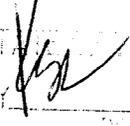


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No. 34350-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

The person identified by the prosecution in this Persistent Offender case as

DONALD BETTS,

Appellant.

---

ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

---

The Honorable Thomas J. Felnagle,  
The Honorable Bryan E. Chuschoff, and  
The Honorable Rosanne Buckner, Judges

---

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A. ASSIGNMENTS OF ERROR

1. Appellant's state and federal constitutional due process rights to a fair trial under the Fifth, Sixth and Fourteenth Amendments and Article I, §§ 3 and 22, were violated by the prosecutor's repeated flagrant, prejudicial misconduct.

2. Appellant's state and federal rights to effective assistance of counsel under the Sixth Amendment and Article I, § 22 were violated.

3. The trial court erred in refusing to strike the jury panel after the lead investigator, a prosecution witness, improperly participated in jury selection.

4. The trial court erred in admitting irrelevant, prejudicial evidence.

5. Cumulative trial error deprived appellant of his state and federal due process rights to a fair trial.

6. The court erred in entering sentences of life in prison without the possibility of parole under the "two strikes" portion of the Persistent Offender Accountability Act and the standard range sentences based upon a foreign conviction which was not legally comparable and cannot be found factually comparable under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and In re the Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005).

7. Appellant's rights as described in Blakely were violated when the court made factual findings about identity at sentencing and relied on those findings in increasing the sentence from that which was authorized by the jury's verdict.

8. The “prior conviction” exception to the rights to trial by jury and proof beyond a reasonable doubt is no longer valid and appellant was entitled to have the existence of his prior convictions proven to a jury beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is flagrant, prejudicial prosecutorial misconduct for a prosecutor to tell the jury that it must find that state’s witnesses are lying in order to acquit or believe the defendant, because it misstates the prosecutor’s burden of proof and the jury’s role and is highly misleading. Is reversal required where the evidence was no overwhelming and the prosecutor repeatedly stated, in both initial and rebuttal closing argument, that the jury would have to find that the complaining witness was lying and that other state witnesses were lying and in fact committing perjury and conspiracy in order to acquit?

Further, if the serious prejudice caused by the misconduct could have been cured by objection and instruction, was counsel prejudicially ineffective in failing to take such elementary steps on his client’s behalf?

2. Did the prosecutor commit flagrant, prejudicial misconduct by effectively telling the jurors that they would be cowards and weak if they did not convict, and by injecting the issue of “justice to the community” into this already emotionally charged sex crime case?

3. Did the court err in refusing to strike the jury panel where a prosecution witness, the lead investigating officer, actively participated in the selection of the jurors who would be evaluating his credibility and

that of the investigation he led?

4. Did the trial court abuse its discretion in admitting irrelevant, prejudicial evidence about the defendant's answer to the police question of why the complaining witness would be "making up" the claims against him?

5. The evidence in this case was far from overwhelming, especially on the crucial issue of whether the sexual contact was consensual or forced. Is reversal required for the cumulative impact of the multiple trial errors where that effect deprived appellant of a fair trial?

6. Under Blakely, appellants have state and federal rights to have any fact which increases his sentence beyond that authorized by the jury's verdict proved to a jury beyond a reasonable doubt. In Lavery, the Supreme Court held that the determination of "comparability" of a foreign offense will violate those rights if the foreign offense is broader than the Washington offense and the sentencing court considers facts not proven to a jury beyond a reasonable doubt, or admitted, or stipulated to by the defendant.

Did the trial court err in relying on a prior Colorado conviction in sentencing where the Colorado offense was more broad than the allegedly comparable Washington offense and it was not possible to determine whether there was factual comparability without considering facts not admitted to or stipulated to by the defendant and not proven to a jury beyond a reasonable doubt?

7. It is well-settled that identity is a factual matter. Were appellant's rights under Blakely violated when the sentencing court made

factual findings about identity at sentencing and relied on those findings in increasing the sentence above that which was authorized by the jury's verdicts?

8. Were appellant's rights as described in Blakely violated where the prior convictions the prosecution claimed were his were not proven to a jury by a reasonable doubt and where the "prior conviction" exception which has been interpreted as allowing a sentencing court to make findings about such convictions and apply only a preponderance standard no longer retains currency?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant, the person identified by the prosecution in this case as Donald Betts,<sup>1</sup> was charged by Amended Information with First-Degree Burglary, Second-Degree Robbery, Fourth-Degree Assault, and two counts of Second-Degree Rape. CP 18-20; RCW 9A.36.041(1); RCW 9A.36.041(2); RCW 9A.44.050(1)(a), RCW 9A.52.020(1)(b), RCW 9A.56.190, RCW 9A.56.210.

After pretrial hearings before the Honorable Bryan E. Chushcoff on April 6, 2005, and the Honorable Thomas J. Felnagle on September 28, 2005, trial was held before the Honorable Rosanne Buckner on November 7-9 and 14-18, 2005, after which the jury found Mr. Betts guilty of the two rape charges, the burglary and the assault charge, but not guilty of the theft

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<sup>1</sup>Because this case involved a POAA sentence, the prosecution was required to prove identity. Appellant will refer to himself as "Donald Betts" herein only for the purposes of arguing the appeal and expressly reserves the right to challenge his identity as that person in any future proceedings.

or any lesser included offense of that charge.<sup>2</sup> CP 102-109.

On January 27, 2006, Judge Buckner imposed a sentence of life without the possibility of parole for each of the rape counts, 89 months for the burglary, and 365 days for the assault. RP 895; CP 167-185.

Mr. Betts appealed, and this pleading follows. See CP 194-231.

2. Overview of relevant facts<sup>3</sup>

Heather Burns testified that, on June 6, 2004, a man named Donald Betts, who she did not really know, came to her house and assaulted her, then later returned and raped her in her kitchen and her bedroom. RP 298-304. Ms. Burns' neighbor Mike Smith, who was "like a brother" to her, had introduced her to Mr. Betts at Mr. Smith's house a few years earlier, when Mr. Betts lived next door to Mr. Smith. RP 298-301. Mr. Betts and his family had moved away but Ms. Burns started seeing Mr. Betts again about two weeks before June 6<sup>th</sup>. RP 304. According to Ms. Burns, Mr. Betts would drive over to her house in his minivan, pull into her driveway and honk the horn, so she would go outside and make "small talk" with him for a few minutes, usually about whether she knew where Mr. Smith was and if he was home. RP 304-307. It happened a few times and Ms. Burns said Mr. Betts asked her if she "wanted a boyfriend" and if she wanted to go out to lunch. RP 307. Ms. Burns testified she "didn't really

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<sup>2</sup>The verbatim report of proceedings in this case consists of 10 volumes, which will be referred to as follows:

April 6, 2005, as "1RP;"  
September 28, 2005, as "2RP;"  
the 8 chronologically paginated volumes containing the trial and sentencing, as "RP."

know why” Mr. Betts was coming over and that she thought it was “kind of weird” and became uncomfortable about it “the last few times.” RP 308.

Nevertheless, she admitted, she gave him her telephone number one day. RP 310. She said that she did it because she thought he would not stop by so much if she did. RP 310. She took one of his phone calls but said she did not take any more and that he called a lot before she got her mother to put a call block feature on her phone. RP 308-311.

Although she said she did not like him coming over, not once in the at least ten times it happened did she ever tell him that she did not want him to do so. RP 395-96, 401-402. She also never told him not to call her, prior to blocking his calls. RP 401-402.

Ms. Burns testified that, on June 5, 2004, a Saturday, she was in her front yard in the afternoon, and Mr. Betts walked across the street from Mr. Smith’s house. RP 311-314. According to Ms. Burns, Mr. Betts was upset that she had put a block on his calls and said “nobody disrespects him that way.” RP 312. He then asked her what she was doing that night, and she lied and told him she was going to Seattle. RP 312.

Instead, she actually went to a bar with her cousin and stayed there about five hours, drinking rum and coke. RP 314-15. When her cousin dropped her off, Ms. Burns had a little “buzz” but claimed she was not drunk. RP 315. She said it would take about 8 drinks to get her drunk, and did not recall telling the defense investigator that she had about 8 or 9 rum and cokes that night. RP 315-403.

Ms. Burns said Mr. Smith’s girlfriend, Mandy Joyner, came over

and invited her over to Mr. Smith's house, at about 1:30 or 2 in the morning. RP 315-16. When she got there, Mr. Betts was also there, and came into the kitchen where she was. RP 317. Although she admitted he said nothing, she said she was uncomfortable and asked Ms. Joyner to walk her back to her house. RP 318-20. Within a few minutes, Mr. Smith and Mr. Betts came in. RP 318-20. Ms. Burns testified that she asked Mr. Betts to leave, because she was "uncomfortable," and he then "back-handed" her in the face, telling her "no bitch disrespects him like that." RP 320. She fell on the floor, then got up and told Mr. Smith to get Mr. Betts out of her home. RP 320-21. She said Mr. Betts started "chasing" her around her kitchen table and that Mr. Smith got him out of the house but Mr. Betts was yelling, calling her a bitch, saying noone disrespects him like that and he was "a veteran or something like that." RP 322.

Ms. Burns estimated that it was about 2:30 when she was hit. RP 323. Ms. Joyner ultimately left and Ms. Burns locked her doors and had the phone near her. RP 324. About ten minutes after she was hit, she said, Mr. Betts knocked on her door, so Ms. Burns called Ms. Joyner and asked her to come over. RP 325. When Ms. Joyner arrived, Ms. Burns went outside and Ms. Joyner asked Mr. Betts why he had hit Ms. Burns, to which he said she had "disrespected him" and was a "bitch." RP 325-26. Ms. Joyner and Mr. Betts then went back over to Mr. Smith's house, and Ms. Burns again locked her door and turned out the lights, lying down on the couch. RP 327.

According to Ms. Burns, about 10-15 minutes later, she awoke to pounding on the door and it was Mr. Betts. RP 328. Despite everything,

she did not call police. RP 329. She said she had not done so because he had previously told her “nobody calls the cops on him.” RP 329. She also said she did not call Ms. Joyner again because she had both of her doors locked and knew she “wasn’t going to let him back in.” RP 329.

Ms. Burns testified that she opened her front door and Mr. Betts said he wanted to apologize for earlier, and to shake her hand. RP 330. She initially refused but he said, “[j]ust let me shake your hand and make amends, and then I’ll leave,” so eventually she unlocked her screen door and put her hand out. RP 330. According to Ms. Burns, Mr. Betts then opened the door, came into her house uninvited, and said he wanted to have sex with her. RP 331.

Ms. Burns testified that she said “no,” then went into her kitchen to get a drink, thinking she could get out the kitchen door. RP 331-32. He followed, and she said something about just talking about it and he said, “[w]e have done enough fucking talking.” RP 335. He told her to take her pants off several times and she said no, and then he said he would take them off for her, doing so. RP 336-37. Her underwear came down with her pants, and he removed her shirt and her bra and was suddenly completely undressed himself. RP 337. He then bent her over the counter in the kitchen and penetrated her vagina with his penis. RP 338-39. She said she could not move away because he was behind her, with his arm up at her side on the counter. RP 339. He was also grabbing her on her arm. RP 339. It lasted for about ten minutes. RP 340. She testified that, at some point, he threatened to hit her. RP 340-41.

After awhile, he told her to get on his knees and suck his penis, but

she said no, and he told her to take him to her bedroom, threatening to hit her if she did not. RP 341-42. They went into the spare bedroom, both nude, and she got on top of him for five minutes more of sex, then he stopped and bent her over the bed with her knees on the floor and started having sex with her again. RP 343. She told him she had to go to the bathroom and he said she got one break and to “make it quick.” RP 344. She went into the bathroom, put on some pajamas, then opened the door and told him she wanted a cigarette. RP 344-45. He said she could have one but “make it quick” because he was not done yet, so she went out the back door and smoked. RP 346-47.

Ms. Burns testified that, after a few minutes, he told her she was done and she needed to get back in the house, but she told him no, said “[y]ou are not going to do this to me anymore,” then took off running through her backyard and over a metal fence, getting snagged on it as she went over. RP 348-49. She went several houses down from hers and used a phone to call police, and her mom. RP 349-51. When she got back home, she saw her wallet was out of her purse and she testified that there was \$60 missing. RP 353.

Based upon the details of Ms. Burns’ testimony about the chronology of events, the 9-1-1 call would have been made at about 3:10 a.m. RP 420. It was, in fact, not made until 5:51 a.m. RP 420

Joshua Smith, who had not been drinking that evening, testified that his uncle Michael Smith picked him up in Steilacoom and, when they got back to the house that early morning, he went over to Ms. Burns’ house and knocked on the door, which was closed. RP 714-17. Mr. Betts

answered the door and Ms. Burns was visible in the background. RP 717. After speaking to Mr. Betts for a minute or so, Mr. Smith left. RP 719. At no point during the conversation did Ms. Burns say anything about needing help, or that Mr. Betts was there uninvited, or that something was wrong. RP 714-19.

Ms. Burns had initially testified very specifically that Mr. Betts had forced his way in, immediately said he wanted to have sex with her, followed her into the kitchen and then raped her, all within 10-20 seconds of entering the door. RP 328-37. She admitted that she had given that version of events repeatedly, in her statement to police the night of the incident, in the statement she gave police several weeks later, in the statements she gave to the prosecutor, and the statement she gave to the defense. RP 707-708. In not a single one of those statements did she ever say anything about anyone coming to the door at any point during the alleged rapes. RP 707-708. Nevertheless, just before Joshua Smith was going to testify, Ms. Burns was recalled and testified that, during the incident, at some point, she remembered Mr. Betts standing at his screen door inside talking to someone outside, while she was standing two feet away. RP 698-69. Her testimony was that this occurred at some point after the entry into her home but before Mr. Betts said he wanted to have sex with her and began doing so. RP 700.

On cross-examination, Ms. Burns admitted that she only became aware that there was a witness who would testify that he had gone to her house that evening, had seen her there with Mr. Betts, and had heard absolutely nothing from her that Mr. Betts was there uninvited or that she

needed help, on the morning of the day of trial when she was recalled to give her “rebuttal” testimony. RP 711-12.

Ms. Burns went to the hospital and saw a doctor and a “sexual assault lady.” RP 354. In the version of events she gave to the doctor, she alleged sexual assault at 4 in the morning by a known acquaintance who slapped her on the right side of the cheek and jaw with the back of his hand and then pinned her and “penetrated vaginally.” RP 511-12. She reported a tenderness to the right side of her cheek, but had no injuries to her chest or abdomen and only a small contusion to the crook of her arm and the back of her left thigh. RP 512. There was no swelling or bruising on her face or injury to her teeth. RP 512. A nurse who also saw Ms. Burns that night reported seeing a “slight discoloration” on Ms. Burns’ face and saw a bruise on the upper left arm, a scratch on the left upper leg which required no treatment, a “reddened” area on her abdomen, a reddened area on the “perineum” inside the vagina but no injuries to the cervix. RP 519-35.

Nichole Bortle testified that she spoke with Ms. Burns on June 5, 2004, and Ms. Burns said something about an acquaintance who was “creeping her out, continually calling her” and that she wanted it to stop. RP 545-47. Ms. Bortle admitted she thought that Ms. Burns said she was not sure how that person got her phone number. RP 547. Ms. Joyner similarly testified that Ms. Burns told her, on June 5<sup>th</sup>, that Mr. Betts had been “bothering her” and “creeped her out” and she did not want to be around him. RP 662-64. Ms. Burns also never told Ms. Joyner that she had had contact with Mr. Betts a number of times before, or that she had

given him her phone number. RP 676.

April Eadie, a close friend of Ms. Burns', testified that she had seen Mr. Betts in the driveway of Ms. Burns' house, talking to Ms. Burns, three or four days before the incident. RP 591-93. Ms. Eadie reported Ms. Burns saying that she thought it was strange he kept "trying to talk to her." RP 595. Ms. Eadie also said that Ms. Burns said Mr. Betts was flirting with her and that he did "creep her out." RP 599.

Ms. Eadie admitted that, in fact, Ms. Burns told Ms. Eadie she had never given Mr. Betts her phone number. RP 600.

Another friend, Jayme Lundstrom, testified that, when Mr. Betts lived on the street in 2003, one day she had been at Ms. Burns' house and saw him drive by the front of her house and slow down and look in the window. RP 601-604. Ms. Lundstrom said she asked Mr. Betts about it later and he "became defensive and started yelling," saying something about how they should not accuse him of that, that Ms. Lundstrom was a bitch, and that they "weren't that interesting" and why would he be looking in the front of her house. RP 605. Ms. Lundstrom also said that Ms. Burns said Mr. Betts was "very strange and weird and that he was kind of creepy, that he would drive by and look in her window, and she was uncomfortable with that." RP 605.

Ms. Lundstrom stated she knew that Ms Burns had never dated an African-American, that it would be very unusual to Ms. Lundstrom for Ms. Burns to do so. RP 607. Again, Ms. Burns neglected to tell her friend that, in fact, Ms. Burns had specifically given Mr. Betts her phone number. RP 607.

Ms. Burns, who is white, admitted her family would not approve of her seeing a married man with a child, or an African-American man, but claimed it would not concern her what they thought. RP 397.

Michael Smith, who was there that night, saw Mr. Betts hit Ms. Burns in the kitchen and heard him say something about her being disrespectful. RP 617-20. Mr. Smith and Ms. Joyner admitted they had been drinking a lot that night, as did other witnesses who corroborated various parts of Ms. Burns' version of events. RP 392, 432-36, 630-33.

Mr. Smith testified that Mr. Betts said Ms. Burns needed "someone to protect her" and that he was going to do so by making her "his prostitute" and making her "go to work and do things for men for him." RP 613-15. He did not take it seriously at all because it "just ridiculous." RP 656-57.

Mr. Smith was not aware that Mr. Burns had given Mr. Betts her telephone number. RP 661. He was also not aware that Mr. Betts had been to Ms. Burns' house at least ten times and she had not told him not to do so. RP 662.

Mr. Smith testified about seeing a van drive away quickly early that morning and, about 3/4 hour later, receiving a phone call from Mr. Betts. RP 626-28. Mr. Smith thought it was unusual because of the time in the morning and also Mr. Betts never called. RP 629. According to Mr. Smith, Mr. Betts said he and Ms. Burns had had sex and he got "200 bucks" by stealing it out of Ms. Burns purse. RP 629. While he was on the phone, Mr. Smith saw cops "flying by" on the street and he mentioned it to Mr. Betts, who then said, "[d]on't tell them where I live." RP 630.

In Ms. Burns' house, some jeans and a white bra were found on the kitchen floor. RP 689. There were no panties, and no sign of a struggle anywhere. RP 689-90.

Deputy Mark Fry testified that, when he went to arrest Mr. Betts, he asked about whether Mr. Betts had slapped Ms. Burns, and Mr. Betts said he had not and first denied having sex with her. RP 548-49. The officer then "confronted" Mr. Betts with "the fact that she said he had and she was going to be going to the hospital to be checked out," and Mr. Betts admitted an affair with Ms. Burns, which had started when he lived in the area before. RP 549-59. He stated he was ashamed because he was married. RP 559. Mr. Betts also said that the sex that night was consensual, and reported someone having shown up at Ms. Burns' house after they had engaged in consensual sex in one room. RP 566-67.

Mr. Betts' statement, heavily redacted, was played for the jury and indicated inconsistencies about when he had arrived back in town, among other facts.

D. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR COMMITTED FLAGRANT, PREJUDICIAL MISCONDUCT WHICH DEPRIVED APPELLANT OF HIS STATE AND FEDERAL RIGHTS TO A FAIR TRIAL

It is well-settled that, as quasi-judicial officers, prosecutors must not just act as advocates but also have a duty to ensure that an accused receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). As part of that duty, prosecutors are required to

refrain from engaging in conduct at trial which is likely “to produce a wrongful conviction.” State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). When a prosecutor commits misconduct, she does more than just violate a prosecutor’s duties, she deprives the defendant of his state and federal constitutional due process rights to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); Suarez-Bravo, 72 Wn. App. at 367; 5<sup>th</sup> Amend.; 6<sup>th</sup> Amend.; 14<sup>th</sup> Amend.; Art. I, § 22. Even absent objection below, misconduct compels reversal where the misconduct is so flagrant and prejudicial it could not have been cured by instruction. State v. Brown, 132 Wn.2d 529, 561, 40 P.2d 545 (1997), cert. denied, 523 U.S. 1007 (1998).

In this case, this Court should reverse, because the prosecutor committed flagrant, prejudicial misconduct which deprived Mr. Betts of his state and federal rights to a fair trial, in two ways. Further, reversal is required because counsel was ineffective in his handling of the most serious, prejudicial and flagrant of the misconduct.

a. Relevant facts

In closing argument, the prosecutor began with the permissible argument that the jury should convict if it believed the prosecution’s witnesses. RP 795-97. He then went on to tell the jury that Ms. Burns had “no reason to lie about being raped by this defendant.” RP 797. The prosecutor then argued about the evidence which corroborated Ms. Burns’ version of events, including the testimony of the other witnesses, then shifted between arguing that the evidence “corroborated” her testimony

and that it proved she was “telling you the truth.” RP 799-800, 802. He also argued that Mr. Smith’s testimony about the “prostitution” claim had the “ring of truth,” and told the jury that Mr. Smith was “telling the truth.” RP 806-807.

The prosecutor pointed out that Mr. Betts’ statement to police had inconsistencies and was not corroborated by the evidence. RP 809-814. The prosecutor asked the jury declared that the jury knew Ms. Burns was “telling the truth” about Mr. Betts returning a short time later, because Ms. Joyner testified to the same thing. RP 799-800.

In summing up the initial closing argument, the prosecutor told the jury that, when they began deliberations, they would “see that the light of truth has cast away the shadows of the presumption of innocence” and would be left with

a picture of the real truth. And that truth is that this defendant is guilty. *What I’m going to ask you to do is to have the courage and strength and the fortitude to look this defendant in the eye and tell him he is guilty[.]*

RP 817 (emphasis added).

In his closing argument, counsel highlighted the “discrepancies” in Ms. Burns’ version of events, including the timing, and that the bulk of the evidence was presented through her and what she told people. RP 820-24. He argued that there was “reason to doubt” Ms. Burns’ credibility, especially noting that she neglected to tell her friends and family that she Mr. Betts had visited her house ten times at least and she never asked him to leave, and her failing to tell them that she had, in fact, been the one to give him her phone number. RP 824-32. He also noted that the objective

evidence was not consistent with what Ms. Burns said, such as the items on the kitchen table and counter in perfect place despite the alleged chasing around the kitchen and struggle, and the lack of bruising where she was supposedly hit so hard that she was knocked to the ground. RP 831. He asked the jury to consider the fact that so many of the witnesses had been drinking all day long and admitted at least a “buzz.” RP 833. He concluded that the jury could rely on the fact that the evidence did not “match” the allegations and the jury did not need to “rely on wondering if this person is telling . . . the truth or not,” that the jury could simply evaluate the evidence for itself and see there was reasonable doubt. RP 835. He told the jury that it only had to have a “reasonable doubt about whether or not Ms. Burns’s version of events is accurate” in order to find Mr. Betts not guilty. RP 837.

In rebuttal closing argument, the prosecutor said that the inconsistencies in Mr. Betts’ statements “tells you volumes about who has something to hide, who has committed a crime, *and who is telling the truth.*” RP 838 (emphasis added). He argued about whether the friends would have made up something “a little bit better” if they were “making this up or if they have a bias.” RP 843. He then went on:

*If her friends are going to come in and perjure themselves, get their stories straight, conspire, there are a lot of details that they have to get. They have to get together. They have to keep them straight. And I submit to you they would come up with more information than they have provided.*

RP 843 (emphasis added). Then, at the close of the rebuttal closing argument, the prosecutor exhorted the jury:

Ladies and gentlemen of the jury, the evidence in this case

is overwhelming. This defendant assaulted her. He committed the crime of burglary. He committed two counts of rape. He committed a count of robbery. If you are convinced beyond a reasonable doubt that he is guilty of all these crimes, the judge has instructed you that you must render a verdict of guilty. If you are convinced beyond a reasonable doubt that he is guilty of all these crimes and you do otherwise, *you are allowing him to steal not just her money, but justice to the community as well.*

RP 848 (emphasis added). Counsel objected that the argument was “inappropriate,” and the court overruled the objection. RP 848. The prosecutor then declared, “I’m asking you to render a verdict which represents the truth and that is a verdict of guilty.” RP 848.

- b. The arguments that the jury could not acquit unless it found the state’s witness were lying and some conspiring and committing perjury were flagrant, prejudicial misconduct

The prosecution’s argument was serious, flagrant and prejudicial misconduct, in two ways. First, it was flagrant, prejudicial misconduct for the prosecutor to tell the jury it had to find that Ms. Burns and all of the friends who testified were lying and indeed perjuring themselves in order to acquit. It is well-settled that it is “misleading and unfair to make it appear that an acquittal requires the conclusion” that the prosecution’s witnesses are lying. State v. Castaneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991); United States v. Richter, 826 F.2d 206, 209 (2<sup>nd</sup> Cir. 1987). The argument is improper and misstates the burden of proof and the jury’s role, because the jury is not required to determine who is telling the truth and who is lying. State v. Wright, 76 Wn. App. 811, 824-26, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995). Instead, it is only required to determine if the prosecution has proven its case beyond a reasonable doubt. Wright, 76

Wn. App. at 824-26.

In addition, the argument incorrectly gives the jury the “false choice” between believing the witnesses are lying or telling the truth, whereas the “testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved.” Wright, 76 Wn. App. at 824-26; see State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997).

Thus, in Fleming, the defendants were accused of raping the victim together in her home, and the sole issue was whether the sexual contact was consensual. 83 Wn. App. at 213. The prosecutor told the jury it would have to find that the victim lied, was confused, or just fantasized what had happened in order to find the defendants not guilty. 83 Wn. App. at 213. The argument was absolutely clear misconduct, both a misstatement of the law and a misrepresentation of the role of the jury and the burden of proof, because

[t]he jury would not have had to find that D.S. was mistaken or lying in order to acquit; instead, it was *required* to acquit *unless* it had an abiding conviction in the truth of her testimony. Thus, if the jury were unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened in light of her level of intoxication on the night in question, it was required to acquit. In neither of these instances would the jury also have to find that D.S. was lying or mistaken, in order to acquit.

83 Wn. App. at 213 (emphasis in original).

Fleming is directly on point. Just as in Fleming, here, there was clear evidence of intoxication on the part of Ms. Burns - and indeed, for all of her friends who testified about what they perceived that night. The jury

need not have found that they were lying in order to find that the prosecution had not presented sufficient evidence to prove its case beyond a reasonable doubt. It could easily have found that there was a reasonable doubt about their ability to accurately perceive events, due to the fact that they had all been drinking.

Mr. Betts is not arguing that the prosecutor should not have pointed to the inconsistencies in his statements to police. He is not arguing that the prosecutor was not entitled to argue about whether the evidence supported Mr. Betts' defense or the claims of the state's witnesses.

But the prosecutor went far, far further here. And "prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels those tactics are necessary to sway the jury in a close case." Fleming, 83 Wn. App. at 215. The evidence here was far from overwhelming, given the inconsistencies in Ms. Burns' testimony and the admitted intoxication of nearly every crucial state's witness at the relevant time. Further, the jury clearly did not completely believe Ms. Burns' version of events, because it acquitted him of the robbery that she claimed he also committed. The prosecutor himself declared that, if the jury found that Ms. Burns was, in fact, raped, if it believed her completely, it "therefore follows that" they would have to convict him of robbery "as well." RP 796. There can be no question that the misconduct in this case had a direct, prejudicial impact on the jury's verdict.

In response, the prosecution may attempt to argue that the

comments were either a permissible comment on how the jury should resolve a conflict in witness testimony, or that they were somehow “invited” by the argument of counsel. This Court should summarily reject any such arguments. Under Wright, where there is a conflict in witness testimony which must necessarily be resolved in order to decide the case, it is permissible for the prosecutor to argue that, in order to believe the defendant, the jury must find the state’s witnesses were mistaken. Wright, 76 Wn. App. at 826. The argument “is not objectionable because it does no more than state the obvious and is based on permissible inferences from the evidence.” Id.

Here, however, the prosecutor did not argue that the jury had to find that the prosecution’s witnesses were *mistaken*. He told the jury that they would have to find they were *lying*, that they had a motive to do so, and further, that they were committing the uncharged crime of perjury, before the jury could acquit. Such argument is still misconduct under Wright. Wright, 76 Wn. App. at 826 n.13.

Further, because of the evidence of intoxication in this case, the jury need not have resolved the “conflict” by believing either Mr. Betts or the state’s witnesses. It could have resolved the “conflict” by believing that the state’s witnesses were impaired in their perceptions, due to their admitted “buzz” from alcohol at the time.

Similarly unconvincing would be any claim that counsel somehow “invited” the prosecutor’s highly prejudicial, improper argument. Improper remarks of a prosecutor may not be grounds for reversal if they were provoked by defense counsel and are in reply to counsel’s arguments,

unless the remarks are not “a pertinent reply” or so prejudicial no curative instruction could have been effective. See State v. Russell, 125 Wn.2d 24, 38, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

Here, many of the improper comments were made in *initial* closing argument, before counsel’s argument on Mr. Betts’ behalf. RP 797 (Ms. Burns “no reason to lie about being raped”); RP 799-800, 802 (Ms. Burns “telling you the truth” and “telling the truth”); RP 806-807 (Mr. Smith’s testimony had the “ring of truth” and he was “telling the truth”); RP 817 (the prosecution had presented “the light of truth,” the jury would have a “picture of the real truth,” the “truth is that this defendant is guilty”). Thus, before counsel made any argument, the prosecutor had already strayed far afield from permissible argument and committed himself to the course of misconduct his rebuttal closing argument only continued.

Further, in his argument, counsel very clearly and very deliberately *avoided* telling the jury they had to find that Ms. Burns or her friends were lying. He specifically focused only on whether there was “reason to doubt” the prosecution’s case, whether there were “discrepancies” which cast doubt on Ms. Burns’ version of events, and whether the objective evidence supported her testimony or whether there was enough question for reasonable doubt to exist. RP 820-32. And he specifically asked the jury to consider the fact that so many of the witnesses had been drinking all day long and admitted at least a “buzz.” RP 833. Indeed, he told the jury it did not need to decide “if this person is telling . . . the truth or not,” that the jury could simply evaluate the evidence for itself and see there was reasonable doubt. RP 835. And clearly, counsel never made any

allegation that any of the witnesses were perjuring themselves and thus were guilty of crimes.

Thus, counsel's argument was carefully crafted *not* to elicit the kind of improper misconduct in which the prosecutor engaged here. Nothing in counsel's argument can be deemed as providing any cover for the prosecutor's flagrant misstatement of the law and misrepresentation of the jury's role and the true burden of proof.

Reversal is required. Even where, as here, counsel failed to object to the misconduct below, a reviewing court will still reverse if the misconduct is so flagrant and prejudicial it could not have been cured by instruction. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).<sup>4</sup>

Here, no instruction could have cured the enduring prejudice caused by the prosecution's repeated arguments on this point. The prosecutor did not simply tell the jury, effectively, that Mr. Betts' defense was that Ms. Burns was lying. He also effectively told them it also required them to find that this woman the prosecutor described as having been "broken" by Mr. Betts, "soft-spoken, somewhat timid," "beaten" and repeatedly raped, had some nefarious *motive* to lie. And the prosecutor did not just say the jury would have to find all of her friends were lying, he told the jury it would effectively have to find them guilty of the crime of perjury, of deliberately and essentially maliciously conspiring against Mr. Betts. The effect of these arguments went far beyond just misstating the law, the jury's role and the burden of proof - they also clearly invoked the jury's strong

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<sup>4</sup>Counsel's ineffectiveness in failing to object to the misconduct is discussed, infra.

passions against Mr. Betts in this already highly charged case where a black man was accused of raping a white woman and the only real issue was consent. The arguments were exactly the kind which create such strong emotional reactions that they amount to a “bell” which, once sounded, cannot be unrung.

Indeed, ten years ago, the Fleming Court held that it is so well-established that arguments such as those made here are misconduct that the very fact the prosecutor made such arguments demonstrates that they are flagrant and ill-intentioned. Fleming, 83 Wn. App. at 214. Notably, in Fleming, the prosecutor did not go as far as here, by raising the specter of perjury on top of everything else.

Ultimately, before trial, Mr. Betts admitted having sex with Ms. Burns. For the rape convictions, and the burglary, the only question was whether it was consensual. The prosecutor’s misconduct struck directly at the heart of that issue. Further, “improper suggestions” made by a prosecutor “carry much weight against the accused when they should properly carry none,” because the average juror will believe that a prosecutor will act in the interests of justice and act as befits an officer of the court and the people. Berger, 295 U.S. at 88. The prosecutor fell far short of that standard here, and the result was that Mr. Betts was deprived of his state and federal constitutional rights to a fair trial. This Court should reverse.

In the alternative, in the unlikely event that the Court believes that the enduring prejudice caused by the misconduct could have been erased by a proper instruction, this Court should reverse based on counsel’s

ineffectiveness in failing to object and request such an instruction. Both the state and federal constitutions guarantee the accused the right to effective assistance. Strickland v. Washington, 366 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); 6th Amend; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). If Mr. Betts can show that, but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different, reversal is required. Strickland, 466 U.S. at 694.

Here, Mr. Betts can meet that standard. The misconduct went to the heart of the prosecution's case against him. It misstated the jury's role, relieved the prosecution of the full weight of its burden of proof, and invoked strong feelings against him in this already highly emotionally charged sex offense case. Yet counsel made no objection to the prosecutor's repeated acts of misconduct despite their very clear prejudice to his client.

It is Mr. Betts' position that the enduring prejudice caused by that argument could not have been erased by even the most strongly worded instruction. If, however, such erasure was even possible, reasonably competent counsel would have made the attempt to do so on his client's behalf. The failure was unprofessional, and it clearly prejudiced Mr. Betts in this case, because it went to the very heart of the prosecution's case on the most serious charges he faced. The result was that the jury was

completely unable to fairly and impartially evaluate the evidence in this very serious, very close “credibility” case. Based upon the prosecutor’s repeatedly telling the jury that it had to find the prosecution witnesses were lying - and that some of them were actually committing perjury - in order to acquit, this Court should reverse.

c. The prosecutor’s emotional appeals were also misconduct

In addition, this Court should reverse based upon the misconduct of the prosecutor exhorting the jury to have the “courage and strength and the fortitude” to find Mr. Betts guilty, and telling them that failing to convict if they were convinced he was guilty was “allowing him to steal” not just money from Ms. Burns but also “justice to the community as well.” RP 848. It is flagrant, prejudicial misconduct to urge the jury to convict for the purposes of sending a message or vindicating the “community.” See State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989), review denied, 114 Wn.2d 1011 (1990). Such arguments are improper because they invite the jury to decide the case based upon emotion and sending a message to society, rather than the evidence at trial against this particular defendant. See State v. Coleman, 74 Wn. App. 835, 838, 876 P.2d 458 (1994), review denied, 125 Wn.2d 1017 (1995) (telling the jurors they would have to violate their oath as jurors by ignoring the evidence if they did not find the defendant guilty as charged).

The prosecutor’s arguments here gave the jury just such an improper invitation, and more. By telling the jury they would have courage, strength and fortitude if they convicted Mr. Betts, the prosecutor

clearly told the jury that the *failure* to convict would mean just the opposite: that they were cowardly and weak. And although the prosecutor couched the “justice to the community” invocation in terms of reasonable doubt, the obvious import of that comment was to tell the jury that they should convict based upon their duty to the community.

Counsel only objected to the “justice to the community” comment. But both that comment and the one which came before had the same effect - of eliciting an improper conviction based not upon proper, unbiased evaluation of the actual evidence the state had presented but rather based upon emotion and improper

Further, where, as here, the defendant has objected and the court overruled the objection, that effectively gave the court’s imprimatur to the misconduct. See State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984); Mahorney v. Wallman, 917 F.2d 469, 473 (10<sup>th</sup> Cir. 1990). There is more than a substantial probability that the misconduct affected the verdict in this very close, credibility case. This Court should reverse.

2. THE TRIAL COURT ERRED AND APPELLANT’S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE COURT REFUSED TO DISMISS THE JURY PANEL AFTER A PROSECUTION WITNESS ACTIVELY PARTICIPATED IN ITS SELECTION

Reversal is also required because the court erroneously refused to dismiss the jury panel after the lead investigator, a witness in the case, actively participated in selecting the very jury which would be evaluating not only his credibility but the investigation he led, and the failure to do so violated appellant’s due process rights.

a. Relevant facts

Before trial, the prosecutor noted the presence of detective Curtis Wright, “the lead detective” in the case, asking that the detective be present “during all phases of the trial.” RP 8. Counsel objected that the detective was possibly going to be a witness, but the court agreed with the prosecution that the officer could be designated under ER 615 to “assist” the prosecution. RP 8-9. Right before voir dire, the potential jurors were introduced to the detective as “Detective Curtis Wright with the Pierce County Sheriff’s Department.” RP 75.

The officer was then present at counsel table for juror voir dire and, after voir dire and the exercise of peremptory challenges, counsel moved to strike the jury panel and have the selection process begin anew, because it was clear that Detective Wright had participated in jury selection. RP 266. The court acknowledged that the prosecutor had consulted with the detective during the “peremptory challenge process of writing down names, and the prosecutor agreed he did “consult” and “confer” with the officer in making the selection of jurors. RP 267.

Counsel argued that the selection process was therefore “skewed and prejudicial” because the detective was actively involved and had a “particular interest” in the outcome of the case. RP 266. He also noted that ER 615 referred only to exclusion of a witness, not participation of that witness in the selection of the jury. RP 268-69. He pointed out that there was an improper “appearance” to the jury when the lead detective was actively participating in determining “who is going to assess Mr. Betts’ innocence.” RP 270-71.

The court reserved ruling and the next day, counsel again noted that the issue was not whether the officer was “present in the courtroom” but rather the “totally different question” about the propriety of the jury seeing a witness actively participating in decision-making with the prosecutor in the selection of the fact-finders. RP 274. He pointed out that the conduct “does nothing more than vouch for the credibility of the witness,” that it showed “obviously the prosecutor has enough faith in this detective that he would listen to his conclusions and input and that was during the selection process,” and that it was improper vouching. RP 275.

The prosecutor said that it was not a “surprise” that prosecutors and detectives “work together as a team to effectively prosecute a case.” RP 275. He admitted that it was something that was “going on in front of the jury,” but said it was not telling the jury “anything they don’t already know.” RP 275. The court denied the motion to strike the panel, holding that ER 615 allowed the detective to “assist the prosecution” and the fact that he was a witness was not a reason to “exclude” him from helping select the jury. RP 278.

b. The court erred and reversal is required

The court’s refusal to strike the jury panel and begin anew was in error and this Court should reverse. The court’s reliance on ER 615 was sorely misplaced. That rule simply provides that a party may move to exclude witnesses “so they cannot hear the testimony of other witnesses,” but such a motion will not apply to “authorize exclusion of . . . an officer or employee of a party which is not a natural person designated as its representative by its attorney.” ER 615(2). Nothing in the rule authorizes

a *witness* to participate in the selection of the jurors who will be evaluating not only his testimony but the investigation he led.

ER 615 did not support the procedure here. Nothing could, because it was so clearly a violation of Mr. Betts' due process rights, fundamental fairness, and mandates against prosecutorial bolstering of witnesses. While no Washington court has apparently addressed this issue, Washington courts have made it clear that it is highly improper and even misconduct for a prosecutor to vouch for or bolster the credibility of any witness or place the integrity of the prosecutor's office behind them. See State v. Reed, 102 Wn.2d 140, 143-45, 684 P.2d 699 (1984); State v. Sargent, 40 Wn. App. 340, 343-46, 698 P.2d 598 (1985). Thus, in Sargent, where the prosecutor told the jury she "believed" a state's witness, and that "[t]here was no reason he would be testifying other than the fact that the people that called him as a witness believed what he has to say," the Court reversed. 40 Wn. App. at 343. It was improper to so associate the witness with the integrity of the prosecution. Id; see also, State v. Smith, 67 Wn. App. 838, 840, 841 P.2d 67 (1992) (improper to admit testimony from an officer about the awards and commendations he had received because it was not only irrelevant but was also improper bolstering of the officer's credibility).

In addition, it is well-settled that jurors already place great weight on the testimony of the police officers. See Casteneda-Perez, 61 Wn. App. at 360 (jurors would be reluctant to believe officers lied if faced with a choice between officers and the accused). And courts recognize that it is especially likely for a jury to be influenced by the testimony of an officer

as opposed to other witnesses. See State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985) (improper opinion testimony by an officer more likely to sway a jury).

Other courts have recognized the inherent prejudice caused by permitting a witness to select jurors which will be evaluating him or others from his office, as well as the serious risk of bias such association with the prosecution will cause. In Anderson v. Frey, 715 F.2d 1304 (8<sup>th</sup> Cir. 1983), cert. denied, 454 U.S. 1057 (1984), the Court addressed a procedure whereby the elected sheriff was permitted to select “bystander” jurors such from the community and would veto proposed jurors if they were close friends or “for some other good reason unqualified.” 715 F.2d at 1306. The sheriff was not himself personally involved in the investigation but was just the supervisor of those who did. The investigating officer was not involved in the selection of the jurors, and the sheriff did not himself testify. 715 F. 2d at 1306. In holding that the procedure violated the appellant’s due process rights, the court noted that it had been “concerned with the opportunity for abuse” presented by permitting the sheriff, an “interested” party, be involved in jury selection. 715 F.2d at 1307. The risks, which were “unacceptable,” were that the sheriff would select people who were sympathetic to the prosecution, and the “possibility that the jurors would associate the credibility of the sheriff with that of the deputy sheriff who was a prosecution witness.” 715 F.2d at 1307. It was not that the particular sheriff was himself guilty of having any personally improper motives but rather the fact of his “institutional role and professional involvement in law enforcement” that there was a

“fundamental unfairness” in allowing him to help select jurors. 715 F.2d at 1308-1309. And this was true even though the sheriff had delegated the duty of the juror selection to subordinates. Id.

Further, the court noted, the “availability of voir dire” does not really address the fundamental unfairness of the procedure. Id. Because of the “nature” of the practice, harm, or the lack thereof, was “virtually impossible to adduce,” because there was no way to know what jury would have been selected without the sheriff’s involvement, or how that jury would have decided the case. 715 F.2d at 1308 n. 5, quoting, Peters v. Kiff, 407 U.S. 493, 502-504, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972). As a result, the court held, reversal was required because the “fundamental unfairness” of the procedure compelled it. 715 F.2d at 1390. Put simply, the Court held, “[w]e are concerned with the integrity and fairness of the method,” which not only created the appearance of bias in the individual case but also increased the risk of actual bias as well. 715 F.2d at 1308 n.5, 1309.

Similarly, another court has noted that permitting a police witness to assist in jury selection “tends to ingratiate the police witnesses in the eyes of the jury; and such apparent association” with the prosecutor’s function “tends to enhance unfairly the credibility of the police witnesses.” Shields v. State, 374 A.2d 816, 820-21 (Del.), cert. denied, 434 U.S. 893 (1977).

There can be no question that the procedure here violated basic tenets of fundamental fairness and due process. Allowing a prosecution witness to help select the very jurors which will then evaluate his

credibility is patently unfair. Even more egregious, the witness was the lead investigator, whose investigation was at issue. And the participation of the officer in jury selection conveyed the prosecutor's faith and belief in the credibility of the officer as clearly as any improper closing argument could do. This Court should reverse.

3. THE TRIAL COURT ERRED IN ADMITTING  
IRRELEVANT, PREJUDICIAL EVIDENCE

Only relevant evidence is admissible. ER 402. Evidence is only relevant if it has a tendency to make any fact which is of importance to a case more or less probable than it would have been otherwise. ER 401. Further, even if evidence is relevant, ER 403 requires its exclusion if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. See State v. Oughton, 26 Wn. App. 74, 83-84, 612 P.2d 812, review denied, 94 Wn.2d 1005 (1980). Further, in a close case, the scale must be tipped in favor of the defendant and the evidence excluded. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

In this case, the trial court improperly admitted irrelevant, prejudicial evidence of what Mr. Betts said when he was asked by officers, during his interrogation, why Ms. Burns would be making up the allegations. At trial, the prosecutor asked Deputy Fry if he had asked Mr. Betts, during interrogation, why Ms. Burns would "be making this allegation," and counsel objected and asked for a sidebar. RP 560. Outside the jury's presence, counsel argued that the testimony was improper, and the prosecutor argued it was appropriate as relevant to the defendant's "personal knowledge or lack thereof as to the victim's motive

to fabricate.” RP 562-63. The officer was then allowed to testify that Mr. Betts “claimed that there was another individual that had been bugging” the victim, a “white male named Terry,” and “maybe that was why” she was making up the allegations. RP 565-66.

The court erred in admitting this irrelevant, highly prejudicial evidence. It is well-settled that it is entirely improper for the state to ask a defendant, at trial, whether a victim was “making up” their claim or why a victim would be doing so. State v. Boehning, 127 Wn. App. 511, 524, 111 P.3d 899 (2005). Such questioning is “misleading and unfair,” because it is completely irrelevant what one witness thinks of another witness’ credibility, and because requiring a defendant to effectively accuse a witness of lying “puts the defendant in a bad light before the jury.” Wright, 76 Wn. App. at 821-22. Here, the evidence admitted had those effects, and more. Not only did it place before the jury the irrelevant, misleading and unfair evidence that the defendant could not come up with a good reason why Ms. Burns would be making up the rape allegations, and not only did it place Mr. Betts in a bad light before the jury, it also exacerbated the prosecutor’s later misconduct of telling the jury it had to find Ms. Burns and the others were lying in order to acquit.

It is unclear why the court admitted this evidence. The prosecution presented absolutely nothing indicating why whether Mr. Betts had any “personal knowledge” of why Ms. Burns might be making up the allegations was in any way relevant to whether he was guilty of the charged crimes. The only purpose for admitting such evidence was the improper purpose of making Mr. Betts look bad in front of the jury, and

again misleading the jury into focusing improperly on whether Ms. Burns was lying, rather than the real issue of whether the prosecution had proved its case beyond a reasonable doubt.

Where the court errs in admitting prejudicial evidence this Court will reverse if, within a reasonable probability, the error materially affected the outcome of the case. See State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Here, there is more than such a reasonable probability. The erroneously admitted evidence was highly prejudicial, irrelevant and misleading. And the evidence supporting the convictions was far from overwhelming, given the inconsistencies in the prosecution's case. Reversal is required.

4. THE CUMULATIVE EFFECT OF THE TRIAL ERRORS DEPRIVED APPELLANT OF A FAIR TRIAL

Even if the individual errors below did not separately compel reversal, their cumulative effect would. It is well recognized that such an effect can deprive a defendant of his state and federal due process rights under the Fifth, Sixth and Fourteenth Amendments and Article I, §§ 3 and 22, to a fair trial. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); United States v. Preciado-Cordobas, 981 F.2d 1206, 1215 n. 8 (11<sup>th</sup> Cir. 1993); Mak v. Blodgett, 970 F.2d 614 (9<sup>th</sup> Cir. 1992).

Here, the cumulative effect of the errors caused just such a deprivation. The prosecutor's misconduct misstated the jury's role and relieved the prosecution of the full weight of the burden of proof. And it did so while exciting strong passions against the defendant. Further, the jury who was evaluating the case was picked in a procedure which was

fundamentally unfair and inherently biased in favor of the police and prosecution. And the jury was again given a very bad impression of Mr. Betts based not upon the evidence but upon his inability to come up with a legitimate reason why Ms. Burns would be “making up” the allegations, even though that inability was completely irrelevant and highly prejudicial.

All of the errors in this case went directly to the jury’s ability to fairly, impartially and properly evaluate guilt based upon the actual evidence admitted at trial. And that evidence was very far from overwhelming, given the serious inconsistencies in the prosecution’s case and the evidence of intoxication on the part of nearly every state’s witness, including the complainant.

All of these errors, taken together, rendered the proceedings far, far short of the constitutionally mandated fair trial to which Mr. Betts was entitled. Even if the individual errors do not separately compel reversal, their cumulative effect does, and this Court should so hold and should reverse. violated appellant’s state and federal rights to a fair trial under the Fifth, Sixth and Fourteenth Amendments and Article I, §§ 3 and 22.

#### 5. THE SENTENCES MUST BE REVERSED

Appellant was sentenced to life in prison without the possibility of parole for the two current rape offenses and standard range sentences for the other two offenses, based upon the sentencing court’s determinations 1) that the 1991 Colorado attempted first degree sexual assault was “comparable” to a 1991 Washington attempted second degree rape, and thus comparable to a Washington “strike” crime, and 2) that the 1994 Colorado vehicular assault amounted to a 1994 Washington third degree

assault and thus should be counted as such. This Court should strike the persistent offender sentences and reverse and remand for resentencing within recalculated standard ranges for all the offenses, because the sentencing court erred in finding the 1991 crime comparable, “factual” comparability cannot be established without violating appellant’s state and federal rights to trial by jury and proof beyond a reasonable doubt, and appellant’s rights under Blakely were violated when the court made factual findings regarding identity and then relied on those findings to increase the sentences from that which could be imposed based solely upon the jury’s verdicts.

a. Relevant facts

On January 3, 2006, the prosecutor requested a continuance of sentencing, based upon the failure to have secured copies of documents from Colorado which would support the prosecutor’s sentencing requests. CP 110-12. In a declaration, the prosecutor explained that he had been making efforts to get the required documents for awhile and had only just discovered that more documents were available. CP 110-12.

When the prosecutor filed a subsequent sentencing memorandum, the defendant was alleged to have the following prior convictions:

<u>JURISDICTION</u>	<u>CRIME</u>	<u>DATE OF CRIME</u>	<u>TYPE</u>
Denver, Colorado	Att. Sexual Assault	09/19/1991	Adult
Denver, Colorado	Vehicular Assault	02/11/1994	Adult
Pierce County	Assault 4	07/02/2002	Adult
Pierce County	Assault 4	07/02/2002	Adult
Pierce County	Assault 4	05/16/2003	Adult

See CP 113-84. In the memorandum, the prosecutor argued that the Colorado attempted sexual assault offense was “comparable” to a

Washington offense and further, a “strike” crime under the “two strikes” portion of the Washington Persistent Offender scheme. CP 113-66. In addition, the prosecutor argued that, although the Colorado vehicular assault statute was broader than that in Washington, the court could look at the plea hearing transcript to determine comparability. CP 120-24. Based on those arguments, the prosecutor urged the court to impose a sentence of life without the possibility of parole either under the “two strikes” sentencing scheme for the prior Colorado attempted sexual assault and one of the current rapes, or the “three strikes” sentencing scheme for the prior Colorado attempted sexual assault, the prior Colorado vehicular assault, and either of the current rape convictions. CP 114, 119.

The sentencing was then set for January 19, 2006, but at that hearing the prosecution admitted it did not have the evidence necessary to prove the Colorado prior convictions, because it only had “fax copies” and not certified documents and did not have the “transcripts” it was planning to present from the pleas and sentencing hearings for those priors. RP 872-73. The prosecutor offered to present the fax copies and testimony and then asked the court to continue the proceedings in order to permit further time for gathering the evidence. RP 875. The prosecutor also argued that the fax copies were sufficient to support imposing a “two strikes” sentence, but conceded there was insufficient evidence for a “three strikes” sentence based on the two Colorado convictions and one of the current offenses, because there was not evidence to show comparability of the Colorado vehicular assault. RP 876.

Counsel objected that a continuance would violate speedy

sentencing and argued that a standard range sentence should be imposed because the prosecution was not prepared to prove anything else. RP 876. The court held that it was proper to “begin” sentencing at that time, and the prosecutor then presented, over defense objection 1) a certified copy of a Washington driver’s license, which he said belonged to the defendant and showed “that name and date of birth on the Colorado convictions are those of the defendant before the court today,” 2) two pages of faxed “original charging documents from Colorado,” to “show the defendant’s full name and date of birth,” 3) a faxed copy of what the prosecutor said “appears to be what in Washington would be a judgment and sentence,” 4) a faxed copy of a document “adding Count III for defendant’s 1991 attempted sexual assault first degree conviction,” 5) a document he said was “the equivalent of a judgment and sentence in the State of Washington for attempted criminal sexual assault in the first degree,” 6) a faxed copy of a “motion to dismiss” counts in the 1991 case “reflecting a plea of guilty to Count III,” 7) a faxed copy of a document “the state believes to be the equivalent of a judgment and sentence,” 8) a certified copy of a judgment and sentence for a misdemeanor conviction in Washington from 2004, and 9) a copy of a transcript of “defendant’s unredacted taped statement” previously admitted in the CrR 3.5 hearing. RP 880-83.

In addition, the prosecutor presented testimony from a Department of Corrections witness who conducted a presentence investigation. RP 884. That witness declared that the “proof” of the prior “serious sexual offense” from Colorado “came from official documents,” stated his opinion that the Colorado conviction was “the equivalent of a rape in the

second degree,” and said he thought a sentence of life without the possibility of parole was “required.” RP 884.

Counsel objected not only to the admission of the evidence and the continuance but also to the court considering any transcript, arguing that it was improper under Blakely. RP 883. The court agreed with the prosecutor that the transcript was just proof of a “prior conviction,” which did not need to be proven beyond a reasonable doubt to a jury. RP 883.

The following week, on January 27, 2006, the prosecution presented “additional exhibits,” including not only certified copies of the “fax” documents previously presented but also the following additional documents: 1) a “written finding that defendant understands the rights that he is waiving when he entered the plea on the attempted criminal sexual assault,” and 2) several transcripts of hearings in 1991 and 1994 from Colorado, which the prosecution described as transcripts of plea hearings for both offenses and the sentencing hearing for the prior Colorado sex crime. RP 889-91. The prosecution still did not have the evidence it needed to prove that the Colorado vehicular homicide was comparable to a Washington “strike” crime, so it asked the court to sentence the defendant as a persistent offender under the “two strikes” statute for the rape counts and count the vehicular assault as if it were a third degree assault in Washington for the offender score “without prejudice to the state’s ability to demonstrate that it is a comparable offense in the event that, for whatever reason, the defendant prevails on appeal on the rape or burglary counts and it’s remanded for a new sentencing.” RP 892. Counsel objected that the record presented by the prosecution was insufficient and

that the defendant should be sentenced within the standard range for each offense. RP 892. He also objected that the documents regarding the attempted first degree sexual assault from Colorado were insufficient because the judgment was only entered for the “generic statute” without showing the “specific section” under which the conviction was entered. RP 893.

The court noted the objections, ruled that the transcripts from Colorado proved that the prior conviction for attempted first degree sexual assault in Colorado was “comparable to attempted rape second degree” in Washington, and imposed a “two strikes” sentence of life without the possibility of parole on the two current rape counts based on the prior Colorado offense. RP 893-95. The court also counted the Colorado vehicular homicide in imposing 89 months for the burglary and 365 days for the fourth degree assault. RP 895.

- b. The court erred in finding legal comparability and factual comparability was not and could not be constitutionally proved

At sentencing, the prosecution bears the burden of proving all prior convictions before those convictions can be used in an offender score or otherwise. See State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). When a prior conviction is from out-of-state, the prosecution must prove not only its existence but also that it was “comparable” to one in Washington state. State v. Cabrera, 73 Wn. App. 165, 168, 868 P.2d 179 (1994); RCW 9.94A.525(3). Absent such proof or an affirmative acknowledgment of comparability, the out-of-state conviction may not be used to increase the defendant’s offender score, because the prosecution

has failed to prove the prior conviction is a felony under Washington law. Id.; see also State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). Further, where, as here, an out-of-state conviction is being used to support a persistent offender sentence, the prosecution is required to prove not only the existence and comparability of that prior conviction but also that it qualifies as a “strike” under the relevant law. See State v. Thorne, 129 Wn.2d 736, 921 P.3d 514 (1996).

A comparability analysis may require examination of both legal and factual comparability. Lavery, 154 Wn.2d at 255. For “legal” comparability, the court must first compare the elements of the out-of-state crime and those of the Washington crime claimed to be “comparable” at the relevant time. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998); Lavery, 154 Wn.2d at 255. If they are essentially the same, there is legal comparability, and the prior conviction may be counted in the Washington sentencing. Lavery, 154 Wn.2d at 255.

In contrast, if the out-of-state crime did not contain one or more of the elements required to prove the Washington crime on the date of the out-of-state offense, then the out-of-state conviction is not legally comparable because it did not require proof of each fact that must be found for liability for the counterpart crime in Washington. State v. Bunting, 115 Wn. App. 135, 140, 61 P.3d 375 (2003).

Finally, if the foreign statute defines the crime more broadly than how the comparable crime was defined in Washington, courts were, in the past, permitted to examine the underlying facts of the prior conviction in order to determine if the actual offense was comparable to an offense, i.e.,

whether there was factual comparability. See State v. Russell, 104 Wn. App. 422, 443, 16 P.3d 664 (2001). Under Blakely, however, any fact which serves to increase the punishment from that which a defendant faces based solely on the jury's verdicts must be proven to a jury, beyond a reasonable doubt, or admitted. See Ring v. Arizona, 536 U.S 584, 602, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). The narrow "prior conviction" exception to Blakely applies only to the fact of the *existence* of a prior conviction, not other facts which might prove comparability, such as whether a specific defendant had admitted committing a specific act. See United States v. Shepard, 544 U.S. 13, 25, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) (while the "disputed fact" of a burglary had involved entry into a specific place and thus was a "violent offense" could "be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record" to fall under the "prior conviction" exception).

Thus, as the Washington Supreme Court stated in Lavery, if the elements of a foreign crime "are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable," and any "attempt to examine the underlying facts of a foreign conviction" which were neither admitted, stipulated to, nor proven to a fact finder beyond a reasonable doubt runs afoul of the constitutional protections described in Blakely. Lavery, 154 Wn.2d at 258.

In this case, the sentencing court erred in holding that the 1991 Colorado attempted first degree sexual assault was comparable to a Washington attempted second degree rape, and in counting that prior

offense as a “strike” crime in imposing the POAA sentence for the two current rape convictions, and in imposing the sentences on the other crimes. At the relevant time, former RCW 9A.44.050 (1990) defined second-degree rape as follows:

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

- (a) By forcible compulsion;
- (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated; or
- (c) When the victim is developmentally disabled and the perpetrator is a person who is not married to the victim and who has supervisory authority over the victim.

At the same time, the Colorado Revised Statutes (C.R.S.) defined sexual assault in the first degree as follows:

(1) Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits a sexual assault in the first degree if:

- (a) The actor causes submission of the victim through the actual application of physical force or physical violence;
- (b) The actor causes submission of the victim by threat of imminent death, serious bodily injury, extreme pain, or kidnapping, to be inflicted on anyone, and the victim believes that the actor has the present ability to execute these threats; or
- (c) The actor causes submission of the victim by threatening to retaliate in the future against the victim, or any other person, and the victim reasonably believes the actor will execute this threat. As used in this paragraph (c), “to retaliate” includes threats of kidnapping, death, serious bodily injury, or extreme pain; or
- (d) The actor has substantially impaired the victim’s power to appraise or control the victim’s conduct by employing, without the victim’s consent, any drug, intoxicant, or other means for the purpose of causing submission; or
- (e) The victim is physically helpless and the actor knows the victim is physically helpless and the victim has not consented.

Former C.R.S. 18-3-402 (1991).

The Exhibits<sup>5</sup> the prosecution relied on below regarding the 1991 Colorado conviction included the “count forms” initially entered as Exhibit 5 and subsequently admitted as Exhibit 11, which provided in the “ADDED THIRD” accusation that the defendant:

did unlawfully and feloniously attempt to commit the crime of Sexual Assault In the First Degree against MELISSA O’NEILL, and did engage in conduct constituting a substantial step toward the commission or said crime, as defined by 18-3-402(1)(a), C.R.S., as amended[.]

Exhibit 7 indicated that the defendant pled guilty to “Added Count Three,” defined as “CRIMINAL ATTEMPT FIRST DEGREE SEXUAL ASSAULT, C.R.S., 18-2-101 as amended (Class 4 Felony).” The “judgment of conviction” was entered for “added count three: criminal attempt 1<sup>st</sup> degree sex assault, 18-2-101.” (Exhibit 8).

Thus, the judgment and sentence does not clearly indicate that the subsection of the Colorado statute to which the plea was entered was subsection (1)(a), the section involving “actual application of physical force or physical violence.” Yet the court found the Colorado offense “comparable” based upon a conviction on that subsection.

Further, in Colorado, the 1991 statute defining “criminal attempt” provided, in relevant part:

(1) A person commits criminal attempt if, acting with the kind of culpability otherwise required for commission of an offense, he engages in conduct constituting a substantial step toward the commission of the offense. A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor’s purpose to complete the commission of the offense.

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<sup>5</sup>These exhibits have been designated to this Court but not assigned separate clerk’s papers numbers. For this reason, they will be referred to by their exhibit number herein.

Former C.R.S. 18-2-101 (1991). In Washington at that time, criminal attempt was defined in former RCW 9A.28.020 (1991) as follows:

(1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime.

Thus, the Washington statute did not provide liability for an “attempt” based upon conduct which was not an affirmative act but rather was an “omission.”

As a result, the Colorado attempt crime was broader than the Washington attempt crime. Under Lavery, as a result, the court could not count the 1991 Colorado offense either towards the offender score of the burglary and assault or as a “strike” for the purposes of the “two strikes” statute without determining factual comparability, i.e., that the actual facts of the offense either found by a jury beyond a reasonable doubt or admitted or stipulated to by the defendant were for affirmative acts and not omissions.

Nothing in the record supported such a finding. In the transcript admitted from the plea hearing relating to the 1991 offense, the Colorado court indicated what “first degree sexual assault” involved and then explained “the actual charge” for which the plea was being entered was “attempt to commit a first degree sexual assault,” as follows:

[that you] without legal right or justification, again, attempted to commit the crime of sexual assault in the first degree, that you did so against a Melissa O’Neill (phonetic), and that you engaged in conduct constituting a substantial step toward the commission of the crime as I have defined it for you.

Now a “substantial step” means any kind of conduct whether it’s an act, an omission or a possession which is strongly -  
- which strongly indicates the firmness of the actor’s purpose to

*complete the commission of the offense.*

Exhibit 12 at 10 (emphasis added). None of the documents submitted by the prosecution contained any admissions by the defendant that he had engaged in certain conduct or stipulations regarding what he admitted doing that amounted to a “substantial step,” to show whether it was an act, omission or a possession. See Exhibits 1-14.

Further, although the Colorado prosecutor later declared that, if there had been a trial, he would have introduced evidence he believed “have shown” that “the defendant subjected the victim, Melissa O’Neill (phonetic), to vaginal intercourse to which she did not consent” and “[d]uring the course of the assault she was struck in the mouth and had a split lip,” there was no indication that the defendant agreed to those facts or stipulated to them in any way and, of course, because the case involved a plea, those facts were never proved to the jury beyond a reasonable doubt. See Exhibit 12 at 1-17. As a result, under Blakely and Lavery, it would violate appellant’s state and federal constitutional rights to rely on the prosecutor’s mere allegations in finding “comparability.” See 154 Wn.2d at 255.

In addition, there is another serious problem with the court’s comparability finding. In general, in Washington, rape crimes do not require proof of intent. See State v. Chhom, 128 Wn.2d 739, 742, 911 P.2d 1014 (1996). But while second-degree rape does not include an element of intent, *attempted* second-degree rape requires such proof. See State v. Jackson, 62 Wn. App. 53, 813 P.2d 156 (1991); State v. Brown, 78 Wn. App. 891, 894, 899 P.2d 34 (1995), review denied, 128 Wn.2d

1021 (1996). This is because, in Washington, a person commits attempt when, with intent to commit a specific crime, they do any act which is a substantial step toward the commission of that crime. RCW 9A.28.020(1).

As a result, in Washington, an attempt crime has two elements: the intent to commit the substantive crime, and the taking of a substantial step toward its commission. Chhom, 128 Wn.2d at 742; State v. Aumick, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995). More specifically, where, as here, the specific crime allegedly attempted is rape committed by forcible compulsion, in Washington the attempt crime requires proof of intent to “have forcible sexual intercourse.” State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003) (emphasis omitted).

In Colorado, the attempt statute does not explicitly require proof of the intent to commit the substantive crime. Instead, the only intent required is that the offender act “with the kind of culpability otherwise required for commission” of that offense. C.R.S. 18-2-101(1) (1991). In the case cited in the prosecution’s briefing below, People v. Frysig, 628 P.2d 1004 (Colo. 1981), the court had indicated (in the context of addressing instructions) that an essential element of proving attempt was proof of the “intent to commit the underlying offense.” 628 P.2d at 1007. But in People v. Thomas, 729 P.2d 972, 974-75 (Colo. 1986), the court subsequently explained that “this language referred to something ‘akin to . . . general intent,’” rather than a declaration of a blanket requirement of such an element in all attempt cases. See also, Palmer v. People, 964 P.2d 524, 528 (Colo. 1998).

Further, in Palmer, the Colorado Supreme Court noted that

“Colorado’s attempt jurisprudence differs from that of the majority of jurisdictions” because it permits liability to attach for attempting even an unintentional crime. 964 P.2d at 528 n. 4. This is because, in Colorado, the attempt statute does *not* require an intent to commit the specific crime but rather imposes a culpable mental state based upon the nature of the underlying crime:

If the underlying offense is a specific intent crime, then the culpable mental state for the crime of attempt will be “intentionally;” if the underlying offense is a general intent crime, then the culpable mental state will be “knowingly.” Thus, unlike conspiracy, *punishment for attempt “is not confined to actors whose conscious purpose is to perform the proscribed acts or to achieve the proscribed results.”* Instead, it is enough that the accused knowingly engages in the risk producing conduct that could lead to the result. *It is possible to be convicted of attempt without the specific intent to obtain the forbidden result.*

Palmer v. People, 964 P.2d 524, 527-28 (Colo. 1998) (emphasis added), quoting, People v. Krovarz, 697 P.2d 378, 381 (Colo. 1985).

Thus, under Thomas and Palmer, the holding of Frysig is in serious question. The intent required for proving an attempt crime in Colorado is not *always* the specific intent to commit the underlying offense. Rather it depends upon the intent required for the underlying offense. And Colorado’s first-degree sexual assault as defined here under subsection (1)(a) is, in fact, *not* a specific intent crime, but rather one of “general intent,” because it requires only that the actor “knowingly inflicts” the sexual intrusion on the victim, and causes (without any mental state required) submission by actual application of physical force or violence. See, e.g., People v. Vigil, 127 P.3d 916, 931 (Colo. 2006). The Colorado legislature has specifically declared that “[a]ll offenses defined in this code

in which the mental culpability requirement is expressed as "knowingly" or "willfully" are declared to be general intent crimes." C.R.S. 18-1-501(6) (1971).

Thus, the requisite mental state for attempted first degree sexual assault in Colorado is not "intent," defined as having a "conscious objective. . .to cause the specific result proscribed by the statute defining the offense." C.R.S. 18-1-501(5). It is "knowing," and a person acts "knowingly" in Colorado "with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists." C.R.S. 18-1-501(6). Further, a "person acts 'knowingly' or 'willfully', with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result," but, unlike acting intentionally, he does not have to *intend* that result. C.R.S. 18-1-501(6).<sup>6</sup>

As a result, the Colorado attempted first degree sexual assault did not require proof that the defendant had the specific or conscious objective of intending to have forcible sexual intercourse with someone, as was required for Washington's attempted second-degree rape under DeRyke. Again, the Colorado offense was broader than the Washington offense alleged to be comparable. Again, under Lavery, the court could only find "factual comparability" if there were facts admitted, stipulated to or proven beyond a reasonable doubt which established that comparability.

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<sup>6</sup>Washington similarly distinguishes between the greater culpable mental state of acting with "intent" and acting with "knowledge," recognizing that proof of "knowledge" does not necessarily imply proof of "intent." See State v. Thomas, 98 Wn. App. 422, 424-25, 989 P.2d 612 (1999), review denied, 140 Wn.2d 1020 (2000); RCW 9A.08.010.

And again, the record presented by the prosecution on the 1991 Colorado offense was insufficient to establish factual comparability, because it indicates nothing about any admission or stipulation to an intent to commit the underlying crime rather than merely acting knowingly.

Because the 1991 Colorado crime of attempted first degree sexual assault was broader than the 1991 Washington crime of attempted second degree rape, the court erred in finding legal comparability. Further, because the record was insufficient to support a finding of factual comparability on either of the two ways in which the Colorado crime was broad based upon facts admitted, stipulated to or proven to a jury beyond a reasonable doubt, factual comparability was not shown - and could not be, without violation of the fundamental rights protected as described in Blakely. The persistent offender sentences, based upon the erroneous finding of comparability for the 1991 offense, and the "standard range" sentences, calculated based on an offender score including that offense, must therefore be reversed.

On remand, there is no permissible remedy other than entry of standard range sentences for all offenses, without inclusion of the 1991 Colorado conviction in the offender scores and without the possibility of a further attempt at a persistent offender sentence. This is so even though the prosecution stated, on the record, that it wanted the sentencing court to order a standard range sentence for the burglary offense "without prejudice," so that it could later argue that for a three-strikes persistent offender sentence for that offense. It is proper to permit the prosecution to present new evidence on remand only if there has been no objection to the

sufficiency of the evidence below. See Ford, 137 Wn.2d at 485. But where, as here, the prosecution was given not just one but in fact multiple opportunities to present evidence to support the requested sentence (including a continuance of the initial sentencing date and a continuance in the middle of the sentencing hearing to the following week) and the defense specifically objected to the sufficiency of that which the prosecution *did* present, the prosecution is not entitled to another “bite at the apple” and is held to the evidence it has already presented below. See State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002). Further, here, without the 1991 Colorado conviction, there are neither two nor three “strikes” to support a persistent offender sentence. Reversal and remand for entry of standard range sentences - based solely upon the record below - is required.

c. Appellant’s rights under *Blakely* were violated by the court’s factual finding of identity

Both the state and federal constitutions guarantee the rights to trial by jury and proof beyond a reasonable doubt. State v. Manussier, 129 Wn.2d 652, 656, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201 (1997); 5<sup>th</sup> Amend., 6<sup>th</sup> Amend., 14<sup>th</sup> Amend.; Const. Art. I, §§ 3 and 22. The rights extend not only to the facts proven at trial, but also to any facts relied on at sentencing to increase the range of punishment that could be imposed beyond that which is authorized by the jury’s verdict. Blakely, 542 U.S. at 303-305; Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

Because most prior convictions were obtained after proof to a jury

beyond a reasonable doubt, some courts have found that the U.S. Supreme Court has created an exception for Blakely where all that is being proved is that the prior conviction exists. Apprendi, 530 U.S. at 490. The exception is construed narrowly, and only applies to the fact of whether a prior conviction exists, not other facts. See Apprendi, 530 U.S. at 490; Jones v. United States, 526 U.S. 227, 248-29, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). The reason for the exception is that the fact of the prior conviction was “entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilty beyond a reasonable doubt.” Apprendi, 530 U.S. at 496.

Thus, in State v. Hughes, 154 Wn.2d 118, 141-42, 110 P.3d 192 (2005), reversed in part on other grounds by, Washington v. Recuenco, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), the Supreme Court examined the scope of the prior conviction exception and distinguished between the fact of whether a prior conviction *existed* and other facts relating to that prior conviction, such as whether such an offense shows “rapid recidivism,” or is part of an “[o]ngoing pattern of same criminal conduct.” 154 Wn.2d at 141-42; see also, Lavery, supra (sentencing court cannot examine underlying facts of a foreign conviction to determine comparability). Construing the “prior conviction” exception narrowly as mandated, the Hughes Court held that where the sentencing court goes beyond just stating the fact of the prior conviction into making “new factual determinations and conclusions,” Blakely mandates proof to a jury beyond a reasonable doubt. 154 Wn.2d at 141-42.

Here, just as in Hughes, the question was not limited to whether

the prior convictions *existed* but involved the separate factual determination of whether they were committed by the same man who was before the court for sentencing, i.e., the identity of the person who had committed the prior crimes. To make its determination, the court had to weigh and evaluate evidence and make findings. These tasks went far outside the narrow prior conviction exception. Further, it is well-settled that identity is a question of fact. See State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974); State v. Salas, 127 Wn.2d 173, 185, 897 P.2d 1246 (1995).

Before Blakely, the Supreme Court had held that the prosecution was only required to prove identity by a preponderance of the evidence, and that the findings need not be made by a jury but could be made by the court. State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719, amended, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986). In addition, in Ammons, the Court held that the fact that the defendant and the person named in the prior conviction had the same “identity of names” was sufficient evidence to satisfy the burden unless the evidence was “rebutted” by sworn testimony from the defendant that some of the convictions were not his. Ammons, 105 Wn.2d at 189-90. If the defendant presented such evidence, that would

suspend the use of the prior conviction in assessing the presumptive standard sentence range until the State proves by independent evidence, for example, fingerprints . . . that the defendant before the court for sentencing and named in the prior conviction are the same.

105 Wn.2d at 189-90.

Under Blakely, however, Ammons retains no currency. Ammons

was based upon an understanding of the nature of what constituted a “fact” and an “element” and what the Sixth Amendment required at the time. Now, after Blakely, it is clear that any fact which increases the punishment the defendant faces beyond that which he faced based solely upon the jury trial must be proved to a jury, beyond a reasonable doubt. Blakely, 542 U.S. at 302-305.

Here, the jury trial only established that Mr. Betts was the person who committed the *current* crimes. It did not establish that he was the same person mentioned in the documents the prosecution presented as supporting criminal history and proving the prior strike crime for the purposes of the Persistent Offender sentence.

Thus, Mr. Betts’ state and federal constitutional rights to trial by jury and proof beyond a reasonable doubt were violated at sentencing. The Washington Supreme Court has held that, under Washington law, such violations can never be harmless. See Hughes, 154 Wn.2d at 142-44. And on remand, there is no statutory authority to empanel the necessary jury. Recent amendments to the exceptional sentencing scheme mention nothing about proof of identity for sentencing purposes, and could not in any event be applied where, as here, the crime occurred well before the amendments. See Laws of 2005, ch. 68 § 7; In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004). Reversal and remand is required.

6. THE “PRIOR CONVICTION” EXCEPTION RETAINS NO CURRENCY AND SHOULD BE REJECTED

As noted above, the courts have described a “prior conviction” exception to the Blakely requirements and the rights to trial by jury and

proof beyond a reasonable doubt. Blakely, 542 U.S. at 303-305; Apprendi, 500 U.S. at 476-77. In the past, a majority in this State's Supreme Court held that it was proper to submit the question of whether a defendant was a persistent offender and must receive a sentence of life without the possibility of parole to a judge, and prove that status by only a preponderance of the evidence. See Thorne, *supra*; Manussier, *supra*; State v. Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996). Although those cases were decided before Blakely, since Blakely the Washington Supreme Court has reaffirmed those holdings by refusing to apply Blakely to POAA proceedings until the U.S. Supreme Court does so. State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001); State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003).

Neither Wheeler nor Smith, however, retains its currency, given subsequent developments in the law. Both cases relied upon the belief that there was a "prior conviction" exception to the rights of trial by jury and proof beyond a reasonable doubt created by Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). Wheeler, 145 Wn.2d at 123; Smith, 150 Wn.2d at 141-43. But in fact, Almendarez-Torres did not even *involve* those rights.

In Almendarez-Torres, the question was whether the status of being a "recidivist" was an element of the substantive crime which therefore needed to be pled in the information in order to give the constitutionally mandated notice. 523 U.S. at 246. Indeed, the U.S. Supreme Court itself has noted that Almendarez-Torres dealt with the notice question and *not* with the issue of the "Sixth Amendment right to a

jury trial.” Jones, 526 U.S. at 248-49.

Thus, contrary to the declarations in Wheeler and Smith, Almendarez-Torres did not create a “prior conviction” exception to the rights to trial by jury and proof beyond a reasonable doubt. The Washington Supreme Court’s devotion to the “prior conviction” exception as a mandate of federal constitutional law under Almendarez-Torres is thus misplaced, as Almendarez-Torres did not create such an exception for the rights to trial by jury and proof beyond a reasonable doubt.

Further, there is very good reason to doubt the continued validity of the holding of Almendarez-Torres even if its ruling on prior convictions was applicable here. The bare majority which joined in the Almendarez-Torres decision included Justice Thomas, and the soon-retiring Justice O’Connor. See 523 U.S. at 225-26. Justice Thomas has himself recently noted that the holding which he supported in Almendarez-Torres “has been eroded by this Court’s subsequent jurisprudence, and a majority of the Court now recognizes that Almendarez-Torres was wrongly decided.” Shepard, 544 U.S. at 27 (Thomas, J., concurring in part and dissenting in part). The ruling of Almendarez-Torres was “flawed,” and the justice lamented the “[i]nnumerable criminal defendants” who “have been unconstitutionally sentenced” based on that case. 544 U.S. at 28. He urged the Court to “consider Almendarez-Torres’ continuing viability” in an “appropriate” case. Id.

Thus, it is clear that the holding of Almendarez-Torres would be different today. And it is clear that there has been “erosion” of the rule that case set forth. Even a brief examination of that erosion reveals how

little of the foundation of Almendarez-Torres remains. For example, in Almendarez-Torres, the majority relied on the legislative intent for passing the relevant recidivist statute. 523 U.S. at 235. But in Blakely and Apprendi, the Supreme Court made it clear that the legislative intent is irrelevant in determining whether there is a Sixth Amendment or due process violation. See Blakely, supra; Apprendi, 530 U.S. at 476.

Similarly, in Almendarez-Torres, the Court relied on the belief that sentencing factors were not “elements” increasing a sentence, so that the placement of the enhancement within the sentencing code was effectively dispositive. 523 U.S. at 228, 234-35. But in Blakely the Court rejected that same theory, and held that, regardless of placement in the sentencing code, sentencing “factors” could still be subject to the requirements of proof beyond a reasonable doubt, to a jury. 542 U.S. at 306.

In addition, in Almendarez-Torres, the fact of prior convictions only triggered an increase in the maximum sentence the sentencing court could consider, but still left discretion with the sentencing court to sentence below that maximum. 523 U.S. at 245-46. The Court relied on the “statute’s broad permissible sentencing range” even after application of the enhancement and found there was not “significantly greater unfairness,” because the judges still had discretion within a broad range. 523 U.S. at 245-46. Here, in stark contrast, the prior convictions mandate a sentence which the judge has no discretion to affect - life without the possibility of parole.

Thus, Almendarez-Torres did not hold that a prior conviction need not be proven to a jury beyond a reasonable doubt under a “prior

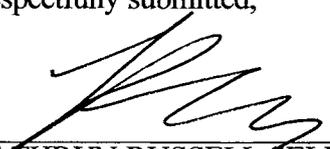
conviction” exception so that any fact “[o]ther than a prior conviction” which increased the penalty for the crime had to be proven to a jury beyond a reasonable doubt, was not only dicta but also incorrect. It was not rendered less so when parroted in Blakely, again as dicta. And the reasoning supporting Almendarez-Torres has been so significantly eroded or is so inapplicable to the situation in this case that continuing to follow Wheeler and Smith in their erroneous reliance on Almendarez-Torres is simply error. This Court should decline to follow Wheeler and Smith and should hold, consistent with Apprendi, Ring and Blakely, that appellant’s state and federal constitutional rights to trial by jury and proof beyond a reasonable doubt were violated by the failure to submit the question of the existence of the prior convictions to a jury and prove them beyond a reasonable doubt in this case.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 6th day of September, 2006.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, Washington, 98402;

to Mr. Donald R. Betts, DOC # 844522, Clallam Bay Corr. Center, 1830 Eagle Crest Way, Clallam Bay, Washington, 98362.

DATED this 07 day of September, 2006.



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BY *KRS* Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the Appellant's Opening Brief previously filed to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

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and that due to the time at which I arrived at the post office, the mailing was made this date rather than the date on the original Certificate attached to the Motion.

DATED this *7th* day of *September*, 2006.

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