NO. 69272-1-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

MATTHEW C. BRUCH,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Where the victim was visibly upset while testifying and several witnesses spoke of how difficult it was for her to talk about the defendant's sexual activities with her, did the prosecutor commit misconduct by commenting on the victim's difficulty in testifying?

2. Where the prosecutor referred to the evidence showing how traumatic the victim's life with the defendant had been, did the prosecutor commit misconduct by arguing her life was no fairytale?

3. During the defendant's examination of the witnesses, he emphasized that the victim had not disclosed his abuse when she initially had the chance, then disclosed molestation but did not disclose the rapes even though one of the rapes happened only days before she disclosed the molestation, and finally only disclosed the rape after moving to Arizona to live with her aunt. Did the prosecutor disparage the defense counsel by arguing that she would present a fairytale world where victims of sex crimes had a reference manual on how to report their father's abuse?

4. Where the witness the defense wished to call to testify about the victim's reputation for honesty in the Arlington High School community could name only his immediate friends and a few friends of his uncle's girlfriend – less than half of one per-cent

of the population of Arlington High School – did the defense prove that the witness could testify about the victim's reputation in a general and neutral community?

5. Where the court reduced the term of community custody so that the combination of confinement and community custody would not exceed the statutory maximum sentence, then added language that would convert earned early release to additional community custody as required by RCW 9.94A.729(5), did the court impose an illegal sentence?

II. STATEMENT OF THE CASE

Between January 26, 2007, and January 25, 2009, the defendant had sexual contact with his daughter J.B.. On at least one occasion, he touched the outside of her vagina under her underpants. On a different occasion, he grabbed her butt under her underpants. On a third occasion, he put her hand on his penis and moved it back and forth. CP 171, 7/10 RP 124, 125, 126.

On September 28, 2010, J.B. told the defendant's former girl friend, Julia Mjelde, about the sexual contact. J.B. was staying with Ms. Mjelde. The defendant had broken up with Ms. Mjelde and called her to let her know he was coming to pick up J.B. Ms.

Mjelde told J.B. to get ready to go with her father. J.B. then told Ms. Mjelde she needed to talk to her alone. 7/11 RP 350-51.

J.B.'s demeanor was described by Ms. Mjelde:

> She was very agitated, very upset. I kept waiting for her to say something, and she wouldn't say anything. So I finally said, Did your dad do something to you? And she just shook her head. She didn't say anything. She shook her head yes. And I said, Did your dad do something to you sexually? And she shook her head yes. Then she started dry-heaving.

7/11 RP 351. Ms. Mjelde called the police and reported that J.B. had told her the defendant "had been molesting her." 7/11 353.

Officer Lambier, Lake Stevens Police Department, was assigned to investigate the case. He contacted J.B. and asked if she would be willing to be interviewed by a child interview specialist. She agreed. J.B. was staying in a safe house, and the staff there brought her to Dawson Place[1] for the interview. 7/12 RP 429.

Once at Dawson Place, J.B. was introduced to the child interview specialist. The two of them were in an interview room. Officer Lambier was in an adjacent room where he watched the interview on a monitor. J.B. appeared fine to the officer when she

[1] Dawson Place is a facility in Snohomish County where there are "specifically trained child interview specialists to do forensic interviews of adolescents." 7/12 RP 427.

arrived at Dawson Place. When the interview began to address the molestation, J.B. became "visibly upset and emotional." She could not speak about what happened, so the interviewer asked her to write it down. J.B. wrote that her father had committed a "sexual assault" against her. 7/12 RP 431-34.

Between January 26, 2009 and January 25, 2011, the defendant raped J.B. twice. The first occasion took place in Julia Mjelde's house in Stanwood. J.B. and the defendant were lying on Ms. Mjelde's bed watching TV. The defendant put his hand over J.B.'s mouth, flipped her over, pulled down her pants, and had intercourse with her. 7/10 RP 133-34.

The second rape occurred at Julia De La Cruz's house. The defendant and his children were temporarily staying with Julia De La Cruz. J.B. and the defendant had an argument. The defendant locked J.B. in a small room and left. At some point, Ms. De La Cruz brought J.B. a glass of water and a tissue. She hugged J.B. and told her "everything was going to be all right." 7/10 RP 136, 147-48.

The defendant came back into the room sometime later and told J.B. he was sorry. He climbed on the bed with J.B.. The

defendant pulled down J.B.'s pants, got on top of her and had intercourse with her. 7/10 RP 149-50.

On August 19, 2011, J.B. went to live with her aunt and her aunt's partner in Bullhead City, AZ. 7/11 RP 256, 262. In October, 2011, J.B.'s aunt talked to her about her attitude. J.B. indicated there were two things she wanted to talk to her aunt about. J.B. first talked about "cuddling" with a boy on a camping trip a couple of weeks earlier. 7/11 RP 270. Her aunt then asked her "what else, and if it was about her dad." J.B. "just shook her head yes at that time, and she said yes." 7/11 RP 272.

J.B.'s aunt said that J.B. "started tearing up" when she said her dad had done something to her. She then told her aunt that the defendant had gone "all the way" with her a couple of times. When J.B. told that to her aunt, "She started sobbing and just kind of shut down a bit." 7/11 RP 276.

J.B.'s aunt called a social worker to talk about what J.B. had told her. J.B. was interviewed by Detective Garcia the next day. 7/11 RP 277.

Detective Garcia was a 20 year veteran of the Bullhead Police Department who had been assigned to the detective division doing "primarily child crimes and sex crimes" for six years. She had

been to specialized training to conduct child forensic interviews. 7/12 RP 480, 481.

Initially, J.B. was smiling. During the interview, "[J.B.] was really broken up. At one point we had to stop the interview. She needed to stop and, you know, compose herself[.]" The detective characterized J.B.'s "voice as starting to quiver, and then she started to cry." The detective thought this emotional change was "the usual thing to see." 2/12 RP 482-83.

The State charged the defendant with two counts of second degree child molestation (DV) and two counts of third degree rape of a child (DV). CP 167-68.

J.B. testified to the sexual incidents described above. During her testimony, the court had to take a break. 7/10 RP 114. The defendant's counsel also said in closing J.B. was crying when she was on the witness stand. 7/16 RP 681 (arguing that the child cried because she had been coached, or was not telling the truth).

After the State rested, the court discussed scheduling with the parties to determine if the case would get to the jury the following day. The defendant said that he did not see how the case could get to the jury the next day, since the court would only be in

session in the morning. The defendant said, "I expect my closing arguments to be lengthy[.]" 7/12 RP 552.

The defendant called Deputy Garcia out of order. He then called a young friend of J.B.'s to provide details of a conversation she had with J.B. when J.B. disclosed a history of molestation by her father that started when she was six. 7/13 RP 569-72.

The defendant also called a witness to testify about J.B.'s opportunities to disclose any sexual contact between the time she said the first incident happened and when she actually reported it. 7/13 RP 581-93.

The defendant then informed the court he wished to call Jordan Kerr "to testify about [J.B.'s] reputation in the community." 7/13 RP 563-64. The defendant's counsel said the community Mr. Kerr was part of was the Arlington High School community. 7/13 RP 602. Kerr had attended Arlington High School. Id. at 604.

The defendant called Mr. Kerr so the State could voir dire him without the jury present. Mr. Kerr said he was friends with one of J.B.'s ex-boyfriends, and his uncle's girlfriend and her friends who were friends with J.B. Mr. Kerr said he "hung out with my uncle a lot." These people, except Mr. Kerr's uncle, all went to Arlington High School. Mr. Kerr said he thought J.B.'s reputation at

Arlington High School was that she was dishonest. 7/13 RP 604-05. Counsel made this her offer of proof. Id.

On voir dire cross-examination, Mr. Kerr could only name his uncle's girlfriend and one of her girl friends. He said they "only hung out with [J.B.] once or twice . . . because they really didn't like her." 7/13 RP 608.

Mr. Kerr also named J.B.'s former boyfriend and four of his friends. They thought J.B. was dishonest because of a situation where they thought J.B. told someone she got pregnant when she wasn't pregnant. 7/13 RP 607. The witness also testified that J.B. accused him of molesting her when he did not do that. He told at least two of the persons he named earlier about the false accusation. 7/13 RP 609.

The witness also said his uncle told him other people told the uncle J.B. told "little white lies," but said he really didn't pay attention. 7/13 RP 610-11.

The court found that the community the witness described "is not a neutral community. "There is nothing neutral about that community." 7/13 RP 618. The court then ruled:

> I'm not convinced that the community is general. I'm not convinced that the community is neutral. And I'm not even convinced, ultimately, if we excise out the

> things that are neither general nor neutral, that the reputation in the community is for veracity or for something else, a propensity to tell white lies, which I think may well be different. In order to explore all that, we would have to have, indeed, another trial on something that has nothing to do with this case, and we are not going to do that.
>
> So I will preclude the testimony.

7/13 RP 619.

After the court ruled, the defense rested. 7/13/ RP 620-21. The State presented no rebuttal. Id.

The following court day, the court instructed the jury. 7/16 RP 650. The State started its argument by reminding the jury that in its opening statement, the State cautioned that there was "no instruction booklet, no how-to manual, no playbook" for a girl to disclose that she had been molested by her father since she was six. Counsel then said "if we lived in a fairytale world, that maybe victims of such sexual abuse would have some sort of resource like that for them to be able to tell about what has happened to them." 7/16 RP 650-51.

The State recounted the ways that J.B.'s life had not been a "fairytale." 7/16 RP 651-52. The State then said:

> You will hear, in defense closing, the portrayal of what defense would like you to believe is a fairytale version of how these victims should act, how [J.B.] should have acted. She should have told someone right

> away, as soon as the first thing ever happened to her: when she did tell, she should have told everything at once, every detail she could remember since she was six years old, tell it all at once; and, oh, you'd better tell a police officer. Don't tell anyone who might have a reason not to like Matt Bruch.

7/16 RP 652-53. There was no objection.

The State then said:

> 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.

7/16 RP 653.

The State reminded the jury that witnesses had described how difficult it was for J.B. to disclose the molestation and rape. 7/16 RP 660. The State then said "you saw on the stand from [J.B.] exactly how difficult it is to talk about even two years down the road." 7/16 RP 661.

The defendant's argument was "And you just can't [believe J.B.]. She's obviously not telling the truth." 7/16 RP 667. The defendant then said:

> And I'll tell you what, that's where most of the crying is coming from, because when you know things are swirling around you and you're being exposed, it's horrifying. It's terrifying. And that's where the crying is coming from, at least on the stand.

7/16 RP 681.

In rebuttal, the State argued:

> [J.B.] said part of her still loves her father. She remembers when they used to go fishing together and the good times they had together. [J.B.] isn't making this up. I would submit to you that she would give anything to have a dad who just took her fishing.

7/16 RP 697. There was no objection.

The State later argued:

> 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[2] by this process. And I'm 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 it took on her. That's a consequence, is it not?

7/16 RP 699.

The jury found the defendant guilty of all four counts. It also found that all the defendant and victim were members of the same household. 7/17 RP 705.

The court sentenced the defendant to a standard range of confinement. 9/4 RP 725, 1 CP 6. The court then added "I am

[2] The court overruled the defendant's objection at this point.

sentencing you to at least four months of Community Custody, plus whatever earned early release time you will have earned by the time of your release." 9/4 RP 725, 1 CP 7. There was no objection.

III. ARGUMENT

The prosecutor argued that testifying was hard for the victim. He did not call attention to the defendant's exercise of his right to trial and confront his accusers. The prosecutor also argued that the victim did not live in a fairytale world. These arguments were not improper.

The prosecutor mentioned that the defense would present a fairytale of how the victim should have reported the sex crimes the defendant committed against her. There was no objection. This argument did not disparage counsel.

The defendant wished to present evidence of the victim's reputation for honesty in the community of Arlington High School. The witness the defendant wished to call could only identify two very limited circles of friends within that community. Neither circle was general or neutral. In any event, the reputation was too remote in time from the trial to be admissible.

The sentence imposed by the court included a community custody component that effectuated the requirement that earned early release for sex offenders be converted to community custody. The sentence was authorized by the Sentencing Reform Act.

A. STANDARD OF REVIEW.

> The defendant bears the burden of showing that the prosecutor's argument was both improper and prejudicial. Failure to object to a prosecutor's improper remark constitutes a waiver, unless the remark was so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been cured by an instruction to the jury.

State v. Gregory, 158 Wn.2d 759, 858-59, 147 P.3d 1201 (2006).

> The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.

State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

"Whether a party has established proper foundation for reputation testimony is within the trial court's discretion." State v. Gregory, 158 Wn.2d 759, 804-05, 147 P.3d 1201 (2006).

"[T]his court can still affirm the lower court's judgment on any ground within the pleadings and proof." State v. Michielli, 132 Wn.2d 229, 242, 937 P.2d 587 (1997).

"Interpretation of the SRA is a question of law that we review de novo." State v. Jones, 172 Wn.2d 236, 242, 257 P.3d 616 (2011).

B. THERE WAS NO PROSECUTORIAL MISCONDUCT.

The prosecutor did not exceed the wide latitude he was permitted in his argument to the jury. He did not invite the jury to convict the defendant for exercising his rights to a trial and to confront his accuser. The prosecutor did not improperly appeal to the sympathy of the jury. The prosecutor did not disparage the defendant's counsel.

1. The Prosecutor's Argument Did Not Directly Comment On The Defendant's Exercise Of His Right To A Trial Or To Confront His Accuser.

A prosecutor has wide latitude in arguing the facts and law to the jury. However, the prosecutor may not argue in a way that "naturally and necessarily" draws an adverse inference from the defendant's exercise of a constitutional right. See State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987). Here, the State did not argue that the jury should draw adverse inferences from the defendant's exercise of his right to trial and to confront his accuser.

In the parts of the argument the defendant now complains were improper, the prosecutor argued that J.B's talking about her molestations and rapes was "horrible." 7/16 RP 653. In context, however, the prosecutor was arguing that J.B.'s having to talk to *anyone* about her sexual activity with her father was an ordeal. This argument was part of an effort to demonstrate why the jury should find the victim credible. The jury would not naturally or necessarily take the prosecutor's argument as a comment, not on witness credibility, but on the defendant's exercise of his right to a trial or to confront his accuser.

The defendant argues that the prosecutor's arguments "directly faulted Mr. Bruch for exercising his constitutional right to a trial instead of pleading guilty." BOA 14. He relies on State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994), and Burns v. Gamon, 260 F.3d 892 (8th Cir. 2001), to support his argument. The comments here pale in comparison to those made in Jones and Burns.

In Jones, the prosecutor stood between the defendant and the victim while the victim was testifying. When the defendant testified, the prosecutor asked him if he wasn't "frustrated because I was blocking your view from her such that you could not stare at

her as she was testifying[.]" The defendant answered, "Yes, I did." Jones, 71 Wn. App. at 805.

During his closing, the prosecutor argued that the defendant wanted to "have direct eye contact with [the victim]. Why?" The prosecutor then argued that as a result of that eye contact, the victim broke down, cried, and told the jury she was afraid of the defendant. Jones, 71 Wn. App. at 806.

This Court found that the prosecutor's questioning of the defendant and argument "did constitute an impermissible use of constitutionally protected behavior." This Court nonetheless found the error was harmless. Jones, 71 Wn. App. at 811-12.

The prosecutor here did not question the defendant or directly tie the defendant's exercise of his right to confront his accuser to the victim's difficulty in testifying, like the prosecutor did in Jones.

In Burns, the prosecutor argued:

> And it's fair that this defendant have a trial, . . . And now it's also fair that he has Caroline Arnold come in here and he had the ability to sit there and, face-to-face, confront all of the witnesses against him, to question them through his attorney, to cross-examination, one of the finest machines invented by man to get to the truth. That was fair, and it was fair that Caroline Arnold had to go through those humiliating – [objection, overruled] – that she had to

> go through those humiliating sexual assaults and those violent acts perpetrated against her in this trial so that the defendant, through his counsel, could cross-examine her.
>
> Now it's fair that you, the Jury, who we chose on Monday, go back to your jury room and deliberate upon the punishment that this defendant deserves for the violent acts that he committed at the Red Bridge Shopping Center on December 1st.

State v. Burns, 759 S.W.2d 288, 294 (Mo. Ct. App. 1988).

The Missouri Court of Appeals found that defense counsel's objection was not sufficiently specific to have preserved anything for appellate review. Id. On habeas review, the 8th Circuit Court of Appeals found that counsel's having failed to lodge a sufficient constitutional objection to this argument constituted ineffective assistance. Burns v. Gammon, 260 F.3d at 896 (dismissing writ in part and granting writ in part).

Here, however, the prosecutor here did not ask what the prosecutor in Burns had asked, namely, for

> the jury, while considering guilt and sentencing, to consider the fact that [the defendant], by exercising his constitutional right to a jury trial and to confront witnesses, forced the victim to attend trial, take the stand and relive the attack.

Id. Burns involved a prosecutor's invitation to the jury that it punish the defendant for invoking his constitutional rights. The argument of the prosecutor here, by contrast, did not ask the jury to convict

the defendant in retribution for exercising his constitutional rights to a trial and to confront his accuser.

2. The Prosecutor Did Not Improperly Appeal To The Jury's Sympathy For The Victim.

The prosecutor argued that the victim's life "was no fairytale." He then went on to recount the horrors the victim testified to about life with the defendant. 7/16 RP 651-52. The defendant did not object. This was a comment that drew a reasonable inference from the evidence that was before the jury. It was not an impermissible appeal to the jury's sympathy. See State v. Berube, 171 Wn. App. 103, 119, 286 P.3d 402 (2012) (where the prosecutor does not use inflammatory language or introduce hearsay or new evidence, but argues reasonable inferences from the evidence, there is no appeal to the jury's sympathy or passion).

The defendant cites State v. Claflin, 38 Wn. App. 847, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985), to support his argument that the prosecutor improperly appealed to the jury's sympathy. BOA 17. The case does not support the argument.

The prosecutor in Claflin read a poem to the jury about the impact of rape on the victim. The poem contained "vivid and highly inflammatory imagery in describing rape's emotional impact on its

victims[.]" Claflin, 38 Wn. App. at 850. The Court of Appeals found the only purpose of the poem was to appeal to the passions of the jury. Further, the poem "contained many prejudicial allusions to matters outside the actual evidence against Claflin." Claflin, 38 Wn. App. at 851.

There was nothing remotely like the poem read in Claflin in the prosecutor's argument here. There was no appeal to the passions or sympathy of the jury.

3. The Prosecutor Did Not Disparage The Defendant's Counsel.

The prosecutor argued that the defendant's counsel would present a "fairytale version" of how the victim should have reported the crimes. 7/16 RP 652-53. The defense had made a point of drawing out instances when the victim could have disclosed the defendant's crimes against her but did not, including her failure to disclose a rape that had happened days earlier when she was being interviewed at Dawson Place. The prosecutor's comment was a reasonable inference from the evidence that the defendant would argue the failure to disclose completely should discredit the testimony of the victim. While the comment may have disparaged counsel's *argument,* that is not misconduct. See State v. Brown, 132 Wn.2d 529, 566, 940 P.2d 546 (1997) (not misconduct to label

counsel's argument as ludicrous when it was wildly improbable), State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (not misconduct to argue that evidence did not support the defense argument).

Likewise, the prosecutor's comment that counsel would talk for a "long while" was prompted by her statement to the court that she anticipated that her closing would be "lengthy." 7/12 RP 552.

The defendant relies on State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011), State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), cert. denied, 129 S.Ct. 2007 (2009), State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984), and State v. Negrete, 72 Wn. App. 62, 863 P.2d 137 (1993), review denied, 123 Wn.2d 1030 (1994), to argue that the prosecutor disparaged his counsel. BOA 17-18. Reviewing the defendant's notations of the comments made by the prosecutors in those cases show that the prosecutor here did not disparage counsel.

The comments in those cases were as follows: Thorgerson, 172 Wn.2d at 451-52 (misconduct to refer to defense counsel's argument as "bogus" and a "sleight of hand"); Warren, 165 Wn.2d at 29-30 ("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"); Reed, 101 Wn.2d at 146-67 (disparaging defendant's counsel and witnesses as outsiders with fancy cars); and Negrete, 72 Wn. App. at 66-67 (misconduct to argue defense counsel was paid to twist words).

The prosecutor here said nothing remotely like the comments condemned in the above cases. There was no disparagement of counsel.

C. THE COURT DID NOT ABUSE ITS DISCRETION IN NOT ALLOWING THE DEFENDANT TO INTRODUCE EVIDENCE OF THE VICTIM'S REPUTATION FOR HONESTY.

> A criminal defendant's constitutional right to present a defense is, in essence, the right to a fair opportunity to defend against the State's accusations and includes the right to offer testimony and examine witnesses. But that right is not absolute and does not guarantee the admission of irrelevant or otherwise inadmissible evidence.

State v. Rafay, 168 Wn. App. 734, 799-800, 285 P.3d 83 (2012), review denied, 176 Wn.2d 1023 (2013) (citations omitted).

Before reputation evidence may be introduced, the proponent must show:

> [T]he first element is the foundation for the testimony—the knowledge of the reputation of the witness attacked. Second, the impeaching testimony must be limited to the witness's reputation for truth and veracity and may not relate to the witness's general, overall reputation. Third, the questions must be confined to the reputation of the witness in his community ... Fourth, the reputation at issue must not

> be remote in time from the time of the trial. Finally, the belief of the witness must be based upon the reputation to which he has testified and not upon his individual opinion.

State v. Lord, 117 Wn.2d 829, 873, 822 P.2d 177, 203 (1991), cert. denied 506 U.S. 856 (1992), quoting K. Tegland, 5A Wash. Practice: Evidence § 231 at 202–04 (3d ed. 1989); see generally ER 608a) and K. Tegland, 5A Wash. Practice: Evidence §§ 608.1 – 608.21 at 418-467 (5th ed. 2007).

The defendant wanted to present testimony that the victim's reputation for honesty in Arlington High School was bad. 7/13 RP 563-64. Before the witness testified, the State was allowed to voir dire him outside the presence of the jury. The court found that the witness described two communities: his circle of friends and his cousin's girlfriend's circle of friends. The court found that neither community was general or neutral. The court's ruling was correct.

"To establish a valid community, the party seeking to admit the reputation evidence must show that the community is both neutral and general." State v. Land, 121 Wn.2d 494, 500, 851 P.2d 678 (1993); see K. Tegland, 5A Wash. Practice: Evidence § 608.4 at 428 (5th ed. 2007) (same). The community of the witness's circle of friends was not neutral because part of the basis for the victim's reputation was the witness telling at least two of those friends that

the victim falsely accused him of sexually assaulting her. 7/13 608-09. The circle of friends of the witness's uncle's girlfriend was not general in that it only consisted of a few girls, and the witness only knew the names of two of them. 7/13 RP 608.

Even if the court's ruling that the communities were neither general nor neutral was wrong, the evidence still was not admissible. The fourth element that must be established according to Professor Tegland, is that "the reputation at issue must not be remote in time from the time of the trial." Lord, 117 Wn.2d at 873; see K. Tegland, 5A Wash. Practice: Evidence § 608.4 at 429 (5th ed. 2007). Reputation that is from several months before the trial is too remote in time. Gregory 158 Wn.2d at 805.

Here, the reputation was from when the victim attended Arlington High School. That was during the school year 2010-2011. The victim moved to Arizona in August, 2011. 7/11 RP 256. The trial was in July, 2012. The passage of at least 11 months between when the reputation was formed and the trial made the reputation too remote in time to be admissible. Gregory, 158 Wn.2d at 805.

This decision of the trial court to not allow the stale reputation evidence was not an abuse of discretion.

D. THE SENTENCE IMPOSED BY THE COURT WAS AUTHORIZED BY THE SENTENCING REFORM ACT (SRA).

The court sentenced the defendant to a definite term of confinement of 116 months. The court reduced the term of community custody to "at least 4 months, plus all accrued earned early release time at the time of release." CP 7. The total did not exceed the statutory maximum sentence for second degree child molestation of 120 months. The sentence effectuated the provisions of the Sentencing Reform Act.

Second degree child molestation is a violation of RCW 9A.44.086.[3] Violations of RCW 9A.44.086 are sex offenses. RCW 9.94A.030(46).[4] Felony sex offenders are sentenced to community custody pursuant to RCW 9.94A.701(a).[5] The Department of Corrections (DOC) supervises persons convicted of sex offenses. RCW 9.94A.501(4).[6] Any earned early release time is converted to community custody. RCW 9.94A.729(5)(a).[7] The sentence imposed ensured these provisions of the SRA were complied with.

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[3] A copy of RCW 9A.44.086 is at Appendix A.

[4] "'Sex offense' means: (a)(i) A felony that is a violation of chapter 9A.44 RCW, other than RCW 9A.44.132[.]" RCW 9.94A.030(46).

[5] A copy of RCW 9.94A.701(a) is at Appendix B.

[6] A copy of RCW 9.94A.501(4) is at Appendix C.

[7] A person who is eligible for earned early release as provided in this section and who will be supervised by the department pursuant to RCW 9.94A.501 or 9.94A.5011, shall be transferred to community custody in lieu of earned release time[.] RCW 9.94A.729(5)(a).

This is not an illegal sentence. See State v. Winkle, 159 Wn. App. 323, 331, 245 P.3d 249 (2011), review denied, 173 Wn.2d 1007 (2012) ("We hold that the court's decision to impose a term of community custody for the period of earned early release not to exceed the statutory maximum sentence complied with the SRA and is consistent with the clear intent that a sex offender must be transferred to community custody in lieu of earned early release.").

The defendant relies on State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012), State v. Land, 172 Wn. App. 593, 295 P.3d 593 (2013), and State v. Winborne, 167 Wn. App. 320, 273 P.3d 454, review denied, 174 Wn.2d 1019 (2012), to argue that the court imposed an indeterminate sentence. Brief of Appellant 30-32. Those cases do not control resolution of this issue.

In those cases, the court did not reduce the term of community custody so that the combination of confinement and community custody did not exceed the statutory maximum. Instead, in those cases the sentencing courts added a notation that the combination not exceed the maximum. Boyd, 174 Wn.2d at 471 ("the total term of confinement and community custody could not exceed the statutory maximum"), Land, 172 Wn. App. at 603 ("The trial court sentenced Land to community custody for the

longer of the period of early release, or 36 months 'as capped by the statutory maximum'"), Winborne, 167 Wn. App. at 322-23 (the total terms of confinement and community custody must not exceed the statutory maximum sentence of 60 months").

Here, the court did reduce the term of community custody so that the combination did not exceed the statutory maximum. The notation adding any earned early release time did not make the sentence indeterminate. The sentence was authorized by the SRA.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on June ~~10~~ 12th, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: _____
CHARLES F. BLACKMAN, #19354
Deputy Prosecuting Attorney
Attorney for Respondent

APPENDIX A

(1) A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the second degree is a class B felony.

RCW 9A.44.086

APPENDIX B

If an offender is sentenced to the custody of the department for one of the following crimes, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years:

(a) A sex offense not sentenced under RCW 9.94A.507

RCW 9.94A.701(a).

APPENDIX C

> Notwithstanding any other provision of this section, the department shall supervise an offender sentenced to community custody regardless of risk classification if the offender:
>
> (a) Has a current conviction for a sex offense or a serious violent offense and was sentenced to a term of community custody pursuant to RCW 9.94A.701, 9.94A.702, or 9.94A.507;

RCW 9.94A.501(4).

Snohomish County
Prosecuting Attorney
Mark K. Roe

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Everett, WA 98201-4060
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June 12, 2013

Richard D. Johnson, Court Administrator/Clerk
The Court of Appeals - Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

Re: STATE v. MATTHEW C. BRUCH
COURT OF APPEALS NO. 69272-1-I

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

CHARLES F. BLACKMAN, #19354
Deputy Prosecuting Attorney

cc: Washington Appellate Project
Appellant's attorney

a properly stamped envelope
for the defendant that
of this document.
of perjury under the laws of the
is true.
's Office

12th June

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

THE STATE OF WASHINGTON, Respondent, v. MATTHEW C. BRUCH, Appellant.	No. 69272-1-I AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 13th day of June, 2013, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 18th day of June, 2013.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit