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COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

JOSHUA TUCKER CALKINS,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUE

1. PROSECUTORIAL MISCONDUCT

a. DID PROSECUTORIAL MISCONDUCT OCCUR AS A RESULT OF COMMENTS ON EXCLUDED EVIDENCE?

b. DID PROSECUTORIAL MISCONDUCT OCCUR AS A RESULT OF ARGUMENTS MADE BY THE PROSECUTOR DURING CLOSING ARGUMENTS?

2. IS THERE AN ERROR ON THE JUDGMENT AND SENTENCE ?

II. SHORT ANSWER

1. Prosecutorial Misconduct

   a. **No**. The burden is on the Appellant to show that any alleged prosecutorial misconduct had an impact on the jury verdict. There was no showing in this case that any potential misconduct had any impact whatsoever on the verdict.

   b. **No.** The prosecutor's arguments during closing arguments were not objected to and thus preserved for appeal. Therefore, the arguments must be so flagrant or ill intentioned as to warrant a mistrial without the Appellant's timely objection. That is not the case here.

2. The State concedes that there is an error on the judgment and sentence with regards to the defendant's score as a result of the judge finding that the Appellant was not on community custody at the time of the offense.

III. PROCEDURAL HISTORY

The State filed an information charging the Appellant, Joshua T. Calkins, with robbery in the first degree with a deadly weapon

enhancement on December 16, 2005. CP 45-46. The case proceeded to a jury trial before the Honorable James Warme. The jury returned a guilty verdict on the robbery charge as well as a special verdict that the Appellant was armed with a deadly weapon at the time of the offense. CP 18. The trial court imposed a standard range sentence of 88 months with a 24-month weapon enhancement. CP 25.

IV. FACTS

On April 19, 2006, the first day of the jury trial, the court heard several motions in limine before the jury was impaneled. RP 6-25. The defendant moved to exclude evidence that the DNA profile of the defendant was entered into CODIS, which is a felon database. RP 5. The trial court held that it is appropriate just to refer to it as a datable with no mention of CODIS. RP 7.

With regard to the actual fingerprint card obtained from CODIS, the Appellant moved to exclude it on the basis of relevance and foundation. RP 24. The prosecutor stated that Maxine Abundis would be testifying that she took the fingerprint card on November 18, 1994. *Id.* The prosecutor stated that she is familiar with Mr. Calkins since she knows who he is. *Id.* The court indicated that this would "probably do it." *Id.* The Appellant went on to object to the personal identifying

information on the card such as social security number and date of birth. RP 24-25. The court overruled this objection, but did excise certain portions of the fingerprint card pertaining to criminal charges. *Id.*

On September 25, 2004, Wilma Wixon was working at the Denny's in Kelso, Washington from 11:00 p.m. to 6:00 a.m. RP 31. Her duties that evening were taking orders, taking out food and cashing people out. RP 33. She recalled someone sitting by themselves at table 21. *Id.* Ms. Wixon checked on him during the night and took him refills of his drink in a Coke bell glass that had a straw in it. RP 34. She described the man as 5'8"-5'9", with short brown hair and a tattoo on his arm between the elbow and the shoulder. RP 35. Her testimony was that she recalled the tattoo being on the man's right arm, but that she didn't remember seeing it at the time of him dining as it would have been on the outside arm. RP 35-36. She described the tattoo as being all black and between the elbow and the shoulder. *Id.*

Wixon testified that when the man came up to the till he put his ticket on the counter and had a knife in his hand that was partway opened. RP 36. He said, "If you want to avoid a bloodbath, give me the money in the till." *Id.* Wixon said that the knife was about 3 or 4 inches. RP 37. The man had it in the palm of his hand the whole time. *Id.* She also said that the man told her not to say anything. *Id.*

Wixon stood there for a few minutes and didn't do anything, but then called for Jason Jensen to come seat some customers. RP 38. At this point she began taking the money out of the till and Jensen asked her what she was doing. *Id.* In response to the Jensen's question, Wixon pointed to the guy with the knife and Jensen said to go ahead. *Id.* Wixon testified that Jensen followed the man out the door. *Id.*

When asked if she saw the person who robbed her in the courtroom, Wixon indicated that the defendant could be him but that she was not positive because his hair looked darker than at the time of the robbery. RP 39. She stated that other than the hair he looked familiar except that he looked thinner than he did. *Id.*

Wixon took the responding officer to the table where this man was sitting at. RP 40. The glass that she had served him was still on the table at that time. *Id.* Nobody else had sat at this table in the time between when the man left it and when the officers arrived. RP 40.

Wixon also testified that a detective contacted her between September and Ocober of 2005. RP 41. The detective showed her a six-page document with photographs in it. *Id.* The detective asked her to look at the photographs and see if anybody looked familiar. RP 42. Wixon indicated the person on the second page as well as the person on the fourth page looked familiar. *Id.*

Davia Mase also testified for the State that she was working at the Kelso Denny's that night and observed the man seated alone in the same place Wixon described. RP 52-53. She served that person a pop in a Coke glass with a straw and described him as a white male. RP 54. Mase testified that she recalled the man gong up to the register and immediately afterward Wixon stated to her that the guy seated in the booth previously described had just robbed them. RP 55-56.

The next witness the State called was Jason Jensen. RP 58. He was also working at the Kelso Denny's on September 25, 2004. *Id.* He observed a white male at the cash register counter with a knife in his hand. RP 60. Jensen described the knife as metal, darker colored, and about 3 ½ inches long in the blade portion. RP 61. He also testified that when the man left his booth (the same booth that Wixon showed to the detectives and Mase also testified the Appellant was seated at) the dirty dishes were still on the table. RP 70.

Jensen testified that he figured about $250 was taken from the till during the robbery. *Id.* Jensen also stated that his boss did a subsequent audit the next morning. RP 62. When asked if his boss determined how much money was missing, Appellant objected to hearsay. RP 63. The court held that if the witness knew then he might answer. *Id.* Jensen then responded that the figure was $300, to which the court sustained the

hearsay objection. *Id.* The court then instructed the jury to disregard that last statement referring to the $300. RP 63.

Next, the State called Max Abundis. RP 74. She stated on direct exam that she is employed at the Kitsap County Jail as a corrections officer. *Id.* She stated that she has many duties, including: booking officer, taking inmate fingerprints, and taking pictures. *Id.* She stated that she has been fingerprinting for 17-½ years. *Id.* At this point in the testimony, defense counsel objected to the testimony and asked for a sidebar.

Outside the presence of the jury, defense counsel stated that he didn't realized that Abundis would be coming to testify in uniform and testifying that she took prints as part of the jail booking procedure. RP 75. The court responded, "I think that's just the way it happened," and inquired as to whether the prosecutor asked her to come in uniform. *Id.* The prosecutor responded that he did not ask Abundis to come testify in her uniform. *Id.* The court's response to the objection was, "well, that's one of the consequences. I understand that's where we're probably headed, but the question is what are her duties? Did she ever fingerprint the defendant?" *Id.* Defense counsel stated that unless it was really egregious he would not object again, but asked for a continuing objection. RP 76.

After the sidebar, Abundis testified that she had been trained in doing fingerprints for 17-½ years, including the time when the Appellant's fingerprints were taken in November of 1994. *Id.* Abundis also testified that she puts her name, number and signs a card when she fingerprints. RP 77. She indicated that on the Appellant's fingerprint card it was her signature. *Id.* She also testified to the Appellant's date of birth on the card. RP 78.

During a recess, outside the presence of the jury, the court took up the issue of whether Detective Meier should be permitted to testify that he told the Appellant that the police had excellent evidence indicating he was in Kelso. RP 85. The court indicated that witnesses are not permitted to give opinions during the course of trial. RP 86. Then the court ruled that, "it should just be the fact that we have evidence," not excellent. RP 88. The court indicated that, "It is pretty compelling evidence if the jury finds that it is true, but I don't think they need the police officer to tell them it is excellent." RP 89.

After the recess, the State called Kelso Police Department Officer Rich Fletcher. RP 93. Officer Fletcher testified that he responded to the Kelso Denny's within a minute or two of the call going out. RP 95. When he arrived at the scene, Wixon identified the table that the Appellant was sitting at and there was an empty plate, some silverware and a glass with a

straw still on it. RP 97. Officer Fletcher collected the glass and straw according to his training and subsequently tested them for fingerprints and DNA. RP 98-101. Officer Fletcher was able to lift five latent prints from the glass. RP 102. Officer Fletcher then submitted the fingerprints and straw to the Washington State Patrol crime lab to testing and analysis. RP 104.

Detective Meier of the Kelso Police Department then testified for the State. RP 105. He determined that the Appellant's date of birth was August 23, 1982, thus confirming the date of birth on the comparison fingerprints obtained from Max Abundis. RP 113. Detective Meier also testified that he interviewed Calkins regarding the incident and asked him about the last time he had been in Kelso. RP 116. Calkins responded that he had never been in Kelso. *Id.* Detective Meier told Calkins that he had evidence that would show that he was at the Kelso Denny's on September 25, 2004. RP 119. Calkins said that was impossible. *Id.* Calkins then indicated to Detective Meier that he didn't do an armed robbery. RP 120. Detective Meier stated that prior to this point in the interview he had not referred to it as being an armed robbery. *Id.*

The DNA that was submitted to the Washington State crime lab came back as a hit for Calkins. RP 123. Calkins had no explanation for how that could have happened. *Id.* Detective Meier was also able to

observed Calkins' tattoo that matched the description given by Wixon. *Id.* Detective Meier then described how he showed a photo lineup to Wixon. RP 124. Wixon went back and forth between Calkins' photo and the photo of another gentleman. Finally, Detective Meier testified that he took mouth swabs from Calkins for DNA and drove them up to Tacoma and turned them over to Jeremy Sanderson. RP 128.

The next witness the state called was forensic scientist Jill Arwine. RP166. Arwine testified that she had been in fingerprints for 30 years with the last 17 in latent prints. *Id.* She obtained prints bearing the name Joshua Calkins from the criminal records division of the identification section. RP 177. Appellant objected to further testimony and asked for an instruction. Outside the presence of the jury the court stated that it would be best to just move on and a curing instruction may reemphasize the point. RP 178. Appellant agreed and no instruction was given. RP 178. She analyzed the latent prints from the Kelso Denny's and concluded in her opinion that a number of them belonged to Calkins. RP 173-174, 183-184.

Finally, forensic scientist Jeremy Sanderson testified on behalf of the state. RP 185. He analyzed the DNA from the straw and the known DNA swabs from Calkins and determined that a match was found. RP 203. "The profiles were found to match each other and a statistic was then

calculated to assess the strength of that match, and the statistic reads the probability of selecting an unrelated individual form the US population at random with a matching profile of that from the straw is one in 35 billion." *Id.*

In closing argument, the prosecutor emphasized the strengths of Wixon's and Jensen's testimony. RP 221. He stated that Wixon thought that between $150 and $200 were taken from the register, but "I think the final count was testified to as being somewhere in the range of $300." RP 222. Defense counsel for Appellant did not object. The prosecutor also emphasized the strength of the fingerprints and DNA analysis. RP 223-224.

Also in closing argument, the prosecutor pointed out the fact that Calkins denied ever being in Kelso and, "the officer then says, we have excellent evidence that you were at the Kelso Denny's." RP 226. Defense counsel for Appellant again did not object at the time to this argument.

Finally, the prosecutor discussed whether the knife used in the robbery was a deadly weapon. RP 231. He stated, "when box cutters can take down jumbo jets, we know that a knife 3 inches to 4 inches long can take a human life." *Id.* He also argued, "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." RP 232. Again, there was no

objection from defense counsel for the Appellant at the time of this argument.

V. ARGUMENT

1. PROSECUTORIAL MISCONDUCT

a. There was no showing that prosecutorial misconduct occurred as a result of comments on excluded evidence because there was no impact on the jury's verdict as a result of this testimony.

"Where prosecutorial misconduct is claimed, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. To establish prejudice, the defense must demonstrate there is a substantial likelihood the misconduct affected the jury's verdict." *Brown*, 132 Wash. 2d at 564.

Appellant does not adequately contest the fact that there is sufficient evidence from which a jury could find the Appellant guilty of robbery in the first degree with a deadly weapon. During the course of the trial, the testimony was that: the defendant stated he had never been to Kelso; his DNA and fingerprints were found on a glass in a Kelso Denny's; the waitress serving him identified Appellant and one other person as the potential suspect; and the Appellant had a distinct tattoo matching the description given by the Denny's waitress. The Appellant

fails to show how the prosecutor's comments or any direct testimony prejudiced the jury's verdict.

Appellant alleges prosecutorial misconduct as a result of Abundis' direct examination testimony. Abundis stated on direct exam that she was employed with the Kitsap County Jail and it was part of her duties to take fingerprints of the inmates during processing. She never mentioned in what context she took Mr. Calkins' fingerprints or that she processed him as an inmate at the Kitsap County Jail. It is a possibility that Abundis obtained Calkins' fingerprints outside of her employment with the Kitsap County Jail. Abundis never directly testified that she took Calkins' fingerprints at the jail, through the court of her employment, or that he was ever an inmate at the jail.

Further, this testimony was necessary to meet the foundational requirements necessary for admission of the fingerprint card. The State needed to establish a basis of knowledge that Abundis was the person who took the fingerprints and her ability to testify that they were obtained accurately. In order to do this, it was necessary to convey not only Abundis' training and experience, but also her basis of knowledge that she was the one who obtained the fingerprints. By going through her procedures, employment, and experience, the State was merely establishing a foundation for this basis. Although she did not remember

taking these individual fingerprints over ten years ago, she was able to show that she was the one who would have taken them and that due to her training and experience they would have been accurate. There was no testimony stating that Abundis took the prints as a result of Calkins being an inmate. The testimony almost certainly did not have an impact on the verdict and thus constitutes harmless error.

Finally, the remedy in this situation would have been a limiting instruction. Appellant chose not to ask for a limiting instruction, and thus waived any right to subsequently appeal based on prosecutorial misconduct. Failure to request an appropriately worded limiting instruction waives the right to the instruction and fails to preserve the error for appeal. *Lockwood v. AC&S, Inc.*, 109 Wash.2d 235, 255, 744 P.2d 605 (1987); *State v. Oughton*, 26 Wash.App. 74, 81, 612 P.2d 812 (1980).

Appellant also alleges that Abundis' testimony she had seen Calkins since obtaining his fingerprints is also prosecutorial misconduct. There is no direct testimony that Abundis was referring to seeing Calkins in the course of her job. It is possible Abundis had contact with Calkins unrelated to her position at the Kitsap County Jail. Her testimony was not that she contacted him through the course of her duties of employment at the Kitsap County Jail. There was no impact on the jury verdict as a result of this testimony, and certainly no prosecutorial misconduct. Once

again, defense counsel declined to have the court give a limiting instruction and thus failed to preserve the issue for appeal. *Id.*

Finally, the Appellant alleges prosecutorial misconduct as a result of the direct examination testimony of Jill Arwine. Although she did state she had obtained the prints from the criminal records division of the identification section, there was no showing that this had an impact on the verdict.

A sidebar was called at that time and Appellant declined to have a limiting instruction. The trial court agreed that the best approach would be to proceed without calling attention to the statement. The burden is on the Appellant to show that this testimony affected the verdict, and they have failed to do so. There has been no showing that one statement in the course of a two-day trail with hours of testimony would have affected the verdict in any appreciable way. This testimony constitutes harmless error and not prosecutorial misconduct. Finally, here again, defense counsel did not asking for a limiting instruction and failed to preserve the issue for appeal. *Id.*

b. There was no prosecutorial misconduct based on the prosecutor's closing arguments because there was no prejudicial effect on the jury's verdict. Also, the arguments were not objected to at trial in order to preserve them for appeal. Finally, the arguments were not so flagrant as to preserve them as an appropriate issue for appeal.

"In closing argument, a prosecutor has wide latitude to draw and express reasonable inferences from the evidence. " *State v. Mack*, 105 Wn.2d 692, 698, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986). A prosecuting attorney's allegedly improper remarks must be considered in context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *Brown*, 132 Wash. 2d at 564.

"Absent an objection by defense counsel to a prosecutor's remarks, the issue of prosecutorial misconduct cannot be raised on appeal unless the misconduct is so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." *State v. Ziegler*, 114 Wn.2d 533, 789 P.2d 79 (1990), *State v. Echevarria*, 71 Wash.App. 595, 597 (1993), and *State v. Neidigh*, 78 Wash.App. 71, 77-78 (1995). When alleged error can be obviated by asking the court to give a corrective instruction or admonition, the defendant has a duty to make that request. *State v. Crawford*, 21 Wn. App. 153, 583 P.2d 679 (1978), citing *State v. Brown,* 74 Wa.2d 799, 447 P.2d 82 (1968).

With regards to the closing arguments of the prosecutor, it is undisputed that Appellant did not object to the prosecutor's argument at the time. Therefore, the issue is not preserved for appellate review.

Furthermore, the prosecutor's arguments were not so flagrant or ill-intentioned as to warrant a mistrial without the Appellant's timely objection.

In closing arguments, the prosecutor stated that the amount of money taken was "I think somewhere in the range of $300." RP 222. There was no objection by defense counsel at the time of this argument; therefore the statement of the prosecutor must be considered flagrant in order to be considered on appeal. This misstatement of the testimony was by no means flagrant. In fact, it is clear that the prosecutor was not violating the courts order suppressing the hearsay testimony of $300 because he prefaces the statement with "I think" as to the amount. *Id.* Jensen testified that the amount was around $250. This is the same thing as being in the $300 range. Arguing that the amount taken was in the $300 range is not a misstatement of the testimony, merely an inference from it, nor is it an inaccurate statement. Finally, it is by no means a flagrant error.

Further, to the extent that it was an error, this argument was harmless error because the $300 figure is not a pertinent issue to the charge in this case. If Calkins were charged with theft or malicious mischief where damages must be proven, then perhaps this would be an issue. However, in this case, robbery in the first degree does not require

the State to prove a dollar figure as an element of the offense. Therefore, whether $250 or $300 was taken from Denny's, it still constituted robbery in the first degree. The prosecutor did not argue anything inconsistent with this.

Finally, the jury was given an instruction stating, "The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits...admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict." WPIC 1.02. It is presumed that a jury reads and follows the court's instructions and considers them as a composite unit. *State v. Costello*, 59 Wash.2d 325, 332, 367 P.2d 816 (1962). Therefore, it must be presumed that the jury followed the instruction to only consider evidence admitted during the course of the trial. Because the $300 figure was stricken from the record, it must be presumed that they did not consider this figure in reaching their verdict.

Also in closing arguments, the prosecutor stated that Detective Meier told the defendant they had excellent evidence that he was in Kelso despite the court ruling this would be inadmissible. The defense counsel did not object to this argument at the time of trial, so again, the prosecutor's statement must be flagrant to be considered on appeal. The

prosecutor is permitted to comment on the strength of their evidence in closing argument. By classifying the evidence as excellent, this is what the prosecutor was arguing. The prosecutor's statement was not a flagrant violation of the court order excluding this testimony.

Further, Detective Meier never commented on the value of the evidence on direct examination. At most, the prosecutor's statement was merely a misstatement of the evidence presented. The jurors were instructed, "The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." WPIC 1.02. If the prosecutor's statement was a misstatement of the testimony, the jury was instructed to disregard it, and thus it likely had no effect on the verdict.

Finally, Appellant alleges prosecutorial misconduct as a result of the prosecutor's references to acts of terrorism during closing arguments. Defense counsel for Appellant did not object to this argument at the time of trial, so again, it must be so flagrant and ill-intentioned that no curative instruction could have addressed the prejudice. *State v. Ziegler*, 114

Wn.2d 533, 789 P.2d 79 (1990), *State v. Echevarria*, 71 Wash.App. 595, 597 (1993), and *State v. Neidigh*, 78 Wash.App. 71, 77-78 (1995).

Comments on historical events often arise during closing arguments in reference to the origin of certain rights as well as a basis for prevention of future crimes. In this case, the reference to historical acts of terrorism was merely made to address what exactly constituted a deadly weapon. The prosecutor was merely making the argument that the knife used in the robbery was certainly considered a deadly weapon in the context of what a weapon is and how it can be used. Any reference to a terrorist act was merely meant to frame the context in which a weapon can in fact be deadly.

The argument referring to the terrorist acts did not inflame the jury. In this case, the facts of bringing down a jumbo jet do not even closely correlate with a robbery of a Denny's. The Appellant was not charged with terrorism or anything involving a plane or even box cutters. The argument merely served to address a small portion of the case involving the weapon used to carry out the robbery. It is unlikely that this would have had any prejudicial effect upon the jury's verdict involving the actual robbery charge.

Finally, the defense attorney for the Appellant was present during the entire course of the trial and was in the best position to analyze

whether an argument was prejudicial. The Appellant's attorney at trial chose not to object to this argument, thus displaying his belief that it was not overly prejudicial. It is apparent from the record that the Appellant's defense attorney was making determinations during closing argument as to what was an appropriate argument and what was not. This can be gathered from the fact that defense counsel did object to other areas of closing arguments. Appellant's counsel at trial did not view this argument prejudicial enough to object at trial, thus the appellate court should also not consider them as prejudicial.

2. ERROR ON THE JUDGMENT AND SENTENCE

The State concedes this issue and asks that the matter be remanded on this issue alone to the Cowlitz County Superior Court for entry of a Judgment and Sentence that corrects the clerical error.

VI. CONCLUSION

Appellant's convictions for robber in the first degree with a deadly weapon should be affirmed because the Appellant did not ask for a curing instruction with regard to direct testimony and failed to timely object to the prosecutor's closing comments, and comments by the prosecutor did not have a prejudicial effect on the jury's verdict. As such, Appellant's convictions should be affirmed.

Respectfully submitted this 12th day of December 2006.

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COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,	)	**NO. 34748-2-II**
	)	**Cowlitz County No.**
Respondent,	)	**05-1-01576-1**
	)	
vs.	)	**CERTIFICATE OF**
	)	**MAILING**
JOSHUA TUCKER CALKINS,	)	
	)	
Appellant.	)	
	)	

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STATE OF WASHINGTON
BY DEPUTY

I, Audrey J. Gilliam, certify and declare:

That on the 15 day of December, 2006, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

Catherine E. Glinski
Attorney at Law
P. O. Box 761
Manchester, WA 98353

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

Dated this 15 day of December, 2006.

Audrey J. Gilliam

Audrey J. Gilliam