70518-1

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

STATE OF WASHINGTON)
)
Respondent,) No. 70518-1-I
)
v.) STATEMENT OF ADDITIONAL
) GROUNDS FOR REVIEW
)
SAM S. KEODARA)
(your name))
Appellant)

I, SAM KEODARA, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

INeffective Assistance of counsel occured by failure to object to: Blackberry cellphone evidence that lacked foundation and Authentication pursuant to ER 901(A),(B) 9.

Additional Ground 2

Prosecutorial Misconduct occured by the elicitation of testimony it knew or should have known was false and allowed it to go uncorrected.

If there are additional grounds, a brief summary is attached to this statement.

Date: 12/22/2014 Signature: [signature]

ADDITIONAL GROUND 1

INEFFECTIVE ASSISSTANCE OF COUNSEL OCCURRED BY FAILURE TO OBJECT TO: BLACKBERRY CELLPHONE EVIDENCE THAT LACKED FOUNDATION AND AUTHENTICATION UNDER ER 901(A), (B)-9. AS A RESULT KEODORA'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE WAS VIOLATED.

In trial prosecution admitted Sprint/Nextel phone records, allegedly belonging to Keodara. The Sprint Records show that the handler at the time was in the area of the shootings at the time of the shootings. **(RP pg. 20, lines 14-25, 5/16/13).** These Sprint Records were not under the defendants name as the subscriber. **" Just so I am clear. The first name is S-Y-E-O ? Answer: "Yes ma'am". (RP pg. 8, lines 7-15, 5/14/13).**

In pre-trial rulings prosecution asked to admit a Blackberry Cellphone because there were texts where Keodara acknowledges wearing a Hornets jersy. **(RP pg28, lines 10-25, 5/2/13).**

In trial prosecution asserts; without any foundation or authentication that the Blackberry cellphone was the cellphone that belonged to Sprint/Nextel phone records, **(RP pg. 14, lines 19-22, 5/8/13),** and never corrects this assertation, only alleges that it was a different number. **(RP pg. 21, lines 16-22, 5/16/13). " The proponent of evidence must establish the elements of a required foundation by a preponderance of the evidence." ~~State v Benn, 120 Wash.2d 653 845 P.2d 289 (1993).~~**

Under ER 90(A), (B)-9, in order for prosecution to sufficiently authenticate that the Blackberry cellphone belonged to the Sprint/Nextel phone records, the state must produce evidence sufficient to support the finding that the Blackberry cellphone is what prosecution claims it is. Lastly, the state would have had to produce evidence describing the Blackberry cellphones process of system and that an accurate result is

produced. Which is calls/text were same in import as to belong to Sprint cell records in question.

Thus "authentication is a threshold requirement to assure that evidence is what it purports to be". State v Payne, 117 Wash.App. 99, 106, 69 P.3d 889 (2003). To emphasize that the Blackberry cellphone evidence should have been authenticated, and objected to for the lack of foundation - In states trial exhibit 62(RP pg. 12, line 18, 5/15/13). and photographs B,C & D (RP pgs. 20-21, 5/15/13), you can see " AT&T " across the top of the cellphone. (This is not the cellphone belonging to the Sprint cell records, allegedly putting Keodara at the scene). The evidence should have been objected to for lack of foundation or proper authentication. It is clear that the cellphone does not match the phone records.

To prevail on a claim of inneffective assistance of counsel, based on the failure to object, the defendant must show: (1) The absence of legitimate trial strategy or tactical reason for not objecting: (2) That the trial court would have sustained the objection if made: (3) The result of the proceeding would have been different if the evidence would not have been admitted. State v Saunders, 91 Wash.App. 575,578, 958 P.3d 364 (1998).

(1) The absence of legitimate trial strategy and tactical reasons for not objecting is because defense counsel merely argues that the Blackberry cellphone doesn't belong to the Sprint Records. (RP pg. 18, lines 9-11, 5/8/13). When an objection for lack of foundation and a showing of authentication could have proven it was not the phone. This would have been far more persuasive. (2) The trial court would have sustained the objection if it were made because under ER 901(A), (B)-9 , the Blackberry

cellphones process or system was never properly authenticated, thus it lacks proper foundation. (3) the result of proceeding would have differed if the evidence had not been admitted because the assertation by the prosecution that the Blackberry cellphone is the cellphone that belonged to Spring cell records; would be considered evidenc making Keodara's outcome "unworthy" of conficence. Thus counsel's assistance was ineffective for failing to object to the Blackberry cellphone evidence that lacked foundation and authentication under ER (B)-9.

Keodara cites: State v Bashaw, 169 Wash.2d 133, 234 P.3d 195 at 199, **reversed and remanded. " It is fundamental that evidence be authenticated before it is admitted(ER 901(A)).** The Bashaw court held: State failed to make a prima facie showing that the rolling wheel measuring device produced accurate resultes, and therefore results were improperly admitted... I.E. No comparison of results generated by the device to a known distance was made nor was there any evidence that it had ever been inspected or calibrated. Evidence was objected tor lack of foundation.

In Keodara's case the state also failed to make a prima facie showing that the Blackberry cellphone devise produced accurate results; to conclude it belonged to Sprint records and therefore was improperly admitted. Also, there was no evidence that the phone had ever been inspected or calibrated, or that the phone had made any of the calls or texts in the Sprint/Nextel Records. Counsel should have objected, for lack of foundation.

Keodara also cites: State v Vermillion, 112 Wash.App. 844, 51 P.3d 188, (Div. 1 2002). In prosecution for bank robbery bag of stolen money had been traced to defendant by use of electronic tracking device in the bag; tracking device was sufficiently authenticated by the testimony of

police officers who described how the device worked, described the way in which the devices are tested and calibrated and who testified that the device in question was in proper working order.

In Keodara's case there was no form of any authentication. The cellphone device was never shown to have produced accurate results: in order to sufficiently claim that the Blackberry cellphone belonged to Sprint Cell Records , counsel should have objected for lack of foundation and the evidence should have been authenticated.

Strickland v Washington, 104 S.Ct. 2052 , Held: To prove prejudice the defendant must establish a "reasonable probability" that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Herein, **Strickland** applies simply because there is a reasonable probability that but for counsels unprofessional errors, the result of the proceeding would have been different because had an objection been for lack of foundation, the threshold requirement for authentication would have been applied and an evidentiary hearing could have been held. Following that, the trial court would have concluded: in fact the Blackberry cellphone is not the cellphone belonging to Sprint Cellphone Records. However, this did not occur, and the evidence admitted is likely evidence that would [undermine] confidence in the outcome.

In Conclusion,

Ineffective Assistance of Counsel occured by failing to object to admittance of evidence lacking proper foundation. Under **ER 901(A), (B)-9** the Blackberry cellphone was never authenticated, and should have been. Keodara was therefore deprived of his Sixth Amendment Right to Effective Assistance of Counsel. Keodara respectfully requests a new trial in the least.

ADDITIONAL GROUND 2

PROSECUTORIAL MISCONDUCT OCCURED BY THE ELICITATION OF TESTIMONY IT KNEW OR SHOULD HAVE KNOWN WAS FALSE, AND ALLOWED IT TO GO UNCORRECTED WHEN IT APPEARED. KEODARA RAISES THIS ERROR UNDER NAPUE V THE PEOPLE OF ILLINOIS, 79 S.Ct. 1173, 360 U.S. 264, 3 L.Ed.2d 1217. AS A RESULT KEODARA WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF THE LAW AND A FAIR TRIAL.

A claim under **NAPUE** will succeed when; (1) the testimony (or evidence) was actually false; (2) the prosecution knew or should have known that the testimony was actually false, and; (3) the false testimony was material. **ID at 264-71, 71 S.Ct. 1173.**

In Keodaras case state witness Smallbeck alleged/acknowledged that on Sept. 12, 2011 at 3:18 a.m. (shortly after the shootings) Keodara called Smallbeck and admitted to "shooting at the bus station", Keodara is alleged to have said, " I'm in some hot shit right now Smallbeck, you got to let me stay with you." Smallbeck claims that the alleged call lasted "3 to 5 minutes" and was "was fairly certain the call occured at 3:18". **(RP pg. 34, line 16, RP pg. 36, and RP pg. 56, lines14-16, 5/13/13.)** Lastly, Smallbeck also alleges "later that day at around 11 a.m. "Smallbeck called Keodara, Keodara allegedly said "he knew he had hit someone, it was over a crack deal, he shot multiple people."

> **Prosecution-Q: And is it your meory, is this the same day that you had already talked once early in the morning?**

Smallbeck-A: It was about 7 to 8 hours later. (RP pg. 36, at 14), RP pg.38 at 2, 5/13/13).

Sprint/Nextel phone records allegedly for Keodora, and Verizon Wireless phone records were searched. **(RP pg. 105, 5/14/14).**

Cross examinination of Sprint Records Custodian:

Q: Okay, do you see any calls of that kind of duration in the early morning hours of Sept.12?

A: No mam. (RP pg. 32 at 1, 5/14/13, RP pg. 105, 5/14/13).

Therefore, there were no calls between Smallbeck and Keodara whatsoever on Sept. 12, 2013 as Smallbeck testified.. ... thus; (1) The testimony was actually false; (2) The prosecution knew or should have known that the testimony was actually false, and: (3) The false testimony was material because it bore solely on Keodara's "guilt".

The **Napue** court held that the knowing use of false testimony to obtain a conviction violates due process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared. **ID. at 269,79 S.Ct. at 1177.**

In Keodara's case the prosecution elicited and did not correct what she knew to be false testimony. The state had no choice but to acknowledge that there was no call, but in doing so improperly vouched and asserted her personal opinion in a desperate attempt to sweep the falsity under the rug. -(Closing Argument)- **"There is no call at 3:18 a.m. as Nathaniel Smallbeck said, and thats true. And you saw in the that on**

the day of the murder at 3:17 a.m. there is a text, and it is certainly concievable that, 3.18 is staying in Mr. Smallbeck's head because a text came in to him that day." (RP pg. 24, lines 5-10, 5/16/13).

No doubt, "Prosecution has wide latitude in making reassonable inferences from the record." State v Gregory. Keodara asserts that inferences here were unreasonably drawn from nowhere on the record. (1) Smallbeck says nothing about a text at 3:17 a.m.. In fact Smallbect Smallbeck says that he was "fairly certain" that a call occured at 3:18 a.m.. (RP pg. 36, line 13, 5/13/13.)

Also, in that same argument, prosecution says " Mr. Smallbeck says later after he gets the first call, he later got another call day- - the day later on the 13th. And it is a little over a 3 minute call just as Nathanial Smallbeck testified and its from the defendant to him." (RP pg. 24, lines 10-14, 5/16/13); (2) Again Smallbeck says nothing about a second call on Sept. 13. In fact after the first call (on Sept. 12 at 3:18 a.m.), Smallbeck says "later the same day, around 11 a.m. I called him," (which would be Sept. 12 around 11 a.m.). (RP pg. 36, lines 14-17, RP pg. 37, line 21, RP pg. 38. line 3, 5/13/13).

Finally in that same argument prosecution says " Mr Smallbeck testifed that later that same day, after the 11 o'claock call, he later talked to him again. He called the defendant to see if he was okay, and there is indeed a call later that day, 7:42 that about 98 seconds." (RP pg. 24, lines 15-19, 5/13/13). (3) Yet again... Smallbeck says nothing about a call after the second 11 o'clock call. (See Smallbeck's entire testimony. RP 5/13/13).

Where " The jury may be more susceptable to prejudicial conduct during colosing argument, State v Glassman, 175 Wash.2d 696, at 709,

286 P.3d 673). Prosecution knowingly used false testimony to obtain a conviction. She did nothing to correct the false testimony. Instead she used it on soliciting more falsified evidence, in violation of RPC Rule 3.4(B) - A lawyer shall not falsify evidence, or assist a witness to testify falsley...

To further emphasize Keodara's assertations, (Refering to Smalbeck's testimony), prosecution says to the jury, " He was telling the truth because the defendant committed this murder and committed these assaults." (RP pg. 44, lines 18-20, 5/13/13).

Keodara cites Cash v Maxwell, (U.S. 2012) 132 S.Ct. 611. In Maxwell the informant testified that maxwell confessed to the murders. It was held the State Courts denial of relief to respondent Bobby Joe Maxwell was premised on its factual finding that there was no credible or pursuasive evidence Sidney Storch lied at Maxwells trial. (App. to pet. for cert. 137).

In Keodara's case the distinguishing factor is testimony by custodians for Smallbeck and allegedly Keodara's phone records; provide substantially [credible] and [pursuasive] evidence that Smallbeck lied in Keodara's trial. thus taking into account the entire facts herein under Napve, supra at 271, 79 S.Ct. 1178, reversal is required.

IN CONCLUSION,

Prosecution elicited testimony it knew should have known to be false. When the falsity appeared it was left uncorrected and used to solicit more false evidence, (violating RPC rule 3.4). Thus, the knowing use of false evidence was used to obtain a conviction because the evidence bore soley to Keodara's guilt. ~~Thus~~ The error had a reasonable lillihood that could have affected the outcome. Under Napve Keodara was deprived of his due

right to a fair trial. Keodara respectfully requests a new trial in the least.

ADDITIONAL GROUND 3

ERRONEOUS ADMISSION OF NINE-MILLIMETER EVIDENCE FELL UNDER OTHER ACTS EVIDENCE PURSUANT TO ER 404(B); RESULTED IN AN ABUSE OF DISCRETION AND WAS NOT HARMLESS.

ER 404(B) -Evidence of ... Other Crimes, Wrongs, or Acts is not admissible to prove the character of a person to show action in conformity therewith. It may however be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or abuse of mistake or accident.

Before admission of evidence under ER 404(B), the trial court must "(1) Find by a preponderance of the evidence that the misconduct occurred. (2) Identity the purpose for which the evidence is sought to be introduced. (3) Determine whether the evidence is relevant to prove an element of the crime charged and. (4) Weigh the probative value against the prejudicial effect". State v. Thang, 145 WA.2d.630, 642, 41 P.3d 1159 (2002). This analysis must be conducted on the record. State v. Smith, 106 Wash.2d 772, 776, 775 P.2d 951.

In pretrial rulings prosecution requested to elicit testimony from State witness Mr. Smallbeck that prior to the murder and shootings Keodara allegedly had a nine-millimeter pistol. "Mr. Smallbeck was aware from the defendant of numerous guns the defendant owned, but he certainly told him he had a nine-millimeter gun. So I would like to be able to illicit that because that is in a time period just prior to this homicide, so I think it's relevant that he had access to, and had a nine-millimeter gun". (5/9/13 RP 88, Ln. 14-20).

The Court asked for any objections:

> Defense Counsel: Yes, Your Honor, at the time of Keodare's arrest, they found a nine-millimeter gun, it was not the murder weapon. There is no link between the fact that he had nine-millimeters and it being the murder weapon in any weapon in any way whatsoever. (5/9/13 RP 89, Ln. 3-8)

> Prosecution: The defendant told him he was going to try and switch out the nine-millimeter he used to shoot people for something different. So I don't think there is anything on that that cuts away from the fact that when he is discussing having the nine-millimeter with Mr. Smallbeck that it couldn't be the murder weapon. In fact he probably switched it out from the nine-millimeter that was recovered

in the car. (5/9/14 RP 89, at 17-25)

Regarding ER 404(B) elements; The party seeking to introduce evidence has burden of establishing the 1st, 2nd, and 3rd elements. State v. Devincentis, 150 Wash. 2d 11 at 17, 74 P.3d 119. It is because of this burden that evidence of prior misconduct is presumtively inadmissible.

Prosecution does not establish the 1st, 2nd, or 3rd elements. (1) Prove by a preponderance of the evidence that the misconduct occured Prosecution explains that Keodara was going to try and switch out the nine-millimeter to shoot people for something different; That prosecution does not think that when Keodara is allegedly discussing having the nine-millimeter with Mr. Smallbeck that it couldn't be the murder weapon, and that in fact he probably switched it out for the nine-millimeter recovered in the car. (5/9/14 RP 89). Prosecution merely speculates and theorizes by a preponderance of the evidence that the misconduct could have occurred, but does not find, nor establish by a preponderance of the evidence that the misconduct occurred.

(2) Identify the purpose for which the evidence is sought to be introduced. Prosecutions purpose for which the evidence was sought to be introduced: I would like to illicit that because that is in a time period just prior to the homicide. (5/9/13 RP 88 at 17-20) Therefore the admission of the nine-millimeter evidence was for the improper purpose of proving the character of Keodara to show action in conformity therewith; that because Keodara had a propensity to carry a nine-millimeter gun he likely committed the murder and shootings with the nine-millimeter murder weapon. Pursuant to ER 404(B), this purpose is prohibited. However, under ER 404(B) the purpose for which the evidence was sought to be introduced is admissible according to the "Identity" exception rule. seeing as the "identity" of the perpetrator was in question the State may argue this purpose. (which will be addressed in element (3) of relevancy)

(3) Determine whether the evidence is relevant to prove an element of the crime charged. Prosecutions purpose for admission; was the

reason for relevancy. "So I think its relevant that he had access to and had a nine-millimeter gun." (5/9/13 RP 88) The nine-millimeter evidence was in fact irrelevant. According to WA Court precedent when evidence of other bad acts is introduced to show identity by establishing unique modus operandi the evidence is relevant to the current charge "Only if the method employed in the commission ofboth crimes is so unique that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged." State v. thang, 145 Wn. 2d 630 at 643 citing State v. Russell, 125 Wash. 2d 24, 66-67 (1994). Arguably for the record prosecution does not establish a unique modus operandi. Therefore, the evidence was irrelevant. The 1st, 2nd, and 3rd elements were not properly established.

Prior to admission of ER 404(B) evidence the trial court does not fully engage in conducting an ER 404(B) analysis. The Court grants admission in response to prosecutions request by explaining "Well never know. I will allow that, the reference just to him having the nine-millimeter prior to the shooting, nor the other guns". (5/9/13 RP 90 at 1-3). Referencing all elements of the ER 404(B) test (1) The trial court does not find by a preponderance of the evidence that the mis-conduct occurred. The courts assertion that "Well never know" is an expression of doubt. Therefore, "A trial court should resolve doubts as to the admissibility of prior bad acts character evidence under ER 404(B) in favor of exclusion". State v. Thang, 145 Wn. 2d 630, 41 P.3d 1159, at 1154. (2) The Court does not identify a purpose for which the evidence was introduced. To admit evidence of other crimes or misconduct under ER 404(B), the trial court must identify on the record the purpose for which the evidence was admitted. State v. Brown, 132 Wn. 2d 529, 940 P.2d 546 at 569. (3) The trial court excluded reference to the other guns evidence but does not address whether or not the nine- millimeter evidence itself was relevant. (4) The only inquiry into prejudice was the exclusion of other guns, but the probative value of the nine-millimeter evidence itself was not weighed against its prejudicial affect. The evidence should have been excluded.

Thus a trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Powell, 126 Wash. 2d at 258, 793 P.3d 613.

The trial court abused its discretion because admission of the evidence was an application of the wrong legal standard pursuant to ER 404(B), the court relied on unsupported facts such as; Keodara "could have" switched out the murder weapon for the one in the car " could have" got rid of it, and therefore, took a view no reasonable person would take when allowing such prejudicial and inflammatory evidence.

Keodara cites State v. Hartzell, (2010 Div.1) 156 Wash. App. 918 237 P.2d 928. In Hartzell the court found no abuse of discretion because the guns evidence was not admitted to show appellants committed the shooting in Thurston County, inconformity with their general propensity to use guns. Connecting them to those guns was relevant because the expert testimony was that those guns were used to fire at the victims apartment. Thus it was more probative than prejudicial.

In Keodara's case there is an abuse of discretion because the gun evidence (testimony) was admitted to show that Keodara committed the shootings in conformity with his propensity to possess nine-millimeter guns. There was no expert testimony to connect Keodara to the murder weapon because there was no murder weapon recovered (5/16/13 RP 29 at 9) In fact it is exactly as defense counsel asserted, "There is no link between the fact that he had nine- millimeter and it being the murder weapon in any way whatsoever". (5/9/13 RP 89) The evidence was extremely prejudicial with little probative value. Hence the trial courts abuse of discretion.

The erroneous admission of ER 404(B) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. State v. Halstein, 125 Wn.2d 104, 857 P.2d 270 (1995). There is a reasonable probability that the error materially affected the outcome, and thus requires reversal in Keodara's case for multiple reasons. (1) Based on expert testimony, the shell casings found at the scene allowed the conclusion that the murder weapon was of a nine-millimeter caliber. (5/13/13 RP 158) Therefore, the erroneous admission suggested Keodara's propensity to have used the nine-millimeter murder weapon; Thus allowing the jury to infer guilt based on mere speculation and theory that Keodara possessed the nine-millimeter murder weapon never found. (2) Prejudicial error will not be found unless it is clear and unmistakable that counsel is expressing a personal opinion.

State v. Brett, 126 Wash.2d 136, 175 P.2d 842 (1995) The erroneously admitted evidence opened the door for prosecution to vouch for its own witness. "And then there is the fact that the defendant had a nine millimeter firearm that he told Smallbeck about. Non again, you have to believe Smallbeck for that count, but I submit to you that you should." (Closing arguments, 5/16/13 RP 27) and (3) Citing State v. Freeburg, 105 Wash. App 492, 20 P.3d 984 at 989 (Div.1), We cannot that the evidence was harmless. Evidence of weapons is highly prejudicial, and courts have uniformly condemned... evidence of... dangerous weapons even though found in possession of a defendant, which have nothing to do with the crime charged. Freeburg also held at 990, Given the powerful nature of the evidence, we cannot characterize its admission as harmless. We therefore reverse and remand for trial.

In Keodara's case the weapon found had nothing to do with the crimes charged. Pursuant to ER 404(B) a proper analysis would have excluded the prior acts evidence. There was "No Link" lastly, the erroneous admission of the evidence was also powerful, it lacked relevance, lacked a limiting instruction, and therefore the admission cannot be characterized as harmless. Thus there is a reasonable probability the error materially affected the outcome; Keeping the fact in mind that the evidence was not so overwhelming that it necessarily would have led to a finding guilt, absent the error.

IN CONCLUSION:

A trial court abuses its discretion by not following the requirements of ER 404(B) in admitting evidence of a defendants past acts. State v. fisher, 65 Wash.2d at 744-45, 202 P.3d 957. As a result the evidence was highly prejudicial, tainted the evidentiary picture as a whole, and therefore the error, within a reasonable probability materially affected the outcome of Keodara trial. Keodara respectfully request a new trial in the least.

Respectfully submitted by:...

_____

DATED this __ day of December, 2014

ADDITIONAL GROUND 4

Counsels failure to object to prosecutions inproper vouching for the credibility of its witnesses resulted in ineffective assistance of counsel; violating Keodora's Sixth Amendment Constitutional right to "effective assistance of counsel".

A. Counsel should have objected to prosecutions improper vouching of it witness because: Under **RPC Rule 3.4(E), "A lawyer or counsel shall not assist another to do any such act; (E) assert personal opinion as to credibility of a witness."**

The State may not vouch for a government witness's credibility. State v Coleman, 155 Wash.App. 951, 957, 231 P.3d 212 (2010).

In Keodara's case, at closing arguments prosecution improperly vouched for it's witness in regourds to Keodara's VUFA I charge.

First, the state witness alleged that Keodara told him that Keodara had a nine-millimeter prior to the shootings,"... And he mentioned that he had a 9 mm..."(5-13-13 RP 36 at 18-19)

Second, In closing argument, prosecution improperly vouches for the credibility of it's own witness (Smallbeck) on behalf of the testimony above,"And there is the fact that the defendent had a nine-millimeter firearm that he told Smallbeck about. Now again you have to believe Nathainel Smallbeck for that to count, but **I submit to you that you should." (5-16-13 RP 27 at 19-22)**

It is clear and unmistakable that prosecution is vouching, for it's witnesses credibility. Counsel should have objected.

B. Defense counsels failure to object to a prosecutions closing arguments will generally not constitute deficient performance because lawyers "do not commonly object during closing argument", absent

egregrious mistatements. In Re Pers. Restraint of Davis, 152 Wash.2d at 717, 101 P.3d 1,"Quoting" Us v Necoched, 986 F.2d 1273, 1281 (9th cir, 1993). But, this does not mean that all failures to object are decidely reasonable under Strickland, 466 at 688, 104 S. Ct. 2052. If a prosecutors remark is improper and prejudicial, failure to object may be a deficient performance. Gentry, 125 Wash. 2d at 643-44,888 P.2d 1105 (It's prosecutor misconduct if conduct is both improper and prejudicial).

In Keodara's case counsel should have objected to prosecutions improper / prejudicial personal opinion regarding it's witness credibility, because it was an egregrious miststement, and RPC Rule 3.4(E) clearly states cousel "shall not assert personal opinion as to the credibility of it's witness." Counsel should have objected to the egregrious mistatement.

The fact that prosecution told the jury "but, I submit to you that you should.."(5-13-13) RP 27 at 19-22) believe the allegation that Keodara possessed a nine-millimeter prior to the shootings was prejudicial, because prosecution blatanly improperly vouched by placing the prestige of the government behind it's witness. State v Smith, 162 Wash. App. 833, 262 P.3d 72 at 80, and most critically, the evidence of VUFA I (Or any of the charges) were not so overwhelming that it would have led to guilt absent the prejudicial error.

For further emphasis there was no murder weapon recovered, and no positive in court identification.(5-13-13 RP 39 at 23-28, 5-9-13 RP 89) Counsels failure to object clearly constitutes deficient performance.

C. To prevail on a claim of ineffective assistance of counsel based on the failure to object, the defendant must: (1) Show the absense of legitimate trial strategy or tactical reason for not objecting: (2) That the trial court would have sustained the objection if made: and (3) the result of the proceeding would have differed if the evidence had not been admitted. State v Saunders, 91 Wash.App. 575,578, 958 P.3d 364 (1998).

(1). There was no legitimate trial strategy or tactical reason for Keodora's counsel not to object to the prosecutions improper/prejudicial vouching: **(a) there was no in court identification.(RP pg.39, lines 23-28 5/13/13): (b) State witness Smallbeck was impeached for crimes of dishonesty, such as burgulary and theft. (Rp pg.48, lines 7-9, 5/13/13): (c) There was no murder weapon. (RP pg.29, lines 9-12, 5/16/13).**

Had counsel objected, it would not have "opened the door" to anything unfavorible. An objection would have preserved the issue for appeal at the least, or, it would have striken the comment from the record, and recieved a curative instruction from the court. Neither happened.

Further, counsel never addressed anything in regards to the allegation that Keodora "had" a 9mm prior to the shootings. **(Closing Argument, RP pg.39 through end of argument, 5/13/13).**

The only thing that counsel said that could have related to prosecutors vouching, was that there was no DNA or physical evidence linking Keodora to the crimes. **(RP Pg.29, lines 9-12, 5/16/13).**

This does not take away from the fact that prosecution told the jury it **"should believe"** it's witness when he claimed that Keodora had a 9mm, in order to secure a VUFA I conviction. There was no legitimate trial strategy or tactical decision for not objecting.

(2). Had an objection been made the court should have sustained the objection pursuant to : **RPC Rule 3.4(E), "Lawyer or counsel shall not assert personal opinion as to credibility of witness;** Evidence showed that its witness was untruthful or had committed crimes of dishonesty. **(RP pg.48, lines 7-9, 5/13/13)**, and most importantly, Smallbeck said Keodora called him on Sept. 12,2011 at 3:18 a.m., on the night of the shootings, hysterical and admitted to the shooting. The state witness was **"fairly certain"** that the call occured. The caller I.D. said **"Keodora". (RP pgs. 34-36, 5/13/13).**

Call records proved that Smallbeck lied, **there was no such call!! (RP pg. 105, lines 2-5, RP pg. 27, lines 21-25, RP pg.28, line 1)**

And while **"Prosecution has wide latitude in drawing reasonable inferences from the record". State v Warren, 165 Wash.2d 17,30, 195 P.3d 940 (2008),**it is clear from the record that Smallbeck is a liar. Therefore, prosecution telling the jury that it **"should believe"** its witness was personal opinion, and not a reasonable inference drawn from the record. **"Numerous cases have held that prosecution may not vouch for the credibility of its witness. U.S. v Roberts, 618 F.2d 530,533 (9th Cir. 1980), State v Coleman, 155 Wash.App. 951, 231 P.3d 212,215.**

Lastly, telling a jury that it "should believe" its witness, especially in a case like Keodora's, was prejudicial, and a misstatement. Prosecution did the jurys duty/played its role in assessing the credibility of its witness, contrary to rule of law and evidence. **"The trier of fact has sole authority to asses witness credibility."** State v Ish, 170 Wash. 2d 189,196, 241 P.3d 389(2010). Had an objection been made, the court would have sustained.

(3). The result of the proceeding would have been different because; (a) Following the objection a curative instruction could have been made; (b) There was no murder weapon, **(RP pg. 89, 5/9/13)**; (c) There was no in court identification, **(RP pg.39, lines 23-28, 5/13/13).**

Therefore, in light of the facts herein, its likely that because of the prosecutions improper/prejudicial vouching, and counsels failure to object; **the error was in fact prejudicial. " The untainted evidence was not so overwhelming that it necissarily leads to a finding of guilt."** State v Guloy, 104 Wash.2d at 426, 705 P.2d 1162. The result of the trial would have been different if the evidence was not admitted. In this case, if Defense counsel had objected to the improper/ prejudicial vouching, a curative instruction could have been made, and the result of these proceedings would have been different.

For Defense Counsels failure to object rising to the constitutional level of ineffective assistance of counsel, Keodora cites, State v Grier, 168 Wash.App. 635, 278 P.3d

225,at 233). Grier did not show a concievable legitimate tactic explaining counsels performance. The court discerned at least once "concievable legitimate tactic" that expalains trial counsels failure to object; Her counsel may have declined to object because he "may not have wanted to risk emphasising the testimony with an objection." Also the evidence to which counsel did not object was relatively significant in the context of the other evidence presented at trial. State v Grier, 171 Wash.2d 17, at 33, 243 P.3d 1260.

In Keodora's case there was no concievable legitimate strategy or tactical decision in failing to object. "Counsel not wanting to object as not to risk emphisis" on the improper/prejudicial vouching is a poor excuse to "justify" deficient performance in order to deny Keodora's Sixth Amendment right to Effective Assistance of Counsel and a Fair Trial.

The point is, that, had an objection been made, "no" emphisis on the improper remark would have been made simply because a curative instruction following an objection would have cured the error, or at least preserved the issue for appeal. Rule 103.8. Objection compiled with curative instruction (FN 17). This did not happen, hence counsels deficient performance if failing to object, absent legitimate trial strategy or tactical decision, has created this violation of Keodora's rights.

Lastly, to conclude that "the evidence to which counsel did not object was relatively significant in context of the other evidence in trial", would also be a poor excuse to justify counsels poor performance in failing to object. Just because counsel did or did not object does not mean error was not prejudicial. Strickland v Washington, 466 U.S. 688, at 694, 104 S.Ct. 2052. "To prove prejudice the defendant must establish a "reasonable probability that, but for counsels unprofessional errors" the result of the proceeding would have been different". (emphasis added).

The courts in **Glassmann** held that "the jury may be more susceptable to prejudicial conduct during closing argument." **State v Glassmann, 175 Wash.2d 696 at 709 & 710, 286 P.3d 673.** With that said, the prejudicial conduct during closing argument in Keodora's case made it more likely that the jury was susceptable to the misconduct, because prosecution told the jury **"it should believe"** that Keodora possessed a nine-millimeter , soley to convict Keodora of VUFA I, with no proof of a murder weapon in the court record.

For this reason alone counsel should have objected , because the jury was more susceptible to prosecutorial vouching. However, counsel did not object, thereby creating a reasonable probability that but for counsels unprofessional error, **the result of the proceedings would have been different.**

In Conclusion, the error here was per se prejudicial in light of the fact that the evidence was not so overwhelming. And even though the error was not objected to , pursuant to **RAP 2.5(3)** the result was deprivations of Keodora's Sixth and Fourteenth Amendment Rights.

For the above reasons, Keodora respectfully requests this court to vacate the sentence and conviction in this case, and remand to Superior Court for Re-trial.