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No. 69272-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

v.

MATTHEW BRUCH,

Appellant/Cross-Respondent.

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

BRIEF OF APPELLANT

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2. The prosecutor committed misconduct in closing argument by disparaging defense counsel.

3. The prosecutor committed misconduct by appealing to the jurors' emotions in closing argument.

4. Mr. Bruch's constitutional right to present a defense was violated when the trial court excluded evidence of the complaining witness's reputation for untruthfulness in violation of ER 608(a).

5. The trial court erroneously imposed an indeterminate term of community supervision in violation of RCW 9.94A.701(9).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Bruch had the constitutional right to a jury trial, to be represented by counsel, and to confront the witnesses against him. U.S. Const. amends. VI, XIV; Const. art. I § 22. The prosecutor may not comment on a defendant's exercise of his constitutional rights. Over objection, the prosecutor argued that the teenage complaining witness was victimized by being required to testify and submit to cross-

examination. Is there a substantial likelihood that the misconduct affected the jury verdict? (Assignments of Error 1-3)

2. The prosecutor is a representative of the State, and prosecutorial misconduct may deny the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I §§ 3, 22. In his closing argument to the jury, the prosecutor (1) commented on Mr. Bruch's exercise of his constitutional rights by arguing how difficult it was for the teenage complaining witness, J.B., to testify and undergo cross-examination, (2) used emotion to appeal to the jurors' sympathy for J.B. and asked the jury to believe her testimony due to her inconsistencies and the emotion she displayed on the witness stand, and (3) disparaged defense counsel by referring to the arguments the jury could expect her to make and suggesting questions she should be expected to answer in her closing argument. Where the case hinged on the jury's evaluation of J.B.'s credibility, was the prosecutor's repeated misconduct so flagrant and ill-intentioned that no objection or instruction would have cured the prejudice? (Assignments of Error 1-3)

3. The accused has the constitutional right to present a defense. U.S. Const. amends. VI, XIV; Const. art. I § 22. When a party seeks to impeach the credibility of a witness, ER 608(a) provides for admission

of evidence of a witness's reputation for untruthfulness. The trial court improperly excluded evidence of the teenage complaining witness's reputation for untruthfulness at a high school she attended. Where Mr. Bruch's defense depended upon impeaching the complaining witness's credibility, did the exclusion of evidence of her reputation for dishonesty at her high school violate his constitutional right to present his defense? (Assignment of Error 4)

4. The Sentencing Reform Act (SRA) requires the trial court to impose a determinate sentence that does not exceed the statutory maximum term. The maximum term for second degree child molestation is 120 months. The trial court imposed a term of 116 months followed by community custody for "at least four months, plus all accrued earned early release time at the time of release." CP 7. Where RCW 9.94A.701(9) requires the sentencing court, not the Department of Corrections, to reduce the term of community custody when the terms of confinement and community custody exceed the statutory maximum term, does the sentence violate the SRA? (Assignment of Error 5).

C. STATEMENT OF THE CASE

Matthew Bruch had custody of his two children, daughter J.B. (dob 1/26/95) and son Matthew (Matt), who was a year older than J.B.; the children's mother was an addict and not part of their lives. 1RP 101-02, 103.[1] Mr. Burch and the children lived in several towns in Washington. 1RP 100. From 2001 to 2007, the family resided in Lake Stevens with Mr. Bruch's girlfriend Tara Kerr, her sons Jordan and Tristan, and often other relatives of Ms. Kerr.[2] 1RP 101-02; 4RP 581-82, 584. The families were blended; Mr. Bruch worked at Boeing while Ms. Kerr was home full-time and treated Mr. Bruch's children as her own. 2RP 333; 4RP 582-833, 592, 596-97 Ms. Kerr described a normal family life and noted J.B. and her father were close and had a good relationship. 4RP 582, 593, 597.

When the relationship between Mr. Bruch and Ms. Kerr ended, he and his children moved in with his new girlfriend, Julie Mjelde in Stanwood. J.B. was in eighth grade. 1RP 103-04; 2RP 334; 3RP 383-84. J.B. had her own bedroom in the home with a television. 1RP 231.

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[1] The verbatim report of proceedings of Mr. Bruch's jury trial and sentencing hearing contains four consecutively-numbered volumes labeled 1 to 4. Two transcripts of earlier hearings will not be cited.

[2] At the time of trial, Tara Kerr's name was Tara Osborn. 4RP 581.

Ms. Mjelde's sons Josiah and Evan and nephew William lived with them for part of the time. 2RP 334; 3RP 384-85. Josiah moved in after he completed probation for sexually abusing Evan and William, both of whom were younger than Josiah, and he had an alarm on his bedroom door.[3] 1RP 105, 161-62; 2RP 346; 3RP 396-98, 413-14. J.B. and Josiah grew fond of each other were permitted to have a romantic relationship, but were not allowed to be alone together. 1RP 105-06, 154; 2RP 346-47; 3RP 400-01. J.B. was 15. She believed she was in love with 18-year-old Josiah, and did not want to be without him. 1RP 154-55, 159-60; 4RP 590.

Mr. Bruch and Ms. Mjelde's rocky relationship occasionally became physical, and Mr. Bruch and his children would often have to leave her house and stay with his friends or in cars or motels. 1RP 106-08; 2RP 230; 3RP 385. J.B. lived with her friend Elizabeth Deselms's family in the spring of 2010. 1RP 107; 4RP 573, 576. When Mr. Bruch's relationship with Ms. Mjelde ended in the summer of 2010, Mr. Bruch and his children moved into the home of friends Daniel Hernandez and his wife Julia De La Cruz in Bothell, but J.B.

[3] One of J.B.'s cousins who resided with the family for a while when they lived with Ms. Kerr had also molested a younger relative. 2RP 234-35.

sometimes remained at Ms. Mjelde's home. 1RP 109; 2RP 249, 348, 252; 3RP 488, 490.

In August, Mr. Bruch wanted J.B. to return to his care from Ms. Mjelde's house, but J.B. wanted to remain where she was. 1RP 112; 2RP 350. In addition to her love for Josiah, J.B. was concerned by her father's increased anger. 1RP 113. When she learned her father had sent the police to get her from Ms. Mjelde's house, J.B. asked to talk to Ms. Mjelde alone. 1RP 113, 163; 2RP 351. J.B. did not say anything, but appeared upset. 2RP 351. Suspicious, Ms. Mjelde asked J.B. if her father did anything to her, and J.B. shook her head affirmatively. 2RP 351. In response to Ms. Mjelde's questions, J.B. said she had been sexually abused during the course of her childhood when her father did not have a girlfriend and that the last time was after Ms. Kerr moved out of the Lake Stevens house. 2RP 351. J.B. hoped that she would be able to stay at Ms. Mjelde and Josiah's house. 1RP 164.

Ms. Mjelde and J.B. repeated the allegation to the police who arrived to transport her to her father's custody, and J.B. was placed in a juvenile shelter. 2RP 354-56; 3RP 429, 510, 513. At an interview with a child interviewer from the Snohomish County Prosecutor's officer, J.B. related two incidents of child molestation. 3RP 427, 430-

31. During a physical examination, J.B. also answered questions from the nurse-practitioner. 2RP 203-04, 315-17.

In August 2011, J.B. was placed with a foster family but eventually moved in with Mr. Bruch's sister Stephanie Bruch and her partner Rebecca VanSteenkiste in Arizona. 1RP 117-18, 128-30; 2RP 262. One day J.B. had a conflict with her aunts and they turned off her cell phone. 1RP 131-32; 2RP 268-69, 298-300. J.B. was angry, but when she calmed down she talked to her aunts about being permitted to date a boy she had met on a camping trip. 1RP 132, 209-10, 213, 262-63, 271-71, 288, 297. J.B. did not reveal that she had sex with the boy. 2RP 244, 252.

J.B. still appeared upset, and her aunts encouraged her to talk. 1RP 214015; 2RP 303. In response to leading questions from Aunt Stephanie, J.B. asserted for the first time that Mr. Bruch had raped her on two occasions. 1RP 132-33, 2RP 214-15, 272, 275-277, 308. J.B. then gave a statement to a detective in Arizona. 2RP 219; 3RP 474.

The Snohomish County Prosecutor's Office charged Mr. Bruch by amended information with two counts of child molestation in the second degree, two counts of rape of a child in the third degree, and a count of bail jumping in March 2012. CP 167-68. The bail jumping

charge was dismissed upon motion of the State before trial. CP 97; 1RP 93-94.

At trial J.B. testified her memory was not clear. 1RP 122; 2RP 234, 235-37, 243. She remembered two incidents at the Lake Stevens home her family shared with Ms. Kerr's family. She said one time she and her father were lying on the living room couch with a sheet over them, and Mr. Bruch put his hand underneath her pants and underwear and touched her vagina. 1RP 124-25; 2RP 250. She said they were under a sheet on the couch another time when Mr. Bruch grabbed her hand, put it in his pants and on his penis. 1RP 125-27.

J.B. also testified that her father had sexual intercourse with her two times. The first time occurred in Ms. Mjelde's bedroom in her Stanwood home when J.B. was 15 years old. 1RP 133-34. The second time was at the home of Ms. De La Cruz and her husband. 1RP 136. J.B. said the second incident occurred in a small upstairs bedroom that her father had locked her into earlier in the day after an argument. 1RP 143, 148-50.

Defense counsel impeached J.B. with numerous inconsistencies between in her testimony and her prior statements. For example, J.B. did not mention the rapes when she was interviewed by a child

interview specialist only a few days after one of them occurred. 2RP 194, 197, 200, 203, 227-28. J.B. had not mentioned in several interviews that the alleged molestation in Lake Stevens occurred under a sheet until she testified. 1RP 169-70; 2RP 249; 3RP 456. J.B. provided details of child molestation to her friend Elizabeth that she did not mention or even remember on the witness stand. 2RP 206-08; 4RP 571.

J.B. told the Arizona detective that the second rape occurred on a weekend only two days before she told Ms. Mjelde she was molested. 3RP 480, 485-86. The conversation with Ms. Mjelde and report to the police, however, occurred on a Saturday. 3RP 505, 510-12, 540. Mr. Bruch also proved that the small room where J.B. claimed the second rape occurred could not be locked from the outside. 4RP 499. J.B. told her aunts that a knife was involved in one incident, but did not mention a knife in her testimony. 2RP 285-87, 307. J.B. admitted she had not been completely honest in her conversation with her aunts, because she had not revealed she had sex with the boy she wanted to date. 2RP 218-19.

Mr. Bruch was convicted of two counts of child molestation in the second degree and two counts of rape of a child in the third degree,

with a special finding that he and J.B. were members of the same household. CP 48-52. He received concurrent standard-range sentences of 116 months for child molestation and 60 months for rape of a child. CP 5-6. The sentencing court did not set a determinate term of community custody for the child molestation charges. CP 7.

D. ARGUMENT

1. **Prosecutorial misconduct in closing argument denied Mr. Bruch a fair trial.**

A criminal prosecutor plays a unique role in the criminal justice system that requires him to act impartially and seek a just verdict based upon matters in the record. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1934); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984); RPC 3.8. Washington courts have long emphasized that a prosecutor's misconduct in closing argument may violate the defendant's right to due process and a fair trial. State v. Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); Reed, 102 Wn.2d at 146-49 (and cases cited therein); State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Carr, 160 Wash. 83, 90-91, 294 Pac. 1016 (1930); U.S. Const. amend. XIV; Const. art. I, §§ 3, 22.

To determine if a prosecutor's comments or argument constitute misconduct, the reviewing court must decide first if the comments were improper and, if so, whether a "substantial likelihood" exits that the comments affected the jury verdict. Glasmann, 175 Wn.2d at 704; State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Where the defendant does not object to the improper argument, the reviewing court may still reverse the conviction if the misconduct is so flagrant and ill-intentioned that the resulting prejudice would not have been cured with a limiting instruction. Id. If, however, the prosecutor's misconduct implicates the defendant's constitutional rights, the State must demonstrate beyond a reasonable doubt it was harmless. Monday, 171 Wn.2d at 680; State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

In Mr. Bruch's trial, the prosecutor's closing argument was improper because he (1) asserted that J.B. had been "victimized" by Mr. Bruch's exercise of his constitutional right to a trial and confronting the witnesses against him, (2) appealed to the juror's sympathy for J.B., and (3) disparaged Mr. Bruch's attorney.

a. The prosecutor's comments that J.B. was victimized by appearing at trial violated Mr. Bruch's constitutional rights to a trial and to confront the witnesses against him. Both the federal and the state constitutions safeguard an accused person's right to confront the witnesses against him. U.S. Const. amends. VI, XIV; Const. art. I, § 22. The Sixth Amendment right to confront witnesses is a fundamental right that applies to the states by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). The right to "face to face" confrontation is "essential to fairness." State v. Jones, 71 Wn. App. 798, 810, 863 P.2d 85 (1993) (citing Coy v. Iowa, 487 U.S. 1012, 1019, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988)), rev. denied, 124 Wn.2d 1018 (1994).

The right of the accused to be present at trial is also essential to the dignity of the trial and the presumption of innocence. It is "one of the most basic rights guaranteed by the Confrontation Clause, Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970), and is "scarcely less important to the accused than the right of trial itself." Diaz v. United States, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500 (1912); see also Duncan v. Louisiana, 391 U.S. 145, 155-56, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) (fundamental right to jury trial).

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

In Mr. Bruch's case, the prosecutor commented on Mr. Bruch's constitutional rights to a trial and to confront witnesses by stressing how difficult it was for J.B. to be a witness:

> She came up here, and she knew what this was going to be like. You could see that she knew what she was getting herself into. And it was horrible for her; horrible for her to answer my questions about what happened to her; horrible for her to answer defense counsel's questions about what she might or might not have said in

> a transcript [-] not about what actually happened to her, but what she said in a transcript about what happened to her. She was exhausted. It was very difficult for her to do that. But she told you. She was strong and brave, and she told you what happened to her.

4RP 653 (emphasis added).

The prosecutor was even more colorful in his rebuttal closing argument, claiming J.B. was "victimized" by testifying. Defense counsel's objection to this argument, however, was overruled. 4RP 699.

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

4RP 699 (emphasis added). These comments directly faulted Mr. Burch for exercising his constitutional right to a trial instead of pleading guilty.

This Court addressed analogous misconduct in Jones, where the prosecutor stressed that the defendant was trying to make eye contact

with the complaining witness, his girlfriend's daughter, which caused her to cry and break down so that she was unable to return to the courtroom. Jones, 71 Wn. App. at 802, 805, 806. This Court ruled that the prosecutor impermissibly commented on Jones's exercise of his constitutional right of confrontation. Id. at 811-21. The Eighth Circuit similarly held that a prosecutor's argument that the complaining witness in a sexual assault case had to "go through those humiliating sexual assaults and those violent acts perpetrated against her" so that the defense counsel could cross-examine her was egregious misconduct to which his trial counsel should have objected. Burns v. Gammon, 260 F.3d 892, 895-98 (8th Cir. 2001).

It is well-settled that prosecutorial comments on an accused person's fundamental rights infringe the right to a fair trial. See e.g. Burns, 260 F.3d at 896-97 (and cases cited therein); Jones, 71 Wn. App. at 811. Like the comments in Jones and Burns, the prosecutor's argument here asked the jury to draw a negative inference from Mr. Bruch's decision to have a trial and confront the witnesses against him. 4RP 653, 699.

b. The prosecutor committed misconduct by appealing to the jury's sympathy. The State must obtain convictions based on the strength of the evidence adduced at trial. Arguments which appeal to the jury's passions and prejudices invite the jury to determine guilt based on improper grounds and are misconduct. Glasmann, 175 Wn.2d at 704; Belgarde, 110 Wn.2d at 507; State v. Boehning, 127 Wn. App. 511, 522, 111 P.3d 899 (2005). The prosecutor's closing argument urged the jury to decide the case based upon its sympathy for J.B. and the emotion she exhibited on the witness stand.

These improper comments not only asked the jury to draw a negative inference from Mr. Bruch's exercise of his constitutional rights, they also appealed to the jurors' sympathy for the young witness. In addition to those comments, the prosecutor argued J.B.'s life was "no fairy tale" to both engender sympathy for J.B. and justify her faulty memory. 4RP 650-53. Without evidentiary support, the prosecutor discussed the "emotional destruction, the absolute devastation that happens when your father, your own father, does these things to you." 4RP 663.

In rebuttal, the prosecutor asserted J.B. did not wish her father ill, but "would do anything to have a dad who just took her fishing."

4RP 697. Finally, in summing up his case, the prosecutor urged the jury to believe J.B. because of the imperfections in her testimony and "the pure emotion you saw from her on the stand." 4RP 698.

In Claflin, the prosecutor read a poem to bring home to the jurors the emotional impact of rape on its victims. State v. Claflin, 38 Wn. App. 847, 850 n.3, 690 P.2d 1186 (1984), rev. denied, 103 Wn.2d 1014 (1985). The poem touched on women's shared fear of rape and the indignities of being a rape victim. Id. The court found the reading of the poem was "so prejudicial that no curative instruction would have sufficed to erase the prejudice it was bound to engender in the minds of the jurors." Claflin, 38 Wn. App. at 850. This Court should similarly find the prosecutor's dramatic argument improperly urged convictions based on sympathy, not reason and evidence.

c. The deputy prosecuting attorney committed misconduct by disparaging defense counsel. The prosecutor may not argue to the jury in a manner that disparages defense counsel or counsel's legitimate function; such an argument impacts the defendant's constitutional right to counsel. State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011) (misconduct to refer to defense counsel's argument as "bogus" and a "sleight of hand"); State v. Warren, 165 Wn.2d 17, 29-30, 195

P.3d 940 (2008) (complaining of "misrepresentations" in defense counsel's argument as an example of "what people have to go through in the criminal justice system when they deal with defense attorneys"), cert. denied, 129 S. Ct. 2007 (2009); Reed, 102 Wn.2d at 146-47 (disparaging defendant's counsel and witnesses as outsiders with fancy cars); State v. Negrete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993) (misconduct to argue defense counsel was paid to twist words), rev. denied, 123 Wn.2d 1030 (1994).

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

defense counsel for objecting when the prosecutor unsuccessfully moved to admit the video and audio tape of J.B.'s interview with the prosecutor's child interview specialist. 4RP 694-5.

d. Mr. Bruch's conviction must be reversed. Defense counsel objected to the prosecutor's argument that J.B. was "victimized" by the legal process. 4RP 699. Thus, this Court must reverse if there is a substantial likelihood the misconduct affected the jury verdict. Belgarde, 110 Wn.2d at 508. The prosecutor's emotionally-charged statement invited the jury to convict Mr. Bruch simply because he exercised his constitutional right to a jury trial and his attorney cross-examined the State's complaining witness. It also attempted to garner sympathy for J.B. and criticize defense counsel for her role in the proceedings.

The impact of prosecutorial misconduct on jury deliberations is especially prejudicial when the jury's decision rests largely on their determination of the credibility of witnesses. State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011) (reversal due to pervasive prosecutorial misconduct in case that hinged on witness credibility); State v. Venegas, 155 Wn. App. 507, 526-27, 228 P.3d 813 (reversal based upon cumulative impact of several factors, including

prosecutorial misconduct, in case that "turned largely on witness credibility"), rev. denied, 170 Wn.2d 1003 (2010). J.B.'s credibility was the key to this case, and defense counsel impeached her on many grounds. The prosecutor's comment was especially prejudicial because it implied that such impeachment was an unnecessary burden on J.B. This Court must conclude there was a substantial likelihood the jury was affected by the improper argument blaming Mr. Bruch for exercising his constitutional rights and using the witness's duty to testify to engender sympathy for her.

Defense counsel did not pose an objection to prosecutor's prejudicial comments, presumably to avoid highlighting the improper argument. This Court must thus determine if the misconduct was so flagrant and ill-intentioned that no objection or curative instruction would have cured the prejudice. Belgarde, 110 Wn.2d at 508. It was nothing short of flagrant and ill-intentioned for the prosecutor to urge the jury to convict Mr. Bruch based upon sympathy for J.B., upon Mr. Bruch's exercise of his constitutional rights, and by disparaging his lawyer for protecting those rights. Again, the jury was required to determine if J.B.'s testimony was truthful, and the prosecutor's

improper argument took the jury's attention away from a dispassionate determination of her credibility.

Curative instructions were unlikely to erase the prejudice caused by the misconduct. See State v. Stith, 71 Wn. App. 14, 21-23, 856 P.2d 415 (1993) (court's strongly-worded curative instruction could not cure prejudice where prosecutor's remarks struck at the heart of the right to a fair trial before an impartial jury and thus could not be cured); State v. Bozovich, 145 Wash. 227, 233, 259 Pac. 395 (1927) (defendant's prompt objections and court's curative instructions could not obviate prejudice when prosecutor elicited defendant's other bad acts in cross-examination of defendant's character witnesses).

Moreover, "the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." Glasmann, 175 Wn.2d at 707 (quoting Walker, 164 Wn. App. at 737). Here, the prosecutor committed misconduct in several different ways throughout his closing argument. The misconduct also combined to develop the prosecutor's theme that J.B.'s life was not a "fairy tale" and it is only in a "fairy tale" world that her testimony would be consistent with her prior statements. 4RP 651-53; Walker, 164 Wn.

App. at 738 (prosecutor used variety of misconduct to develop "themes").

This Court must reverse Mr. Bruch's convictions and remand for a new trial. Reed, 102 Wn.2d at 148; Walker, 164 Wn. App. at 738-39.

2. **Mr. Bruch's constitutional right to present his defense was violated when the trial court excluded evidence of the complaining witness's reputation for dishonesty.**

A criminal defendant has the constitutional right to meaningful opportunity to present a complete defense. U.S. Const. amends. VI, XIV; Const. art. I, § 22; Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 1731, 164 L. Ed. 2d 503 (2006); Davis v. Alaska, 415 U.S. 308, 314-15, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). This includes the right to present relevant evidence and cross-examine the government's witnesses. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). A claim that the defendant's constitutional right to present a defense is violated is reviewed de novo. Jones, 168 Wn.2d at 719.

A trial court's decision regarding the admission of evidence is reviewed for abuse of discretion. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Even where a court has discretion regarding the

admission or exclusion of evidence, however, that discretion may not be exercised in a manner that violates a defendant's constitutional rights. State v. York, 28 Wn. App. 33, 36-37, 621 P.2d 784 (1980).

a. A party may attack a witness's credibility by introducing evidence of the witness's reputation for dishonesty. ER 608 permits a party to attack or support the credibility of a witness with evidence of that witness's reputation for honesty or dishonesty. The rule reads:

> (a) The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

ER 608(a). The purpose of the rule is to "facilitate testimony from those who know a witness' reputation for truthfulness so that the trier of fact can properly evaluate witness credibility." State v. Land, 121 Wn.2d 494, 499, 851 P.2d 678 (1993).

The foundational requirement for evidence under ER 608 is a community that is both neutral and general. Land, 121 Wn.2d at 500. "[R]elevant factors might include the frequency of contact between members of the community, the amount of time a person in known in the community, the role a person plays in the community, and the

number of people in the community." Id. The community is not limited to the witness's residential community. In Land, for example, the State established a community comprised of a small group of business associates in which the defendant worked as a salesman for several years and developed a reputation for untruthfulness among his business contacts. Id. By contrast, two family members are not a community for purposes of rule, because the proposed group was too small and family members are not neutral. State v. Gregory, 158 Wn.2d 759, 804-05, 147 P.3d 1201 (2006).

b. The trial court erroneously excluded evidence of J.B.'s reputation for dishonesty. Mr. Burch sought to introduce evidence of J.B.'s reputation for dishonesty. Jordan Kerr and J.B. both attended Arlington High School for one year; the school had approximately 1500 students. 4RP 590, 604, 611. Jordan had a number of friends and acquaintances through the high school who believed that J.B. was dishonest. 4RP 604-05. Their opinions were based in part on an incident where J.B. told people she was pregnant when she was not. 4RP 607-09. Two people were also aware that J.B. had falsely accused

Jordan of sexually abusing her.[4] 4RP 608-09. But J.B. was also known for telling other little white lies. 4RP 609-10. The trial court excluded the evidence on the grounds that (1) the community was not general or neutral and (2) a reputation for telling little white lies is not necessarily determinative of credibility. 4RP 618-19.

Arlington High School is a relevant community for purposes of this rule. This Court, for example, has found the Boy Scouts to be a community for purposes of reputation evidence. State v. Carol M.D., 89 Wn. App. 77, 94-95, 948 P.2d 837 (1997), reversed, remanded on other grounds, 136 Wn.2d 1019 (1998).

The trial court improperly excluded Jordan's testimony about J.B.'s reputation for dishonesty in a relevant community for a teenager, her high school. While Jordan's testimony was based upon circles of friends and acquaintances, the court acknowledged this is common for high school students. 4RP 617. The court concluded, however, that the community was not neutral because they knew Jordan. Jordan, however, had only shared his experience of being accused by J.B. with two other people. 4RP 609.

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[4] Jordan is the son of Ms. Kerr and lived with J.B. when they were children. 4RP 582.

The court also believed the community was basing its opinion on J.B.'s treatment of her ex-boyfriend. Apart from the ex-boyfriend, each of these students had his or her own opportunity to interact with J.B. and form his or her own opinion as to her honesty. 4RP 604-08. It does not appear that all of these students knew or were friends with the ex-boyfriend. Thus, the community was neutral and the trial court should have admitted Jordan's testimony as to J.B.'s reputation for dishonesty in the Arlington High School community,

c. Mr. Bruch's conviction must be reversed. Mr. Bruch's only defense was to challenge J.B.'s credibility and memory. Presenting evidence of her reputation for untruthfulness at Arlington High School was thus critical to his case and its exclusion violated his constitutional right to present a defense.

When constitutional error is identified on appeal, the conviction must be reversed unless the State can demonstrate beyond a reasonable doubt that the error did not contribute to the conviction. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); Jones, 168 Wn.2d at 724. Without Jordan's testimony, defense counsel had the difficult task of convincing the jury to doubt J.B.'s credibility based only upon her inconsistent statements. Given the importance of

witness credibility to this case, no reviewing court could be convinced beyond a reasonable doubt that the reputation evidence would not have led to a different jury verdict. See Jones, 168 Wn.2d at 724-25 (excluding evidence of circumstances surrounded alleged rape not harmless beyond a reasonable doubt); Maupin, 128 Wn.2d at 928-30 (excluding defendant's alibi defense was not harmless beyond a reasonable doubt). Mr. Bruch's conviction must be reversed and remanded for a new trial. Jones, 168 Wn.2d at 724-25.

The State may argue that this is an evidentiary error that should not be reviewed under the constitutional harmless error standard. Where a trial court abuses its discretion, reversal is required unless the error is harmless. State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2010). The erroneous exclusion of evidence requires reversal where, within reasonable probabilities, the error materially affected the outcome of the trial. Gresham, 173Wn.2d 1at 433. This case came down to the jury's determination of whether or not J.B.'s testimony was truthful and accurate. The error thus likely affected the jury verdict, and reversal is required.

3. **The trial court did not impose a definite term of community custody as required by RCW 9.94A.701.**

The superior court must sentence a felony offender as provided in the Sentencing Reform Act (SRA). In Mr. Bruch's case, the court was required to impose a definite term of community custody. Instead, the court ordered Mr. Bruch to be on community custody for "at least four months, plus all accrued earned early release time at the time of release." CP 7. The term of community custody must be stricken because it does not comply with RCW 9.94A.701(9).

a. The superior court may sentence only as authorized by the Legislature. The superior court's power to sentence a felony offender derives solely from the SRA. RCW 9.94A.505(1). An offender may challenge a sentence that does not comply with the SRA for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999).

RCW 9.94A.505 provides that the court "shall" impose a sentence "as provided in the following sections and as applicable to the case." RCW 9.94A.505(2)(a). In Mr. Bruch's case, the court was required to impose a term of confinement within the standard range established in RCW 9.94A.510 and a term of community custody as set forth in RCW 9.94A.701 and .702. RCW 9.94A.505(2)(a)(i), (ii). The

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

b. The sentencing court did not set a determinate term of community custody as required by RCW 9.94A.701(9). Child molestation in the second degree is a Class B felony, and the statutory maximum term is 10 years. RCW 9A.44.086(2); RCW 9A.20.021(1)(b); CP 3. Mr. Bruch's standard sentence range for second degree child molestation was 87 to 116 months, and the court imposed a 116-month term of imprisonment and community custody of 4 months plus any earned early release time he earned.[5] CP 5-7.

RCW 9.94A.701(9) requires the sentencing court, and not the Department of Corrections, to set a definite term of community custody. State v. Boyd, 174 Wn.2d 470, 275 P.2d 321 (2012); State v. Land, ___ Wn. App. ___, 295 P.3d 782, 798-88 (2013). The statute reads:

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

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

RCW 9.94A.701(9).

The sentencing court understood that Mr. Bruch's total sentence could not exceed 120 months and that the court was required to set a definite number of months for both confinement and community custody. 4RP 725. The State, however, asked the court to set a term of community supervision of "[120] -116 – earned early release as determined by DOC)]." CP 31. The State acknowledged the proposed would require the definite term of community custody to be "calculated by DOC." Id.

The court adopted the State's suggestion to maximize the term of community custody by ordering a variable term. CP 7. The Judgment and Sentence requires community custody "for a period of at least 4 months, plus all accrued earned early release time at the time of release." CP 7; 4RP 725.

This Court recently interpreted the current version of RCW 9.94A.701(9) in State v. Winborne, 167 Wn. App. 320, 273 P.3d 454, rev. denied, 174 Wn.2d 1019 (2012). The sentencing court in that case ordered terms of confinement and community custody that exceeded the statutory maximum term, but directed DOC "that the total terms of confinement and community custody must not exceed the statutory

maximum of 60 months." Winborne, 167 Wn. App. at 322-23. While such a sentence did not violate former RCW 9.94A.701(9), which permitted a variable term of community custody, it did violate the current version of the statute. Id. at 323; In re Personal Restraint of Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009).

The Winborne Court observed that the court's notation was "contrived" and designed only to avoid the statute's new requirement that the court set a reduced term of community custody when the normal term would exceed the statutory maximum sentence. Winborne, 167 Wn. App. at 329.

> With the 2009 amendments, the legislature has clearly and intentionally addressed the components. To take what RCW 9.94A.701(9) plainly presents as a three-stop process (impose the term of confinement, impose the term of community custody, then reduce the term of community custody if necessary) and attempt to preempt it with a prophylactic Brooks notation is contrived. It has no other objective but to prevent the reduction of community custody called for by the statute and preserve a substitution of community custody for earned release term that was eliminated by the 2009 repeal of former RCW 9.94A.715 and amendment of RCW 9.94A.710(1)-(3). It transforms the term of community custody into a variable term, contrary to the clear intent of the 2009 changes.

Id.

The court that sentenced Mr. Bruch similarly set a variable term of community custody designed to avoid the mandate of RCW 9.94A.701(9). The sentence created by the court required DOC to set Mr. Bruch's term of community custody. See Boyd, 174 Wn.2d at 473 (trial court, not DOC, required to reduce sentence) The sentence thus violated RCW 9.94A.701(9).

c. This case must be remanded for the sentencing court to set a definite term of community custody for Counts 1 and 2. Mr. Bruch's sentence must be vacated and his case remanded for resentencing to (1) amend the term of community custody or (2) resentence Mr. Land consistent with RCW 9.94A.701(9). Boyd, 174 Wn.2d at 473; Winborne, 167 Wn. App. at 330, 331; Land, 295 P.3d at 787.

E. CONCLUSION

Mr. Bruch's convictions must be reversed and remanded for a new trial because the prosecutor committed misconduct in closing argument by (1) commenting on Mr. Bruch's constitutional right to a jury trial, (2) appealing to the jury's sympathy for the young complaining witness, and (3) disparaging defense counsel. Reversal is also required because the trial court's exclusion of reputation testimony violated Mr. Bruch's constitutional right to present a defense.

In the alternative, Mr. Bruch's sentence must be vacated and the case remanded for the court to impose a determinate term of community custody.

DATED this 8th day of April 2013.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent/Cross-appellant, MATTHEW BRUCH, Appellant-Cross-respondent.	))))))))	NO. 69272-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF APRIL, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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