Supreme Court No. 98193-1
COA No. 80640-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN ACKERMAN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF THURSTON COUNTY

The Honorable Christopher Lanese

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jonathan Ackerman was the appellant in COA No. 80640-8-I.

B. COURT OF APPEALS DECISION

Mr. Ackerman seeks review of the decision entered January 27, 2020. Appendix A (Decision).

C. ISSUES PRESENTED ON REVIEW

The defendant negotiated a plea down from first degree premeditated murder to second degree murder, and the prosecutor agreed to recommend a sentence of 240 months, within the 195 to 295-month standard range. But at sentencing, the prosecutor perfunctorily noted the recommendation, then made extensive unsolicited remarks about motive and plan, emphasized the vulnerability of the victim, opined about lack of remorse, detailed the defendant's criminal past, and in several other ways set out herein, implicitly argued that the crime was as bad as first degree murder, and impliedly catalogued multiple well-known statutory aggravating factors, objectively encouraging a harsher sentence – which Mr. Ackerman indeed then received.

Did the State breach the plea agreement, requiring reversal of the 295-month sentence and remand for re-sentencing before a different court, or withdrawal of the plea, at Mr. Ackerman's choice?

D. STATEMENT OF THE CASE

1. <u>Inducement of plea</u>. Jonathan Ackerman was charged with first degree premeditated murder of Dakota Walker. CP 5. According to the affidavit of probable cause, in 2016, Mr. Ackerman met Walker and drew him into his and Vincent Garlock's pattern of committing property crimes. CP 1-2. Ackerman also allegedly had a romantic relationship with Walker. CP 1-2, 5. In mid to late October of 2016, Mr. Ackerman allegedly became concerned that Walker was going to call the police and report the crimes. Co-defendant Garlock told police that Ackerman took him and Walker driving in the Delphi Road area in Thurston County, and then shot Walker. CP 2-3.

Following negotiation, Mr. Ackerman entered a guilty plea to the reduced charge of second degree murder, outlined in the January 9th amended information in No. 16-1-01859-34. CP 8; 1/9/18RP at 13-14. In his plea, he acknowledged an offender score of 6, and a standard range of 195 to 295 months. CP 9; 1/9/18RP at 11, 16.

The key aspect of the plea was that the State was dropping the effort to incarcerate Mr. Ackerman for first degree murder, and the agreement by the prosecutor to recommend 240 months incarceration to the sentencing court. CP 11-12 (para. 6.j); 1/9/18RP at 13-14.

2. Sentencing – breach of plea agreement. On April 13, 2018, the trial court held a sentencing hearing and the deputy prosecutor stated that "[t]his is an agreed recommendation . . . for 240 months in prison[.]" 4/13/18RP at 25. Then, however, the prosecutor regaled the court with a lengthy discussion of unsolicited information, despite acknowledging that the court already had background knowledge about the case. 4/13/18RP at 24-25. The prosecutor described facts that supported a crime of premeditation, listed other facts and made arguments which plainly paralleled aggravating factors under the SRA, such as the victim's vulnerability, and a seeming lack of remorse and efforts to conceal the offense, along with making repeated characterizations of Mr. Ackerman's criminal record - which the court also already had before it - and emphasizing that the defendant had an abusive domestic relationship with the victim, even though the "DV" allegation was expressly excluded from the agreed sentence. 4/13/18RP at 24-31. The trial court imposed a sentence of 295 months incarceration. 4/13/18RP at 33, 41-43; CP 37.

3. Breach of plea agreement - appeal. Mr. Ackerman appealed, arguing that the prosecutor's conduct was a breach of the plea agreement. COA No. 80640-8; See AOB, at pp. 4-5, 11-15; Reply, at pp.

2-19. He argued that the State breached the plea agreement in multiple ways, each of which is an independent basis to find breach, and to therefore impose the requested remedy. Among other things, the State decried Mr. Ackerman as a "skilled criminal," who had long engaged in a "life of crime," and argued at multiple junctures that he had been continuing to commit crimes - this conduct, the prosecutor argued, continued even after going to prison for crimes, where he met the co-defendant and formed a relationship of cooperative offending. 4/13/18RP at 25, 27, 29, 31 (also describing the defendant as having "lots of aliases" and as having been wanted by the "U.S. marshals").

The prosecutor also spent significant time discussing that the victim, Walker, was vulnerable, because he was quite young, and because he had inadequate connection or support from family or friends and was thus susceptible to Ackerman's controlling behavior. 4/13/18RP at 26, 28-29. This control came in the form of domestic abuse by Ackerman making threats, and also by his enlisting of Walker into his and Garlock's identity theft enterprises. 4/13/18RP at 27, 29. The State also spent significant time describing Mr. Ackerman as lying or deceiving multiple people in multiple ways into believing that Walker was still alive, including by impersonating him in text messages or online

discussions, causing his mother the distress of not knowing what had happened. 4/13/18RP at 26, 30-31.

These narratives, to any objective observer, were a characterization of the case as aggravated, and more serious than the typical offense. See RCW 9.94A.535(3)(b) (particular vulnerability is an aggravating factor); State v. Shephard, 53 Wn. App. 194, 199, 766 P.2d 467, 469 (1988); RCW 9.94A.535(3)(n) (abuse of trust is an aggravating factor); State v. Bedker, 74 Wn. App. 87, 95, 871 P.2d 673 (1994); RCW 9.94A.535(3)(q) (lack of remorse); see State v. Zigan, 166 Wn. App. 597, 602, 270 P.3d 625, 628 (2012); RCW 9.94A.535(3)(j) (aggravating factor that defendant established relationship with youth not residing with a legal custodian for purpose of victimization).

Additionally, the prosecutor's narrative about the crime involving intimidating and taking advantage of a domestic partner was a breach of the plea in this respect - and also stood as an argument directly akin to the aggravating factor for ongoing domestic violence – an accusation the State had agreed to remove if the defendant plead guilty. CP 38; 4/13/18RP at 19-22.

The State's discussion of facts supporting premeditated murder could only have the effect of contradicting the recommendation of a 240-

month sentence. The prosecutor spent significant time discussing facts associated with the original charge, which alleged that the defendant acted pursuant to plan and drove the complainant to a wooded area and shot him. See CP 2-3. According to the prosecutor at sentencing, this was done with the motive that Walker "was about to turn either Mr. Ackerman or Mr. Garlock in, because [Walker] had information about [the defendant] being a wanted individual," and had "information about [Ackerman's] true identity." 4/13/18RP at 30-31.

This, too, was breach of the plea agreement, by effectively seeking punishment for the crime dismissed to induce a plea. 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 that was made. State v. Carreno-Maldonado, 135 Wn. App. 77, 84, 143 P.3d 343, 347 (2006). Compliance with the terms of a plea agreement is fairly simple - the State adheres to the terms of the agreement by recommending the agreed upon sentence – and the State must not *undercut* the terms of a plea agreement, "either explicitly or implicitly through conduct indicating an intent to circumvent the agreement." State v. Xaviar, 117 Wn. App. 196, 199, 69 P.3d 901 (2003) (quoting State v. Williams, 103 Wn. App. 231, 236, 236, 11 P.3d 878

(2000)). Yet that is what occurred here. Xaviar, at 201 ("absent a question from the court, the prosecutor's knowledge of the details of the crime was not a relevant issue before the court").

The Court of Appeals affirmed the sentence, although chiding the prosecution, stating that "the prosecutor should not have elaborated as much as she did about Ackerman's threats against Walker's friends and the alleged circumstances of the shooting itself." Decision, at p. 9. This was inadequate. Further facts of the prosecutor's statements to the court are set forth in the Opening Brief and discussed herein.

E. ARGUMENT

1. This Court should grant review of the Court of Appeals decision in Mr. Ackerman's case under Rules of Appellate Procedure 13.4(b)(1), (2), and (3).

Review is warranted under RAP 13.4(b)(1). The Court of Appeals decision is in direct conflict with this Court's decisions as argued infra. The Court of Appeals decision is also in direct conflict with the Court of Appeals' decisions as argued infra. RAP 13.4(b)(2). Finally, review is warranted under RAP 13.4(b)(3) because the Court of Appeals decision presents a significant question of law under the State and United States Constitutions, where the Fourteenth Amendment's Due Process guarantee requires the plea bargaining process to comport with

principles of fairness. U.S. Const. amend. XIV; Const. Art. I, § 3; see Santobello v. New York, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); State v. Sledge, 133 Wn.2d 828, 839-40, 946 P.2d 1199 (1997).

2. The Court of Appeals decision was in error because the recitation of aggravating facts was plainly effective advocacy for a high end sentence, and the Court of Appeals misapplied the concept of objective assessment of whether breach occurred – any prosecutorial purpose of discussion of the co-defendant, Garlock, which is illogical in itself, does not obviate, or excuse the breach.

Mr. Ackerman plead guilty in exchange for a mid-range, 240 month recommendation. CP 8-14. The Court of Appeals recognized and highlighted virtually all of the factual descriptions of the crime by the prosecutor that, in Mr. Ackerman's briefing, were argued as corresponding with aggravating factors and also amounting to a description of a higher degree of offense than that negotiated for. From the State's repeated descriptions of the victim as "vulnerable" to the State's account of the defendant having a motive to kill the victim and a scheme to take the victim to a location to shoot him because the victim was planning to turn him into police, this was the prosecutor's improper description of an aggravated, premeditated offense. Decision, at pp. 5-7.

The Court of Appeals recognized that although it "may be necessary [for the prosecutor] to recount certain aggravating facts in order to safeguard against the court imposing a lower sentence . . . a

prosecutor must use great care in such circumstances, and the facts presented must not be of the type that make the crime more egregious than a typical crime of the same class." Decision, at p. 8 (citing State v. Carreno-Maldonado, 135 Wn. App. 77, 84-85, 143 P.3d 343 (2006)).

However, the Court failed to apply this rule. Instead, the Court excused the prosecutor's recitation of aggravating facts by holding there was no breach because "[s]pecifically, the trial court was not bound by the parties' midrange sentencing recommendation," and therefore,

> the prosecutor's remarks . . . are fairly characterized as the recounting of facts to support the agreement to a midrange (as opposed to low-end) sentencing recommendation.

Decision, at pp. 8-9. This reasoning is not tenable. The trial court at sentencing is *never* bound by the agreed recommendation, and was not so bound here. See generally State v. Coppin, 57 Wn. App. 866, 791 P.2d 228 (1990); see CP 8-14 (plea agreement). Rather, it is the prosecution that is bound to comply with the plea agreement. And here, the State instead breached the plea agreement. The Court's characterizations of the State's conduct at sentencing as not constituting breach is not supported by the record and is based on an erroneous assessment of the law. Thus Court's characterization of the prosecutor's conduct as not

having been "outright advocacy" or the "advanc[ing of] aggravating circumstances that had no basis in the record" should be reviewed.

The two cases cited by the Court for these propositions in fact support Mr. Ackerman's argument. See State v. Van Buren, 101 Wn. App. 206, 215-16, 2 P.3d 991 (2000), review denied, 142 Wn.2d 1015, 16 P.3d 1265 (2000) ("[O]n balance . . the State crossed that impermissible boundary" when the prosecutor recommended the sentence but also listed factors that the presentence reporter had identified, "if" the court was considering an exceptional sentence. Van Buren, at 215-16 (also noting that the State's response to the defendant's allocution emphasized the aggravating fact that he showed lack of remorse).).

The case of State v. Xaviar is akin to what the prosecutor did in this case – without citing the specific aggravating factor statutes, emphasizing the terrible facts of the crime (and also the defendant's "life of crime" as a "skilled criminal"), reciting multiple facts supporting the higher degree charge that the State had dropped, and highlighting facts of the case that were akin to well-known aggravators. State v. Xaviar, 117 Wn. App. at 200-01. The case stands for the proposition that a prosecutor need not particularly cite specific statutory aggravating factors to be in breach – there, the prosecutor discussed the facts as

"grave" and causing "trauma," and faulted the defendant for exhibiting "no remorse" after committing crimes "in the worst way possible;" the Court of Appeals stated that "[t]he above unsolicited remarks obviously refer to the aggravating factors in RCW 9.94A.535." (Emphasis added.) Xaviar, 117 Wn. App. at 200-01.

Here, the prosecutor's unsolicited extended discussion told a tale of an alleged planned (i.e., first degree) shooting of an abused youth who had been supposedly enlisted into a criminal enterprise and was then killed in the face of his vulnerability, by a defendant who (the State contended) posed as an impostor after the offense.

Although the Court of Appeals chided the prosecution, see Decision, at p. 9, the Court again excused the State's departure from the core spirit of the agreement (which the State must abide by in good faith, rather than undercutting, per State v. Sledge, supra, 133 Wn.2d at 839, and Santobello v. New York, 404 U.S. 257), by stating that the "facts presented by the prosecutor were not of the type that made Ackerman's crime more egregious than other second degree murders." Decision, at p. 9.

This is not supportable by a comparison of the facts to the case law and the Court's reasoning is not supported by objective assessment

of what the prosecutor told the court. As discussed in the Opening Brief and Reply, the prosecutor's remarks mirrored multiple well-known aggravating factors such as particular vulnerability, and emphasized facts that painted the crime as the first degree premeditated murder that Mr. Ackerman believed he was securing against, by entering a plea in the second degree. See AOB, at pp. 4-5, 11-15; Reply Brief, at pp. 2-19.

(i). The prosecutor's subjective purpose of distinguishing the defendant from Mr. Vincent Garlock does not excuse the recitation of aggravating facts.

The Court of Appeals also stated that the implication of the prosecutor's remarks "when viewed objectively," was "that the State planned to recommend a lower sentence for [defendant Vincent] Garlock despite Ackerman's claim that Garlock was the shooter." Decision, at p. 9. The Court reasoned – speculatively - that "[i]t was not inappropriate under these circumstances for the prosecutor to explain why the State believed that Ackerman was the shooter and thus deserving of a higher sentence than Garlock." Decision, at pp. 9-10.

It does not obviate or excuse the breach that the prosecutor's remarks might have been designed to distinguish the current defendant with his later-to-be-sentenced co-defendant, Vincent Garlock. As the Court recognized, Mr. Garlock was charged under a separate cause

number. Decision, at p. 4; see CP 5, 22 (Ackerman informations). This was Mr. Ackermann's sentencing, and the impropriety of the prosecutor's recitation of aggravating facts cannot be dismissed as inconsequential to the question of breach by labeling it a mere discussion of a different case not before the trial court, for which there was no colorable need in discussing the case.

In addition, the Court of Appeals' reasoning that the prosecutor was merely attempting to point out "why the State believed that Ackerman was the shooter and thus deserving of a higher sentence than Garlock" does not logically or legally warrant, or excuse, the breach. Decision, at pp. 9-10. But there is no need at a sentencing hearing for the trial court to "distinguish" this defendant from a co-defendant who will later be sentenced. And indeed it would be well understood by counsel to be not proper - the present trial court was not sitting to consider the co-defendant's comparative level of guilt, or to take evidence on the co-defendant's actions, for use at the later hearing.

The charging documents described the two co-defendants as either principals or accomplices, each guilty irrespective of who pulled the trigger. See CP 5 (information, naming jointly charged co-defendant Vincent Garlock and alleging that the defendants were guilty as either

principals or accomplices). This is even more the case when one considers that distinguishing between principal and accomplice liability is unnecessary for charging, or guilt. See State v. Teal, 117 Wn. App. 831, 73 P.3d 402 (2003) (charging document need not allege the State's reliance on accomplice liability, which is simply criminal liability).

Even if distinguishing Garlock's case was the prosecutor's subjective purpose for reciting facts about Ackerman's crime that mirrored aggravating factors, the issue of breach is adjudged objectively by looking to the language uttered. AOB, at pp. 7, 16 (citing cases including *inter alia* Santobello v. New York, 404 U.S. at 262 (the question whether the breach was intentional, inadvertent, or unintentional, is immaterial); see also State v. Mobley, COA No. 77059-4-I (Division One, February 25, 2019) (Slip Op. at. p. 3) (unpublished, cited for persuasive purposes only, under GR 14.1). The Court of Appeals engaged in an incorrect application of the "objective" assessment of breach that the Court purported to be properly applying. Decision, at pp. 9-10.

None of this should distract from the facts that the prosecutor's discussion of Ackerman's motives, purposes, and plan to kill the victim – including the motive that the victim had learned that Ackerman was

wanted by authorities, the purpose that it appeared the victim was about to turn Ackerman and Garlock in to the police, and the plan and act of driving the victim to a wooded area – all stands as improper discussions of the more serious crime of *first degree* murder. AOB, at pp. 14-15 (citing 4/13/18RP at 30-31. The petitioner was persuaded to waive his constitutional right to a trial by the State's promise that this would no longer be a first degree murder case. Having secured that waiver, the State then went to sentencing and engaged in a long recitation of facts that supported the greater charge that the prosecutor, by *dropping* that charge, had induced Mr. Ackerman to enter a guilty plea. Yet the objective relevance of these matters pertained to that greater crime,

And as noted, the State's discussion of other facts mirrored aggravating factors as closely as could possibly done without listing their statutory citations. This unsolicited series of factual presentations was a fundamental breach of the plea, in perhaps the most basic form. They were proffered here in the sentencing forum, where the amount of punishment was to be decided.

(ii). The cited cases do not support the Court of Appeals decision.

Contrary to the Court of Appeals decision, the case of State v. Xaviar, supra, along with United States v. Whitney, State v. Williams,

State v. Jerde, and State v. Carreno-Maldonado, supra, do not support the decision. In the case of State v. Xaviar, it was no protection from clear breach of the plea agreement that the prosecutor "made" the agreed recommendation. In that case,

> [a]t the sentencing hearing, the prosecutor made the agreed upon 240-month recommendation. But instead of stopping there, and without the court's prompting, she proceeded to (1) emphasize the graveness of the situation; (2) reiterate the charges that the State did not bring; (3) note that the State had forgone the opportunity to ask for a 60-year exceptional sentence; and (4) highlight aggravating circumstances that would support an exceptional sentence.

State v. Xaviar, 117 Wn. App. at 198. Objectively viewed, the State's presentation at sentencing effectively placed these each of these emphases before the sentencing court.

In United States v. Whitney, 673 F.3d 965, 971-972 (9th Cir. 2012), the government breached the plea agreement to recommend the low end of the range by describing how the defendant was a "good thief" and highlighting the defendant's criminal history which was already before the sentencing court. Here, the Court of Appeals erroneously deemed it indicative of a lack of breach that the defendant's crime and criminal history were already before the trial court. Decision, at p. 9.

The Whitney Court was also unpersuaded by the government's claim that its factual recitation was a mere effort to guard against the court departing downward from the guidelines range, where the defendant had agreed to a joint sentence recommendation and thus was barred from seeking, and did not seek, a sentence below the agreed-upon sentence recommendation - as here. See CP 11. There was nothing in the nature of that case that made it plausible that the court was contemplating *sua sponte* imposition of a sentence below the recommendation. Whitney, 673 F.3d at 971-72. The same is all true in Mr. Ackerman's case. Defense counsel, in brief argument, asked the court to impose the sentence "that the parties had worked out." 4/13/18RP at 39-40. That was proper accord to the agreement as to sentence, per the plea.

State v. Williams does not support the Court of Appeals decision because it is similar to this case. There, the prosecutor listed and argued multiple, specific aggravating factors. SRB, at p. 12; see AOB, at p. 13; State v. Williams, 103 Wn. App. at 236. Mr. Ackerman's prosecutor very similarly argued aggravating circumstances like many of those in Williams, if less expressly, including victim vulnerability, concealing the crime, and lack of remorse. Williams, 103 Wn. App. at 233-34. Much

more importantly, in Williams the State had listed the aggravating factors as support for its promise to recommend 12 months (the top of the range) as against the defendant's permissible request for a *lower*, 6 month, sentence. The core of the State's breach was the prosecutor's briefing and repeated use language that the defendant should receive "at least" or "a minimum" of 12 months , which was followed by the court imposing a 5-year prison term. Williams, at 233. The case does not stand for the proposition that express statutory citation to aggravating factors is a prerequisite before the Court of Appeals can find breach.

The Respondent also argues that State v. Xaviar is different because the prosecutor there agreed to recommend a 240 month sentence, but then "emphasized the graveness of the situation, reiterated charges that the State did not bring, noted that the State had foregone the opportunity to ask for a 60 year exceptional sentence and highlighted aggravating circumstances that would support an exceptional sentence." SRB, at p. 13. But the prosecutor in this case effectively did each of those same things. The fact that the breach in State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781, review denied, 138 Wn.2d 1002 (1999), and other cases was particularly blatant does make it a useful test for whether breach occurred here. And State v. Jerde in fact carries

similarity to this case where the different prosecutor in Mr. Ackerman's identify theft case, which was sentenced before the murder case, told the court that the victim wanted Ackerman to be sentenced to the highest sentence possible for the murder; and that prosecutor purported to disavow any attempt to seek a higher sentence in the murder case. 4/13/18RP at 9-11.

And in State v. Carreno-Maldonado, as here, where the prosecutor did not cite the aggravator statutes but argued that the defendant committed crimes by seeking out women for "free sex" and "preyed on what would normally be considered a vulnerable segment of our community" the prosecutor was "undercutting the agreed sentencing recommendation [by] using words that mirror the statutory aggravating factors[.]" (Emphasis added.). Carreno-Maldonado, 135 Wn. App. at 81-82. That is exactly what happened at sentencing in this case.

As recently emphasized by the Court of Appeals, a prosecutor breaches the plea agreement by failing to provide what the defendant bargained his trial rights away for – "the prosecutor's good faith [sentencing] recommendation[.]" State v. Mobley (Slip Op. at. p. 3) (citing State v. Carreno-Maldonado, at 83). In this case, Mr. Ackerman provided the Prosecuting Attorney with a murder conviction without the

burdensome need to hold a Due Process trial – and in exchange, he was entitled, if not to an enthusiastic recommendation, but at least to a good-faith performance of the promise to proffer the mid-range sentence recommendation settled upon. The system of securing convictions by plea will not work fairly in Washington if a prosecutor can "undermine[]" a promised recommendation and yet not be deemed in breach. Mobley (Slip Op., at p. 4). The prosecutor here severely undermined the agreed recommendation, per the standard that this Court's decisions and decisions of the Court of Appeals have determined to amount to breach of promise. The Court should grant review and hold that the State breached the plea agreement.

F. CONCLUSION

Mr. Ackerman respectfully requests that this Court accept review, reverse his sentence, and remand for Mr. Ackerman's choice of remedies.

DATED this 20th day of February, 2020.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JONATHAN JASON BARTOSEK, AKA JONATHAN EDWARD ACKERMAN and DAVID JOSEPH CAPRON, Appellant.	No. 80640-8-I DIVISION ONE UNPUBLISHED OPINION FILED: January 27, 2020

SMITH, J. — Jonathan Ackerman[1] appeals the judgment and sentence for his conviction of second degree murder, for which he was sentenced to 295 months—the high end of the sentencing range—after pleading guilty. Ackerman contends that the prosecutor breached the State's agreement to recommend a 240-month sentence by, among other things, making remarks about motive, referring to the victim's vulnerability, and discussing Ackerman's criminal past and lack of remorse at the sentencing hearing. Ackerman also contends that remand is required to correct scrivener's errors in the judgment and sentence.

We hold that the prosecutor's conduct did not undercut the State's obligations in the plea agreement. We affirm but remand to the trial court with

[1] We refer to the appellant as Jonathan Ackerman for consistency with the parties' briefs.

directions to revise the judgment and sentence to specify that Ackerman's restitution obligations are joint and several with his codefendant.

FACTS

On October 20, 2016, a citizen found the body of 18-year-old Dakota Walker near a campground. Law enforcement identified Ackerman as a person of interest. According to a later-filed probable cause statement, Ackerman had been in a relationship with Walker, and Walker was the "'submissive'" or "'slave'" in the relationship. Witnesses reported that Ackerman "exercised a great deal of power and control over [Walker], including controlling his telephone privileges and his ability to have external conversations with his friends."

According to the probable cause statement, a witness told law enforcement that Ackerman told her he had been in prison with a man named Vincent Garlock and that they "protected each other." The witness stated that Ackerman and Garlock "were almost always together." Law enforcement contacted and interviewed Garlock, who stated that he, Ackerman, and Walker would drive around Thurston County at night, stealing mail from mailboxes. Garlock "described the relationship between [Ackerman] and [Walker] as 'tumultuous.'" According to the probable cause statement, Garlock said "[Ackerman] had told him he saw [Walker]'s phone where [Walker] had been 'taking notes' and writing down personal information on [Ackerman]." Garlock said that "[Ackerman] expressed his concern [that Walker] was going to call the police on him."

According to the probable cause statement, when asked when he last saw Walker, Garlock said that he, Ackerman, and Walker were in a van during the late night or early morning hours of October 19 or 20, 2016, when at some point Garlock fell asleep. Garlock recalled that he was awakened by a single gunshot and saw Ackerman in the driver's seat but did not see Walker. Garlock stated that Ackerman exited the van, and then Garlock heard six more gunshots. Ackerman returned to the van and told Garlock, "'It had to be done.'" Garlock and Ackerman then drove away.

According to the probable cause statement, a witness who had been emailing with Walker on October 19, 2016, noticed a change in the vernacular of the conversation in the early evening or late afternoon. She then believed she was not communicating with Walker, but with Ackerman. Another witness provided a Facebook Messenger conversation with a person using Walker's account. In the messages, the sender asked the witness for help, saying that he had been shot and was bleeding. The witness, who had messaged with Walker before, did not think that the tone used in the conversation was consistent with Walker's. She believed that the sender was Ackerman, who had used Walker's account to message her before.

Detectives later interviewed Ackerman. According to the probable cause statement, Ackerman stated that he, Walker, and Garlock were in Capitol Forest when they stopped so that Walker could go to the bathroom. Ackerman stated that "[h]e observed [Walker] on the passenger side of the vehicle urinating when

Garlock shot him through an open passenger side window." When Ackerman asked Garlock why he had murdered Walker, Garlock told him, "'He knew too much.'" According to the probable cause statement, Ackerman was referring to Walker's knowing Garlock's alias.

The State charged Ackerman with murder in the first degree/domestic violence while armed with a firearm. Garlock was jointly charged under a separate cause number. The State later amended the charge against Ackerman to murder in the second degree, and Ackerman pled guilty to that charge. Based on Ackerman's offender score, the standard range for second degree murder was 195 to 295 months. In the plea agreement, the State agreed to recommend a sentence of 240 months, the approximate middle of the standard range. The State agreed that the sentence would run concurrently with Ackerman's sentence in another case (identity theft case), in which Ackerman had pled guilty to attempted theft in the first degree, attempted theft of a motor vehicle, and identity theft in the second degree. The State and Ackerman also agreed that restitution would be joint and several between Ackerman and Garlock, and that Ackerman would "forfeit all property collected as evidence (except family and other personal photographs belonging to defendant)" that were found in the van involved in the shooting. (Boldface omitted.)

The trial court held a sentencing hearing in April 2018. Before sentencing Ackerman for the murder charge, the court issued the jointly recommended sentence in the identity theft case. After turning to the sentencing in this case, the court asked the State for its recommendation. The prosecutor began by

stating that "[t]he sole charge in this cause number is murder in the second degree" and that "[t]he agreed recommendation is for 240 months in prison." After outlining other aspects of the agreed sentence and asking the court to impose restitution and legal financial obligations, the prosecutor provided the court with a high-level timeline of the case. She explained that Ackerman and Garlock knew each other from prison in Pennsylvania and decided to move to Washington. She explained that while Garlock and Ackerman were in Oregon, Ackerman, who was 30 at the time, met Walker, who was 17, on an online dating app for men. The prosecutor stated that Walker had told a friend that "he wasn't really interested in a homosexual relationship but primarily was interest[ed] in getting out of the area where he was currently living." She then stated that Walker

> seemed to be a vulnerable young man. And I'll tell the court, one of the reasons I say that was just how long it took for—I mean, nobody knew that he was missing during the time that his body lay in the Capit[o]l Forest. So he was vulnerable, in that he wanted to get out. He maybe didn't have as much connection with all of his family members as you might hope for a 17-year-old young man.

The prosecutor went on to describe Ackerman and Garlock's "life of crime," in which they "supported themselves primarily by stealing mail" and took Walker with them. The prosecutor recounted Walker's friends' statements that Ackerman treated Walker "as if he owned him." She stated that "[w]hen you look at this case, it's clear that Ackerman had the motive to kill [Walker]." She stated that Ackerman had threatened Walker's friends and anyone that appeared to be helping Walker, indicating that he would kill them. She reported that "[o]ne witness even stated that Mr. Ackerman provided her a list of names and

addresses for her family members," and another person close to Walker said that Ackerman "threatened her and said he would put a bullet between her eyes and shoot her when she was least expecting it." The prosecutor stated, "[T]he State believes that's what happened to [Walker], that he was shot when he was least expecting it."

The prosecutor described Ackerman as "a pretty skilled criminal" but explained that he made a "significant error" by keeping the GPS (global positioning system) running in his vehicle in the days before and after Walker's death. She explained that based on the GPS information, the State believed that Walker was murdered the morning of October 17, 2016, and that Ackerman visited the crime scene twice in the days after Walker's death. She stated that at the same time, someone was sending messages to Walker's friends, pretending to be Walker. The prosecutor concluded her remarks as follows:

> I tell all of that to Your Honor because I know the court is going to be sentencing Mr. Garlock later. Ultimately, this was a very difficult case, but the State could see that clearly Mr. Ackerman had the motive to kill . . . [Walker]. Both individuals said [Walker] was about to turn either Mr. Ackerman or Mr. Garlock in, because [Walker] had information about either Mr. Garlock or Mr. Ackerman being a wanted individual and also information about these folks' true identity.
>
> In the entire time that we've had this case, we've never been able to find any information about Mr. Garlock using aliases or being wanted. But we know that Mr. Ackerman has lots of aliases and . . . at the time was wanted by the U.S. marshals, and he still is today.
>
> One thing that is troubling, I think not only for everyone who has worked on this case but especially for . . . Walker['s mother] is that she doesn't know what happened in the moments of her son's last moments of his life. We know that he was shot six times. We know he had a wound on his hand, a wound that says to us that he wasn't killed right away, that he used his hand to deflect shot.
>
> We've not been able to get information about why was

> [Walker] shot at that particular moment. The only thing that I can deduce is that Mr. Ackerman shot [Walker] when he was least expecting it, just like he threatened to do to others.

After hearing from Walker's mother, Ackerman's counsel, and Ackerman, the trial court sentenced Ackerman not to the recommended 240 months, but to the maximum term of 295 months. Ackerman appeals.

ANALYSIS

Breach of Plea Agreement

Ackerman asserts that the prosecutor's conduct constituted a breach of the plea agreement. We disagree.

"A plea agreement is a contract between the State and the defendant." State v. MacDonald, 183 Wn.2d 1, 8, 346 P.3d 748 (2015). Accordingly, under ordinary contract principles binding the parties to the agreement, "[t]he State . . . has a contractual duty of good faith, requiring that it not undercut the terms of the agreement, either explicitly or implicitly, by conduct evidencing intent to circumvent the terms of the plea agreement." MacDonald, 183 Wn.2d at 8. Additionally, because defendants waive significant rights by pleading guilty to a crime, "constitutional due process 'requires a prosecutor to adhere to the terms of the agreement' by recommending the agreed-upon sentence." MacDonald, 183 Wn.2d at 8 (quoting State v. Sledge, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997)). "Whether a breach of a plea agreement occurred is an issue [we] review de novo." State v. Neisler, 191 Wn. App. 259, 265, 361 P.3d 278 (2015).

"We review a prosecutor's actions and comments objectively from the sentencing record as a whole to determine whether the plea agreement was

breached." State v. Carreno-Maldonado, 135 Wn. App. 77, 83, 143 P.3d 343 (2006). "Although the State need not enthusiastically make the sentencing recommendation, '[it] is obliged to act in good faith, participate in the sentencing proceedings, answer the court's questions candidly in accordance with [the duty of candor towards the tribunal][,] and . . . not hold back relevant information regarding the plea agreement." Carreno-Maldonado, 135 Wn. App. at 83 (most alterations in original) (quoting State v. Talley, 134 Wn.2d 176, 183, 949 P.2d 358 (1998)). "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." Carreno-Maldonado, 135 Wn. App. at 83.

Where, as here, the State agrees to make a midrange sentencing recommendation, "we recognize that it may be necessary to recount certain potentially aggravating facts in order to safeguard against the court imposing a lower sentence." Carreno-Maldonado, 135 Wn. App. at 84. That said, "a prosecutor must use great care in such circumstances, and the facts presented must not be of the type that make the crime more egregious than a typical crime of the same class." Carreno-Maldonado, 135 Wn. App. at 84-85.

Here, the prosecutor's conduct at sentencing did not amount to a breach of the plea agreement. Specifically, the trial court was not bound by the parties' midrange sentencing recommendation. Thus, the prosecutor's remarks regarding Walker's relative youth, the extreme control that Ackerman exercised in the relationship, Ackerman's concern that Walker would turn him in, and Ackerman's criminal past and attempts to impersonate Walker after his death are

fairly characterized as the recounting of facts to support the agreement to a midrange (as opposed to low-end) sentencing recommendation. Furthermore, these facts were consistent with allegations already before the court based on the probable cause affidavit, Walker's offender score calculation, and Walker's sentencing in the identity theft case. By bringing these themes to the court's attention at the sentencing hearing, the prosecutor did not engage in "outright advocacy" or advance aggravating circumstances that had no basis in the record. Cf. State v. Van Buren, 101 Wn. App. 206, 215, 2 P.3d 991 (2000) (State breaches plea agreement when it "crosses the line from objectively reporting facts that may have some bearing on the existence of aggravating factors to outright advocacy for those factors"); State v. Xaviar, 117 Wn. App. 196, 201, 69 P.3d 901 (2003) (concluding that breach occurred and observing that prosecutor referenced aggravating circumstances that went beyond those mentioned in presentence report). Finally, and although the prosecutor should not have elaborated as much as she did about Ackerman's threats against Walker's friends and the alleged circumstances of the shooting itself, the facts presented by the prosecutor were not of the type that made Ackerman's crime more egregious than other second degree murders. Rather, when viewed objectively in the context of the sentencing record as a whole, the obvious implication from the prosecutor's explanation that "I tell all of that to Your Honor because I know the court is going to be sentencing Mr. Garlock later" is that the State planned to recommend a lower sentence for Garlock despite Ackerman's claim that Garlock was the shooter. It was not inappropriate under these circumstances for the

prosecutor to explain why the State believed that Ackerman was the shooter and thus deserving of a higher sentence than Garlock. For these reasons, we conclude that the prosecutor's conduct did not amount to a breach of the plea agreement.

Ackerman disagrees, contending that "there is no need at a sentencing hearing for the trial court to 'distinguish' this defendant from a co-defendant who will later be sentenced." But he cites no authority to support his apparent contention that in a case involving codefendants for whom the State will recommend different sentences, a prosecutor is not permitted to justify the higher recommendation—or that she may do so only in the context of explaining the lower one.

Additionally, the cases on which Ackerman relies to argue that a breach occurred are distinguishable and do not require reversal here. In Xaviar, the State and the defendant agreed to a recommendation at the bottom of the standard range. 117 Wn. App. at 198. But at sentencing, the prosecutor emphasized the graveness of the crime, reiterated the charges that the State did not bring, noted that the State could have, but did not, ask for a 60-year exceptional sentence, highlighted aggravating factors that would support an exceptional sentence, and referred to the defendant as "'one of the most prolific child molesters that this office has ever seen.'" Xaviar, 117 Wn. App. at 198-201. We held that the prosecutor's conduct constituted a breach of the plea agreement. Xaviar, 117 Wn. App. at 198.

In United States v. Whitney, the government agreed both to recommend a low-end sentence and to not use any incriminating information divulged by the defendant. 673 F.3d 965, 968 (9th Cir. 2012). But at sentencing, the prosecutor stated that the defendant had "'supplied information to [the prosecutor] during his debriefing session that put himself in a supervisory role.'" Whitney, 673 F.3d at 969. She also asserted that the defendant "was a 'good thief,' and pointed to past offenses already included in the record . . . to contend that [he] had 're-victimized' his victims." Whitney, 673 F.3d at 971. The Ninth Circuit held that the prosecutor's remarks breached the plea agreement both by recounting the defendant's incriminating statements and by implicitly arguing for a higher sentence than the low-end sentence the government had agreed to recommend. Whitney, 673 F.3d at 970-71. The court observed that "when the government obligates itself to make a recommendation at the low end of the . . . range, it may not introduce information that serves no purpose but 'to influence the court to give a higher sentence.'" Whitney, 673 F.3d at 971 (quoting United States v. Johnson, 187 F.3d 1129, 1135 (9th Cir. 1999)).

In State v. Williams, the State agreed to recommend a sentence at the high end of the standard range. 103 Wn. App. 231, 233, 11 P.3d 878 (2000). But in a 16-page sentencing memorandum, the State included a section regarding exceptional sentences in which it addressed aggravating circumstances. Williams, 103 Wn. App. at 236. The State also argued in its sentencing memorandum that a sentence at the high end of the range "'is the MOST leniency that should be afforded to the defendant,'" an argument that the

prosecutor echoed at sentencing by advocating for "'*at least* a high-end recommendation.'" Williams, 103 Wn. App. at 237, 238. We concluded that by "set[ting] forth specific grounds for imposing an exceptional sentence," the prosecutor's conduct constituted a breach of the plea agreement. Williams, 103 Wn. App. at 239.

In both Van Buren and Jerde, the State agreed to recommend a standard range sentence, while the presentence investigation report (PSI) recommended an exceptional sentence. Van Buren, 101 Wn. App. at 209; Jerde, 93 Wn. App. 774, 776-77, 970 P.2d 781 (1999). At sentencing in each case, the prosecutor briefly noted the State's recommendation but proceeded to identify aggravating factors that the court could consider in support of an exceptional sentence, including factors that were not contained in the PSI. Van Buren, 101 Wn. App. at 215, 217; Jerde, 93 Wn. App. at 777-78, 782. In each case, we concluded that the prosecutor's conduct amounted to a breach of the plea agreement, making specific note of the prosecutor's reference to aggravating factors not mentioned in the PSI. Van Buren, 101 Wn. App. at 216 (observing that unnecessary highlighting of two aggravating factors proposed in the PSI did not, standing alone, cross the line into advocacy, but that unsolicited reference to an unmentioned factor "was more egregious"); Jerde, 93 Wn. App. 782 (observing that "both prosecutors advocated for an exceptional sentence by highlighting aggravating factors and even added an aggravating factor not found in the [PSI]").

Finally, in Carreno-Maldonado, the State agreed to make a low-end recommendation on one count of first degree rape, a midpoint recommendation of 240 months on five counts of second degree rape, and a high-end standard range recommendation on a count of second degree assault. Carreno-Maldonado, 135 Wn. App. at 79-80. At the sentencing hearing, the court set out the standard range sentence, acknowledged having reviewed the PSI and plea agreements, then asked the State if it had anything to add. Carreno-Maldonado, 135 Wn. App. at 80. The prosecutor then made a statement "'on behalf of the victims'" in which the prosecutor referred to the defendant's "'very extreme violent behavior'" and his preying on "'what would normally be considered a vulnerable segment of our community'" in carrying out "'crimes . . . so heinous and so violent [they] showed a complete disregard and disrespect for these women.'" Carreno-Maldonado, 135 Wn. App. at 80-81. Only when defense counsel objected and suggested that the State was failing to comply with the plea agreement did the prosecutor respond, "'I'm speaking here on behalf of the victims and on behalf of the [S]tate[.] And I'm not going beyond my recommendation in this case. It's an agreed recommendation. M[y] recommendation [for the second degree rape is] 240 months.'" Carreno-Maldonado, 135 Wn. App. at 81 (alterations in original).

Here, unlike in Xaviar and Whitney, where there was an agreed *low-end* recommendation, the parties agreed to a *midrange* recommendation. Thus, as discussed, it was not a breach for the prosecutor to discuss some potentially aggravating facts to support its midrange recommendation and "safeguard

against the court imposing a lower sentence." Carreno-Maldonado, 135 Wn. App. at 84. And unlike in Williams, the State did not repeatedly suggest that the recommended sentence was the minimum the court should impose. Furthermore, unlike in Van Buren and Jerde, there was no request for an exceptional sentence in a PSI of which the prosecutor took advantage by arguing specific aggravating factors to support an exceptional sentence. And finally, unlike in Carreno-Maldonado, where the prosecutor made a statement "on behalf of the victims" and did not even mention the State's recommendation until the defendant objected, the prosecutor here began with the State's recommendation and, as discussed, her remarks were appropriate in the context of justifying that midrange recommendation. Ackerman does not demonstrate that the prosecutor's remarks amounted to a breach of the plea agreement.

Scrivener's Errors

As a final matter, Ackerman argues that remand is required to correct two scrivener's errors in the judgment and sentence. First, Ackerman argues that the trial court erred by failing to specify, consistent with the plea agreement, that Ackerman's liability for restitution obligations is joint and several with Garlock. The State concedes this error, and we accept the State's concession.

Second, Ackerman argues that remand is required because the trial court erred by not specifying that Ackerman is entitled to return of his personal property. The State contends that remand is not necessary because the parties agreed only that certain personal items would be excluded from forfeiture, but the trial court did not order forfeiture. We agree with the State.

We affirm but remand to the trial court with directions to revise the judgment and sentence to specify that Ackerman's restitution obligations are joint and several with Garlock.

WE CONCUR:

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. 80640-8-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 / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Joseph Jackson
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Thurston County Prosecuting Attorney

☐ petitioner

☐ Attorney for other party

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Washington Appellate Project

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