IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 66016-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
CHARLES CLARKE KEENEY,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: March 12, 2012
_____	)	

Becker, J. — The primary issue in this appeal is prosecutorial misconduct. We conclude reversal is not required. We remand for resentencing.

According to testimony presented at trial, Keeney visited the home of Brian Branch on two occasions between January 8 and 9, 2010. Branch was a 48-year-old man who had been introduced to Keeney by a mutual acquaintance who worked as a prostitute. Branch testified that Keeney visited him at home on the night of January 8, 2010, robbed him at knifepoint, and threatened to kill him if he called the police or cancelled his credit card. Branch testified that Keeney broke into his home a second time early the following morning, robbed him again at knifepoint, threatened to kill him, and stole his car.

Keeney was charged with two counts of first degree robbery with a deadly weapon, as well as single counts of first degree burglary and theft of a motor

vehicle. There was a trial lasting three days. The record reflects that Branch lost his composure during cross-examination. Keeney did not testify or call any witnesses.

In his closing argument, defense counsel commented on inconsistencies in Branch's testimony, such as his statements on cross-examination that there had actually been three robberies, not two. Defense counsel also offered theories as to what had really happened between Branch and Keeney. He speculated that "maybe" Branch had previously asked Keeney to procure drugs or prostitutes for him and Branch owed Keeney money, or "perhaps" Branch had voluntarily given Keeney the money in order to buy him drugs, but Keeney simply failed to return with anything. Defense counsel also speculated that Lea Gruver, Branch's friend who testified as an eyewitness to the second robbery, may have decided to lie for Branch because he was supplying her with drugs.

During her rebuttal, the prosecutor responded to defense counsel's comments. With regard to Branch's statements on cross-examination concerning a third robbery, the prosecutor suggested that Branch had become confused by defense counsel's line of questioning. She stated:

> And defense counsel's exactly right that when he first started talking about this third incident, about this third robbery, was not during direct examination, was not with the police officers or with the detective that he talked to, it's when he started having to answer a bunch of questions from defense counsel that came in in a confusing way. That came in in a way that definitely -- you saw Mr. Branch get flustered. Get emotional. Get confused. And you can take that for what it is, as for whether or not there was another robbery or whether it was an attempt to really get Mr. Branch confused and you confused.
>
> But what it showed was an exact example of how easily

> manipulated Mr. Branch is. How easily bullied he can be as he was sitting there trying to answer questions and trying to remain calm as he was talking about what happened to him.

The prosecutor went on to respond to the speculative theories put forward by defense counsel:

> And there were a number of speculations and different ideas that were just posed to you by defense and gave you some things saying -- that maybe the defendant bought women for Mr. Branch. Maybe he bought drugs for Mr. Branch. Maybe Mr. Branch buys drugs for Ms. Gruver.
>
> That's why you get your instructions that say that the arguments of counsel are not evidence and you must base your verdict on the evidence because there is zero evidence of those speculations or theories or ideas. And to -- to pose them or to suggest them, and to suggest that you should somehow base your verdict on those kinds of theories, of which there is no evidence at all, is simply inappropriate and wrong. You have no evidence of those things and that is simply an attempt to confuse you, just like Mr. Branch was confused.

Defense counsel did not object to any of these remarks.

The jury convicted Keeney of theft of a motor vehicle and a single count of second degree robbery. Both convictions related to the visit to Branch's home on the morning of January 9, 2010. The jury acquitted Keeney of the first degree robbery charges, the burglary charge, and the deadly weapon enhancements.

At sentencing, the court calculated Keeney's offender score as "9+." The court imposed sentences at the high end of the standard range. In calculating Keeney's offender score, the court included in his criminal history 12 prior felonies between 1981 and 2007, including convictions for federal bank robbery, burglary, attempt to elude, and possession of controlled substances.

PROSECUTORIAL MISCONDUCT

Keeney seeks reversal of his convictions on a theory that the prosecutor's statements during rebuttal violated his Fourteenth Amendment right to a fair trial and Sixth Amendment rights to an impartial jury and to confront witnesses against him. He contends the prosecutor leveled "a personal attack" on defense counsel by calling him a manipulator and a bully and calling his closing statements "inappropriate and wrong," and by suggesting that he was deliberately trying to confuse Branch and the jury. Br. of Appellant at 13. The State responds that the prosecutor's remarks were not improper, and in any event, Keeney's challenge on appeal is waived because he failed to object at trial.

To prevail on a claim of prosecutorial misconduct, the defendant bears the burden of showing both improper conduct and resulting prejudice. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006), citing State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). Comments made by a prosecuting attorney during closing argument may constitute improper misconduct entitling a petitioner to a new trial. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks "'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" McKenzie, 157 Wn.2d at 52, quoting Brown, 132 Wn.2d at 561.

Where, as here, the defense fails to object to an improper comment, the error is considered waived "'unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" McKenzie, 157 Wn.2d at 52, quoting Brown, 132 Wn.2d at 561. Defense counsel's failure to object to the remarks at the time they were made "'*strongly suggests* to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.'" McKenzie, 157 Wn.2d at 53 n.2, quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991).

Viewing the prosecutor's statements in the context of the full trial, we conclude they were not improper; but even if improper, that impropriety did not rise to the level of incurable prejudice.

Each of the prosecutor's challenged statements was made on rebuttal in direct reply to statements or theories put forth by defense counsel. The prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). It is not misconduct for a prosecutor to argue that the evidence does not support the defense theory. Russell, 125 Wn.2d at 87. The prosecutor's statement that it was "inappropriate and wrong" of defense counsel to encourage the jury to adopt speculative theories from outside the evidence was a strongly worded "editorial" comment, but was not improper. Brown, 132 Wn.2d at 566

(prosecutor's comment on rebuttal that defense counsel's closing theory was "ludicrous," was simply an "editorial comment by the prosecuting attorney which was a strong, but fair, response to the argument made by the defense").

The prosecutor's statements that Branch had appeared "manipulated" and "bullied," and that counsel had attempted to confuse both Branch and the jury, were closer to the line but, if improper, were not incurably prejudicial. Defense counsel spent a significant portion of his argument attacking Branch's credibility based on testimony about a third robbery. The State was entitled to respond to this attack by arguing a different theory—confusion due to counsel's aggressive line of questioning—to explain away Branch's inconsistencies. See Russell, 125 Wn.2d at 92-93 (prosecutor's comment that defense counsel would "stoop to any level" was not an incurably prejudicial attack where remarks were "provoked by defense counsel and arguably constitute a fair response to attacks made by the defense on the deputy prosecutor, her witnesses, and the work of government agents").

Moreover, Keeney takes the prosecutor's statements out of context. The prosecutor did not, as Keeney alleges, call his counsel a "manipulator" or a "bully." She made the quite different comment that Branch himself was "*easily* manipulated," and "*easily* bullied." (Emphasis added.) This was a comment about Branch personally.

Viewing the record as a whole, we observe no deliberate or pervasive strategy on the part of the State to impugn defense counsel or prejudice the jury.

Keeney's belated objections to the prosecutor's comments are waived. His claim that he was deprived of a fair trial by prosecutorial misconduct is rejected.

INEFFECTIVE ASSISTANCE OF COUNSEL

Keeney argues he was denied effective assistance of counsel by his attorney's failure to object to the prosecutor's remarks.

To prevail on a claim of ineffective assistance of counsel, a defendant must show both deficient performance and prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Because both prongs must be met, a failure to show either prong will end the inquiry. State v. Hunley, 161 Wn. App. 919, 925, 253 P.3d 448, review granted, 172 Wn.2d 1014, 262 P.3d 63 (2011). Competency of counsel is determined based upon the entire record below. McFarland, 127 Wn.2d at 335, citing State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). The court engages in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335.

We see no evidence that defense counsel was ineffective for failing to object to the prosecutor's comments. We do not judge the prosecutor's remarks to be objectionable, but even if they were, Keeney has not shown that the result of trial would have been different if the remarks had not been made. Most of the prosecutor's challenged remarks were uttered for purposes of rehabilitating Branch's credibility, but the acquittal verdicts suggest this attempt was largely unsuccessful. The jury acquitted Keeney of all charges associated with the first alleged robbery, at which Branch was the sole eyewitness. The charges of

which the jury did convict Keeney rested on evidence in excess of Branch's testimony, including Gruver's eyewitness testimony and a copy of the check for $1,000 Branch made out to Keeney on January 9, 2010. We see no indication that the jury was swayed by the prosecutor's comments to accept Branch's testimony.

The jury also had clear evidentiary grounds for rejecting defense counsel's speculative theories, outside of the prosecutor's remark that counsel's proposal of those theories was "inappropriate and wrong." At trial, the jury listened to recordings of jail telephone calls between Keeney and his girl friend Christy, during which they schemed about a fictional defense. On one such call, Keeney stated, "He owed money, so I'm saying I went and collected it." On another call, Christy suggested she could say that she was a prostitute, that Branch had refused to pay for her services, and that Keeney went to collect the money. When Keeney said, "That's what happened," Christy replied, "No, that's not what happened." Keeney replied, "you've got to be careful what you say on these phones." During such calls, the jury also heard Keeney essentially admit to some level of wrongdoing. Christy said to him, "Charles, when are you gonna stop doing this? . . . [Y]ou have a baby on the way," to which Keeney replied, "Now. I would say now is probably . . . I know. It would probably be a good time right about now."

The trial court's comments at sentencing are instructive as to the competency of defense counsel in light of the full record. The court remarked:

> I would note that [defense counsel] garnered several not

> guilty verdicts. He obviously convinced the jury that the State hadn't proven the case beyond a reasonable doubt. Even on the one count that you were convicted on, it was a lesser, not the original charge.
>
> So quite frankly, Mr. Keeney, I think you got a splendid trial, and your attorney did well by you, including making the deadly weapons enhancement disappear. As bad as things look right now, they could have been substantially worse for you.
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> . . . .
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> . . . And I think you can thank [defense counsel] for that.

Keeney has made no showing of prejudice. He was not denied effective assistance of counsel.

miscalculation of OFFENDER SCORE

In the alternative to reversal, Keeney seeks a remand to the trial court to recalculate his offender score.

At sentencing, the State bears the burden of proving prior convictions by a preponderance of the evidence. Hunley, 161 Wn. App. at 927. The burden is on the State "because it is 'inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.'" State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999), quoting In re Personal Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988). A sentencing court may rely on a stipulation or acknowledgment of prior convictions without further proof. In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 873-74, 123 P.3d 456 (2005). But "the defendant's silence is not constitutionally sufficient to meet this burden." Hunley, 161 Wn. App. at 928. Further, where a defendant is not convicted pursuant to a plea agreement, he "has no obligation to disclose any prior

convictions." Cadwallader, 155 Wn.2d at 875.

Here, the State filed a presentence statement that listed Keeney's criminal history. The State identified twelve prior felonies, including three 1982 burglary convictions, a 1999 federal bank robbery conviction, seven convictions for possession of controlled substances between 2004 and 2008, and a 2008 conviction for eluding police. The State's offender scoring sheets were left incomplete. They listed Keeney's offender score as a "9+." At the sentencing hearing, Keeney's criminal history was not discussed. The prosecutor stated that the offender score was over 9, and requested a sentence at the high end of the range. Keeney requested a sentence at the low end. The court imposed the high end of the range, explaining,

> In light of the fact that your standard range is predicated on an offender score of nine, and you actually have a higher offender score than that, I am going to accede to the request of the top end of the standard range. I think that really is appropriate.

Keeney contends the trial court should have scored his three 1982 burglary convictions as one offense because he was sentenced for all three on the same day. The State concedes this error. We accept the concession. Under RCW 9.94A.525(5)(a)(ii), multiple prior convictions for offenses committed before July 1, 1986, are counted as one offense if they were served concurrently. The State's presentencing report indicates the sentences were concurrent.

Keeney also contends that the 1982 burglary convictions were improperly included in his offender score because the State failed to prove they did not

wash out. Under RCW 9.94A.525(2), certain prior convictions will not be counted in an offender score if sufficient time has lapsed between the date of release from confinement and a subsequent conviction. The State concedes that its presentencing report suggests that Keeney may have had a crime-free period between 1987 and 1999, but it objects that the record on appeal is inadequate to resolve the matter, as the record does not contain the dates when Keeney was released from confinement. See RCW 9.94A.525(2)(b)-(c) (wash out period commences as of "the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction").

Keeney additionally argues the 1999 federal bank robbery conviction should not be included in his offender score unless the prosecutor establishes that it is comparable to the Washington crime of robbery. The State cites RCW 9.94A.525(3), which provides that a federal conviction is still scored as a Class C felony if it is not comparable to a Washington crime.

The trial court should resolve these matters on remand. Remand for resentencing is required unless the record clearly shows that the trial court would have imposed the same sentence regardless of the error. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

Because there was no objection below, the State will not be precluded from submitting additional evidence on remand. See State v. Mendoza, 165 Wn.2d 913, 930, 205 P.3d 113 (2009) ("Where, as here, there is no objection at sentencing and the State consequently has not had an opportunity to put on its

evidence, it is appropriate to allow additional evidence at sentencing.").

We affirm Keeney's convictions and remand for resentencing.

Becker, J.

WE CONCUR:

Leach, J.

Dwyer, C.J.