

Original

NO. 34748-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JOSHUA TUCKER CALKINS

Appellant.

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

The Honorable James Warne, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct denied appellant a fair trial.

2. The Judgment and Sentence form as filled out is inconsistent with the court's sentencing decision.

Issues pertaining to assignments of error

1. The trial court granted appellant's motions in limine excluding all reference to his criminal history, including information that his fingerprints had been taken in connection with a criminal charge. Nonetheless, the prosecutor presented evidence that established appellant's fingerprints had been taken as part of a booking procedure. The prosecutor disregarded further rulings by the court during closing argument, referring to evidence the court had excluded. Finally, the prosecutor appealed to the jury's passions and fears by comparing this robbery case with the terrorist acts of September 11. Did the prosecutor's flagrant misconduct deny appellant a fair trial?

2. Where the trial court ruled that it would not find appellant was on community custody at the time of the offense, but the Judgment and Sentence form indicates such a finding, must the form be corrected to properly reflect the court's decision?

B. STATEMENT OF THE CASE

1. Procedural History

On December 16, 2005, the Cowlitz County Prosecuting Attorney charged appellant Joshua Calkins with first degree robbery with a deadly weapon enhancement. CP 45-46; RCW 9A.56.200(1)(a)(i); RCW 9.94A.602; RCW 9.94A.533(4). The case proceeded to jury trial before the Honorable James Warne, and the jury returned a guilty verdict. CP 19. The jury also found by special verdict that Calkins was armed with a deadly weapon at the time of the commission of the crime. CP 18. The court imposed a standard range sentence of 88 months with a 24 month weapon enhancement. CP 25. Calkins filed this timely appeal. CP 33.

2. Background Facts

On September 25, 2004, Wilma Wixon was working the night shift at the Kelso Denny's restaurant. 1RP<sup>1</sup> 31. It had been a busy night, and the front half of the restaurant was full. 1RP 31-32. Wixon was responsible for taking orders, bringing food to the tables, cashing out customers, and cleaning. 1RP 32. She was handling not only her tables but also refilling drinks at the other server's tables. 1RP 34.

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<sup>1</sup> The Verbatim Report of Proceedings is contained in three consecutively paginated volumes, designated as follows: 1RP—4/19/06; 2RP—4/20/06; 3RP—4/27/06.

Around 1:30 in the morning, a man was sitting alone at one of the tables. Wixon brought him drink refills, serving them in a Coke glass with a straw. 1RP 33-34. When Wixon met the man at the cash register after his meal, the man had a knife in his hand. He said, "If you want to avoid a bloodbath, give me the money in the till." 1RP 36. Wixon thought the man was joking at first, but then he looked at the manager and told her not to say anything. The manager, Jason Jensen, asked what Wixon was doing. She pointed to the man with the knife, and Jensen told her to go ahead. Wixon then handed the man the money, and he left. 1RP 37-38. Jensen followed the man into the parking lot and saw him drive away. 1RP 63-64. He then called the police. 1RP 65.

Wixon gave a statement to the police when they arrived. 1RP 40, 97. Believing the suspect might have left some fingerprints or DNA evidence, the police collected a glass and straw from the table where Wixon said the man had been sitting. 1RP 97-98.

Some latent fingerprints recovered from the glass were first analyzed in October 2004. When the prints were compared to a database of known prints, no match was found. 2RP 175-76. A DNA profile was then obtained from the straw and compared to profiles in a DNA database. The profile was matched to one from Joshua Calkins. 2RP 197-98. Once that information was obtained, the latent fingerprints from the glass were

compared to a fingerprint card bearing the same name and birth date as the DNA profile, and they were found to match. 2RP 179.

On November 22, 2005, Kelso police detectives Meier and Blain interviewed Calkins. 1RP 106, 135. Calkins told the detectives that he had not been in Kelso in September 2004. When Meier told Calkins they had evidence he had robbed the Kelso Denny's, Calkins said he did not commit armed robbery. 1RP 119-20. The detectives told Calkins they had not mentioned that the robbery was armed, and Calkins questioned the difference between robbery and armed robbery. 1RP 120, 130. Because Wixon had indicated in her initial report to the police that the suspect had a tattoo on his right arm, the detectives asked Calkins if he had any tattoos. 1RP 130-31. Calkins showed them a large tattoo on his left upper arm. 1RP 123.

Meier then contacted Wixon. 1RP 41, 124. He showed her a set of six photographs and asked if she could identify anyone. 1RP 42. Wixon picked two possible suspects, including Calkins. 1RP 42, 126. She could not positively identify anyone, however. 1RP 43, 126.

At trial, Wixon testified that the man who had robbed her was 5'8" or 5'9", had really short light brown hair, and was wearing a grey sleeveless shirt and light blue jeans. 1RP 35. When she had given her statement to the police, she did not specify his height, however. 1RP 46.

The defense theory at trial was that Calkins was likely at the Kelso Denny's on the night in question but did not remember being there. Defense counsel argued that it is not unusual for someone returning from a long road trip to forget which restaurant in what town he stopped at along the way. 2RP 240. Moreover, Denny's was busy that night, and the employees could not remember everyone who was in the restaurant. 2RP 236. The DNA and fingerprint experts could only say that Calkins was at the restaurant. They could not say that he robbed the place. The Denny's employees were able to testify that the restaurant was robbed, but they were not able to identify Calkins as the robber. 2RP 233. These circumstances were grounds for reasonable doubt. 2RP 242.

3. Facts relevant to issues on appeal

a. **Improper presentation of previously excluded evidence**

Calkins moved prior to trial to exclude testimony that a match for his DNA profile was found in a database of felons, referred to in the police reports as "CODIS." Counsel argued that any connection of Calkins's DNA with this database was unfairly prejudicial. 1RP 5-6. The prosecutor responded that he had talked to his witness about simply referring to the database without mentioning that the database is comprised of DNA profiles from felons. 1RP 6. The court agreed that it

Wixon testified that it was very difficult to give an accurate description of the robber because the restaurant was very busy at the time. 1RP 48. Davia Mase testified that she took the order of a man sitting alone at either the first or second booth. 1RP 53-54. She described the man as “not too tall or short, not too fat, not too thin, not too old, not too young, and [he] didn’t have any facial hair, and [he] kind of kept [his] head down like this the whole time that I served [him], and kind of like a thin jaw line....” 1RP 55. Jason Jensen, the restaurant manager, testified that he had seen a Caucasian man wearing darker colors who had been sitting by himself. 1RP 60.

None of the witnesses from Denny’s identified Calkins as the man they had seen that night. 1RP 39, 52-57, 58-73.

Wixon also testified that the man who robbed her had a tattoo on his arm between the elbow and shoulder. 1RP 35. When she had given her statement to the police, she had stated unequivocally that the tattoo was on the man’s right arm. 1RP 45. At trial she testified that she might have been mistaken about the location of the tattoo. From where the man had been sitting, she now believed she would have noticed a tattoo on the right arm while she served the man, but she did not notice it until he was at the register. 1RP 43. Wixon admitted that the police had told her, after interviewing Calkins, that she had the tattoo on the wrong arm. 1RP 44.

was appropriate to exclude the fact that it is a database of felons and granted Calkins's motion. 1RP 7.

The defense also moved in limine to exclude reference to the fact that Detective Meier interviewed Calkins in the Kitsap County Jail, arguing it would be unfairly prejudicial for the jury to learn Calkins was being held in jail on another matter. Defense counsel argued that the information was improper character evidence and also inadmissible under ER 403. 1RP 12-13. The state's only argument that the evidence was admissible was that the circumstances of the interview were relevant to the voluntariness of Calkins's statement. 1RP 13. The court deferred ruling until the CrR 3.5 hearing, which was to be held at trial prior to Meier's testimony. 1RP 14.

Similarly, Calkins moved to exclude any testimony that he may have been on community custody at the time of the offense. Again, counsel argued that Calkins's criminal history was improper character evidence, and the highly prejudicial nature of that evidence outweighed any probative value. 1RP 14. The prosecutor agreed that Calkins's community custody status was not relevant to any element the state was required to prove. He argued, however, that Calkins's community custody status was relevant to rebut Calkins's statement to Meier that he thought he might have been in custody at the time of the offense. 1RP 14-15. The

court questioned whether the state could introduce a statement and then rebut it, and defense counsel pointed out that no alibi defense was being raised. 1RP 15. Again, the court deferred its ruling until the CrR 3.5 hearing. 1RP 16.

Calkins ultimately waived the CrR 3.5 hearing, agreeing that the statements he made to the police were voluntary. 1RP 80. At that point the prosecutor made a record of what he understood the court's rulings to be as to the limits on the officer's testimony. He understood there was to be no reference to the fact that Calkins had been arrested on other charges, that the interview took place in jail, or that Calkins had a probation officer. 1RP 81. Further, Calkins's references to his prior offenses and incarcerations were excluded. 1RP 81-83.

Calkins also moved prior to trial to exclude the fingerprint card from 1994, which had been compared to the fingerprints on the glass. Counsel pointed out that the charge of auto theft is listed on the card and argued that the jury would be able to figure out that the fingerprints were taken in connection with that criminal charge. 1RP 21. The prosecutor explained that there was no fingerprint card taken after the Denny's robbery and that the fingerprint expert used this card in reaching her conclusion. He therefore planned to offer the card into evidence. 1RP 22. The prosecutor agreed that the prejudicial reference to the criminal charge

could be redacted from the card, and the court ordered the redaction. 1RP 23-24.

Defense counsel also argued that the fingerprint card should be excluded for lack of foundation. Counsel noted that it had been over ten years since the fingerprints were taken, and he doubted that the person who prepared the card knew Calkins personally or could testify that she knew it was Calkins whose fingerprints she took. 1RP 24. The prosecutor responded, "I have Maxine Abundis, who took the fingerprint card 11/18/94....And she actually is familiar with Mr. Calkins since, so she knows who he is." 1RP 24. Based on that representation, the court denied the defense motion to exclude the fingerprint card. 1RP 24.

At trial, the prosecutor called Max Abundis as a witness. Her testimony proceeded as follows:

Q. Could you please state your name for the record and spell your last name, please?

A. Max Abundis, A-B-U-N-D-I-S.

Q. Okay, and who do you work for?

A. Kitsap County Jail.

Q. Okay, and what are your duties at the Kitsap County Jail?

A. I have many duties: Booking officer, court – the inmates I fingerprint, I take pictures.

Q. Okay, and how long have you been fingerprinting?

A. 17 ½ years.

Q. Okay, and does the Kitsap County – now is it the sheriff's office you work for?

A. I work for the Kitsap County Sheriff's Office –

Q. Okay.

- A. —as a corrections officer.  
Q. As a corrections officer? Okay.

1RP 74. At that point, defense counsel objected to the testimony and requested a sidebar. 1RP 74.

At sidebar, defense counsel pointed out that the court had ruled in limine that the fingerprint card could be admitted only if reference to the criminal charge was redacted. Yet, from Abundis's testimony, the jury would clearly understand that his fingerprints were taken when he was booked into jail on a criminal charge. 1RP 75. Counsel argued that there was no need to introduce her testimony regarding the fingerprint card by way of a booking procedure. *Id.* The court responded that that was one of the consequences of asking Abundis what her duties are. After ensuring that Abundis had not worn her uniform at the prosecutor's suggestion but of her own accord, the court granted defense counsel a continuing objection to her testimony. 1RP 75-76.

Following the sidebar, the prosecutor asked Abundis if she had been trained in taking fingerprints. She responded that she had, and repeated that she had been doing that for 17 ½ years, including in November 1994. 1RP 76-77. The prosecutor asked if she does fingerprints in the ordinary course of her job at the Kitsap County Sheriff's office, and she responded that she does. She then identified a

fingerprint card with Calkins's name and date of birth, bearing her signature. 1RP 77. Abundis testified that she took the fingerprints on the card, and that based on Calkins's date of birth, he would have been 12 years old at the time. She then described how she takes fingerprints and testified that was the method she used at the time. 1RP 78. Finally, Abundis testified that she has subsequently seen Calkins. 1RP 79.

After Abundis's testimony, outside the presence of the jury, the court asked the prosecutor, "It was my understanding from the – from our discussion early in the case before the jury was here that the Kitsap County officer would identify the defendant?" 1RP 90-91. The prosecutor responded, "No, that she knew him from prior – she didn't know him personally, but she knew him – and she testified that she had seen him subsequent to that time." 1RP 91. Defense counsel indicated that, like the court, he understood from the earlier discussion that Abundis would testify she knew Calkins and would be able to identify him as the person whose fingerprints she took. The court repeated that it believed Abundis would say she took the prints on the card from Calkins, but she did not say that. The prosecutor then admitted that Abundis does not remember Calkins, and if he said otherwise, he misspoke. 1RP 91.

The final testimony regarding the fingerprint card came from the forensic scientist who compared the inked prints on the card to the latent

prints recovered from the glass. She testified that after initially finding no match for the latent prints, she was given information that Calkins was a potential suspect. 2RP 177. The prosecutor asked if she was able to obtain inked prints from Calkins, and she said she was. He asked where she obtained those prints, and she responded, "I obtained those from the criminal records division of the identification section." 2RP 177.

Defense counsel objected and asked for an instruction. 2RP 177. At sidebar, the court asked counsel what sort of instruction he wanted. Counsel could not think of an appropriate instruction but noted that the court had ruled in response to his previous motions that the jury was not to be informed that Calkins's criminal records were the source of the fingerprint cards. 2RP 178. The prosecutor commented that any sort of curative instruction would reemphasize the prejudicial testimony and the court gave its opinion that it was best just to move on. Defense counsel responded that he wanted to avoid any further introduction of this type of evidence, and the court agreed. 2RP 178.

**b. Improper closing argument**

Jensen, the Denny's manager, testified that he had estimated that about \$250 was taken from the till. His boss came in later that morning and did a full audit, however, and he found out that his estimate was not correct. 1RP 61-62. When the prosecutor asked if the boss had

determined how much was missing, defense counsel objected that the question called for hearsay. The court responded that Jensen could answer the question yes or no. Jensen instead answered that the amount was about \$300, and the court sustained defense counsel's objection, instructing the jury to disregard Jensen's answer. 1RP 63. Nonetheless, in closing argument, the prosecutor told the jury that "the final count was testified to as being somewhere in the range of \$300. That is not change from a meal and a soft drink at Denny's. That money was taken from Denny's by the individual at knifepoint under threat of a bloodbath." 2RP 222.

The prosecutor again referred to excluded evidence when discussing Meier's interview with Calkins. During the interview, Meier had told Calkins there was "excellent evidence" which placed him at the Kelso Denny's on the night of the robbery. 1RP 86. Upon the defense motion, the court excluded reference to the term "excellent evidence," ruling that such a characterization of the evidence was an impermissible opinion which invaded the province of the jury. 1RP 88-89. In accordance with the court's ruling, Meier testified that he told Calkins he had "evidence that would show that he was in Kelso." 1RP 119. Despite the court's ruling and the officer's testimony, the prosecutor informed the jury in closing argument that Meier told Calkins, "We have excellent

evidence that you were at the Kelso Denny's on September 25, 2004, when you robbed the Denny's." 2RP 226.

The prosecutor's final reference to facts outside the evidence came when he was arguing that the evidence established that Calkins was armed with a deadly weapon. Although the charge against Calkins included a special deadly weapon allegation, the state did not produce a weapon in evidence. Instead, it relied on testimony from Wixon and Jensen. Wixon said the person who robbed her had a folding knife with a blade that was three to four inches long. She said the man had the knife in the palm of his hand the whole time, down against the counter so that no one else could see it. 1RP 37. The knife was only partly opened. 1RP 36. Jensen said he saw a knife with a blade about 3 ½ inches long. 1RP 61. He also said, however, that the man was holding a rolled up newspaper or something in his hand, which he had to roll sideways in order to show Jensen the knife. 1RP 65-66.

In discussing whether the state had produced sufficient evidence, the prosecutor argued that the evidence supported a finding that the knife had a blade longer than three inches and was a deadly weapon as a matter of law. He then went on to argue that even if the jury found that the blade was less than three inches long, the jury could find that the knife was a deadly weapon:

It is still capable of cutting somebody's throat. It is still capable of cutting a major artery. It is still capable of causing sufficient bleeding to bleed out. Use your common sense. Use your experience. And when box cutters can be used to take down jumbo jets, we know what a deadly weapon is.

2RP 232.

Defense counsel did not object to the prosecutor's arguments.

**c. Sentencing**

At the sentencing hearing, the state urged the court to enter a finding that Calkins was on community custody at the time of the offense, adding a point to the offender score and increasing the standard range.

3RP 255. The court ruled that it would not find Calkins was on community custody because that fact was not pleaded and proven to the jury. 3RP 263. It found an offender score to 6 points, rather than the state's calculation of 7 points.

The Judgment and Sentence correctly includes the court's offender score and standard range calculation. CP 22. Nonetheless, a box is checked indicating that "The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.360." CP 22.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT DENIED CALKINS  
A FAIR TRIAL

As a quasi-judicial officer, a prosecutor is duty bound to act impartially in the interests of justice. "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 2d 1314, 55 S. Ct. 629 (1934). A prosecutor who acts as a heated partisan, seeking victory at all costs, violates the duty entrusted to him by the people of the state whom he is supposed to represent. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

Prosecutorial misconduct may deprive the defendant of the right to a fair and impartial trial guaranteed by the Sixth Amendment to the United States Constitution and Const. art. 1, § 22 (amend. 10). Reed, 102 Wn.2d at 145. A defendant is deprived of a fair trial when there is a substantial likelihood that the prosecutor's misconduct affected the verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing Reed, 102 Wn.2d at 147-48). When the defendant establishes misconduct and resulting prejudice, reversal is required. State v. Copeland, 130 Wn.2d

244, 284, 922 P.2d 1304 (1996); State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994).

A prosecutor's flagrant violation of the court's in limine rulings may alone be sufficient to require reversal. State v. Easter, 130 Wn.2d 228, 242 n.11, 922 P.2d 1285 (1996); State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937); State v. Stith, 71 Wn. App. 14, 22, 856 P.2d 415 (1993) (prosecutor's violation of motion in limine excluding evidence of defendant's prior drug-related offense was "flagrantly improper"); State v. Ransom, 56 Wn. App. 712, 713 n.1, 785 P.2d 469 (1990) (citing State v. Stephans, 47 Wn. App. 600, 736 P.2d 302 (1987)). Moreover, a prosecutor may never introduce evidence of any matter immaterial or irrelevant to the issues to be determined. State v. Devlin, 145 Wash. 44, 49, 258 P. 826 (1927).

In Devlin, the defendant was convicted of robbery and murder based on an identification by a single witness. On cross examination by the defense regarding the identification, the witness testified that he had seen a picture of the defendant, he had seen the defendant in jail, and he had picked the defendant "out of a row—out of a bunch." Devlin, 145 Wash. At 45-46. On redirect, over defense objection, the prosecutor asked where the witness had seen the picture of the defendant, and the witness responded, "in the rogue's gallery." Id. at 46. Defense counsel again

objected, but the state was permitted to ask what the witness meant by the rogue's gallery, and the witness explained that it was a bunch of pictures in a book at the police station. Id.

On appeal, the state attempted to justify its line of questioning by arguing it was necessary to clarify whether the witness meant he had picked the defendant out of a row of men or that he picked the defendant's picture out of a bunch of pictures. The Supreme Court rejected that argument, however, noting that if that had been the purpose of the inquiry, that question would have been asked. Instead, the prosecutor asked where the witness had seen the picture, knowing what the likely answer would be, leading to the highly prejudicial testimony about the rogue's gallery. Id. at 47. This information was not needed by the state for the supposed purpose if was offered. Instead, it was a prejudicial tangent, designed to place before the jury evidence that the defendant had a criminal past. Id. at 47-48. The court held that the prosecutor's redirect examination was improper and prejudicial.

The matter was wholly disconnected from, and foreign to, the issues to be decided. It was too well calculated to lead the jury into the belief that they were dealing with a criminal already so notorious as to demand the vigilance and services of the police and detectives of the country, and thereby lessen the jury's sense of responsibility or excuse that calm and faithful deliberation which should, at all times, prevail in the trial of one accused of such atrocious crimes.

Id. at 52. The Court held that the improper argument denied the defendant a fair trial, and his convictions were reversed. Id. at 52-53.

Here, as in Devlin, the prosecutor deliberately and unnecessarily pursued a line of questioning designed to draw attention to Calkins's criminal history. Moreover, this was done in violation of the court's rulings in limine. As in Devlin, the misconduct in this case denied Calkins a fair trial.

Defense counsel had moved prior to trial to limit the use of the fingerprint card, and the court's ruling made it clear that the state was not permitted to inform the jury that the fingerprints were taken in connection with a criminal charge. 1RP 21-24. In addition, counsel made several other motions designed to prevent the jury from learning of Calkins's criminal history, all of which the court granted. 1RP 5-7, 12-13, 14-15, 81. The purpose of orders in limine is to clear up questions of admissibility before trial to prevent the admission of highly prejudicial evidence. See State v. Evans, 96 Wn.2d 119, 123-24, 634 P.2d 845 (1981); State v. Austin, 34 Wn. App. 625, 633, 662 P.2d 872 (1983), affirmed sub. nom. State v. Kolske, 100 Wn.2d 889, 676 P.2d 456 (1984); see also ER 103(c) ("in jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements ... in the

hearing of the jury.”). In light of the motions made and the court’s rulings in this case, the prosecutor could have no doubt that all references to Calkins’s criminal history were excluded as unduly prejudicial. See also ER 404(b).

Despite the court’s mandate, the state’s direct examination of Abundis was crafted so that the jury would inescapably conclude that the fingerprint card was created when Calkins was booked into the Kitsap County Jail. The prosecutor asked Abundis where she worked, what her duties were at the jail, and how long she had been performing those duties. In response to the prosecutor’s questions, Abundis testified that she had worked as a corrections officer at the Kitsap County Jail for 17 ½ years, booking inmates into the jail, taking their pictures and fingerprints. IRP 74.

None of that information was necessary to establish a foundation for introducing the fingerprint card, however, as is evident from the line of questioning the prosecutor pursued after defense counsel’s objection. At that point, the state asked Abundis if she had been trained in taking fingerprints, whether she took fingerprints in the ordinary course of her job, whether she had been doing so in November 1994, and how she recorded fingerprints. IRP 76-78. This second line of questioning would have been sufficient to establish Abundis’s qualifications for taking

fingerprints, the method used, and the fact that she created the fingerprint card in question. As in Devlin, the prosecutor chose instead to present unduly prejudicial evidence to make his point, unnecessarily drawing the jury's attention to the criminal context of the fingerprinting. And the misconduct is even more egregious in this case because the court had specifically excluded that information.

Moreover, the state then proceeded to ask Abundis whether she had had subsequent contact with Calkins. 1RP 79. That information might have been relevant if Abundis was prepared to identify Calkins as the person she fingerprinted in 1994, to explain how she recognized him. In fact, when defense counsel raised the issue of Abundis's ability to remember Calkins, the prosecutor informed the court that "she actually is familiar with Mr. Calkins since, so she knows who he is." 1RP 24. The court and counsel understood the prosecutor's representation to mean that Abundis would identify Calkins at trial. The prosecutor knew she did not remember him and would not make the necessary identification, however. 1RP 90-91. Thus, given Abundis's unnecessary testimony about booking procedures, her testimony that she had seen Calkins since the time she fingerprinted him, which the prosecutor specifically elicited, served only to imply that Calkins had again been booked into the Kitsap County Jail

since 1994. The prosecutor's deliberate attempt to skirt the court's limitation on fingerprint evidence constitutes misconduct.

Finally, the state's fingerprint expert testified, in response to the prosecutor's specific question, that she had obtained inked fingerprints for Calkins from the criminal records division of the identification section. IRP 177. Whether the prosecutor intentionally elicited this prejudicial testimony or failed to inform the witness of the court's ruling, the testimony was in clear violation of the pre-trial order, and its presentation constitutes prosecutorial misconduct. See Ransom, 56 Wn. App. at 713 n.1.

In addition to violating the court's rulings excluding evidence of Calkins's criminal history, the prosecutor also committed misconduct by arguing facts not in evidence. It is improper for the state, which bears the burden of proof, to argue facts that are not in evidence. Belgarde, 110 Wn.2d at 507 (conviction reversed where the prosecutor "testified" during closing argument regarding a political organization he claimed was responsible for terrorist incidents, when there was no evidence to support that argument); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968) (it was improper for a prosecutor to argue, without supporting evidence, that the defendant was trying to frame the victim's ex-husband for murder) cert. denied, 393 U.S. 1096 (1969); State v. Case, 49 Wn.2d 66, 68-70,

298 P.2d 500 (1956) (no evidence supported prosecutor's argument that incest victims often reported belatedly; argument constituted misconduct). When a prosecutor argues facts not in evidence, he becomes an unsworn witness against the defendant. Belgarde, 110 Wn.2d at 507. By misleading the jury in this way, the prosecutor violates his duty to provide the defendant a fair trial. State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955).

In Reeder, the defendant was charged with second degree murder. He admitted shooting the victim but claimed self defense and temporary insanity. When cross examining the defendant, the prosecutor held in his hand a complaint in a divorce action filed by the defendant's first wife, and he asked the defendant whether his wife said in the complaint that the defendant had threatened him with a gun on a number of occasions. The defendant denied ever threatening her with a gun. The court allowed the question and answer to stand, in light of the insanity plea, but it did not permit the divorce complaint to be read and refused to admit it in evidence. Reeder, 46 Wn.2d at 891. In closing argument, however, the prosecutor repeated three times, in making three separate points, that the defendant had threatened his first wife with a gun. Id. at 892.

The Supreme Court held that the prosecutor's repeated references to excluded evidence constituted reversible misconduct. The prosecutor

knew the complaint was not in evidence and knew the court had specifically excluded it. While attorneys are permitted to argue reasonable inferences from the evidence, they may not mislead the jury by references to matters outside the evidence. This is especially true for a prosecutor, who is a quasi-judicial officer with a duty see that the defendant in a criminal prosecution receives a fair trial. Id. at 892. Although no objections were made to the prosecutor's arguments, the Court reversed, finding the harm had already been done and could not have been cured by an instruction to disregard the statements so flagrantly made. Id. at 893.

Here, as in Reeder, the prosecutor during closing argument referred three times to excluded, prejudicial, and irrelevant evidence, with each reference escalating in its prejudicial impact. First, the prosecutor referred to the amount of money taken during the robbery, saying "the final count was testified to as being somewhere in the range of \$300." 2RP 222. The court had struck that testimony as hearsay, however, and the state presented no competent evidence of that fact. Nonetheless, the prosecutor used that information to attack the defense theory that Calkins was present at the restaurant as a paying customer and was not the person who committed the robbery, saying \$300 was not change from a meal at Denny's. Id. The prosecutor misled the jury by making his point with evidence the jury had been told to disregard.

Next, the prosecutor told the jury that detective Meier has said the evidence against Calkins was “excellent.” 2RP 226. The jury had never heard this information, however, because the court ruled before Meier testified that the evidence was simply too prejudicial. While the court, defense counsel, and the witness all took pains to prevent the jury from hearing Meier’s opinion that there was “excellent evidence” of Calkins’s guilt, the prosecutor flouted those efforts and presented that opinion to the jury in closing argument. As the court recognized when it excluded Meier’s comment, the officer’s opinion as to the strength of the evidence or the defendant’s guilt invades the province of the jury and was therefore unfairly prejudicial. See City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994). The prosecutor’s testimony about Meier’s opinion in closing argument constitutes misconduct.

Finally, the prosecutor brought in evidence which had nothing to do with this case and was designed only to appeal to the jury’s passions, prejudices, and fears. Clearly the weakest part of the state’s case was its attempt to convince the jury that there was sufficient evidence to support the deadly weapon enhancement. No weapon was produced, and while there was testimony about a knife, the witnesses said they had very little opportunity to see it. Wixon said the man kept the knife, partially folded,

in the palm of his hand against the counter, and Jensen said the knife was covered by a rolled up newspaper.

The prosecutor urged the jury to make the deadly weapon finding despite the lack of evidence concerning the knife. Trying to distract the jury from the weaknesses in the evidence, the prosecutor said,

So if you decide that well, maybe it was 2 inches – 2 ¾ inches long, that is still a deadly weapon. 2 3/4 inches. It is still capable of cutting somebody's throat. It is still capable of cutting a major artery. It is still capable of causing sufficient bleeding to bleed out. Use your common sense. Use your experience. And when box cutters can be used to take down jumbo jets, we know what a deadly weapon is.

2RP 232. This unmistakable reference to the tragedy of September 11 had absolutely no place in the trial of a defendant charged with robbing a Denny's restaurant, where no one was injured despite the alleged presence of a knife. The only purpose for the prosecutor's reference to those acts of terrorism was to incite the jury's passions, prejudices and fears. The prosecutor's argument constitutes flagrant misconduct. See Belgarde, 110 Wn.2d at 509-10, (where prosecutor told jury to "remember Wounded Knee," deliberate appeal to jury's passions could not be neutralized by curative instruction).

Prosecutorial misconduct requires reversal if there is a substantial likelihood the misconduct affected the jury's verdict. Even where defense counsel fails to object, request a curative instruction, or move for mistrial,

reversal is required if the misconduct was so flagrant and ill intentioned that a curative instruction could not have obviated the resulting prejudice. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995); Belgarde, 110 Wn.2d at 507.

Here, not only did defense counsel move pretrial to exclude evidence regarding Calkins's criminal history, he also objected to Abundis's testimony regarding the booking procedure in which Calkins's fingerprints were taken. He was granted a continuing objection to that testimony. 1RP 74-76. Further, when the state's fingerprint expert testified that she obtained Calkins's fingerprints from the criminal records division, counsel objected and moved for a curative instruction. 2RP 177. As the court and prosecutor recognized, however, no instruction would have been effective to cure the prejudice caused by that testimony. 2RP 178. The presentation of evidence which drew the jury's attention to Calkins's criminal history, even though the court had made it quite clear that such evidence was inadmissible, is flagrant and ill intentioned misconduct. See State v. Alexander, 64 Wn. App. 147, 154-56, 822 P.2d 1250 (1992).

The misconduct committed in closing argument was similarly flagrant and ill intentioned. There was simply no excuse for the prosecutor's repeated references to facts not in evidence. The prosecutor

was obviously aware of the court's rulings excluding the hearsay and opinion evidence. And a prosecutor must know he has duty to seek a verdict based on reason, free from passion and prejudice. See State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); Suarez-Bravo, 72 Wn. App. at 367.

It is possible that the jury could have been reminded that the testimony about the \$300 had been struck from evidence without undue prejudice. As to the other improper arguments, however, the damage was done when the jury heard the prosecutor's comments. The prosecutor told the jury that Meier had found the state's evidence to be excellent, and any attempt to cure that error would simply emphasize the officer's opinion. Finally, while the jury might logically understand that the terrorist attacks of September 11 had no bearing on this case, the prosecutor had already evoked emotions and fears related to that tragedy. That bell, once rung, could not be unringed. See State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992).

The state's evidence was not overwhelming. No one was able to identify Calkins as the man who committed the robbery. The state relied instead on DNA and fingerprint evidence to identify Calkins. But the most that evidence could do was place him in the restaurant. The testimony was not consistent as to where the robber had been sitting.

Wixon and Jensen testified that the man sat at the second booth. Mase, the server who took the man's order, thought the man might have been at the first booth, however. 1RP 33, 53-54, 70. Moreover, the restaurant was very busy that night, with many customers coming and going, and Wixon could not remember any other customers or where they had been sitting. 1RP 48. Thus, the jury could have had a reasonable doubt as to whether the police actually collected the glass and straw used by the robber. But the jury also learned that Calkins had a criminal history, heard Detective Meier's opinion that the state's evidence was "excellent," and had their emotions played upon by a comparison to the tragedy of September 11. Considering the problems with the state's evidence, there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict, and reversal is required. See State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless).

2. THE ERROR IN THE JUDGMENT AND SENTENCE FORM MUST BE CORRECTED.

At sentencing, the court ruled that it would not find that Calkins was on community custody at the time of the current offense. Accordingly, it recalculated Calkins's offender score and imposed a sentence within the appropriate standard range. 3RP 263. The Judgment and Sentence form was

adjusted to incorporate the court's offender score calculation. CP 22. Nonetheless, a box on the form is checked indicating that Calkins was on community placement at the time of the offense. Id.

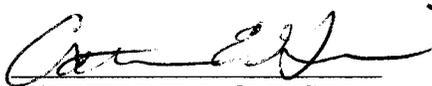
A sentence must be "definite and certain." State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2 (1998) (citing Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946)). As currently written, the Judgment and Sentence form is inconsistent with the court's ruling and its offender score calculation. The Judgment and Sentence must be corrected to remedy this error.

D. CONCLUSION

Prosecutorial misconduct denied Calkins a fair trial, and his conviction must be reversed and the case remanded for a new trial. Moreover, the Judgment and Sentence form contains an error which must be corrected.

DATED this 22<sup>nd</sup> day of September, 2006.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Joshua Calkins*, Cause No. 34748-2-II, directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski  
Done in Port Orchard, WA  
September 22, 2006

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