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Supreme Court No. 99433-1
(COA No. 370135)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ASHLEY DAWN MYERS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Ashley Dawn Myers, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4(b)(1), (3) & (4).

B. ISSUE PRESENTED FOR REVIEW

When Ms. Myers gave up her constitutional rights and agreed to plead guilty, due process required she receive the benefit of her bargain with the State. U.S. Const. amends. V, XIV, §1; Const. art. I, §3. Did the prosecutor breach their plea agreement by informing the court that the plea agreement did not account for the victim, and then introducing the testimony of the surviving victim who asked the court to impose a higher sentence than agreed to by the parties, which the trial court imposed? RAP 13.4(b)(1),(3)&(4)?

C. STATEMENT OF THE CASE

Suffering delusions caused by the methamphetamine Kenneth Allen provided her, Ashley Myers developed the false belief that Mr. Allen killed her child, and that he would kill her too. RP 13-14, 17, 25. She shot Mr. Allen and he died. RP 14, 24;

CP 1-6. She stayed at the scene and readily admitted to shooting him. RP 14.

The medical doctor who evaluated her opined that Ms. Myers's conduct was consistent with a "delusional stimulant-induced psychotic disorder." RP 25. This is a form of insanity, but does not rise to a legal defense because it is voluntarily induced, rather than organic. RP 25.

The prosecutor amended the charge from murder in the first degree to murder in the second degree. RP 14-15; CP 31. Ms. Myers entered a guilty plea to the reduced charge. RP 15; CP 8-14.

Ms. Myers had no prior criminal history and an offender score of "0." RP 15. She faced a standard sentencing range of 123-220 months. CP 22. As part of the bargained-for exchange, the prosecutor recommended a low-range, 130-month sentence. RP 15; CP 19.

When the court asked the prosecutor for his recommendation, the prosecutor emphasized this was an "awful, terrible act." RP 17. However, the defense's extensive mental health evaluation and Ms. Myers's admission of guilt and

decision to take responsibility for her actions led the prosecutor to recommend a low-range sentence of 130 months. RP 18.

However, the prosecutor also informed the Court that this recommendation runs the risk of “ignoring the other part of this and that’s Mr. Allen, the fellow who got murdered,” including “what he thinks the sentence [ought¹] to be and how his life was going when it got stolen by Ms. Myers in her murdering him.” RP 18. The prosecutor stated he would ask the decedent’s sister “to come up and tell you about Mr. Allen and tell you what she thinks the sentence [ought] to be.” RP 18-19.

Peggy Roberts told the court about her brother, Mr. Allen, a person who had “issues with the law of his own,” RP 20, and was a “methamphetamine addict.” RP 21. Ms. Roberts stated her belief about the “facts” of the case that were not admitted to or even alleged, including that Mr. Allen “picked [Ms. Myers] up off the street...[s]he was, my understanding, selling her body to infiltrate a sex trafficking ring to—to find her daughter who had been kidnapped.” RP 21.

¹ The VRP uses the word “out” instead of “ought.” RP 18, 19.

Ms. Roberts then offered her “understanding from some of the records” about the crime that was contrary to the evidence, including that this “wasn’t a psychotic episode. At that point in time she knew that what she had done was wrong.” RP 22.

Based on these and additional unproven assertions about the offense and Ms. Myers’s history of drug use, Ms. Roberts asked the court to sentence Ms. Myers to “the full extent of the law.” RP 23.

Ms. Myers disputed Ms. Roberts’s assertions, arguing based on the medical evidence that Ms. Myers’s conduct resulted from a drug-induced psychosis. RP 25. Ms. Myers informed the court that since the offense, she had gained important perspective on the impact drugs had on her life, and wanted nothing more to do with them. RP 25.

Despite recognizing that Ms. Myers was now “clean and sober,” the court echoed Ms. Roberts’s concerns, finding that Ms. Myers needed more time in jail to remain sober and think about the consequences of her actions. RP 27. The trial court declined to follow the parties’ recommendation, imposing 180 months instead of the agreed-to 130-month sentence. RP 27.

On appeal, Ms. Myers argued that by informing the court that the plea agreement failed to account for the victim, the prosecutor committed breach, in violation of due process. The Court of Appeals found there was no breach, wrongly equating the statute that requires a prosecutor to inform the court if a victim disagrees with the recommendation with informing the court that a plea agreement failed to account for victim. Slip op. at 4. The Court of Appeals also erroneously found that because the surviving victim did not “work as an arm of the prosecutor’s office,” the prosecutor’s introduction of her statements to the Court “cannot fairly be attributed to the State.” Slip op. at 4 (citing *State v. MacDonald*, 183 Wn.2d 1, 14-15, 346 P.3d 748 (2015)).

This Court should accept review of the this decision that conflicts with this Court’s recognition in *MacDonald* that a victim’s rights cannot supersede a defendant’s due process right to enforcement of the plea agreement. RAP 13.4(b)(1),(3)&(4).

D. ARGUMENT

The prosecutor breached the plea agreement by informing the court that the agreement did not account for the victim. RAP 13.4(b)(1)(3)&(4).

The prosecutor breached the plea agreement by informing the court that the agreement did not account for the victim's perspective, and then introducing the surviving victim's testimony in support of a higher sentence.

When Ms. Myers agreed to the terms of the State's plea offer, she formed a contract with the State. *MacDonald*, 183 Wn.2d at 8. This bargain imposed on the prosecutor a "contractual duty of good faith, requiring that it not undercut the terms of the agreement, either explicitly or implicitly, by conduct evidencing intent to circumvent the terms of the plea agreement." *Id.* at 8.

Due Process bound the prosecutor to the agreement because Ms. Myers relinquished significant constitutional rights in exchange for this plea agreement. *MacDonald*, 183 Wn.2d at 8-9; *see also Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

“A breach occurs when the State offers unsolicited information by way of report, testimony, or argument that undercuts the State’s obligations under the plea agreement.” *State v. Carreno-Maldonado*, 135 Wn. App. 77, 83, 143 P.3d 343 (2006). “The test is whether the State’s words or conduct, without looking to the intent behind them, contradict the State’s recommendation.” *State v. Neisler*, 191 Wn. App. 259, 266, 361 P.3d 278 (2015). A breach cannot be harmless error. *Carreno-Maldonado*, 135 Wn. App at 88-89.

A surviving victim has a statutory right to address the court and request a sentence. RCW 9.94A.500(1). But this statutory right may not impede Ms. Myers’s due process rights to the plea agreement she entered into with the prosecution. *MacDonald*, 183 Wn.2d at 7, 15-16.

In *MacDonald*, even though RCW 9.94A.500 granted statutory authority to an investigating officer to make a sentencing recommendation, that authority did not permit him to undercut the prosecutor’s plea agreement by proxy. *MacDonald*, 183 Wn.2d at 15- 17 (citing *State v. Sanchez*, 146 Wn.2d 339, 363, 46 P.3d 774 (2002) (Madsen, J., dissenting)

(“Because a prosecutor cannot make an argument contrary to the plea agreement, the statute cannot be intended to serve as authority for a law enforcement officer to make a recommendation contrary to the prosecutor’s”). Likewise, a prosecutor may not make statements that undermine a plea agreement even if he informs the court he is making the statements on behalf of the victims. *Carreno-Maldonado*, 135 Wn. App. at 86-87.

Here, after reviewing the guilty plea with Ms. Myers, the court asked the prosecutor for his recommendation. RP 17. After emphasizing how terrible the crime was, the prosecutor breached the plea agreement by arguing that it ignored the victim:

[I]n these types of cases there’s a risk -- a risk for me, I don’t know about others -- but a risk for me of ignoring the other part of this and that’s Mr. Allen, the fellow who got murdered, the fellow who’s not here today to explain how this crime has impacted him or what he thinks the sentence out [sic] to be and how his life was going when it got stolen by Ms. Myers in her murdering him.

But his sister, Peggy Roberts, is here to tell the Court about Mr. Allen; and I’ll ask her to come up and tell you about Mr. Allen and tell you what she thinks the sentence out[sic] to be.

RP 18-19 (emphasis added).

In her statements to the court, Ms. Roberts declared her personal beliefs about the “facts” of crime, accusing Ms. Myers of additional conduct that went far beyond what Ms. Myers had admitted to in the guilty plea. Slip op. at 2. Ms. Roberts then ended with a request for the court to “sentence her to the full extent of the law.” RP 23.

Acknowledging Ms. Roberts’s testimony, the trial court stated that Ms. Myers’s drug use “took a toll on the whole family of the victim of this crime.” RP 26. Though the court noted it typically followed the State’s recommendations, here the court was concerned “there needs to be more jail time.” RP 26-27. The trial court imposed more jail time as requested by Mr. Allen’s sister, and imposed a 180-month sentence rather than the requested 130 months. RP 27; CP 23.

As in *MacDonald*, RCW 9.94A.500 allowed Mr. Allen’s sister, a surviving victim, to speak about the sentence; however, this right “must be read in conjunction with precedent protecting a defendant’s due process rights in a plea bargain” *MacDonald*, 183 Wn.2d at 17. In *MacDonald*, the investigating

officer advocated for a sentence above the agreed upon plea recommendation. *Id.* at 6. The State argued the officer was not acting as an arm of the State but as an advocate for the deceased victim. *Id.* at 16. This Court rejected this argument that sought to “elevate a victim’s state’s rights over an accused’s due process rights as conferred by both state and federal constitutions” and was inconsistent with controlling case law. *Id.* at 17.

In *MacDonald*, the Court noted the proper place for the investigating officer to voice his opinion about the length of the sentence was to the prosecutor, during plea negotiations, which the record established he was able to do. *Id.* at 18. The officer’s advocacy at sentencing undermined the plea agreement and was a breach, necessitating reversal. *Id.* at 20-21

The same is true here. Ms. Roberts’s sentence request should have been taken into account in the plea negotiations, not offered by the prosecutor as an alternative to the agreement he made with Ms. Myers. The prosecutor had a constitutional and statutory duty to inform Mr. Allen’s sister about the final resolution of the case. RCW 7.69.030(2); Const. art I, § 35. And

he had a duty to assist her with the “victim impact statement or report to the court...if requested.” RCW 7.69.030(13). The prosecutor also has a duty to inform the court whether the victim of a crime against the person has any express objections. RCW 9.94A.431(1). If the court then determines the plea is inconsistent with the “interests of justice” and “prosecuting standards,” it shall inform the defendant and prosecutor they are not bound by the agreement, and allow the defendant to withdraw her plea. *Id.* Given these obligations to account for the victim’s wishes throughout plea negotiations, the prosecutor cannot simply claim at sentencing that the plea agreement he reached with the defendant failed to account for the victim’s perspective as occurred here.

Like in *MacDonald*, here the record reflects the prosecutor did in fact communicate with the surviving victims about their wishes, because the exact cost of Mr. Allen’s funeral expenses were part of the plea agreement. CP 19. And the prosecutor was aware Ms. Roberts would be telling the court “what she thinks the sentence [ought] to be” when he introduced her testimony to the court. RP 19. It is immaterial that the

surviving victim whose testimony the prosecutor introduced was not an employee of the office as the Court of Appeals erroneously concluded. Slip op. at 4. The key point is that the prosecutor undercut the plea agreement by informing the court that the agreement did not include a critical consideration that the prosecutor was required to account for in the plea offer.

This Court should accept review and reverse for Ms. Myers to withdraw her plea or seek specific performance where the prosecutor breached the agreement by alerting the court that the plea offer did not account for the victim's perspective and then introducing the victim's perspective on the sentence that should be imposed as if it were an alternative to the plea agreement. *Carreno-Maldonado*, 135 Wn. App. at 83; *MacDonald*, 183 Wn.2d at 21.

E. CONCLUSION

This Court should accept review and reverse where the Court's decision is contrary to *MacDonald* and Ms. Myers's due process rights. RAP 13.4(b)(1), (3)&(4).

DATED this 14th day of January, 2021.

Respectfully submitted,

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

STATE OF WASHINGTON,)	No. 37013-5-III
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
ASHLEY DAWN MYERS,)	
)	
Appellant.)	

PENNELL, C.J. — Ashley Myers appeals a 180-month sentence, imposed as a result of her guilty plea to second degree murder. Although the sentence is within the standard range, Ms. Myers contests its validity, arguing the State breached its plea agreement and the court relied on unproven facts in violation of the real facts doctrine. We disagree and affirm.

FACTS

Ashley Myers shot and killed Kenneth Allen while she was under the influence of methamphetamine. The State charged Ms. Myers with one count of first degree murder and one count of possession of a controlled substance. The parties entered into an

agreement whereby Ms. Myers agreed to plead guilty to second degree murder and the State agreed to recommend a sentence of 130 months. This was near the low end of the standard range of 123 to 220 months.

At sentencing, the prosecutor articulated the State's 130-month recommendation. The prosecutor explained his recommendation by pointing to Ms. Myers's willingness to admit guilt and take responsibility for her actions.

After making his sentencing recommendation, the prosecutor introduced Kenneth Allen's sister, Peggy Roberts. The prosecutor stated:

A lot of times—excuse me—in these types of cases there's a risk—a risk for me, I don't know about others—but a risk for me of ignoring the other part of this and that's Mr. Allen, the fellow who got murdered, the fellow who's not here today to explain how this crime has impacted him or what he thinks the sentence [ought] to be and how his life was going when it got stolen by Ms. Myers in her murdering him.

But his sister, Peggy Roberts, is here to tell the Court about Mr. Allen; and I'll ask her to come up and tell you about Mr. Allen and tell you what she thinks the sentence [ought] to be.

Report of Proceedings (Aug. 2, 2019) at 18-19.

Ms. Roberts then addressed the court. She made several factual allegations about the offense that went beyond the information that had been presented to the court. She also requested the court sentence Ms. Myers “a little longer” than what

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was recommended by the prosecutor, and to sentence Ms. Myers “to the full extent of the law.” *Id.* at 22-23.

After hearing from the defense, the court announced it would impose a sentence of 180 months’ imprisonment. The court justified this decision by stating that Ms. Myers’s “use and abuse of drugs” had taken a toll on everyone, and she needed more jail time to think about the consequences of her drug use. *Id.* at 26-27.

Ms. Myers now appeals.

ANALYSIS

A standard range sentence is generally not appealable. RCW 9.94A.585. An exception exists for legal errors. *State v. Williams*, 149 Wn.2d 143, 146-47, 65 P.3d 1214 (2003). For example, a defendant may assert denial of their legal right to due process by arguing the prosecutor breached its plea agreement at sentencing. *See State v. Goldberg*, 123 Wn. App. 848, 852, 99 P.3d 924 (2004). In addition, a standard range sentence is reviewable if it was issued in reliance on unproven facts. RCW 9.94A.530(2). The former type of error is constitutional in nature and therefore may be reviewed regardless of a contemporaneous objection; however, the latter type of error is generally statutory and therefore requires an objection to preserve appellate review. *See* RAP 2.5(a).

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Plea agreement

Crime victims have constitutional and statutory rights to address the court at sentencing. WASH. CONST. art. I, § 35; RCW 7.69.030(13)-(14). A prosecutor, as an officer of the court, can and should help victims exercise their rights. A prosecutor does not breach a plea agreement merely by helping facilitate a victim's communication with the court. *State v. Carreno-Maldonado*, 135 Wn. App. 77, 86-87, 143 P.3d 343 (2006). To the contrary, if a crime victim disagrees with a plea agreement reached by the prosecutor and the defendant, the prosecutor is obliged to inform the court of this fact on the record. RCW 9.94A.431(1).

The record here indicates the prosecutor stayed within his role as both a party to the plea agreement and an officer of the court. The prosecutor never argued for a sentence beyond the agreed term of 130 months. He did not emphasize the aggravating facts of the case, express misgivings about the plea agreement, or state that he agreed with the assessment of the case by Kenneth Allen's sister. The crime victim in this case did not work as an arm of the prosecutor's office. Thus, her comments to the court cannot fairly be attributed to the State. *Cf. State v. MacDonald*, 183 Wn.2d 1, 14-15, 346 P.3d 748 (2015).

The prosecutor's comment about not wanting to risk ignoring the victim was made after a discussion that was focused exclusively on Ms. Myers and her circumstances. It was entirely appropriate for the prosecutor to recognize that Ms. Myers was not the only individual impacted by the State's case. The deceased victim was also of central concern and it was important for the prosecutor to remind the court of that fact and to facilitate the right of the victim's sister to address the court.

Real facts doctrine

A defendant may appeal a standard range sentence based on an alleged violation of the real facts doctrine as set forth by RCW 9.94A.530(2). However, relief on appeal generally requires a specific objection at the time of sentencing. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993); *State v. Watson*, 120 Wn. App. 521, 86 P.3d 158 (2004), *aff'd*, 155 Wn.2d 574, 122 P.3d 903 (2005).

An exception to the error preservation requirement of the statute exists when it comes to proof of criminal history. *See State v. Cate*, 194 Wn.2d 909, 913-14, 453 P.3d 990 (2019). A defendant's criminal history is material to calculating the offender score. Thus, due process requires the State to prove criminal history, regardless of whether the defendant objects. *State v. Hunley*, 175 Wn.2d 901, 911-916, 287 P.3d 584 (2012).


Facts other than criminal history are not necessarily material to a trial court's decision to impose a sentence within the standard range. As such, mere mention of extraneous facts during a sentencing hearing does not raise constitutional concerns. A defendant concerned about whether extraneous facts will have an impact on the court is obliged by statute to object. The failure to do so waives review on appeal. RAP 2.5(a).

Here, Ms. Myers did not make an objection under the real facts doctrine at the time of her sentencing. Review of this claim of error is therefore waived.

CONCLUSION

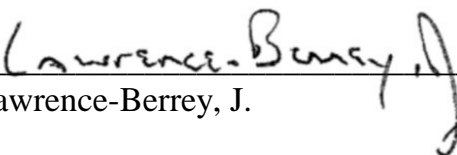
The judgment and sentence is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

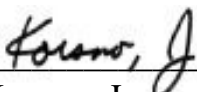


Pennell, C.J.

WE CONCUR:



Lawrence-Berrey, J.



Korsmo, J.

IN THE SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	COA NO. 37013-5-III
)	
ASHLEY MYERS,)	
)	
PETITIONER.)	

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WASHINGTON APPELLATE PROJECT

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