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DIVISION II

NO. 39557-6-II

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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BY  DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

DAWN FLEMING, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James R. Orlando

No. 08-1-05975-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether sufficient evidence was presented to convict defendant of identity theft in the second degree.
2. Whether sufficient evidence was presented to convict defendant of possessing stolen property in the second degree.
3. Whether the prosecutor's closing argument was proper.
4. Whether the prosecutor's closing argument denied defendant of a fair trial.

B. STATEMENT OF THE CASE.

1. Procedure

The Pierce County Prosecutor's Office filed an information on December 17, 2008, charging Dawn Fleming, defendant, with identity theft in the second degree and possessing stolen property in the second degree, in Pierce County cause number 08-1-05975-0. CP 1-2.

Co-defendant Shane Skilton was charged in the same document with the same counts. He entered a plea to two counts on April 14, 2009, with no agreement to testify for the State against Fleming. Defendant's jury trial began on May 6th with defendant's motions *in limine* being heard. After hearing the evidence, the jury convicted defendant as charged on May 11, 2009. 2 RP 247. Sentencing was set for July 17, 2009.

Defendant moved for a new trial alleging improper admission of a scheduling order which bore defendant's signature. EX 4. The trial court denied this motion on July 17, 2009. 2 RP 256, 2 RP 275. Defendant was sentenced on that same date to 60 days in custody and 12 months of community custody. Defendant timely filed a notice of appeal on July 21, 2009.

2. Facts

Marlys Cheney's car was broken into between 10:30 a.m. and noon on October 26, 2008. 1 RP 68. Two credit cards, her bank cards, and driver's license were stolen. 1 RP 71. Two charges were made on her Visa credit card on October 26th at 2:35 p.m. and 2:41 p.m. 1 RP 73. Ms. Cheney had not given anyone permission to use her cards. 1 RP 74, 76.

Ms. Cheney was shown the two signed receipts from charges made on her Visa account. EXS. 1 & 2. The signatures on the receipts were illegible, and not her signature. Nor did she recognize the signature. 1 RP 74.

Deputy Solbrack investigated the case by asking the victim's credit card company for the locations, dates and times the credit card was used after the theft. 1 RP 29. He then contacted a business where the card was used, Sports Authority, and asked them to pull the video covering the time frame when the victim's credit card was used. 1 RP 33-34. The business also provided three receipts from two purchases, and one attempted purchase made using the victim's Visa card. 1 RP 41.

Skilton testified that on October 26, 2008, he had several Visa gift cards¹ which he knew were not legally his. 1 RP 89-90, 95. Skilton did not recall where he got the gift cards. 1 RP 87, 89. Skilton and defendant used the gift cards to go shopping. 1 RP 85, 90. Skilton gave a gift card to defendant so that she could shop for herself. 1 RP 96. Defendant bought a pair of shoes for herself. 1 RP 96. Skilton attempted a purchase by himself which was not successful. 1 RRP 95, 96. Defendant then went back in and bought the merchandise from Skilton's failed transaction. 1 RP 96. Skilton is a drug user and he has "picked up a lot of charges, identity thefts, stolen properties, big crime spree." 1 RP 80, 93. Skilton was using drugs on October 26th and does not recall much of that day's events. 1 RP 85. Skilton has 14 prior felony convictions, including some from this incident 1 RP 93-94.

Eric Hieber is a district asset protection manager for Sports Authority, where the victim's credit card was used on October 26th. 1 RP 113. Hieber knew that the transactions were made with the victim's credit card rather than a gift card, because the transaction showed the victim's name. 2 RP 145. Gift cards do not show a name during a transaction.

¹ Victim Cheney, Deputy Solbrack and Eric Hieber, Loss Prevention Asset Protection Manager for Sports Authority, all testified that defendant's transactions had been made using victim Cheney's credit card. Skilton claimed they used gift cards.

Hieber stated that thieves can take the information in the magnetic strip of a credit card and transfer it to a gift card. 2 RP 181-182.

Hieber identified a video of his store which depicts the transactions made by defendant on October 26, 2008. 2 RP 159, EX. 3. Hieber narrated the video as it was shown to the jury. The video depicts the cash register, sidewalk and parking lot of the store at the time defendant used the victim's card to make the fraudulent transactions. 2 RP 120, 131, 158, 164, EX. 3. The video shows defendant and Skilton walk into the store to conduct their first transaction. 2 RP 164, EX. 3.

The video shows defendant making one fraudulent purchase at 2:35 p.m., and then leave the store alone. 2 RP 168, EX. 3. During this purchase, defendant physically distanced herself from the cash register by moving to the side of the sales counter. She kept her head down. Skilton is on the opposite side of the sales counter during defendant's purchase. 2 RP 171, EX. 3. Hieber stated that defendant and Skilton did interact with each other in the store until the time of the transactions. 2 RP 165.

The video next shows Skilton alone in the store at 2:38 p.m. 2 RP 171-172, EX. 3. He attempted a transaction which was denied. He then left the store. 2 CP 172, EX. 3..

The video shows the third transaction completed at 2:41. 2 RP 176, EX. 3. Defendant and Skilton walk into the store together and go to the

sales counter. Defendant purchases the merchandise which Skilton attempted to buy in his unsuccessful transaction at 2:38 p.m. 2 RP 176, EX. 3.

During the purchases made by defendant, the cashiers never took the credit card from her. 2 RP 180, EX. 3. Defendant twice swiped the card herself. 2 RP 180, EX. 3. Defendant signed the sales receipt for the purchase completed by her at 2:35 p.m. 2 RP 149, EX. 1 and EX. 3. Defendant signed the sales receipt showing the third transaction, made by her at 2:41 p.m. 2 RP 176, EX. 2, and EX. 3.

The prosecutor offered a scheduling order bearing defendant's signature as plaintiff's exhibit # 9. 2 RP 191-193. This order was admitted over defendant's objection. 2 RP 191-193. The order showed defendant's signature. EX. 4. Defendant was convicted of identity theft in the second degree and possessing stolen property

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF IDENTITY THEFT IN THE SECOND DEGREE AND POSSESSING STOLEN PROPERTY IN THE SECOND DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App.

24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); *State v. Rempel*, 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990) (citing *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980)), and *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *rev. denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor in of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *Id.* *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *rev. denied*, 109 Wn.2d 1008 (1987)). The appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the

persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415 16, 824 P.2d 533 (1992).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said: great deference . . . is to be given the trial court's factual findings. *In re Sego*, 82 Wn.2d 736, 513 P.2d 831 (1973); *Nissen v. Obde*, 55 Wn.2d 527, 348 P.2d 421 (1960). It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). When the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

a. Sufficient Evidence Was Adduced To
Convict The Defendant Of Identity Theft In
The Second Degree.

To prove identity theft in the second degree, the State must show that: (1) the defendant knowingly possessed or used a means of identification or financial information² of another person, living or dead; (2) that the defendant acted with intent to commit any crime; (3) that the defendant obtained money,

² "Financial information" means any of the following information identifiable to the individual that concerns the amount and conditions of an individual's assets, liabilities, or credit: (a) account numbers and balances; (b) transactional information concerning an account; and (c) and other information held for the purpose of account access or transaction initiation. CP 112-133, instruction no. 9.

goods or anything else that is \$1,500 or less in value from the acts described in element (1); and (4) that any of these acts occurred in the State of Washington. RCW 9.35.020(3), CP 112 – 133, number 11. Defendant argues that she was unaware that the credit card she possessed and twice used belonged to another person. The State adduced sufficient trial evidence for a rational finder of fact to conclude that the defendant knew the credit card she possessed and used to commit theft belonged to another person.

Evidence showed that defendant had possession of Cheney's credit card. Hieber identified two receipts which recorded purchases made on the victim's credit card on October 26, 2008. 2 RP 130-132, EXS. 1 and 2. Hieber obtained correlating video of the transaction which showed defendant using Cheney's card. 2 RP 164. The credit card was not produced as evidence, but the jury could well have concluded that Cheney's name was displayed on the front and her signature was on the back.

To show that defendant knew the card was Cheney's, the evidence showed she had possession of the credit card for the time it took her to shop and conduct two separate transactions, at least 8 minutes. 2 RP 163, 173. Defendant herself twice swiped the credit card when she made the two purchases from Sports Authority. 2 RP 149, 176. The jury may have concluded that during the course of defendant's possession and use of the credit card, she would have had ample time to see the victim's name on the card. This would have notified her that the credit card did not belong to Skilton, and was not his to use.

The jury may have inferred that defendant's actions in the store were indicia of guilty knowledge; defendant and Skilton separated when she used to card to make her initial purchase, Skilton was on the far side of the counter when defendant made a purchase with the credit card, and defendant wandered away from the cashier and stood with her head down while her purchase was being processed. 2 RP 170-171. The jury had an abundance of evidence defendant used the card, and that she had ample opportunity to read the name on it.

The jury may well have determined that the following conduct is not the customary shopping style of friends; they distanced themselves from each other, from the purchases the other was making, and from the cash register where the purchase was made. 2 RP 96, 172 EX. 3. Their three attempted or accomplished purchases occurred within a span of 8 minutes. The jury may have seen this conduct as indicative of defendant's guilty knowledge that the credit card was stolen.

Last, the two cash register receipts were signed by defendant for the two purchases she made. EX 1 and EX 2. Defendant's signature is also shown on a court order. EX 4. The jury may have determined that defendant's signature on the order is neat, precise and legible, while the "signatures" on the credit card receipts are messy and illegible. The jury may have decided that the signatures bear no apparent relationship to each other. They may have perceived the distinctive difference in style as an attempt by defendant to disguise her own handwriting, or to make the signature purposefully difficult

to read.³ The act of producing a signature so alien from her own could have been interpreted by the jurors as indicia of guilt. If the defendant was using the card legitimately, then she would have no need to disguise her signature.

Defendant and Skilton have known each other for six years. 1RP 81. Skilton considered her to be a friend and said that “they hung out” together within a mutual circle of friends. 1 RP 83. Skilton was so high on October 26th that he does not recall many of the events of that date. 1 RP 85. Skilton was using the victim’s card to support his drug habit. 1 RP 90. Skilton was on drugs at the time of the purchases and did not care if the cards he used were stolen or not. 1 RP 87.

The jurors could have found that Skilton’s drugged state, his use of stolen cards to support his drug habit, and the fact that he was on a crime spree would have been obvious to a friend who had known him within a circle of friends for six years. The element that defendant purchased merchandise valued less than \$1,500 is satisfied by the amounts of the purchases and testimony that the acts occurred in Washington. 1 RP 25 and 2 RP 118.

Drawing all inferences from the evidence for the State and against defense, and viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that

³ Cheney testified that her signature was not on either receipt. There was no evidence about what her signature looks like. 1 RP 74 and 75.

defendant was aware that the credit cards she used belonged to someone else, but that she intentionally used them to make purchases. There is sufficient evidence to support a conviction of identity theft in the second degree.

b. Sufficient Evidence Was Adduced To
Convict The Defendant Of Possessing
Stolen Property In The Second Degree.

To prove possessing stolen property in the second degree, the State's evidence must show: (1) That the defendant knowingly possessed stolen property; (2) that the defendant acted with knowledge that the property had been stolen; (3) that the defendant withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto; (4) that the property was an access device; and (5) that the acts occurred in the State of Washington. RCW 9A.56.140(1), RCW 9A.56.160(1)(c) and CP 112 – 133, number 13. The State adduced sufficient evidence at trial for a rational finder of fact to find the defendant knew the credit card she possessed and used belonged to another person.

The evidence outlined in the identity theft argument above applies to the issue of whether defendant knew the credit card she possessed was stolen. Video showed the defendant use the victim's credit card to make two purchases within an eight minute time frame on October 26th. 2 RP 164. The jurors may have inferred from the evidence that defendant's actions in the store indicate guilty knowledge, and that defendant and Skilton's behavior while in the store is not the customary shopping style of friends, 2 RP 170 –

172, 96, that defendant's signature on the purchase receipts is distinctly different than her signature on other papers, EX. 1, EX 2. and EX 4, and that the difference may be seen as an attempt to obscure her identity or to imitate the victim's signature.

Finally, the jurors may have believed Skilton's testimony, that his lifestyle at the time centered around getting drugs, getting high and committing crimes, that defendant was well acquainted with him, and knew his tendencies to use stolen cards to make purchases. 1 RP 81 – 90.

Drawing all inferences from the evidence for the State and against defense, and viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant was aware that the credit card she possessed had been stolen. The defendant's convictions for identity theft in the second degree, and possessing stolen property in the second degree, were supported by sufficient evidence and must be preserved.

2. DEFENDANT HAS FAILED TO SHOW THAT THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY APPEALING TO THE PASSIONS AND PREJUDICE OF THE JURY, OR THAT THE VERDICT WAS AFFECTED.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*,

479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996).

Before an appellate court should review a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice.” *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

An appellate court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998).

a. Prosecutor’s Closing Comments Were Proper Argument.

To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)).

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

Attorneys may argue credibility and draw inferences from the evidence. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied* 516 U.S. 1121 (1996).

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. *McKenzie*, *supra*. at 53-54, quoting *Papadopoulos*, *supra* at 400.

A prosecutor arguing credibility only commits misconduct when it is 'clear and unmistakable' he is expressing a personal opinion rather than arguing an inference from the evidence. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006); *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59, *review denied*, 100 Wn.2d 1003 (1983), *overruled on other grounds* by *State v. Davis*, 101 Wn.2d 654, 658-59, 682 P.2d 883 (1984).

Defense complains that the prosecutor's closing argument was improper. Defense relies on six objections made during the prosecutor's closing argument. Three of the objections were overruled. After each objection, whether it was sustained or overruled, the prosecutor moved on to a new argument, and did not belabor topics which had been objected to.

This does not support defendant's allegation of bad faith or improper conduct by the prosecutor.

Defendant's first objection concerned defendant's pretrial motion to exclude any statements by the victim Marlys Cheney that her car was broken into by unknown subjects. 1 RP 7. The State responded to the motion *in limine*:

I don't think that there's any evidence in this case that Ms. Fleming was involved in the vehicle prowl. I am certainly not going to intimate that. However, Mr. Skilton was apparently involved in prowling vehicles, and I think that **this is part of *the res gestae* as far as how identity theft crimes happen and how quickly they occur.** So I think that the fact that her car was vehicle prowled is relevant in this case.

1 RP 9.

The court denied defendant's motion to exclude evidence of the vehicle prowl, saying that, as part of the *res gestae*, the fact that the victim's vehicle was prowled put the theft in context and showed Ms. Cheney did not give defendant permission to use the card. The court found the facts of the vehicle prowl were not overly prejudicial and certainly probative. 1 RP 15. ER 404(b). The trial court allowed testimony of the vehicle prowl, even knowing that co-defendant Skilton may have been involved in it.

Defendant's first objection to the prosecutor's closing came during her discussion of the four hours between the theft and the use of Cheney's card. 2 RP 212-213. Defense argues that the prosecutor alleged that defendant committed uncharged crimes. The prosecutor inferred that defendant had knowledge that the cards Skilton gave her were not legally his, based on Skilton's description of his lifestyle, his lack of recall of the events of this date, and that he just did what he needed day to day to get drugs: 1 RP 87:

What kind of stuff do you do together? Well, that wasn't answered. But what was going on on October 26th? There was a vehicle which was prowled in a parking lot. And I think common sense tells you that usually an automobile is involved when a suspect is going around prowling vehicles. You have got to have a vehicle to drive around and get away from the scene. You have got to have some place to store all your stolen stuff. Ms. Fleming had a vehicle.

2 RP 215 - 216. The court overruled the objection, reminding the jury that this is closing, not evidence. 2 RP 216.

After this objection, the prosecutor moved on to the unlikelihood that Skilton, who lived for drug money, would buy a pair of expensive shoes for a friend who had taken him shopping. 2 RP 216-217. She then discussed Skilton's lack of recall of how he got the gift certificate.⁴

⁴ Skilton consistently referred to the access device he gave defendant as a "gift certificate" despite Mr. Hiebert's testimony that the purchases were made with a card that showed the victim's name, and only a credit card would have that feature.

The prosecutor questioned what defendant and Skilton were doing on the day of the crime. This was relevant since Skilton testified that he was on a major crime spree and he would do anything to get drugs. 1 RP 87, 93.

I submit to you, I submit what was going on on October 26th is that Mr. Skilton needed wheels so he could go around and get his drugs. Ms. Fleming had wheels.

Defense made a second objection. The court's response was to ask the prosecutor to argue based on the evidence that was presented here. 2 RP 217. The prosecutor moved to other another topic. 2 RP 217.

Defense argues that the two closing comments by the prosecutor amount to an allegation that uncharged bad acts were committed by the defendant.

Viewing these two arguments in context, it becomes clear that they carry on a theme that the prosecutor had begun four pages earlier in the transcript, that defendant had notice of Skilton's lifestyle and knowingly helped him in exchange for a pair of shoes. 2 RP 214. These two arguments by the prosecutor were inferences drawn from the evidence. The first comment was classified by the trial judge as argument and not objectionable. The second comment was quickly objected to, and the judge did not sustain or overrule the objection. The prosecutor moved on to other topics after each objection. 2 RP 217.

The arguments complained about are contained on two pages of the trial transcript. The prosecutor's closing argument reads from page 207 to page 252 in the transcript. The comments were fleeting and reflected more on Skilton's actions than defendant's. Neither argument was improper misconduct, nor do they show bad faith on the part of the prosecutor.

Defense cites *State v. Boehning*, 127 Wn. App. 511, 111 P. 3d 899 (2005), as an example of improper argument regarding uncharged crimes. Boehning was charged with multiple counts of rape against a child. Three counts were dismissed after the child victim did not testify about them during direct examination. The *Boehning* prosecutor repeatedly argued during closing that the three dismissed counts bolstered the remaining counts. He also implied that the victim had made consistent hearsay statements which she was too shy to repeat before the jury.

The appellate court reasoned that the dismissal of three counts during a trial was not evidence from which argument and reasonable inferences could be drawn. *Id* at 522. The *Boehning* court also found that the prosecutor's references to charges which had been dismissed for lack of evidence appealed to the passion and prejudice of the jury, and invited conviction on improper grounds. *Id*. The *Boehning* court found that the prosecutor's argument also implied that witnesses had a "great deal of

knowledge favorable to the State, which, but for the court's rulings, would have been revealed." *Id.* The Boehning prosecutor repeatedly made this argument, in an attempt to "bolster [the victim's] trial testimony and credibility by instilling inadmissible evidence in the juror's minds..." *Id.* at 523.

In the case at bar, the prosecutor was drawing inferences that defendant's actions were indicative of guilty knowledge. In the *Boehning* case, the prosecutor argued that the three dismissed charges made the defendant more likely guilty of the remaining charges. The *Boehning* prosecutor acted in bad faith. Unlike the *Boehning* case, the prosecutor's closing arguments here were not repeated. When an objection was made, whether it was sustained or not, the prosecutor moved on and did not return to the topic. The prosecutor acted in good faith by abandoning the argument, rather than belaboring the type of comment which defense found objectionable.

Defense also cites *State v. Coles*, 28 Wn. App. 563, 573, 625 P.2d 713 (1981), in which a prosecutor elicited extensive testimony about a defendant's prior convictions and bad acts during cross examination. The *Coles* prosecutor explored with a talkative defendant the circumstances of his past crimes and his other incidents of misconduct. *Id.* at 566. The

prosecutor then referred to these past convictions and their details in closing as evidence pointing to the defendant's guilt.

In the case at bar, defendant did not testify. The prosecutor did briefly discuss Skilton's activities on October 26th. The prosecutor linked defendant to Skilton's activities in that she drove him around on that date. Where he got the gift cards, the drugs which obscured his memory or why he would buy her shoes all have to do with her knowledge of whether his activities were illegal. Again, the prosecutor did not argue that defendant's knowledge about the vehicle prowling or Skilton's drug use were evidence that she was guilty of uncharged crimes. This evidence was used to show defendant's knowledge that Skilton was on a crime spree. Drawing these inferences for the jury does not constitute bad faith or improper argument.

Defendant's third objection during the prosecutor's closing was to her invitation for the jurors to review their preconceived notions about a thief's appearance.

Ladies and gentlemen, I want to ask you a rhetorical question, since I can't really elicit responses from you at this time, But what does a thief look like? What does a thief look like? How can you know a thief when you see a thief?

2 RP 224. Defendant's objection was sustained. 2 RP 224. She made no motion to strike the comment or ask the jury to disregard it. The prosecutor then commented:

Bernard Madoff was recently convicted on a Ponzi scheme and that means that he stole money from thousands of people knowing that there were not going to get their money back, knowing that he was defrauding them. Bernard—you've probably seen pictures of him in the newspaper. He looks like any other average person. No "T" on his forehead. And I know in some – some societies as some points in time, people have been branded for being thieves.

RP 225. Defendant made a fourth objection which the court overruled, stating that this was closing argument, not evidence. 2 RP 225.

The prosecutor continued:

In some societies, some points in time, people who have committed thefts have had their arms chopped off or their hands chopped off. We don't do that in this society. So how do you know what a thief looks like? Well. Basically you don't know what a thief looks like. The defendant in this case is an attractive young woman. She looks healthy. She looks wholesome.

2 RP 225. Defendant's fifth objection to the argument was sustained. No request to strike the comment or instruct the jury to disregard it was made.

2 RP 225. The prosecutor moved on to other argument. Finally, defendant's objection to the prosecutor's argument about circumstantial evidence was overruled.

To argue that defendant did not receive a fair trial, defendant must successfully argue that a prosecutor's conduct was both improper and prejudicial, and that it created a substantial likelihood that the instances of misconduct affected the jury's verdict. *State v. Pirtle*, 127 Wn. 2d. 628, 672, 904 P.2d 245 (1995).

Defense has not met her burden of showing that the prosecutor's comments were made in bad faith, or that the prosecutor's actions were improper. This case is not infused with the same type of objectionable argument found in either *Boehning* or *Coles*. The prosecutor did not attempt to introduce excluded hearsay or belabor evidence deemed by defense to be prejudicial or improper. She argued the evidence and reasonable inferences which could be drawn from the evidence.

Viewing the prosecutor's comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions, the prosecutor's comments were not improper. Nor has she shown that the prosecutor acted in bad faith. Defendant has not met her burden to show that there is an accumulation of prosecutorial misconduct which deprived defendant of her right to a fair trial.

b. Prosecutor's Remarks Did Not Prejudice Or Impassion The Jury.

The prosecutor's duty is to ensure a verdict free of prejudice and based on reason. *State v. Huson*, 73 Wash.2d 660, 662, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). Although reference to the heinous nature of a crime and its effect on the victim can be proper argument, it is improper for a prosecutor to appeal to the prejudice and passions of the jury or to assume facts not in evidence. *State v. Clafin*, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985); *see also State v. Jones*, 71 Wn. App. 798, 808, 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018, 881 P.2d 254 (1994).

In deciding whether the misconduct warrants reversal, we consider its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005). A defendant shows prejudice only if he shows a substantial likelihood that the instances of misconduct affected the jury's verdict. *State v. Pritle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

Defense argues that the prosecutor's closing references to an uncharged vehicle prowl and the physical description of a thief appealed to the passions and prejudice of the jury. The closing argument must be viewed in the context

of the entire case. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 432 P3d (2003).

Defense cites *Clafin* to argue that it is improper for prosecutor to invite the jury to decide a case based on emotional appeals. The *Clafin* prosecutor read a poem about the damaging effects of child abuse during closing. If the State's charges were true, the appellate court reasoned, Clafin had engaged in a pattern of repulsive sexual and physical abuse of young girls over a long period of time. *Supra* at 850.

In such an emotionally charged trial, the use of a poem utilizing vivid and highly inflammatory imagery in describing rape's emotional effect on its victims was nothing but an appeal to the jury's passion and prejudice. *Id.* See also *State v. Stacy*, 355 S.W.2d 377, 380-81 (Mo.1962). In addition, the poem contained many prejudicial allusions to matters outside the actual evidence against *Clafin*. In short, the reading of the poem was so prejudicial that no curative instruction would have sufficed to erase the prejudice it was bound to engender in the minds of the jurors.

The closing argument in the case at bar was neither inflammatory nor did it appeal to the passions of the jury. The prosecutor made references to evidence given by Skilton's about his lifestyle, and the likelihood that defendant knew he had a drug habit and committed thefts. 1 RP 87, 93. She did not discuss any heinous crime or the affect of the crime on the victim. Her discussion of Skilton's criminal activity went to the issue of defendant's knowledge.

• . . . •

The prosecutor then asked how we identify a thief when we see one. 2 RP 224. She pointed out that we do not have physical attributes which indicate who is a thief. 2 RP 225. She then challenged juror's preconceived notions that an attractive person may be a thief. 2 RP 225. These comments did not impugn defendant. Quite the opposite, the prosecutor implied defendant did not look like a thief, that she looked attractive and healthy and wholesome.

Taken in the context of *Boehning* and *Coles*, the prosecutor's comments were not intended to cast aspersions on defendant, but were an invitation to the jurors to examine their own stereotypes, and to recall that looks can be deceptive.

Defendant has failed to show a substantial likelihood that the prosecutor's argument was misconduct, or that any misconduct affected the jury's verdict. There is no invitation to the jury to decide the case based on emotional appeals or passions and prejudices as there was in *Claflin*. Rather, this case presents an abundance of circumstantial evidence from which inferences of defendant's guilty knowledge can be drawn.

This Court must review the prosecutor's closing in the context of the total argument, the issues in the case, and the jury instructions. *Dhaliwal*. *Supra* at 578. The facts presented in this circumstantial case were strong. A video showed defendant committing the crime, a co-defendant testified that defendant participated in the crime. There was an

abundance of circumstantial evidence from which the jury could have inferred that defendant knew the credit card she used belonged to Marlys Cheney, and that it did not belong to Skilton.

Finally, defense has not shown that there was there a cumulative effect of misconduct that affected the jury's verdict. She has not shown that the prosecutor acted in bad faith, nor has defense shown that the prosecutor's argument was intended to inflame the passion and prejudice of the jury. There is abundant evidence in this case to prove the defendant's guilt. The defendant has not shown a substantial likelihood that a rational jury would not have returned the same verdict but for the prosecutor's allegedly improper remarks.

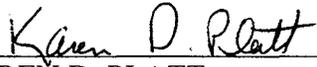
D. CONCLUSION.

The evidence in this case was sufficient to support guilty convictions for identity theft in the second degree and possessing stolen property. The prosecutor's argument was not improper. The argument was made in good faith and with no attempt to inflame the passions or

prejudices of the jury. Defense has shown no prejudice to the defendant,
nor an accumulation of misconduct deprived defendant of a fair trial.
These convictions must stand.

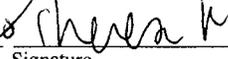
DATED: March 22, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


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Deputy Prosecuting Attorney
WSB # 17290

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3-22-10 
Date Signature

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