP 167-68. At trial J.B., who was then 17 years old, testified about two incidents of child molestation and two time where her father had sexual intercourse with her. 1RP 98, 124-27, 133-36, 148-51.

Defense counsel impeached J.B. with numerous inconsistencies between in her testimony and her prior statements. See 1RP 169-70; 2RP

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[1] A more complete statement of the underlying facts is found at the Brief of Appellant, pages 4-10

[2] The verbatim report of proceedings of Mr. Bruch's jury trial and sentencing hearing contains four consecutively-numbered volumes labeled 1 to 4.

[3] A bail jumping charge was dismissed prior to trial. CP 97; 1RP 93-94.

194, 197, 200, 203, 206-08, 227-28, 249; 3RP 456, 480, 485-86, 505, 510-12, 540; 4RP 571.

During closing argument, the prosecutor urged the jury to consider how difficult it was for J.B. to testify, referencing cross-examination by defense counsel, and argued that J.B. was "victimized" by the process. 4RP 653, 699. The prosecutor also appealed to the juror's sympathy for the teenage witness, referencing her emotional devastation and how she longed for a "dad who just took her fishing." 4RP 650-53, 663, 697. The prosecutor also predicted and belittled defense counsel's arguments. 4RP 652-5, 663.

Mr. Bruch was convicted as charged. CP 48-52. He received concurrent standard-range sentences of 116 months for child molestation and 60 months for rape of a child. CP 5-6. Instead of a determinate term of community custody for the child molestation charges, the court ordered community custody of "at least 4 months, plus all accrued earned early release time at the time of release." CP 7.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. **The Court of Appeals decision affirming an indefinite term of community custody is in conflict with State v. Boyd, 174 Wn.2d 470, 275 P.2d 321 (2012) and the conflict between RCW 9.94A.701(9) and 9.94A.729(5) should be addressed by this Court.**

The Sentencing Reform Act (SRA) requires the superior court to impose definite terms of incarceration and community custody, and this Court has made it clear that the court cannot delegate the determination of the community custody term to the Department of Corrections (DOC). State v. Boyd, 174 Wn.2d 470, 275 P.2d 321 (2012). In Mr. Bruch's case the superior court ordered him to be on community custody for "at least 4 months, plus all accrued earned early release time at the time of release." CP 7. Such an indeterminate term of community custody is not authorized by the SRA, and the Court of Appeals opinion affirming the sentence is in conflict with Boyd.

The superior court's power to sentence a felony offender derives solely from the SRA. State v. Ammons, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986); RCW 9.94A.505(1). In Mr. Bruch's case, the court was required to impose a term of confinement within the standard range established in RCW 9.94A.510 and a term of community custody as set forth in RCW 9.94A.701 and .702. RCW 9.94A.505(2)(a)(i), (ii). In

addition, the total sentence imposed could not exceed the statutory maximum term. RCW 9.94A.505(5).

Child molestation in the second degree is a Class B felony, and the statutory maximum term is 10 years. RCW 9A.44.086(2); RCW 9A.20.021(1)(b); CP 3. Mr. Bruch's standard sentence range for second degree child molestation was 87 to 116 months plus 36 months of community custody. CP 5; RCW 9.94A.701. The court imposed a 116-month term of imprisonment and community custody of 4 months plus any earned early release time he earned.[4] CP 5-7.

RCW 9.94A.701(9) requires the court to set terms of confinement and community custody that do not exceed the statutory maximum term. The statute reads:

> The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

RCW 9.94A.701(9). The statute does not permit the trial court to simply note that the combined sentence may not exceed the statutory maximum term, thus requiring the Department of Corrections to determine the actual

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[4] Mr. Bruch's other offense, third degree rape of a child, is a Class C felony with a 5-year maximum term. RCW 9A.44.079(2) RCW 9A.20.021(1)(c); CP 3. He received a 5-year sentence for Counts 3 and 4 with no community custody, concurrent with his sentence for child molestation. CP 5-7.

term of community custody. Boyd, 174 Wn.2d at 472-73. The sentencing court, and not the Department of Corrections, must set a definite term of community custody. Id. at 473; State v. Land, 172 Wn. App. 593, 603, 295 P.3d 782, rev. denied, 177 Wn.2d 1016 (2013).

A determinate sentence is one which is stated as an exact term of days, months, or years.[5] RCW 9.94A.030(18). Mr. Bruch was sentenced to a term of community custody of "at least four months," leaving the Department of Corrections to determine the exact term of community custody based upon his earned early release time. CP 7. His sentence thus violated RCW 9.94A.701(9).

The Court of Appeals, however, affirmed Mr. Bruch's sentence, argument, concluding that "the conversion of earned early release to community custody is required by statute and the fact that the amount of earned early release that will be converted is unknown does not render the sentence indefinite." Slip Op. at 10 (citing State v. Winkle, 159 Wn. App. 323, 245 P.3d 249 (2011), rev. denied, 173 Wn.2d 1007 (2012)).

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[5] RCW 9.94A.030(18) reads:

> "Determinate sentence" means a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community custody, the number of actual hours or days of community restitution work or dollars or terms of a legal financial obligation. The fact that an offender through earned early release can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence.

In Winkle, the Court of Appeals upheld a sentence of 60 months incarceration plus community custody "for the entire period of earned early release awarded under RCW 9.94A.728" where the statutory maximum term was 60 months. Winkle, 159 Wn. App. at 327. The Court of Appeals found the sentence was consistent with a legislative intent to require sex offenders to serve community custody in lieu of earned early release. Id. at 330 (citing inter alia Former RCW 9.94A.729(5)(a)).

The fault in the Winkle Court's reasoning, and thus of the Court of Appeals in this case, is that RCW 9.94A.729 is not a sentencing statute. Rather, it directs DOC's actions when community custody has been imposed at sentencing. This Court should accept review because the Court of Appeals decision is in conflict with Boyd and to address the continued validity of Winkle in light of Boyd's directive that terms of community custody be definite.[6] RAP 13.4(b)(1), (3).

In addition, this case is of public importance, as it impacts countless SRA sentences. While Winkle Court's reasoning is limited to sex offenders, RCW 9.94A.729(5)(a) has since been amended to apply to many other cases. It now reads:

> A person who is eligible for earned early release as provided in this section and who will be supervised by the

[6] The issue was raised but not addressed in State v. Franklin, 172 Wn.2d 831, 837 n.8, 263 P.3d 585 (2011).

> department pursuant to RCW 9.94A.501 or 9.94A.5011, shall be transferred to community custody in lieu of earned early release.

RCW 9.94A.729(5)(a); Laws of 2011 1st sp.s. c 40 § 4.[7] This covers a large number of offenders other than sex offenders. The statute now applies, for example, to every felony offender to whom the DOC has assigned a high risk classification, who is subject to parole, who was sentenced for a domestic violence felony offense with a prior conviction, who received a special sentence as a drug offender, sex offender, or parent, or who is deemed a dangerously mentally ill offender, as well as those convicted of serious violent offenses and crimes against persons. RCW 9.94A.729(5)(a); RCW 9.94A.501; RCW 9.94A.5011 (Laws of 2011 1st sp.s. c 40 §§ 2, 3, 4). A decision from this Court addressing Mr. Bruch's sentence is also an issue of public importance. RAP 13.4(b)(4).

2. **This Court should accept review to address the prosecutorial misconduct in closing argument.**

A criminal defendant's right to due process of law protects the right to a fair trial. U.S. Const. amend. XIV; Const. art. I, § 22. The prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L Ed. 1314 (1935); State v.

[7] This version applied to Mr. Bruch's July 2011 conviction. Laws of 2011 1st sp.s. c 40 §§ 42, 44.

Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). Washington courts have long emphasized the prosecutor's obligation to ensure the defendant receives a fair trial and the resulting need for reasoned closing argument. Reed, 102 Wn.2d at 146-49 (and cases cited therein); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). When a prosecutor commits misconduct in closing argument, the defendant's constitutional rights to due process and a fair trial may be violated. State v. Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); Charlton, 90 Wn.2d at 664-65.

Mr. Bruch's case presents this Court with the opportunity to address this important constitutional issue. During closing argument, the prosecuting attorney committed misconduct by (1) arguing that the complaining witness was victimized by appearing at trial and being subjected to cross-examination, (2) appealing to the juror's sympathy for the young witness, and (3) disparaging defense counsel. The Court of Appeals concluded that the prosecutor's statements were not a comment on Mr. Bruch's exercise of his constitutional rights, that a timely objection would have addressed any prejudice caused by the appeals to sympathy, and the comments concerning defense counsel were a fair response to her theory of the case. Slip Op. at 5-7. This Court should accept review. RAP 13.4(b)(3).

First, a prosecutor commits reversible constitutional error when he comments on a specific constitutional right of the defendant. "The State may not act in a manner that would unnecessarily chill the exercise of a constitutional right, nor may the State draw unfavorable inferences from the exercise of a constitutional right." State v. Jones 71 Wn. App. 798, 810, 863 P.2d 85 (1993), rev. denied, 124 Wn.2d 1018 (1994); see Darden v. Wainwright, 477 U.S. 168, 182, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (prosecutorial misconduct during closing argument may infect trial with constitutional error when it "implicate[s] ... specific rights of the accused"); Griffin v. California, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (prosecution prohibited from using defendant's exercise of right to remain silent against him in case-in-chief); State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984) (prosecutor violated defendant's due process rights by admitting his legal gun collection at death penalty sentencing hearing).

In Mr. Bruch's case, the prosecutor commented on Mr. Bruch's constitutional rights to a trial and to confront witnesses by stressing how difficult it was for J.B. to be a witness, arguing that her appearance in court cause J.B. to be "victimized all over again." 4RP 653, 699. First the prosecutor emphasized how difficult it was for J.B. to testify:

> She came up here, and she knew what this was going to be like. You could see that she knew what she was getting herself into. And it was horrible for her; horrible for her to answer my questions about what happened to her; horrible for her to answer defense counsel's questions about what she might or might not have said in a transcript [-] not about what actually happened to her, but what she said in a transcript about what happened to her. She was exhausted. It was very difficult for her to do that. But she told you. She was strong and brave, and she told you what happened to her.

4RP 653 (emphasis added).

In his rebuttal closing argument, the prosecutor went so far so to claim J.B. was "victimized" by testifying, but defense counsel's objection to the argument was overruled:

> What are the consequences that happened to [J.B.]? Well, last week was a consequence. It's an incredibly regrettable part of our legal process that [J.B.] essentially was victimized all over again –
>
> Defense counsel: Objection
>
> Court: Overruled.
>
> -- by this process. And I'm a part of that; I had to ask her the hard questions. Ms. Goykhman was doing her job by asking her hard questions, as well. And you saw the toll that it took on her. That's a consequence, it is not?

4RP 699 (emphasis added).

The Court of Appeals reasoned that the prosecutor's comments were part of a permissible discussion of J.B.'s credibility. Slip Op. at 5-6 (citing State v. Gregory, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006)).

These comments, however, faulted Mr. Burch for exercising his constitutional right to a trial, as otherwise J.B. would not have been required to testify. The Court of Appeals was incorrect, and Mr. Bruch's conviction should have been reversed.

In addition, it is misconduct for the prosecutor to make arguments that appeal to the jury's passions or prejudices, thus inviting the jury to determine guilt based on grounds other than the evidence. Glasmann, 175 Wn.2d at 704; State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The prosecutor's closing argument urged the jury to decide the case based upon its sympathy for J.B. and the emotion she exhibited on the witness stand. The comments quoted above appealed to the jurors' sympathy for the young witness. The prosecutor also argued J.B.'s life was "no fairy tale" to both engender sympathy for J.B. and justify her faulty memory. 4RP 650-53. Without evidentiary support, the prosecutor discussed the "emotional destruction, the absolute devastation that happens when your father, your own father, does these things to you." 4RP 663. The prosecutor asserted J.B. did not wish her father ill, but "would do anything to have a dad who just took her fishing." 4RP 697. Finally, in summing up his case, the prosecutor urged the jury to believe J.B. because of the imperfections in her testimony and "the pure emotion you saw from her on the stand." 4RP 698.

In Claflin, the prosecutor read a poem to bring home to the jurors the emotional impact of rape on its victims. State v. Claflin, 38 Wn. App. 847, 850 n.3, 690 P.2d 1186 (1984), rev. denied, 103 Wn.2d 1014 (1985). The poem touched on women's shared fear of rape and the indignities of being a rape victim. Id. The court found the reading of the poem was "so prejudicial that no curative instruction would have sufficed to erase the prejudice it was bound to engender in the minds of the jurors." Claflin, 38 Wn. App. at 850. The prosecutor's argument in Mr. Bruch's case was similarly prejudicial, but the Court of Appeals concluded that any prejudice from the prosecutor's argument could have been addressed by an objection and curative instruction. Slip Op. at 6. The Court of Appeals was incorrect, and its opinion in conflict with Claflin. RAP 13.4(b)(2).

Third, prosecutors are forbidden from arguing in a manner that disparages defense counsel or counsel's legitimate function. State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011) (misconduct to refer to defense counsel's argument as "bogus" and a "sleight of hand"); State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008) (complaining of "misrepresentations" in defense counsel's argument as an example of "what people have to go through in the criminal justice system when they deal with defense attorneys"), cert. denied, 556 U.S. 1192 (2009); Reed,

102 Wn.2d at 146-47 (disparaging defendant's counsel and witnesses as outsiders with fancy cars).

The prosecutor derided defense counsel in his closing argument by predicting her arguments and belittling them as a "fairy tale." 4RP 652-53. He invited defense counsel to explain how a child who is abused by her father should process the information and how much counseling would be needed for the child to be able to discuss the abuse. 4RP 663. The prosecutor also predicted defense counsel would talk "for a while – I anticipate a long while" about why J.B.'s testimony was not believable. 4RP 663-64 (emphasis added). In addition, by focusing on the alleged harm done to J.B. by the criminal justice system, the prosecutor criticized defense counsel for her role in the process.

The Court of Appeals nonetheless found that the prosecutor's argument did not malign defense counsel's integrity in any way and were fair. Slip Op. at 7. The prosecutor's misconduct by disparaging Mr. Bruch's attorney, however, undermined defense counsel's critical role and thus rendered the trial unfair.

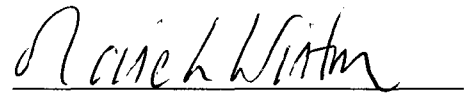
The Court of Appeals decision concerning the prosecutorial misconduct conflicts with Claflin and raises a constitutional issue that should be addressed by this Court and which. RAP 13.4(b)(2), (3).

F. CONCLUSION

Matthew Bruch asks this Court to accept review of the Court of Appeals upholding his convictions and sentence.

DATED this 26th day of February 2014.

Respectfully submitted,



Elaine L. Winters – WSBA # 7780
Washington Appellate Project
Attorneys for Petitioner

APPENDIX

COURT OF APPEALS DECISION TERMINATING REVIEW

January 27, 2014

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 69272-1-I
Respondent,	)	DIVISION ONE
v.	)	
MATTHEW BRUCH,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: January 21, 2014

SPEARMAN, J. — A jury found Matthew Bruch guilty of two counts of child molestation in the second degree and two counts of rape of a child in the third degree. Bruch appeals his convictions arguing that the prosecutor committed misconduct in closing argument by improperly commenting on his trial rights, appealing to the jury's passions and prejudices, and disparaging defense counsel. He also contends that the trial court erred in excluding evidence of the victim's reputation for dishonesty and imposed an indefinite term of community custody. Because none of the challenged remarks were improper, the court acted within its discretion in excluding the proffered reputation evidence, and the court imposed a sentence that complies with the statutory requirement of converting earned early release time to community custody, we affirm.

FACTS

From approximately 2001 until 2007, when she was between the ages of six and twelve, J.B. lived in Lake Stevens with her father, Matthew Bruch, his girlfriend, Tara Osborne (formerly Kerr), her biological brother, Osborne's children, and occasionally other family members. In 2007, Bruch ended his relationship with Osborne and entered

into a relationship with Julia Mjelde. Bruch, J.B., and her brother moved to Mjelde's residence in Stanwood. Bruch and Mjelde had a tumultuous relationship and on several occasions, Bruch and his children temporarily moved out.

In August 2010, when J.B. was fifteen years old and her father's relationship with Mjelde was ending, J.B. told Mjelde that her father had had sexual contact with her in the past. Mjelde informed the police and J.B. was taken into protective custody. J.B. initially described incidents that took place at the Lake Stevens house. She described an occasion when she and her father were lying on the couch together and Bruch put his hand down the front of her pants and touched her vagina. She said that another time, also on the couch, Bruch reached his hand down her pants and grabbed her buttocks. J.B. asked him why he was doing that and he said, "'I made it'" and "'it's mine.'" 1Report of Proceedings (RP) at 125. She said there were other times when he took her hand, put it around his penis, and made her move her hand back and forth.

J.B. was in foster care for approximately a year. J.B. eventually contacted her aunt in Arizona. Her aunt agreed that J.B. could come and live with her and her partner. A few months after she arrived in Arizona, J.B. told her aunt that her father had raped her twice when she was fifteen.

According to J.B., the first rape occurred when they were still living at Mjelde's Stanwood house. J.B. said that Mjelde and her kids had left the house after her father and Mjelde had a fight and she was watching television on Mjelde's bed with her father. Bruch put his hand over her mouth, flipped over on top of her, pulled down her pants and had sexual intercourse with her. When asked why she did not call the police after

this happened, J.B. explained that she was "terrified" of Bruch and she "couldn't fathom what had just happened" and "didn't want to accept it." 1RP at 135-36.

J.B. described a second incident when Bruch, J.B., and her brother were staying at the home of Julia de la Cruz, a friend of Bruch's. J.B. said that she and her father had a fight there. Bruch yelled at J.B., told her she was no longer his daughter, and put her in a small bedroom in the house. J.B. said that after Bruch put her in the room, she tried the door but couldn't open it. Eventually, Bruch came back. He apologized and climbed into bed with her. J.B. said that again, Bruch got on top of her, pulled her pants down, and had sex with her. J.B. gave a statement about the rapes to an Arizona detective.

The Snohomish County Prosecutor's Office charged Bruch with two counts of second degree child molestation and two counts of rape of a child in the third degree and designated all counts as involving domestic violence.[1] Following a trial, the jury convicted Bruch as charged. Bruch appeals.

Prosecutorial Misconduct

Bruch claims that the prosecutor made several improper comments during closing argument that rose to the level of prosecutorial misconduct. We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A prosecutor has wide latitude in closing argument to

[1] The State also charged Bruch with one count of bail jumping but filed a motion to dismiss this count before trial.

draw reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). A prosecutor may not, however, make statements that are unsupported by the evidence or invite the jurors to decide a case based on emotional appeals to their passions and prejudices. In re Det. of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998); State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85 (1993). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's comments were improper and that the comments were prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

First, Bruch contends that the prosecutor improperly focused on J.B.'s difficulty in testifying and thereby invited the jury to penalize him for exercising his right to confront witnesses at trial.

Several witnesses described J.B.'s emotional difficulty in talking about the abuse. Both counsel also referred to the obvious distress she displayed on the witness stand. Bruch's counsel suggested that J.B.'s emotion during her testimony stemmed from the fact that she had falsely accused her father. The prosecutor contended that J.B.'s testimony was credible, in part, because of her demeanor. He also argued that J.B. was reluctant to disclose the abuse for a variety of complex reasons, including the fact that she still loved her father and because she anticipated many of the negative consequences that would follow. The prosecutor argued:

> You could see that she knew what she was getting herself into. And it was horrible for her; horrible for her to answer my questions about what happened to her; horrible for her to answer defense counsel's questions about what she might or might not have said in a transcript; . . . 4RP at 653.

Bruch did not object.

During rebuttal argument, the State responded to the defense contention that J.B. fabricated the allegations against her father in order to further her own objectives. The State pointed out that, far from benefitting from her disclosures, J.B. suffered numerous serious adverse consequences, including the emotional cost of her testimony. The prosecutor stated: "It's an incredibly regrettable part of our legal process" that essentially "victimized" J.B. again, by requiring her testimony. 4RP at 699. The court overruled Bruch's objection to this comment.

The appellant claims that the prosecutor "directly faulted Mr. Bruch [sic] for exercising his constitutional right to a trial" and causing harm to J.B. Appellant's Brief at 14. We disagree.

While the State may not draw adverse inferences from a defendant's exercise of his constitutional rights, not all arguments that touch upon those rights are impermissible. State v. Gregory, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006). The relevant questions are whether the prosecutor manifestly intends the remark to be a comment on the defendant's trial rights and whether the exercise of constitutional rights is the focus of the argument. Gregory, 158 Wn.2d at 807.

General discussion of the emotional toll of a victim's testimony offered to support the victim's credibility does not amount to an improper comment on the defendant's right to confrontation. See Gregory, 158 Wn.2d at 808 (argument focused on the credibility of the victim, not on the defendant's exercise of his constitutional right to confrontation). The cases Bruch relies upon are not analogous. See e.g., State v. Jones, 71 Wn. App. 798, 805-06, 863 P.2d 85 (1993) (prosecutor expressly criticized the defendant's exercise of his right to confrontation by commenting on the effect of the defendant's

behavior in court on the victim). In the context of the argument about credibility, it was not improper for the prosecutor to discuss J.B.'s obvious difficulty when she testified. The prosecutor did not criticize the defendant for subjecting J.B. to cross examination, nor suggest or imply that Bruch should have pleaded guilty to spare the victim from having to testify. The argument did not infringe upon Bruch's right to confrontation.

Next, Bruch also argues that the prosecutor unfairly appealed to the jury members' passions and prejudices. Bruch points to the prosecutor's comment that J.B.'s life was "no fairytale," his reference to the "absolute devastation" caused by rape perpetrated by a parent, and argument in rebuttal that, far from having an agenda to destroy her father, J.B. would do "anything to have a dad who just took her fishing." 4RP 651, 663, 697. Bruch fails to demonstrate that any of these remarks, when viewed in context, were unwarranted by the evidence or incurably prejudicial. Cf., State v. Claflin, 38 Wn. App. 847, 850-51, 690 P.2d 1186 (1984) (prosecutor's reading of a poem "utilizing vivid and highly inflammatory imagery" describing rape's emotional effect was "so prejudicial that no curative instruction would have sufficed to erase the prejudice it was bound to engender in the minds of the jurors"). Bruch cannot show that any arguable prejudice could not have been addressed by a timely objection and curative instruction.

Finally, Bruch contends that the State committed misconduct by belittling the defense's argument as a "fairytale" and predicting that defense counsel would argue for a "long while" about J.B.'s credibility. 4RP at 652; 663.

It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn counsel's integrity. State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d

43 (2011). In Thorgerson, for example, the court agreed that the State committed misconduct when it accused the defense of engaging in "sleight of hand" and used disparaging terms such as "'bogus'" and "'desperation.'" Thorgerson, 172 Wn.2d at 451-55. However, the court concluded that this misconduct was not prejudicial because it was not likely to have altered the outcome of the case. Thorgerson, 172 Wn.2d at 452.

In contrast, here, the State did not accuse defense counsel of deceiving the jury nor malign counsel's integrity in any manner. Defense counsel's cross examination of some witnesses focused on the timing of J.B.'s disclosures and her missed opportunities to fully disclose what happened to her. The questioning suggested that the defense would argue extensively about J.B.'s credibility and would suggest that the timing and evolving nature of her disclosures were reasons to doubt the truth of her testimony. In response to this anticipated argument, the State argued in favor of a different interpretation of the evidence, contending that the way J.B. reluctantly disclosed the abuse over time lent authenticity to her account. Here again, Bruch failed to object to the comments of which he now complains. And in any event, the State's comments were a fair response to the defense's theory of the case, not misconduct.

Reputation Evidence

Bruch contends that the trial court abused its discretion by refusing to admit evidence of J.B.'s reputation for dishonesty in her former school community. Bruch sought to present the testimony of Jordan Kerr, the son of his former girlfriend, who attended Arlington High School for a year with J.B. before she moved to Arizona.

During voir dire, Kerr said that J.B. had a reputation for dishonesty based on the opinion of one of J.B.'s former boyfriends and some of his friends, and the opinion of Kerr's uncle's girlfriend, and three or four of her friends who Kerr met once or twice, but did not really know. Kerr said that his uncle's girlfriend and her friends did not like J.B. because she would sometimes "cry for no reason" and do "weird things." 4RP at 607. Kerr said that J.B.'s former boyfriend thought J.B. was dishonest because of an incident when she apparently thought she was pregnant and told another boy, but did not tell her boyfriend. Kerr also told a couple of the people he mentioned that J.B. had falsely accused him of molesting her when they lived together.

ER 608 allows the admission of evidence of a witness's reputation for untruthfulness in the community to attack the credibility of a witness. Gregory, 158 Wn.2d at 804. A witness's reputation is deemed reliable where the witness is well known in a substantial community. State v. Land, 121 Wn.2d 494, 499, 851 P.2d 678 (1993). To establish a valid community, the party seeking to admit the reputation evidence must show that the community is both neutral and general. Gregory, 158 Wn.2d at 804. Factors relevant to this showing may include "the frequency of contact between members of the community, the amount of time a person is known in the community, the role a person plays in the community, and the number of people in the community." Land, 121 Wn.2d at 500. Whether a party has established the proper foundation for reputation testimony is a matter within the trial court's discretion. Gregory, 158 Wn.2d at 804-05. A trial court abuses its discretion when it acts in a manner that is manifestly unreasonable or based on untenable grounds or reasons. Land, 121 Wn.2d at 500.

As the trial court noted, the testimony offered by Kerr described J.B.'s reputation only among two small circles of people within the school community. According to Kerr, one of these groups thought J.B. was "weird" and did not like her. The other group included several people who had reason to be biased against her. Under these circumstances, the trial court acted well within its discretion in concluding that the community was not sufficiently general or neutral and in excluding the evidence.

Sentence

The court imposed a standard range term of confinement of 116 months. The court also imposed community custody of four months "plus all accrued earned early release time at the time of release." Clerk's Papers (CP) at 7. Bruch challenges his sentence, arguing that the sentencing court imposed an indefinite term of community custody, in violation of RCW 9.94A.701, which requires fixed community custody terms.

Child molestation in the second degree is a class B felony with a statutory maximum sentence of ten years. RCW 9A.44.086(2); RCW 9A.20.021(l)(b). Felony sex offenders are also subject to community custody, supervised by the Department of Corrections. RCW 9.94A.701; RCW 9.94A.501(4). While RCW 9.94A.701 authorizes a 36-month term of community custody for Bruch's offense, the trial court properly reduced the term to four months so as not to exceed the statutory maximum sentence. See RCW 9.94A.701(9). Because Bruch is a sex offender, any early release time he earns on the confinement portion of his sentence must be converted to community custody. RCW 9.94A.729(5)(a) ("A person who is eligible for earned early release as provided in this section and who will be supervised by the department ... shall be transferred to community custody status in lieu of earned release time.")

Bruch relies on cases in which the trial court failed to reduce the term of community custody so as not to exceed the statutory maximum. State v. Boyd, 174 Wn.2d 470, 275, P.3d 321 (2012); State v. Land, 172 Wn. App. 593, 295 P.3d 593, rev. denied, 177 Wn.2d 1016, 304 P.3d 114 (2013); State v. Winterborne, 167 Wn. App. 320, 273 P.3d 454, rev. denied, 174 Wn.2d 1019, 282 P.3d 96 (2012). In each of those cases, the trial court merely added a notation that the defendant could not serve a sentence in excess of the statutory maximum. But here, the sentencing court reduced the term of community custody to four months to avoid exceeding the 120-month maximum. As we have previously determined, the conversion of earned early release to community custody is required by statute and the fact that the amount of earned early release that will be converted is unknown does not render the sentence indefinite. State v. Winkle, 159 Wn. App. 323, 331, 245 P.3d 249 (2011), rev. denied, 173 Wn.2d 1007, 268 P.3d 942 (2012) ("The SRA specifically states that a sentence is not rendered indeterminate by the fact that a defendant may earn early release credits.").

We affirm.

Spearman, J.

WE CONCUR:

Leach, C.J. Appelwick, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69272-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Seth Fine, DPA
[sfine@snoco.org]
Snohomish County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: February 26, 2014