No.
COA No. 75206-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RYAN DANIEL ERKER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Ryan Erker asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Ryan Daniel Erker*, No. 75206-5-I (October 2, 2017). A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

Where a prosecutor agrees to make a particular sentencing recommendation in return for a guilty plea, the prosecutor cannot thereafter do anything to undercut that recommendation at sentencing. The prosecutor here undercut the plea agreement and suggested facts that supported a higher sentence. Is a significant question of law under the United States and Washington Constitutions involved entitling Mr. Erker to reversal and remand for his choice of remedies?

D. STATEMENT OF THE CASE

Ryan Erker pled guilty as part of a plea agreement to one count of second degree felony murder with a firearm enhancement. CP 32-57; RP 6-7. In return for Mr. Erker's plea, the State agreed to recommend that Mr. Erker be sentenced to the low end of the standard range of 183 months.[1] CP 36, 57; RP 6-7.

At sentencing, after making the promised low end standard range sentence recommendation, the prosecutor, without prompting, gratuitously argued:

> It is significant, however -– and I will say this in response to defense Pre-Sentence Report, and the final sentence therein, which was that Mr. Erker had great difficulty coming to terms and grasping the felony murder role. And I'd like to make a few comments about that that are not meant at all to undermine our agreed recommendation, but that are meant to edify him, and edify the families as to why we have this felony murder ruling. Because it's tempting for people to think well, felony murder; I arrange a felony, a burglary, and unintended things happen, something goes wrong. Why should I be on the hook for something that somebody else did?
>
> But here's what felony murder is really about. It's -– it's really about willingness to disregard the cost of the crime, the perfectly foreseen cost of human life when one arranges a home invasion burglary and robbery. And when one arranges such a crime with full knowledge of

[1] The low end of the standard range of 123 months for the felony murder plus 60 months for the firearm enhancement. CP 56.

> the folks who wanted to institute it. Mr. Erker knew David Marshall –- knew Steven Marshall, and he knew what he was capable of. And knew that going in and burglarizing someone who is a marijuana dealer, for hopefully getting marijuana and money, could involve violence. And would involve violence. And he accepted that consequence by doing this.
>
> And in some ways, that disregard for another's life –- it's no different than the sentiment behind an intentional murder. And that is why we have felony murder. And I genuinely hope that Mr. Erker can understand that, and that that is why it took two years of negotiations, which really were two years to get him to plead guilty as charged. Because the State held fast that the consequences were completely foreseen, and he accepted them when he did his part in this crime. And again, I don't say that for any other reason than to respond to Ms. Gaisford's comment that he's had a difficult time understanding it. And I hope that some day [sic] he does understand that what he did –- if he had never initiated this event, Ryan Prince would still be alive. It's a great weight for him to bear, but I think it's important that he bear it.

RP 18-19.

Counsel for Mr. Erker expressed concerns over the prosecutor's unsolicited improper argument:

> I do have some concern, which as Mr. Erker's counsel, I have to express to the Court. And that is what I perceive as Mr. Erker's counsel, a subtle effort that disturbs me, having reached at least an agreed recommendation with the Office of the King County Prosecuting Attorney. I will temper my remarks only to say I'm not here to argue the nuances of the felony murder rule, or the reasons for negotiations, or my role in this case, except to say that I prepared on Mr. Erker's behalf as much as possible an appropriate, and accurate pretrial statement.

> I am constrained to say to the Court, there is an upcoming trial of a co-Defendant Marshall in this case. We believe the evidence shows to be one of the shooters in this case. And our understanding is the State's case was strong and that no testimony from Mr. Erker was needed. But that's in the future, and we have nothing to do with that.
>
> Mr. Erker is prepared to go to prison for a very long time. And that's the reason he's here today. And whether his counsel took time to negotiate this case, or whether I worded something to which someone took exception, I ask the Court not to allow that to weigh against Mr. Erker in this Court's decision here today.

RP 33.

The trial court rejected the parties agreed sentence recommendation and sentenced Mr. Erker to an aggregate sentence of 233 months.[2] CP 61; RP 40-41.

The Court of Appeals ruled the prosecutor did not breach the plea agreement but did agree that the prosecutor's comments about the felony murder rule "were unnecessary to the sentencing." Decision at 7-8.

[2] The midrange sentence consisted of 173 months plus the 60 month firearm enhancement. CP 56, 61.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

The prosecutor undercut the plea agreement at sentencing violating Mr. Erker's right to due process.

The State and the defendant enter into a contract when entering into a plea agreement. *State v. Talley*, 134 Wn.2d 176, 183, 949 P.2d 358 (1998). But, a criminal defendant's rights arising from a plea agreement are constitutionally based and fundamentally broader than those under commercial contract law. *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997).

Because plea agreements concern fundamental rights, due process requires the prosecutor to strictly adhere to the terms of the agreement. U.S. Const amend. XIV; *Santobello v. New York*, 404 U.S. 257, 261-63, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *Sledge*, 133 Wn.2d at 839. Thus, a plea agreement obligates the prosecutor to recommend to the court the sentence contained in the agreement. *Talley*, 134 Wn.2d at 183. Although the prosecutor does not have to make the sentencing recommendation enthusiastically, the prosecutor must not undercut the terms of the agreement. *Talley*, 134 Wn.2d at 183; *Sledge*, 133 Wn.2d at 840.

The constitutional dimensions of the plea agreement make it essential that the State fulfill its "implied promise to act in good faith."

State v. Williams, 103 Wn.App. 231, 235, 11 P.3d 878 (2000). To do so, it "must adhere to its terms by recommending the agreed upon sentence." *State v. Jerde*, 93 Wn.App. 774, 780, 970 P.2d 781 (1999).

Moreover, the State may not undercut the plea bargain "either explicitly or implicitly through conduct indicating an intent to circumvent the agreement." *Williams*, 103 Wn.App. at 236. This Court determines whether the State violated its duty to adhere to the agreement by reviewing the entire sentencing record and applying an objective standard. *Id.* Neither good motivations nor a reasonable justification will excuse a breach. *State v. Van Buren*, 101 Wn.App. 206, 213, 2 P.3d 991 (2000).

A breach occurs when the State offers unsolicited information by way of report, testimony, or argument that undercuts the State's obligations under the plea agreement. *State v. Carreno-Maldonado*, 135 Wn.App. 77, 83, 143 P.3d 343 (2006).

Here, in the last sentence of his presentence report, Mr. Erker noted that part of the delay in agreeing to the plea agreement was the difficulty he had "coming to terms with and grasping the felony murder rule." CP 70. Instead of simply making the agreed recommendation, the prosecutor felt the need to provide information to the court which

"went beyond what was necessary." *Carreno-Maldonado,* 135 Wn.App. at 84-85. With this single sentence on the last page of a five page document, the prosecutor launched into an unnecessary argument which ultimately concluded by arguing that Mr. Erker was more culpable that what he was willing to admit. RP 18-19 ("And in some ways, that disregard for another's life – it's no different than the sentiment behind an intentional murder"). The Court of Appeals agreed that whether Mr. Erker understood the felony murder rule was not germane to the recommended sentence or the sentencing hearing generally. Decision at 6-7 fn.2. The inference to be drawn from this act was that it was only provided to the court to paint Mr. Erker in as bad of light as possible to encourage the court to do what it ultimately did and reject the agreed recommendation and impose a greater sentence. *See Carreno-Maldonado,* 135 Wn.App. at 84-85 (because it was an agreed recommendation, "there was no need for the State to recite potentially aggravating facts" and "went beyond what was necessary" to support the mid-range recommendation).

This Court should grant review to determine whether the prosecutor's comments undercut the plea agreement and constituted a breach entitling Mr. Erker to reversal.

F. CONCLUSION

For the reasons stated, Mr. Erker asks this Court to grant review and remand for resentencing or for Mr. Erker to withdraw his guilty plea.

DATED this 1st day of November 2017.

Respectfully submitted,

s/Thomas M. Kummerow

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RYAN DANIEL ERKER, Appellant.	No. 75206-5-1 DIVISION ONE UNPUBLISHED OPINION FILED: October 2, 2017

APPELWICK, J. — Erker appeals his felony murder sentence of 233 months. He argues that the prosecutor undercut the plea agreement at the sentencing hearing by offering prejudicial comments about the felony murder rule. We affirm.

FACTS

Ryan Erker was charged with murder in the second degree with a firearm enhancement. He faced the standard range of imprisonment of 123 to 220 months, plus 60 consecutive months for the firearm enhancement. He pleaded guilty as charged on March 18, 2016. The plea was entered after almost two years of negotiations between the State and Erker. Erker's presentence report stated that part of the delay was due to his "great difficulty coming to terms with and grasping the felony murder rule." As part of the plea bargain, the State agreed to recommend the low end of the standard range, 183 months, including the firearm enhancement. At the plea and sentencing hearings, the State recommended the low end rage of 183 months.

At the sentencing hearing on April 22, 2016, the State listed three reasons for the agreed sentencing recommendation. First, Erker accepted responsibility with his guilty plea. Second, Erker provided some assistance to law enforcement in the case. Third, the State had no evidence that Erker participated in the homicidal event. In response to a statement by the defense in the presentence report, the State went on to comment on the purpose of the felony murder rule.[1]

The prosecutor stated,

> And I'd like to make a few comments about [the felony murder rule] that are not meant at all to undermine our agreed recommendation, but that are meant to edify him, and edify the families as to why we have this felony murder ruling. Because it's tempting for people to think well, felony murder; I arrange a felony, a burglary, and unintended things happen, something goes wrong. Why should I be on the hook for something that somebody else did?
>
> But here's what felony murder is really about. It's—it's really about willingness to disregard the cost of the crime, the perfectly foreseen cost of human life when one arranges a home invasion burglary and robbery. . . .
>
> And in some ways, that disregard for another's life—it's no different than the sentiment behind an intentional murder.

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[1] RCW 9A.32.050(1) states,

> A person is guilty of murder in the second degree when:
>
> (a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or
>
> (b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime . . . causes the death of a person other than one of the participants.

The court then heard statements from the victim's mother and fiancé. Erker's brother and a jail chaplain spoke, conveying Erker's remorse. Erker also made a statement.

After hearing the statements, the trial court imposed a mid-range sentence of 173 months, plus the 60 months for the firearm enhancement, for a total of 233 months. And, the trial court explained why it deviated from the agree recommendation and imposed a mid-range sentence. It explained that the court approaches sentencing by starting in the middle of the range, and then goes up or down depending on the factors. The trial court pointed out that the State recommended the very low end of the range, and stated that it understood why it was reasonable for the State to do so. The court also noted that it was entitled to impose a sentence different from the agreed recommendation. But, the trial court noted it was moved by the statements by the victim's family members. Because of the egregious consequences of this case, the trial court said it would tend to go above the middle of the range, but that the mitigating factors of Erker's actions brought it to a middle of the range sentence. Erker appeals.

DISCUSSION

Erker's primary argument on appeal is that the State undercut his plea agreement. He asserts that the State must strictly adhere to the terms of a plea agreement, and that the State breached the plea agreement by offering unsolicited information that contradicted its obligations.

We generally will not review an issue raised for the first time on appeal. RAP 2.5(a). However we will review an argument not raised below if it concerns a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Williams, 103 Wn. App. 231, 234, 11 P.3d 878 (2000). Plea agreements concern fundamental rights of the accused, and constitutional due process requires prosecutors to follow the terms of the agreement. State v. Sledge, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). Therefore, this case involves a constitutional right. Whether the State breached the plea agreement is an issue we review de novo. State v. Neisler, 191 Wn. App. 259, 265, 361 P.3d 278 (2015), review denied, 185 Wn.2d 1026, 377 P.3d 708 (2016).

Erker argues that the State breached the plea agreement when it offered unsolicited information about the felony murder rule at the sentencing hearing. He argues that the prosecutor spoke about felony murder to make Erker seem more culpable than he was willing to admit. He argues further that the prosecutor explained the felony murder rule, even though it was not germane to the sentencing hearing, to encourage the court to reject the agreed recommendation and impose a greater sentence. He likens the prosecutor's statements to reciting potentially aggravating facts to the court and asserts that these comments undercut the agreed recommendation and breached the plea agreement.

The State must follow the terms of the plea agreement. Sledge, 133 Wn.2d at 839. A prosecutor fulfills this obligation by making the agreed sentencing recommendation. Id. at 840. Although the State need not enthusiastically make

the sentencing recommendation, it must participate in the sentencing proceedings, answer the court's questions candidly, and not hold back relevant information regarding the plea agreement. Id. The State must not undercut the terms of the plea agreement with the defendant explicitly or implicitly by conduct that indicates an intent to circumvent the agreement. Williams, 103 Wn. App. at 236; Sledge, 133 Wn.2d at 840-41. The State breaches the plea agreement when it offers unsolicited information that undercuts the agreed recommendation. State v. Carreno-Maldonado, 135 Wn. App. 77, 83, 143 P. 3d 343 (2006). Specifically, the State violates the agreement when the prosecutor goes beyond the agreed recommendation and emphasizes aggravating sentencing factors at the sentencing hearing. State v. Van Buren, 101 Wn. App. 206, 216, 2 P.3d 991 (2000); see State v. Jerde, 93 Wn. App. 774, 782, 970 P.2d 781 (1999).

We apply an objective standard to determine whether the State breached the plea agreement irrespective of prosecutorial motivations or justifications. Williams, 103 Wn. App. at 236. We look at the sentencing record as a whole. Carreno-Maldonado, 135 Wn. App. at 83.

In Van Buren, the court found that the State crossed the line from objectively reporting facts that may indicate aggravating factors to outright advocating for those factors. 101 Wn. App. at 215. The State made only a fleeting reference to its sentencing recommendation. Id. The State then told the court that there were various grounds to consider an exceptional sentence, including deliberate cruelty to the victim, a lack of remorse, and the impact on the victim's family. Id. at 215-

16. The court emphasized that, standing alone, the prosecutor's reference to facts mentioned in the presentence report did not cross over into advocacy. Id. at 216. However it found that comments not mentioned in the presentence report, about the impact on the victim's family, crossed the line. Id. Looking at the record overall, the court found that the State advocated for, and helped the court justify, an exceptional sentence beyond the agreed recommendation. Id. at 216-17.

Similarly, in Jerde, the court found that the State improperly advocated for a higher sentence when it underscored the aggravating factors that justified imposing an exceptional sentence. 93 Wn. App. at 782. For example, the State noted that the crime was committed in front of an eye witness, the crime occurred over a period of time, and the defendant lacked remorse. Id. at 778 n.3.

The State must also take great care not to present the facts in a way that makes the defendant's crime more egregious than a typical crime of the same class. Carreno-Maldenado, 135 Wn. App. at 84-85. In that case, the prosecutor emphasized to the trial court that the defendant's crimes were heinous and violent, along with the particular vulnerability of the victims. Id. at 80-81. While the State may not offer unsolicited information or argument that undermines the agreed recommendation, we review responses to an argument by defense counsel or the trial court's questions in a different light.[2] Sledge, 133 Wn.2d at 840 (obligation to not hold back relevant information regarding the plea agreement).

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[2]Here, the prosecutor's remarks about the felony murder rule were not in response to oral statements from Erker or questions from the court. The prosecutor said she needed to comment on the felony murder rule to edify Erker in response to defense's statement in the presentencing report. But, Erker's

The State's comments in this case do not undercut the agreed recommendation as they did in Van Buren, Jerde, and Carreno-Maldenado. Here, the State fulfilled its duty under the plea agreement by recommending the agreed sentence to the trial court. The prosecutor's words did not explicitly undermine the agreement. They also did not implicitly undercut the sentencing recommendation. The prosecutor's explanation of the felony murder rule did not rise to the level of advocacy, because it did not include aggravating facts that were not already before the court. In her comments, the prosecutor states that Erker arranged a home invasion burglary and robbery with known accomplices, which led to the murder of the victim. These facts are in Erker's guilty plea statement. The prosecutor also remarks that the victim was a marijuana dealer, which was an undisputed fact from the certification for probable cause determination, to which the parties had stipulated.

Finally, the prosecutor's explanation of the felony murder rule did not make Erker's crime more egregious than a crime of the same class. The comments simply defined felony murder and why it is classified as second degree murder, along with intentional murder. The prosecutor advocated for the low end of the sentencing range, mentioning a number of factors for why the low end was appropriate.

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statement explained why it took him so long to enter the plea. Once the plea was before the court, the reason for the delay was not relevant. The comments on the felony murder rule were unnecessary to the sentencing.

From the record as a whole it is clear that the State did not undercut Erker's plea agreement. The State did not request appellate costs, and we do not award costs pursuant to RAP 14.2.

We affirm.

Appelwick, J.

WE CONCUR:

Mann, J.

Becker, 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. 75206-5-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:

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