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Court of Appeals
Division II
State of Washington
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COA No. 51880-5-II

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN ACKERMAN,

Appellant.

**ON APPEAL FROM THE SUPERIOR COURT
OF THURSTON COUNTY**

The Honorable Christopher Lanese

APPELLANT'S OPENING BRIEF

**OLIVER R. DAVIS
Attorney for Appellant**

**WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711**

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A. ASSIGNMENTS OF ERROR

1. At Jonathan Ackerman's sentencing following his entry of a guilty plea to second degree murder, the State breached the plea agreement requiring it to recommend a 240-month, mid-range sentence.

2. Scrivener's errors in the judgment require remand to amend the judgment in accord with the plea agreement of the parties.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The defendant negotiated a plea down from premeditated murder to second degree murder, and the prosecutor agreed to recommend a sentence of 240 months, under the 295-month top of the standard range. However, at sentencing, the prosecutor breached this plea agreement promise by making extensive, unsolicited remarks about the defendant's criminal past, the vulnerability of the victim, and other facts that paralleled aggravating factors and/or reflected assertions as to the first degree offense that the State dropped as part of the plea. 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?

2. Contrary to the plea agreement, the trial court neglected to note in the judgment that the defendant's liability to pay restitution

would be joint and several with the original co-defendant, Mr. Garlock.

Is remand required to correct the scrivener's error?

3. The court neglected to note in the judgment that the defendant was entitled to return of personal property, as agreed to in the plea of guilty. Is remand required to correct the scrivener's error?

C. STATEMENT OF THE CASE

1. Charge, amendment, and plea of guilty. Jonathan Ackerman and Vincent Garlock were 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 Garlock's pattern of committing property crimes, including theft of mail. 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 six or seven times. CP 2-3. Walker's body was discovered near the Margaret McKenny campground on October 20. Ackerman told police that Garlock had

shot Walker, and other facts in the affidavit suggested the shooting occurred during a controversy about the crimes. CP 2-3.

The State abandoned the effort to prove premeditated murder, and filed an amended information charging second degree murder. CP 22. Following negotiation, Mr. Ackerman completed a guilty plea form entering a plea to the reduced charge 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.

A material aspect of the plea was the section establishing an agreement by the prosecutor to recommend 240 months incarceration to the sentencing court, to run concurrent with property crime convictions in No. 16-1-01403-4, a case charged during the same time period. CP 11-12 (para. 6.j); 1/9/18RP at 13-14. The plea deal also provided that the State would agree that restitution would be ordered to be joint and several with the co-defendant Mr. Garlock, who was to be sentenced after Mr. Ackerman. CP 11; 1/9/18RP at 14. Mr. Ackerman also agreed to forfeit all property collected as evidence, with the specifically delineated exception of property belonging to him that was found in a van involved in the incident. CP 11-12; 1/9/18RP at 14.

2. Sentencing – breach of plea agreement. On April 13, 2018, the trial court held a sentencing hearing on both the murder and property offense cases. 4/13/18RP at 4. On the identity theft case, the prosecutor asked the court to follow the recommendation as laid out in the defendant’s statement of defendant on plea of guilty, which was 43 months on the most serious count. 4/13/18RP at 6-7.

When the court indicated that it was ready to hear from the prosecutor in the murder case “regarding the State’s proposed sentence,” 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, and made other factual arguments which plainly paralleled aggravating factors under the SRA - such as victim vulnerability, and a seeming lack of remorse and efforts to conceal the offense. The State made repeated characterizations of Mr. Ackerman’s criminal past - which the court also already had before it in detail - and emphasized that the defendant had an abusive domestic

relationship with the victim, even though the “DV” designation, and related conditions of sentence, were expressly excluded from the agreed sentence. 4/13/18RP at 24-31. The trial court, after also hearing from the victim’s mother who stated that the defendant’s apparent sentence would be an injustice, imposed a sentence of 295 months incarceration. 4/13/18RP at 33, 41-43; CP 37.

As to restitution, the prosecutor sought compensation for burial expenses, but the court did not note the plea agreement regarding joint and several liability with the original co-defendant for any restitution ordered. 4/13/18RP at 25; see CP 11. The court also did not note the plea agreement’s provision regarding return of the defendant’s personal property that had been collected as evidence. See CP 11-12.

D. ARGUMENT

1. THE PROSECUTOR BREACHED THE PLEA AGREEMENT TO RECOMMEND A 240-MONTH SENTENCE, REQUIRING REMAND FOR ACKERMAN’S CHOICE OF WITHDRAWAL OR RE-SENTENCING BEFORE A DIFFERENT COURT.

(a). A prosecutor’s breach of the plea agreement presents a manifest constitutional error that may be raised on appeal under RAP 2.5(a)(3).

Breach of the plea agreement may be raised for the first time on appeal under RAP 2.5(a)(3), which allows appeal of a manifest error affecting a constitutional right. Here, Mr. Ackerman alleges his Due

Process rights were violated. 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).

Where a prosecutor breaches the contractual terms of a plea agreement, the error "presents an issue of constitutional magnitude" which may be raised for the first time on appeal. State v. Shineman, 94 Wn. App. 57, 61, 971 P.2d 94 (1999) (quoting In re James, 96 Wn.2d 847, 849, 640 P.2d 18 (1982)); State v. Xaviar, 117 Wn. App. 196, 199, 69 P.3d 901 (2003) (citing State v. Van Buren, 101 Wn. App. 206, 211-12, 2 P.3d 991 (2000)); RAP 2.5(a)(3).

The requirement that the error be "manifest" is met. Van Buren, 101 Wn. App. at 211. A higher sentence, which characterizes any appeal based on a State's breach for failure to recommend the agreed-upon sentence, meets the manifest error standard. Id., State v. Sanchez, 146 Wn.2d 339, 346, 46 P.3d 774 (2002); see also United States v. Whitney, 673 F.3d 965, 972 (9th Cir. 2012) (State's breach of plea satisfied plain error standards for review).

(b). The standard of review is objective and looks to the entire record, and no harmless error standard will apply.

The appellate court applies an objective standard to decide whether the State has breached a plea agreement. State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781, review denied, 138 Wn.2d 1002 (1999); Van Buren, 101 Wn. App. at 213. The review is not based upon the State’s subjective intentions. Van Buren, 101 Wn. App. at 213. Rather, the test “is whether the prosecutor contradicts, by word or conduct” the State’s promised recommendation for a particular sentence. Van Buren, at 213, 217 (breach occurred where State recommended agreed sentence but discussed facts amounting to aggravating factors).

The appellate court reviews the entire sentencing record to make its determination whether there was breach. Van Buren, at 213 (citing Jerde, 93 Wn. App. at 782). Thus, a prosecutor’s perfunctory statement describing the case as involving an agreed recommendation does not insulate the State from the charge that extensive comments breached the plea. For example, in 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; see also United States v. Whitney, 673 F.3d at 972 (fact that “the prosecutor uttered the requisite words” did not preclude finding of breach in prosecutor’s extensive remarks that violated promise to recommend low end sentence); Jerde, 93 Wn. App. at 777-79 (prosecutors breached agreement even though they reiterated the agreed sentencing recommendation).

Finally, there is no claim of harmless error available to the State in breach of plea cases; thus any argument that this court might have imposed the 295-month sentence anyway would not avoid the required reversal. United States v. Mondragon, 228 F.3d 981 (9th Cir. 2000) (“The harmless error rule does not apply when the government breaches a plea agreement. . . . The integrity of our judicial system requires that the government strictly comply with its obligations under

a plea agreement.”) (citing United States v. Johnson, 187 F.3d 1129, 1135 (9th Cir.1999)).

(c). The State breached the plea agreement.

(i). The State must perform its core promise in the plea agreement to recommend the agreed-upon sentence.

A plea agreement is a contract between the State and the accused which involves the waiver of several of the accused’s important constitutional rights. State v. Sledge, 133 Wn.2d 828, 838-39 n. 6, 947 P.2d 1199 (1997); U.S. Const. amend. XIV; In re James, 96 Wn.2d at 849. Once a plea is accepted, Due Process requires the prosecutor to act in good faith and recommend the disposition promised under the terms of the agreement. Sledge, 133 Wn.2d at 839-40 (citing Santobello v. New York, *supra*); Shineman, 94 Wn. App. at 60.

Among the core promises made in a plea contract, the prosecutor is bound to fulfill the State’s duty under the plea by making the promised sentencing recommendation. Sledge, 133 Wn.2d at 840. Where this does not occur, the fact that important trial rights were waived by the guilty plea additionally renders a State’s breach of the plea agreement a violation the Due Process clause. Sledge, 133 Wn.2d at 839-40. A prosecutor’s breach implicates “the fairness of the entire criminal justice system” because it undermines the basis for the

defendant's waiver of his constitutional rights. Shineman, 94 Wn. App. at 60-61 (quoting State v. Tourtellotte, 88 Wn.2d 579, 584, 564 P.2d 799 (1977)).

(ii). The State breached its plea agreement promise to recommend a 240-month, mid-range sentence.

Although the State does not have to make the agreed-upon sentencing recommendation with enthusiasm, “the State has a concomitant duty not to undercut the terms of the agreement explicitly or by conduct evidencing an intent to circumvent the terms of the plea agreement.” Sledge, 133 Wn.2d at 840.

Here, the State breached the plea agreement as to the sentencing recommendation in multiple ways, each of which is an independent basis to find breach, and to therefore impose the mandated remedy.

The prosecutor breached the State's promise in the second degree murder plea agreement to recommend a 240-month sentence, by making extensive unsolicited remarks at sentencing about motive and premeditation, arguing the particular vulnerability of the victim, opining about lack of remorse, detailing the defendant's criminal past, and in several other ways detailed herein, implicitly arguing for a harsher sentence.

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, where Ackerman met the co-defendant and formed a relationship of cooperative offending across the country, from Pennsylvania to Washington. 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”).

But the defendant’s criminal history was before the court, both in the form of his offender score, and his property offense convictions in the similarly dated companion case. CP 19; 4/13/18RP at 6-10. The sentence was promised as an agreed recommendation; highlighting the defendant’s alleged criminal past could serve no purpose except to encourage a harsher sentence. See United States v. Whitney, 673 F.3d at 971 (government breached plea agreement to recommend low end of applicable guideline range by introducing unsolicited information at sentencing that served no purpose but to influence the court to give a higher sentence, including describing how the defendant was a “good

thief” and highlighting the defendant’s criminal history which was already before the sentencing court).

The prosecutor also spent significant time discussing that the victim, Walker, was seemingly 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).

But the prosecutor had agreed to recommend a mid-range sentence, not to advocate for a high end sentence. The prosecutor's extensive highlighting of aggravating facts was a breach of the promise. For example, in State v. Williams, breach was found where the State's sentencing memorandum and oral argument supported aggravating factors and thus suggested the court impose some form of greater sentence. State v. Williams, 103 Wn. App. 231, 236, 236-39, 11 P.3d 878 (2000); see also Jerde, 93 Wn. App. at 782 (breach found when the State emphasized aggravating factors despite also making a mid-sentence recommendation); State v. Van Buren, 101 Wn. App. at 209 (breach found where the State uttered mid-range recommendation but focused the court's attention on several aggravating facts).

Additionally, the prosecutor in this case had agreed to remove any domestic violence designation in the sentence. 4/13/18RP at 19-22; see RCW 9.94A.525(21) and RCW 9.94A.030 (domestic violence designation). This included an agreement there would be no

requirement of programming for domestic violence in prison or as a condition of community custody. CP 38. 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. See RCW 9.94A.535(3)(h)(i),(iii).

This discussion of aggravating facts had no possible result but to influence the court to impose a sentence above 240 months. Indeed, the prosecutor's introduction of the case to the court as "hard to wrap your mind around and understand," and the description of the case as "very difficult," were words that plainly characterized the crime as exceptional, for purposes of the sentencing hearing. 4/13/18RP at 25.

Similarly, the State's discussion of facts supporting premeditated murder, which the State dropped, could only have the effect of contradicting the recommendation of a 240-month sentence for the second degree murder conviction secured by the promises inducing the plea. The prosecutor spent significant time discussing facts associated with the original charge, which alleged that the defendant acted pursuant to plan and drove the victim 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. 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. Xaviar, 117 Wn. App. at 199. The State must not *undercut* the terms of a plea agreement, “either explicitly or implicitly through conduct indicating an intent to circumvent the agreement.” Xaviar, 117 Wn. App. at 199 (quoting Williams, 103 Wn. App. at 236).

Yet that is what occurred here. And the fact that all of the State’s remarks were unsolicited further shows breach - here, before the prosecutor’s extensive descriptions of the worst aspects of the case as originally charged and described, the court had merely asked the State for its sentencing recommendation. 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"); compare State v. Coppin, 57 Wn. App. 866, 875, 791 P.2d 228 (1990) (prosecutor's comments about the case did not breach agreement because trial court had solicited the comment and attorneys have a duty under RPC 3.3 to answer a court's questions honestly).

(d). Reversal and remedy.

The question whether the breach was intentional, inadvertent, or unintentional, is immaterial. Santobello v. New York, *supra*, 404 U.S. at 262; Jerde, 93 Wn. App. at 780; Van Buren, 101 Wn. App. at 213. Mr. Ackerman is entitled to relief regardless of whether the prosecutor breached the agreement deliberately or otherwise. For example, the State may argue that the prosecutor so lengthily and unusually harshly described the defendant and the crime to show sympathy with the victim's mother, who was present in court, and understandably very upset. But the test to be applied is satisfied here - an objective test as to whether the plea bargain agreement has been breached by the State's words, irrespective of prosecutorial motivations or justifications for the failure to live up to the performance promised. State v. Collins, 46 Wn. App. 636, 639-640, 731 P.2d 1157 (quoting In

re Palodichuk, 22 Wn. App. 107, 110, 589 P.2d 269 (1978)), review denied, 108 Wn.2d 1026 (1987).

Mr. Ackerman's sentence must be reversed and his case must be remanded for a new sentencing hearing before a different judge, or withdrawal of the plea, at Mr. Ackerman's choice. State v. Neisler, 191 Wn. App. 259, 266, 361 P.3d 278 (2015); Sledge, 133 Wn.2d at 846, n. 9 (same); Williams, 103 Wn. App. at 239 (same). At the hearing, the State must be required to present the agreed upon sentencing recommendation without equivocation or implicit contradiction. Williams, 103 Wn. App. at 239.

2. THE JUDGMENT AND SENTENCE INCLUDES SCRIVENER'S ERRORS THAT DO NOT REFLECT THE COURT'S ACCEPTANCE OF THE PLEA AGREEMENT.

(a). The plea agreement included provisions providing for joint and several liability for restitution and return of the defendant's personal property.

According to the plea agreement, the State promised the defendant that any restitution ordered for loss resulting from the decedent's death would be joint and several with the original co-defendant, Mr. Garlock. CP 11 (plea agreement, para. 6.j). Joint and several liability for restitution is available to be ordered by the trial court. State v. Gonzalez, 168 Wn.2d 256, 261, 226 P.3d 131 (2010)

(relying on RCW 9.94A.753(3)); State v. Davison, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991). The court inadvertently did not include this language in the judgment. See CP 39-40. However, a restitution order that does not specify that restitution liability was joint and several would allow Mr. Ackerman to be held accountable for the full \$5,733.62 amount of restitution even if Mr. Garlock, later sentenced, paid the restitution amount or a portion thereof.

In addition, the trial court inadvertently failed to specify in the judgment that the defendant was entitled to return of his personal property, as agreed to in the plea of guilty. CP 11-12.

These omissions were scrivener's errors and remand is required to correct the judgment.

(b). The scrivener's errors require remand.

These matters should be corrected as scrivener's errors pursuant to the principles of CrR 7.8(a), and per RAP 7.2(e). Under CrR 7.8(a) and RAP 7.2(e), scrivener's or clerical errors in judgments, orders, or other parts of the record that do not reflect the order of the court may be corrected by the court at any time on its own initiative or on the motion of any party.

This Court should remand to correct these errors in the judgment and sentence. See In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005) (remedy for clerical or scrivener's errors in judgment and sentence forms is remand to the trial court for correction); State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (same).

E. CONCLUSION

For the foregoing reasons, Mr. Ackerman respectfully requests that this Court reverse his sentence, and remand for re-sentencing, and for correction of the scrivener's errors.

DATED this 3rd day of December, 2018.

Respectfully submitted,

s/OLIVER R. DAVIS
Washington State Bar Number 24560
Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2710
e-mail: oliver@washapp.org

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 51880-5-II
)	
JONATHAN ACKERMAN,)	
)	
Appellant.)	

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| | 1313 N 13 TH AVE | | |
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Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Telephone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

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