

66016-1

66016-1

NO. 66016-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

CHARLES C. KEENEY,

Appellant.

---

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

The Honorable Jeffrey Ramsdell

---

BRIEF OF APPELLANT

---

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**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE ..... 3

D. ARGUMENT ..... 9

    1. THE PROSECUTOR’S ARGUMENTS DISPARAGING DEFENSE COUNSEL AND COMMENTING ON KEENEY’S RIGHT TO CONFRONTATION WERE MISCONDUCT ..... 9

        a. The prosecutor disparaged defense counsel and encouraged the jury to draw an adverse inference from Keeney’s right to confrontation..... 9

        b. Principles of due process forbid prosecutors from engaging in misconduct to obtain convictions ..... 10

            i. Standard of review..... 11

            ii. The prosecutor’s multiple comments disparaging defense counsel were misconduct..... 12

            iii. The prosecutor’s arguments urging the jury to draw a negative inference from Keeney’s right to confront the witnesses against him were misconduct ..... 14

        c. The misconduct prejudiced Keeney..... 15

    2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE REPEATED INSTANCES OF FLAGRANT AND ILL-INTENTIONED MISCONDUCT ..... 16

        a. It was objectively unreasonable for trial counsel to fail to object to the prosecutor’s improper comments..... 17

        b. Defense counsel’s failure to object to the prosecutor’s misconduct prejudiced Keeney..... 18

3. THE TRIAL COURT IMPROPERLY RELIEVED THE STATE OF ITS BURDEN TO PROVE THE EXISTENCE AND COMPARABILITY OF KEENEY'S CRIMINAL HISTORY ...	20
a. Principles of due process impose the burden to prove criminal history on the State .....	20
b. The State failed to prove that Keeney's prior federal bank robbery conviction was comparable to the crime of robbery in Washington.....	21
c. The State failed to prove that Keeney's 1982 burglary convictions did not wash out or should be scored as more than one point.....	25
d. The State failed to prove the existence of Keeney's remaining criminal history.....	26
e. The remedy is reversal of Keeney's sentence and remand for resentencing.....	27
E. CONCLUSION.....	29

## TABLE OF AUTHORITIES

### Washington Supreme Court Decisions

<u>In re Brett</u> , 142 Wn.2d 868, 16 P.3d 601 (2001).....	16
<u>In re Personal Restraint of Cadwallader</u> , 155 Wn.2d 867, 123 P.3d 456 (2005) .....	20, 25-27
<u>In re Personal Restraint of Lavery</u> , 154 Wn.2d 259, 111 P.3d 837 (2005) .....	22-24, 27
<u>In re Personal Restraint of Williams</u> , 111 Wn.2d 353, 759 P.2d 436 (1988) .....	16, 20
<u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 154 (1988) .....	11
<u>State v. Charlton</u> , 90 Wn.2d 657, 585 P.2d 142 (1978) .....	10
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009) .....	12
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999) .....	20-22, 27
<u>State v. Garrett</u> , 124 Wn.2d 504, 881 P.2d 185 (1994) .....	17
<u>State v. Mendoza</u> , 165 Wn.2d 913, 205 P.3d 113 (2009) .....	20
<u>State v. Morley</u> , 134 Wn.2d 588, 952 P.2d 167 (1998) .....	22
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984) .....	11
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....	16, 17
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008) .....	12, 13

### Washington Court of Appeals Decisions

<u>In re Personal Restraint of Carter</u> , 154 Wn. App. 907, 230 P.3d 181, <u>review granted</u> , 170 Wn.2d 1001 (2010) .....	23
<u>State v. Echevarria</u> , 71 Wn. App. 595, 860 P.2d 420 (1993) .....	10
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996), <u>rev. denied</u> , 131 Wn.2d 1018 (1997) .....	12, 14
<u>State v. Gonzales</u> , 111 Wn. App. 276, 45 P.3d 205 (2002) .....	12
<u>State v. Hunley</u> , __ Wn. App. __, __ P.3d __, 2011 WL 1856074 (May 17, 2011) .....	20, 21, 27

### United States Supreme Court Decisions

<u>Berger v. United States</u> , 295 U.S. 78, 55 S. Ct. 629, 79 L.Ed. 1314 (1935) .....	10, 11
<u>Carter v. United States</u> , 530 U.S. 255, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) .....	23

<u>Griffin v. California</u> , 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) .....	18
<u>Murray v. Carrier</u> , 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) .....	23
<u>Portuondo v. Agard</u> , 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000) .....	14
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 1052, 80 L. Ed. 2d 674 (1984) .....	16, 17, 18, 19
<u>Wiggins v. Smith</u> , 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) .....	17
<u>Williams v. Taylor</u> , 529 U.S. 362, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) .....	16

### **United States Court of Appeals Decisions**

<u>United States v. Frascone</u> , 747 F.2d 953 (5th Cir. 1984) .....	12
---	----

### **United States Constitution Provisions**

U.S. Const. amend. VI .....	1, 12, 14
U.S. Const. amend. XIV .....	1, 23

### **Statutes**

18 U.S.C. § 2113.....	2, 23
<u>Former RCW 9.94A.360</u> .....	26
RCW 9.94A.500 .....	21
RCW 9.94A.525 .....	21
RCW 9.94A.530 .....	21, 27, 28

**A. ASSIGNMENTS OF ERROR**

1. The prosecutor committed misconduct in closing argument that denied Keeney a fair trial by commenting on Keeney's right to confrontation and disparaging defense counsel.

2. To the extent that a timely objection may have resulted in a curative instruction being issued to the jury, defense counsel erred in failing to object to the misconduct.

3. Contrary to the Fourteenth Amendment guarantee of due process of law, the State failed to prove the existence and comparability of Keeney's criminal history.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A prosecuting attorney may violate an accused person's Fourteenth Amendment right to a fair trial through egregious misconduct. Here the prosecutor accused defense counsel of "bullying", "manipulating", and trying to "confuse" the complaining witness by conducting cross-examination. The prosecutor also charged that defense counsel was trying to confuse and manipulate the jury. Did the prosecutor's misconduct violate Keeney's right to a fair trial? (Assignment of Error 1)

2. An accused person has the Sixth Amendment right to the effective assistance of counsel. Did counsel fail to render effective

assistance when he did not object to the prosecutor's improper remarks? (Assignment of Error 2).

3. Principles of due process impose on the State the burden of proving criminal history by a preponderance of the evidence. The State must prove the existence of prior offenses, that "wash out" provisions are not applicable, and that foreign offenses are comparable to crimes in Washington. Where the State's proof of criminal history was limited to bare assertions, did the State fail to meet its burden of proving criminal history? (Assignment of Error 3)

4. The State alleged that a prior 1999 conviction for federal bank robbery should be included in Keeney's SRA offender score. Where 18 U.S.C. 2113, defining federal bank robbery, is broader than robbery in Washington, did the trial court err in including the conviction in Keeney's offender score?

5. The State alleged that three 1982 convictions for burglary and attempted burglary, which were sentenced on the same day, should be included in Keeney's SRA offender score. Although 17 years elapsed between those offenses and Keeney's next conviction, the State did not attempt to prove that the 1982 convictions did not wash out. The State also did not establish whether Keeney's sentences for those offenses were served

concurrently or consecutively, which would also have impacted his offender score. Did the trial court err in including the prior burglary convictions in Keeney's SRA offender score? (Assignment of Error 3)

C. STATEMENT OF THE CASE

Charles Keeney was prosecuted in King County for two counts of robbery in the first degree with a deadly weapon, burglary in the first degree with a deadly weapon, and taking a motor vehicle without permission. 2RP 4-5;<sup>1</sup> CP 7-9.

The prosecution arose out of a series of incidents involving Brian Branch, a self-professed "loner", who had a weakness for women who were "down on their luck." 3RP 29, 32. Branch fraternized with prostitutes but claimed he did not pay them for sexual favors. 4RP 28. One such woman, "Christy," he met through another female acquaintance, "Jennifer." 4RP 28. Christy called Branch frequently to ask him for money; Branch claimed he

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<sup>1</sup> The verbatim report of proceedings consists of six volumes, which are referred to herein as follows:

May 11, 2010	-	1RP
July 26, 2010	-	2RP
July 27, 2010	-	3RP
July 28, 2010	-	4RP
July 29, 2010	-	5RP
September 10, 2010	-	6RP

did not seek sexual favors in return but just gave her money to talk to him. 4RP 29.

One day Christy contacted Branch to ask him if he could help out a friend of hers. 3RP 34. Branch was reluctant, but Christy was insistent, and so Branch agreed to meet Christy at Herfy's restaurant in Fremont. At Herfy's Christy introduced Branch to appellant Charles Keeney. 3RP 35. Keeney said he needed gas money and Branch gave him \$5. Id.

According to Branch, the next time he saw Keeney was when Keeney came to his apartment to rob him. At Keeney's trial, Branch testified that on a Friday night he was at home alone, smoking in his kitchen with the door open. 3RP 37. Branch alleged that Keeney came in, grabbed a knife from a butcher block on the kitchen counter, pointed it at Branch's belly and demanded Branch empty his pockets. Id. Branch testified he literally ripped his pockets on his jeans, emptying between \$120 and \$150, his keys, and his drivers license on the floor. 3RP 39. When Keeney started picking Branch's possessions up, Branch told Keeney to "just take it and go." 3RP 39, 41.

According to Branch, Keeney was unsatisfied and demanded Branch give him a computer, a laptop, and a change jar.

Id. Branch did not have any of these items and offered Keeney his credit card. Id. Keeney took the credit card and told Branch he would be hiding in the bushes and would kill him if he canceled it. 3RP 43.

Later that night Branch canceled the credit card. 3RP 52. He was unable to sleep, and when another female "friend," Lea Gruver, telephoned him, he asked her to come and spend the night. 3RP 52; 4RP 194. At about 5:30 the next morning, Branch and Gruver were awakened by the doorbell ringing and a woman's voice saying, "help me, help me." 3RP 54-55. Branch looked through the peephole and saw a petite woman standing outside. 3RP 55. He turned the deadbolt and from the other side Keeney forced his way in. 3RP 56. Keeney was angry because Branch had canceled the credit card and, according to Branch, punched Branch in the face and said, "I want big money out of you." 3RP 57-58; 4RP 196. Branch produced his checkbook and wrote Keeney a check for \$1000, complaining bitterly. 3RP 59. Keeney demanded Branch's car keys and cell phone and drove away to cash the check in Branch's car, promising to bring it right back. 3RP 60.

Shortly after Keeney left, Money Tree called Branch for authorization to cash the check. 3RP 61. Although Keeney had departed, Branch did not raise an alarm on the telephone with Money Tree or contact the police. Instead Branch authorized the Money Tree to dispense the funds. 3RP 61; 4RP 201-02.

The following day Gruver negotiated with Keeney for the return of the car. 4RP 11. According to Gruver, Keeney wanted \$500 before he would return the car. 4RP 206. Branch had \$150 in cash on him, which he gave to Gruver, along with a blank check. 4RP 20, 208. Gruver then retrieved the car. 4RP 208.

Even after this incident, Branch delayed calling the police. 4RP 13. He explained that he believed the police would not be responsive. 4RP 44. When he finally reported the alleged incidents, he also told the police a story that differed in several respects from the version he testified to at trial. For example, he told one officer that during the first incident, Keeney came through the kitchen door already armed with a knife. 4RP 31. He told the case detective that during the first incident Keeney rang the doorbell and entered through the front door. 4RP 35. He explained on cross-examination that his story had changed due to the stress of being threatened with a knife. 4RP 37. He stated that Keeney in

fact rang the front doorbell, barged his way in, and grabbed a knife from the butcher block or counter. 4RP 37.

Branch then changed his story again to adjust the number of times that Keeney came to his apartment. He said that there were actually three robberies. 4RP 42. He said that the first time Keeney came through the front door, the second time he came through the back door, and the third time he came with the girl. 4RP 42-43. He also insisted that Keeney stole not one but two credit cards. 4RP 47.

Gruver also exhibited confusion regarding what had happened during the alleged robberies. For example, she said at first that she was not sure whether a knife was involved, then stated that she believed there were knives on the floor, and then, after reviewing a transcript of an earlier interview, stated that Keeney had held two steak knives, one in each hand. 5RP 26-29. After hearing Branch and Gruver's testimony, the State requested permission to instruct the jury on robbery in the second degree by use or threat of force. 5RP 71.

The jury acquitted Keeney of the most serious charges, along with the deadly weapon enhancements, and convicted him

only of one count of robbery in the second degree and taking a motor vehicle without permission. CP 66-75.

At sentencing, the trial court calculated Keeney's offender score for each offense as "9+," with a resulting standard range on the robbery charge of 63-84 months confinement and of 43-57 months confinement on the taking a motor vehicle charge. CP 77. The court included in Keeney's criminal history a 1999 federal conviction for bank robbery without requiring the State to prove its comparability, three convictions for attempted burglary and two counts of burglary in the second degree from 1982 without obligating the State to prove they did not merge or wash out, and eight convictions for possession of controlled substances without obligating the State to prove they were felonies. CP 82. Based in part on the fact that Keeney's offender score exceeded nine points, the court imposed high-end sentences on each count. 6RP 14.

Keeney appeals. CP 85.

D. ARGUMENT

1. THE PROSECUTOR'S ARGUMENTS  
DISPARAGING DEFENSE COUNSEL AND  
COMMENTING ON KEENEY'S RIGHT TO  
CONFRONTATION WERE MISCONDUCT.

a. The prosecutor disparaged defense counsel and encouraged the jury to draw an adverse inference from Keeney's right to confrontation. In his closing argument, defense counsel focused on the inconsistencies in Branch's testimony. 5RP 97-111. In her rebuttal argument, the prosecutor used this theme as an excuse to disparage defense counsel. She argued:

And defense counsel's exactly right that when [Branch] first started talking about this third incident . . . [was] when he started having to answer a bunch of questions that came from defense counsel in a confusing way. That came in in a way – you saw Mr. Branch get flustered. Get emotional. Get confused. And you can take that for what it is, as for whether or not there was another robbery or whether it was an attempt to really get Mr. Branch confused and you confused.

But what it showed was an exact example of how easily manipulated Mr. Branch is. How easily bullied he can be as he was sitting there trying to answer questions and trying to remain calm as he was talking about what happened to him.

5RP 112.

The prosecutor did not limit herself to these remarks, but continued:

[T]here were a number of speculations and different ideas that were just posed to you by defense and gave you some things saying – that maybe the defendant bought women for Mr. Branch. Maybe he bought drugs for Mr. Branch. Maybe Mr. Branch buys drugs for Ms. Gruver.

That's why you get your instructions that say that the arguments of counsel are not evidence and you must base your verdict on the evidence because there is zero evidence of those speculations or theories or ideas. And to – to pose them or to suggest them, and to suggest that you should somehow base your verdict on those kinds of theories, of which there is no evidence at all, is simply inappropriate and wrong. You have no evidence of those things and that is simply an attempt to confuse you, like Mr. Branch was confused.

5RP 116.

Defense counsel did not object to the improper remarks.

b. Principles of due process forbid prosecutors from engaging in misconduct to obtain convictions. Prosecutors, as quasi-judicial officers, have the duty to seek verdicts free from prejudice and based on reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). This is consistent with the prosecutor's obligation to ensure an accused person receives a fair and impartial trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); State v. Charlton, 90 Wn.2d 657,

665, 585 P.2d 142 (1978); U.S. Const. amends. VI; XIV; Const. art.

I, 3.

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, 295 U.S. at 88.

i. Standard of review. The defense bears the burden of proving a “substantial likelihood” that prosecutorial misconduct affected the jury. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A claim of prosecutorial misconduct in closing argument is waived if defense counsel did not object and curative instructions would have obviated the prejudice from the remarks. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 154 (1988). However, “[a]ppellate review is not precluded if the prosecutorial misconduct is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered

by the misconduct.” Id. (emphasis in original). This Court has also found prosecutorial misconduct to be flagrant and ill-intentioned where prior decisional law has made the impropriety of the remarks clear. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997). Finally, where misconduct invades a fundamental constitutional right, it may be manifest constitutional error that is properly before the Court on review notwithstanding the absence of an objection. Id. at 216; State v. Warren, 165 Wn.2d 17, 27 n. 3, 195 P.3d 940 (2008).

ii. The prosecutor’s multiple comments disparaging defense counsel were misconduct. A prosecutor violates the Sixth Amendment right to counsel if she personally attacks defense counsel, impugns defense counsel’s integrity or character, or disparages the role of defense attorneys in general. State v. Fisher, 165 Wn.2d 727, 771, 202 P.3d 937 (2009) (Madsen, J., concurring); Warren, 165 Wn.2d at 29-30. Such arguments are improper because they “seek[] to draw the cloak of righteousness around the prosecutor in [her] personal status as government attorney and impugn[] the integrity of defense counsel.” State v. Gonzales, 111 Wn. App. 276, 283, 45 P.3d 205 (2002)

(quoting United States v. Frascone, 747 F.2d 953, 957 (5th Cir. 1984)).

In Warren, the King County Prosecuting Attorney – the same office that prosecuted Keeney – conceded allegations that “mischaracterizations” in defense counsel’s closing were “an example of what people go through in a justice system when they deal with defense attorneys,” and that defense counsel was “taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing” were misconduct. 165 Wn.2d at 29.

In Warren, the Court declined to reverse the convictions in part because the remarks were not part of a well-developed theme. 165 Wn.2d at 30. Here, however, apparently the sole intent of the prosecutor’s rebuttal was to distract the jury from its doubts regarding the State’s weak case by leveling a personal attack on Keeney’s counsel. The prosecutor called defense counsel a bully and a manipulator and suggested he was deliberately trying to confuse not only Branch but the jury.

The prosecutor told the jury it was “inappropriate and wrong” for defense counsel to offer theories as to the real relationship between Branch and Keeney. In fact it was the prosecutor who

inappropriately and wrongly criticized defense counsel for doing his job. See WPIC 4.01 (“A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.” (emphasis added)). The prosecutor consistently and repeatedly linked direct attacks on the character of defense counsel to Keeney’s exercise of fundamental constitutional rights. The prosecutor’s arguments were flagrant misconduct.

iii. The prosecutor’s arguments urging the jury to draw a negative inference from Keeney’s right to confront the witnesses against him were misconduct. The defendant’s Sixth Amendment right “to be confronted with the witnesses against him” serves the truth-seeking function of the adversary process. It also “reflects respect for the defendant’s individual dignity and reinforces the presumption of innocence that survives until a guilty verdict is returned.” Portuondo v. Agard, 529 U.S. 61, 76, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000) (Stevens, J., concurring).

The prosecutor told the jury that Branch’s shifting story was a result of defense counsel trying to “manipulate” and “confuse” Branch with his questions. The prosecutor painted Branch as a victim – “he was sitting there trying to answer questions and trying to remain calm” while defense counsel “bullied” him. 5RP 112.

The improper arguments thus also urged the jury to draw a negative inference from Keeney's right to confront the witnesses against him.

c. The misconduct prejudiced Keeney. In Fleming, this Court observed, "trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." 83 Wn. App. at 215. This Court held that the many errors in the prosecutor's closing argument were not cured by the lengthy, legitimate arguments in favor of finding the complaining witness credible. Id. at 216.

The jury evidently found many problems with the State's proof, given that they acquitted Keeney outright of the most serious charges against him, and also refused to find that the State proved the deadly weapon enhancement. Given the weaknesses in the State's case, had the prosecutor not portrayed defense counsel as a "bully" and a "manipulator" who was trying to "confuse" the witnesses and the jury, it is likely the jury would have acquitted Keeney altogether. This Court should hold that the prosecutor's

manifestly improper arguments denied Keeney a fair trial, and reverse his convictions.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE REPEATED INSTANCES OF FLAGRANT AND ILL-INTENTIONED MISCONDUCT.

In response to Keeney's allegations of misconduct, the State may claim the issue is waived because defense counsel did not object to the improper comments. Keeney believes that no curative instruction could have dispelled the taint from the misconduct. To the extent that this Court may find a claim of waiver to have merit, however, Keeney argues in the alternative that his lawyer was ineffective for failing to object to the improper comments.

The state and federal constitutions guarantee criminal defendants effective representation by counsel at all critical stages of trial. U.S. Const. amends. VI, XIV; Const. art. 1, §§ 3, 22; Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 1052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). To obtain relief based on ineffective assistance of counsel, an appellant must establish that (1) his counsel's performance was deficient and (2) his counsel's deficient performance prejudiced his defense. Strickland, 466 U.S. at 687;

Williams v. Taylor, 529 U.S. 362, 391, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000). A claim of ineffective assistance of counsel presents a mixed question of law and fact that is reviewed de novo. In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

a. It was objectively unreasonable for trial counsel to fail to object to the prosecutor's improper comments. The Strickland test was adopted in Washington to "ensure a fair and impartial trial." State v. Garrett, 124 Wn.2d 504, 518, 881 P.2d 185 (1994) (citing Thomas, 109 Wn.2d at 225). To establish the first prong of the Strickland test, an accused must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." Thomas, 109 Wn.2d at 229-30. If defense counsel's conduct may be characterized as a legitimate trial strategy or tactic, it is not considered ineffective. Id. at 229-30. However, "tactical" or "strategic" decisions by defense counsel must still be reasonable decisions. Wiggins v. Smith, 539 U.S. 510, 523, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

Considering a claim of ineffective assistance of counsel based on the failure to lodge a sufficient constitutional objection to a prosecutor's argument that commented on the right to confront

witnesses, the Eighth Circuit held that while many ineffective assistance of counsel claims require further development of the record to ascertain the reasoning behind counsel's actions, this claim was not one of these. Burns v. Gammon, 260 F.3d 892, 896-97 (8th Cir. 2001). "No sound trial strategy could include failing to make a constitutional objection to a prosecutor's improper comment concerning Burns' rights to a jury trial and to confront witnesses." Id. at 897.

And, in fact, it is entirely realistic that the jury might draw the "natural and irresistible" inferences that the State's duty to prove the charges beyond a reasonable doubt is unfair, and that the exercise of the right to a trial burdens crime victims. See Griffin v. California, 380 U.S. 609, 614-615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). This Court should therefore conclude that defense counsel's failure to object to prosecutorial arguments that commented on the exercise of Keeney's fundamental constitutional rights was deficient performance for which there was no strategic reason.

b. Defense counsel's failure to object to the prosecutor's misconduct prejudiced Keeney. The second prong of Strickland requires the defendant to show prejudice. 466 U.S. at

693. To show prejudice, a defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Id. Rather, he need only show “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

As demonstrated in argument section 1, supra, Keeney was prejudiced by counsel’s deficient performance. Had counsel objected, and the court admonished the prosecutor, the prosecutor would have been precluded from encouraging the jurors to think that counsel was a bully and a manipulator simply because he was doing his job by holding the State to its burden. The prosecutor would have been precluded from making the entirely improper suggestion that defense counsel was trying to bully and hoodwink the jury. As it was, the bell was rung not once, but repeatedly, impacting the jury’s verdict. Keeney has shown his counsel’s deficient performance prejudiced him, meeting the second prong of the Strickland test.

3. THE TRIAL COURT IMPROPERLY RELIEVED THE STATE OF ITS BURDEN TO PROVE THE EXISTENCE AND COMPARABILITY OF KEENEY'S CRIMINAL HISTORY.

a. Principles of due process impose the burden to prove criminal history on the State. “Our Supreme Court has consistently held that the State bears the constitutional burden of proving prior convictions by a preponderance of the evidence.” State v. Hunley, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2011 WL 1856074 ¶ 13 (May 17, 2011) (citing State v. Ford, 137 Wn.2d 472, 479-480, 973 P.2d 452 (1999)). The burden is on the State “because it is ‘inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.’” Ford, 137 Wn.2d at 480 (quoting In re Personal Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)). For this reason, the record before the sentencing court must support the criminal history determination. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). “This reflects fundamental principles of due process, which require that a sentencing court base its decision on information bearing ‘some minimal indicium of reliability beyond mere allegation.’” Id. (emphasis in original, citation deleted).

A sentencing court may rely upon stipulation or acknowledgment of prior convictions without requiring the State to present further proof. In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 873, 123 P.3d 456 (2005). But “[t]he defendant’s silence is not constitutionally sufficient to meet this burden.” Hunley, 2011 WL 1856074 at ¶ 14. Further, where a defendant does not enter into a plea agreement with the State, he has no obligation to disclose prior convictions. Cadwallader, 155 Wn.2d at 875.

Applying Ford and its progeny, in Hunley, the Court invalidated amendments to RCW 9.94A.500 and .530, which provided “[a] criminal history summary relating to the defendant from the prosecuting authority ... shall be prima facie evidence of the existence and validity of the convictions listed therein” and the failure to object to such summary constituted acknowledgment of criminal history. Hunley, 2011 WL 1856074 at ¶¶ 15, 16.

b. The State failed to prove that Keeney’s prior federal bank robbery conviction was comparable to the crime of robbery in Washington. Where the State alleges a defendant’s criminal history contains out-of-state felony convictions, under the SRA, the State bears the burden of proving the existence and

comparability of those convictions. RCW 9.94A.525; Ford, 137 Wn.2d at 480.

To determine whether a foreign conviction is comparable to a Washington offense, the court engages in a two-step analysis. First, the court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. Ford, 137 Wn.2d at 479 (citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). If the elements of the foreign conviction are comparable to the elements of a Washington offense on their face, the foreign offense counts toward the offender score as if it were the comparable Washington offense. In re Personal Restraint of Lavery, 154 Wn.2d 259, 255, 111 P.3d 837 (2005). If the elements of the prior offense are not comparable, or are broader than the pertinent crime in Washington, then the court may look to the facts admitted by the defendant or proved by indictment or trial to determine if the prior offenses are comparable. Id. at 256-57. In this latter instance, however, the court must exercise care.

As the Supreme Court explained in Lavery:

Where the foreign statute is broader than Washington's, [an examination of the underlying facts] may not be possible because there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense.

Lavery, 154 Wn.2d at 257 (citation omitted).

The concern is that substantive differences in the criminal law of foreign jurisdictions may result in the defendant being convicted for conduct for which he may have had a legitimate defense in Washington. See id. at 258 (“Lavery had no motivation in the earlier conviction to pursue defenses that would have been available to him under the robbery statute but were unavailable in the federal prosecution”). Such an outcome violates the Fourteenth Amendment guarantee of due process. Murray v. Carrier, 477 U.S. 478, 495, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) (“[i]n appropriate cases’ the principles of comity and finality that inform the concepts of cause and prejudice ‘must yield to the imperative of correcting a fundamentally unjust incarceration.’”) (citation omitted); In re Personal Restraint of Carter, 154 Wn. App. 907, 918-20, 230 P.3d 181 (applying “actual innocence” exception to excuse procedural default where lack of comparability invalidated persistent offender sentence), review granted, 170 Wn.2d 1001 (2010).

In Lavery, the defendant also had suffered a prior conviction for federal bank robbery. The Court noted that unlike in Washington, where robbery requires proof of specific intent to steal,

federal bank robbery is a general intent crime. Lavery, 154 Wn.2d at 255-56 (citing Carter v. United States, 530 U.S. 255, 261-62, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000)); see also 18 U.S.C. § 2113.<sup>2</sup> The Court noted that numerous defenses that could be available in Washington to a charge of robbery, such as diminished capacity, intoxication, duress, insanity, or claim of right would not be applicable to a general intent crime.

Having concluded that the crimes were not legally comparable, the Court found that because Lavery had no motivation to pursue defenses that would have been available in Washington, allowing the State to attempt to prove factual comparability would be “problematic.” Lavery, 155 Wn.2d at 258. The Court thus held that the crime could not be used to enhance Lavery’s sentence. Id.

Here, similarly, Keeney was convicted of federal bank robbery, a general intent offense, yet the crime was used to

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<sup>2</sup> 18 U.S.C. § 2113, defining bank robbery and other incidental crimes, provides:

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . . Shall be fined under this title or imprisoned not more than twenty years, or both.

enhance Keeney's SRA offender score. CP 82. Not only did the State fail to muster any proof of the crime or its underlying facts, Keeney's judgment and sentence does not even reflect a case number for the offense. Id. Under Lavery, the conviction should have been excluded.

c. The State failed to prove that Keeney's 1982 burglary convictions did not wash out or should be scored as more than one point. The trial court also erred in including in Keeney's offender score his 1982 convictions for attempted burglary and burglary, as on the face of the judgment and sentence, 17 years elapsed between when Keeney was sentenced for those offenses and when he allegedly was sentenced for the federal bank robbery. CP 82. Although the burglary convictions are pre-SRA offenses, the State provided no information regarding Keeney's term of confinement. The State did not disclose Keeney's release date or supply any information regarding how long Keeney was in the community crime-free.

In Cadwallader, the defendant pleaded guilty without a plea agreement and was sentenced to a persistent offender sentence. 155 Wn.2d at 870. The sentencing court included in Cadwallader's criminal history a 1978 conviction for third degree rape even though

the State presented no proof of intervening convictions to show the crime did not wash out. Id. The Court held that Cadwallader could not stipulate to a legally erroneous sentence, and thus his agreement to his criminal history did not relieve the State of its burden of independently proving the crime should count as a predicate offense. Id. at 876.

Here, similarly, the State bore the burden of proving that Keeney's 1982 burglary convictions did not wash out. This the State did not do. Under Cadwallader the sentence must be reversed.

Further, the State did not establish whether Keeney's sentences for those offenses, which, according to the judgment and sentence in the instant matter, were all imposed on March 22, 1982, were served concurrently or consecutively. If they were served concurrently, then even if the crimes did not wash out the burglary convictions could count for only one point. See former RCW 9.94A.360. Keeney is entitled to have his sentence reversed.

d. The State failed to prove the existence of Keeney's remaining criminal history. Finally, the State did not present any proof of Keeney's remaining criminal history.

The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant.

Hunley, 2011 WL 1856074 at ¶ 14 (quoting Ford, 137 Wn.2d at 482) (emphasis in Hunley).

In Hunley the prosecutor submitted an unsworn document, presumably similar to the prosecutor's statement of criminal history in this case, that simply listed what the prosecutor believed were Hunley's prior convictions. Id. at ¶ 17. The Court found the prosecutor's statement was "exactly the type of 'bare assertion' rejected in Ford." Id. The Court, however, found that under RCW 9.94A.530 the remedy was reversal and remand for a resentencing hearing at which the State would have the opportunity to prove the criminal history. Id. at ¶ 19.

e. The remedy is reversal of Keeney's sentence and remand for resentencing. Here, in contrast to Hunley, at a minimum Keeney should be resentenced without the federal bank robbery conviction and the 1982 alleged burglaries. As established in Lavery, permitting the State to attempt to prove the factual comparability of a prior conviction, where Keeney had no incentive

to pursue certain defenses in the prior proceeding, “proves problematic.” Lavery, 155 Wn.2d at 258.

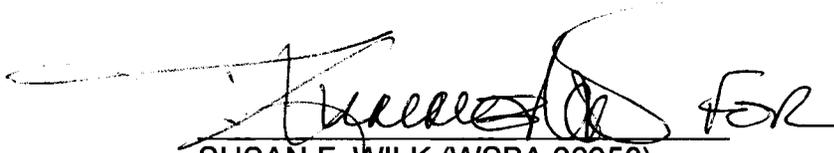
With regard to the burglaries, in Cadwallader the Court held that where the State “does not even allege a necessary prior conviction . . . the defendant has no obligation to object and the State should not be allowed the remedy of an evidentiary hearing to correct its failure.” Cadwallader, 155 Wn.2d at 878. To the extent that Cadwallader controls, RCW 9.94A.530 does not permit the State to prove the prior offenses did not wash out where at the previous sentencing hearing it completely failed in its burden of proof.

E. CONCLUSION

This Court should hold that flagrant misconduct denied Keeney a fair trial and reverse his convictions. In the alternative, this Court should hold that the trial court erred in sentencing Keeney based on criminal history that the State did not prove. Keeney is entitled to be resentenced.

DATED this 26th day of May, 2011.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Susan F. Wilk for", written over a horizontal line.

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