

NO. 44513-1-II

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

STATE OF WASHINGTON, Respondent

v.

DAVID ROBERT TIMMINS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01820-1

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL R. PROBSTFELD, WSBA #37878
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

Contents

A. RESPONSE TO ASSIGNMENTS OF ERROR..... 1

 I. THE STATE CONCEDES INSTRUCTIONAL ERROR
 REQUIRES REVERSAL OF THE ROBBERY, THEFT AND
 BURGLARY CONVICTIONS..... 1

 II. THE TRIAL COURT DID NOT VIOLATE TIMMINS’
 CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE 1

 III. PROSECUTORIAL MISCONDUCT DID NOT AFFECT THE
 VERDICT ON COUNT 4-IDENTITY THEFT..... 1

 IV. THE ISSUE OF SCORING ON ALL FOUR CONVICTIONS
 IS MOOT..... 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT 6

 I. THE STATE CONCEDES INSTRUCTIONAL ERROR
 REQUIRES REVERSAL OF THE ROBBERY, THEFT AND
 BURGLARY CONVICTIONS..... 6

 II. THE TRIAL COURT DID NOT VIOLATE TIMMINS’
 CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE 8

 III. PROSECUTORIAL MISCONDUCT DID NOT AFFECT THE
 VERDICT ON COUNT 4-IDENTITY THEFT..... 12

 IV. THE ISSUE OF SCORING ON ALL FOUR CONVICTIONS
 IS MOOT..... 18

D. CONCLUSION..... 19

TABLE OF AUTHORITIES

Cases

<i>Chapman v. California</i> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....	11, 17
<i>State v. Anderson</i> , 153 Wn. App. 417, 220 P.3d 1273 (2009).....	14
<i>State v. Brewcznski</i> , 173 Wn. App. 541, 294 P.3d 825 (2013).....	6, 8
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997), <i>cert. denied</i> , 523 U.S. 1007 (1998).....	14
<i>State v. Burton</i> , 165 Wn. App. 866, 269 P.3d 337 (2012).....	14
<i>State v. Chino</i> , 117 Wn. App. 531, 540, 72 P.3d 256 (2003)	6, 7
<i>State v. Davenport</i> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	14, 15
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.3d 432 (2003)	14
<i>State v. Estill</i> , 80 Wn.2d 196, 492 P.2d 1037 (1972).....	14
<i>State v. Evans</i> , 96 Wn.2d 1, 633 P.2d 83 (1981)	11, 17
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	13
<i>State v. Fleming</i> , 83 Wn. App. 209, 921 P.2d 1076 (1996).....	14
<i>State v. Gregory</i> , 158 Wn.2d, 759, 147 P.3d 1201 (2006)	13
<i>State v. Hughes</i> , 118 Wn. App. 713, 77 P.3d 681 (2003).....	13
<i>State v. Magers</i> , 164 Wn.2d 174, 189 P.3d 126 (2008).....	13
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	9
<i>State v. Peterson</i> , 168 Wn.2d 763, 230 P.3d 588 (2010).....	8
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	13
<i>State v. Roche</i> , 75 Wn. App. 500, 878 P.2d 497 (1994)	8
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	13
<i>State v. Severns</i> , 13 Wn.2d 542, 125 P.2d 659 (1942).....	6
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	13
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011)	12
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	14

Statutes

RCW 9.94A.535(3)(t)	1
---------------------------	---

A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. THE STATE CONCEDES INSTRUCTIONAL ERROR REQUIRES REVERSAL OF THE ROBBERY, THEFT AND BURGLARY CONVICTIONS
- II. THE TRIAL COURT DID NOT VIOLATE TIMMINS' CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE
- III. PROSECUTORIAL MISCONDUCT DID NOT AFFECT THE VERDICT ON COUNT 4-IDENTITY THEFT
- IV. THE ISSUE OF SCORING ON ALL FOUR CONVICTIONS IS MOOT

B. STATEMENT OF THE CASE

David Timmins (hereafter 'Timmins') was charged by information with Robbery in the First Degree, Burglary in the First Degree, Theft in the Second Degree and Identity Theft in the Second Degree. CP 1-2. Each charge alleged Timmins committed the crime shortly after being released from incarceration pursuant to RCW 9.94A.535(3)(t). The information charged Timmins of committing theft by "wrongfully obtain[ing] or exert[ing] unauthorized control over an access device." CP 2. The information charged Timmins with committing robbery by "in the commission of said crime or in immediate flight therefrom... inflict[ing] bodily injury upon" another person. CP 1. The information charged Timmins with committing burglary by "in entering or while in the

building or in immediate flight therefrom... intentionally assault[ing] any person.” CP 1. Timmins was convicted of all four counts, and the aggravator was found on each count. CP 3-10. Timmins was sentenced to a standard range sentence. CP 6. Timmins now appeals his convictions.

The evidence at trial showed that Karen Kimberling knew Timmins from gambling together at Jantzen Beach. 1A RP at 108. Ms. Kimberling lived alone in Vancouver. 1A RP at 107. Timmins had never been to Ms. Kimberling’s home prior to the date of the allegations. 1A RP at 109. On September 4, 2012, Timmins arrived at Ms. Kimberling’s home and knocked on the door and told her he was there to visit her and check on her. 1A RP at 110-11. However, Timmins soon asked her for her credit cards and starting going through her things. 1A RP at 111. Ms. Kimberling was afraid as Timmins found her purse and her debit card and demanded her PIN. 1A RP at 112. Ms. Kimberling refused and asked him to leave several times. 1A RP at 112, 114. Timmins then hit her in her left eye and again asked for her PIN. 1A RP at 112, 115. Ms. Kimberling fell to the floor and Timmins kicked her in the hip area. 1A RP at 115. She gave Timmins her PIN and he left. 1A RP at 116. Ms. Kimberling did not immediately call the police. 1A RP at 116.

The following day Ms. Kimberling called an ambulance; she was having difficulty breathing, anxiety, and her eye was red and puffy. 1A RP

at 67, 118. Ms. Kimberling initially told the AMR personnel that she had fallen. 1A RP at 118-19. The paramedic noticed Ms. Kimberling smelled of alcohol and had a difficult time speaking due to her shortness of breath. 1A RP at 67-68. Ms. Kimberling testified she did not remember much of going to the hospital, but that she spoke to a police officer while there. 1A RP at 119. Ms. Kimberling initially told the paramedic, nurse, social worker and police officer that she had received the injury to her eye as the result of a fall. 1A RP at 67, 134. Ms. Kimberling freely admits she is an alcoholic. 1A RP at 122.

Ms. Kimberling's debit card was used at Wal-Mart for \$500.00 at 6:31pm, for \$306.74 at 6:57pm, a withdrawal of \$303 at an ATM at 5:57pm, another ATM withdrawal for \$202 at 5:46pm, \$14.10 at a liquor store at 8:18pm, \$102.75 at an ATM at 4:53pm, another ATM withdrawal for \$41.75 at 6:09pm, and another ATM withdrawal at 6:07pm, all on September 4, 2012. 1A RP at 52-53. The total amount of these transactions was \$1,908.87. 1A RP at 53. The State admitted several photographs of the person using the card during some of these transactions. 1A RP at 98, 185. Ms. Kimberling did not ask Timmins to go to the store to purchase anything on her behalf, nor did she give him permission to use her debit card. 1A RP at 114.

Timmins testified at trial that he went to Ms. Kimberling's house where she and he used methamphetamine and drank alcohol. 2A RP at 304. Timmins testified Ms. Kimberling then gave him her debit card and PIN and asked him to go withdraw money from her account to purchase vodka, cigarettes and methamphetamine. 2A RP at 305-06. Timmins admitted on the witness stand that he "noted the fact that there was over \$850.00 in the account" and that he exceeded the scope of Ms. Kimberling's permission with regarding to use of her debit card. 2A RP at 307. Timmins admitted to using Ms. Kimberling's debit card at several locations, and testified that he "just ended up deciding to use the card as many times as I could while I could." 2A RP at 308. He believed he used the card close to ten times. 2A RP at 314. Timmins denied assaulting Ms. Kimberling. 2A RP at 308. Timmins has prior convictions for theft. 2A RP at 307.

Pre-trial and during the trial there was significant discussion of the admissibility of evidence that Timmins had been released from jail the same day as the alleged incident. 1A RP at 4-6, 2A RP at 247-55. In the end it was agreed the State could sanitize the evidence and show Timmins was confirmed to be in the area on the day of the incident. 2A RP at 253. During examination of the police officer, the prosecutor asked,

Okay, So I just—if I direct your attention to the top did he initially say he just went out of jail and went to visit friends?

2A RP at 325. Timmins objected and moved for a mistrial. 2A RP at 325-26. The court denied his motion and told the jury the State had meant to say that Timmins had been at court the morning of the incident. 2A RP 337. Further, the officer testified Timmins had been in court that morning. 2A RP at 337-38.

Timmins moved to exclude the victim's hospital records and objected to their admissibility and testimony regarding them. 1A RP at 9-10, 91. The State attempted to admit evidence of the victim's lab tests, however defense objected to their admission. 1A RP at 91. The prosecutor then asked Timmins on cross-examination why no methamphetamine was found in her system at the hospital if she had consumed methamphetamine the day prior as Timmins testified. 2A RP at 313.

During closing arguments, defense counsel attempted to argue the lab results of the victim's blood tests, which the State attempted to admit but defense prevented through objection, would have been harmful to the State as the State did not seek to admit them. 2B RP at 428-29. The State objected to this argument and the Court told defense to move on. 2B RP at 428-29.

The trial court instructed the jury on all alternative means of committing the crimes of theft, robbery and burglary. CP 44, 46, 48. The jury convicted Timmins of all charges. 2B RP at 450-51.

C. ARGUMENT

I. THE STATE CONCEDES INSTRUCTIONAL ERROR REQUIRES REVERSAL OF THE ROBBERY, THEFT AND BURGLARY CONVICTIONS

Timmins alleges that instructional error requires reversal of Count 1- Robbery, Count 2- Burglary and Count 3- Theft, because the trial court instructed on uncharged means of committing each crime. Timmins accurately reflects the record and the case law. The State concedes and agrees that the trial court improperly instructed the jury on uncharged means of committing each of the crimes. Such error potentially allowed the jury to convict for an uncharged mean of each crime. This error was not cured by any other instruction given to the jury. As such, this error requires reversal and remand for a new trial on these three counts.

It is an error for a trial court to instruct the jury on alternative means that are not contained in the information. *State v. Brewcznski*, 173 Wn. App. 541, 549, 294 P.3d 825 (2013) (citing *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942) and *State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003)). This error may be harmless if other

instructions clearly limit the crime to the charged means. *Id.* Here, the trial court instructed the jury on uncharged alternative means of Theft, Burglary and Robbery. No other instructions given to the jury clearly limited the crimes of the charged means.

The trial court instructed the jury on Robbery in the First degree, and instructed that the jury must find the defendant either was armed with a deadly weapon, displayed what appeared to be a firearm or deadly weapon, or inflicted bodily injury. CP 38. There was no evidence at trial that a deadly weapon or something appearing to be a deadly weapon was used. The State's information alleged Timmins committed this crime by inflicting bodily injury. CP 1.

The trial court instructed the jury on Burglary in the First Degree, and instructed that they could find that the defendant was armed with a deadly weapon or assaulted another person. CP 44. The State's information alleged Timmins committed this crime by assaulting another person. CP 1.

The trial court instructed the jury on Theft in the Second Degree, and instructed that they could find the defendant committed this crime either by wrongfully obtaining or exerting unauthorized control over property of another; obtained control over property of another by color or aid of deception, or appropriated lost or misdelivered property. CP 47. The

State's information only alleged Timmins committed this crime by wrongfully obtaining or exerting unauthorized control over an access device belonging to the victim. Theft, Robbery and Burglary are alternative means crimes. *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010); *State v. Roche*, 75 Wn. App. 500, 510, 878 P.2d 497 (1994); *Brewczynski*, 173 Wn. App. at 549. The trial court must only instruct on the charged means of committing each of these crimes. *Brewczynski*, 173 Wn. App. at 549. By instructing the jury on all alternative means possible, it allowed the jury to convict on an uncharged means. *Id.* These counts should be reversed and remanded for a new trial.

II. THE TRIAL COURT DID NOT VIOLATE TIMMINS' CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

Timmins argues that the trial court violated his right to present the defense that the State failed to produce certain evidence and therefore the jury could infer it was harmful to the State. The trial court did not err in this regard and Timmins' argument is meritless.

Timmins alleges that the "victim's lab test results were in the state's control." *See* Br. of Appellant, p. 19. Timmins further alleges that the State failed to elicit any testimony regarding her lab results and the missing evidence rule therefore permitted Timmins to argue that the evidence would have been harmful to the prosecution. *See* Br. of

Appellant, p. 19. Timmins fails to mention the State provided the same test results to defense prior to trial, and therefore Timmins had the same access to the results and witnesses as the State did. 1A RP at 9-10. Further, Timmins fails to mention the State did attempt to elicit evidence of the victim's lab test results, and in fact the State wanted this evidence admitted, but that Timmins objected to the admission of this evidence. 1A RP at 91. This fact pattern does not lend itself to the inference that the evidence was harmful to the State, but rather that the evidence would have been harmful to Timmins and that's the only reason he sought to keep this evidence out. To then argue to the contrary in closing argument is disingenuous and legally improper.

It is further worth noting that defense did not request an instruction on the missing witness rule. Further, even if defense had requested such an instruction, it would not have been given because the requirements for a missing witness instruction were not met by Timmins. This shows as well that Timmins' argument regarding missing evidence and the inference the jury should draw was improper and properly objected to.

First, the missing witness doctrine applies only if the witness is particularly under the control of one of the parties and not available to both. *State v. Montgomery*, 163 Wn.2d 577, 599, 183 P.3d 267 (2008). Timmins cannot show that the witness he believes should have been

present to testify to the lab results was only available to the State. In fact, defense attorneys likewise can subpoena witnesses and this witness worked at a local hospital. Certainly not someone uniquely known to or available to the State. Further, Timmins infers in his brief that the evidence could have been admitted through the nurse the State called to testify regarding the victim's treatment received at the hospital. *See* Br. of Appellant, p. 19. Timmins cross-examined this witness. If the lab results were truly harmful to the State, Timmins could have sought to elicit them through the nurse. Or simply, Timmins could not have objected when the State attempted to elicit the results from the nurse.

Timmins cannot meet the requirements of a missing witness or missing evidence doctrine. Timmins did not request a missing witness or evidence instruction. Timmins himself prevented this evidence from being admitted. Timmins' successful attempt to block this evidence from admission does not then give him the legal right to argue it would have been harmful to the State. This evidence was not "missing." There was no error in the trial court preventing defense from further arguing this misleading and disingenuous theory.

Further, any potential error did not impact the jury's verdict on count 4- Identity Theft. Even though the potential error here was of constitutional magnitude, some such errors may still be considered

harmless. *State v. Evans*, 96 Wn.2d 1, 4, 633 P.2d 83 (1981). For error of constitutional magnitude to be considered harmless, it must be harmless beyond a reasonable doubt. *Id.* (citing *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). When there is overwhelming evidence to support the jury's verdict, the error may be considered harmless beyond a reasonable doubt. *Id.*

Here, it is clear the potential error was harmless beyond a reasonable doubt as it relates to Count 4- Identity Theft. As the State has conceded instructional error requires reversal of counts 1, 2 and 3, the Court does not need to address whether this error affected the verdicts on those counts.

Timmins testified to facts sufficient to sustain a conviction for Identity Theft. He testified that he used the victim's debit card and PIN to obtain money from her account, with the intent to use the money for his own purposes. Clearly, these facts meet the statutory requirements that the defendant use the victim's financial information with the intent to commit a crime- and in fact, he didn't just intend to commit a crime, he completed the crime of theft in this instance. Further, in closing, Timmins conceded he committed the Identity Theft. In closing he stated,

Mr. Timmins admitted he took the card, admitted he developed the intent outside the house to—to use it when

he was at the Arco and saw how much money was there, and so he says that he used the card, that's not in dispute. That's—that part's—is fairly easy though you need to wonder why they're covering the same acts with two different charges. So there's that.

2B RP at 411. This alone shows that there was overwhelming evidence of Timmins' guilt on Count 4, not to mention the overwhelming evidence presented by the State regarding the Identity Theft count. Any possible error here was harmless beyond a reasonable doubt. The Court should deny Timmins' claim.

III. PROSECUTORIAL MISCONDUCT DID NOT AFFECT THE VERDICT ON COUNT 4-IDENTITY THEFT

Timmins argues prosecutorial misconduct affected the verdicts in his case. Timmins argues the prosecutor committed misconduct by encouraging the jury to rely on passion and prejudice rather than the fact, by testifying to facts not in evidence, and by violating a court's order in limine. Timmins cannot show any of these potential errors affected the verdict on Count 4. Timmins' claim fails.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in

the context of the entire record and the circumstances at trial.” *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a 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. *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 (1998).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court's instructions. *State v. Burton*, 165 Wn. App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a prosecutor to misstate the court's instruction on the law, to tell a jury to acquit you must find the State's witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to everyday decision-making. *Id.* (citing to *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). Contextual consideration of the prosecutor's statements is important. *Burton*, 165 Wn. App. at 885.

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63.

Timmins argues the prosecutor committed misconduct by improperly mentioning in direct examination that the defendant came from jail, by arguing in closing that the defendant was the kind of person to commit these crimes, and by asking Timmins about the victim's lab results on cross-examination. First, it is clear from the record the prosecutor's reference to the defendant having been in jail on the morning of the crimes was unintentional. 2A RP at 326-27. Further, the trial court advised the jury the prosecutor misspoke, and the prosecutor's witness testified subsequently that the defendant had been in court that morning. 2A RP at 337. Any possible prejudice this question caused was cured by the retraction of the statement and the indication to the jury and further testimony that the defendant had been in court, not jail. 2A RP at 337-38.

Timmins also argues the prosecutor committed misconduct by asking him a question on cross-examination that he "had no opportunity to

rebut....” *See* Br. of Appellant, p. 25. However, Timmins had total opportunity to rebut this question if he wanted to. He had access to the witnesses on the State’s witness list, and to the witnesses on his, as well as witnesses whose names were mentioned in any of the reports. Timmins had copies of the victim’s medical records and lab reports. The prosecutor had a good-faith basis for asking the question. Timmins had the ability to admit this evidence. Timmins prevented this evidence from having been admitted earlier. 1A RP at 91. Timmins had every opportunity to allow admission or to admit this evidence himself in his case in chief. Timmins chose not to. His argument now on appeal that he had no opportunity to rebut the prosecutor’s claim regarding the content of the lab results is incorrect. There was no prosecutorial misconduct for the prosecutor asking the question about Timmins’ claim regarding the victim’s methamphetamine use and the contrary result of the lab tests.

The prosecutor did argue inferences from the defendant’s testimony and inferred his intent in telling the jury he did not commit the crimes alleged. These statements taken in the entire context of the closing argument were not so improper as to have impacted the jury’s verdict. Timmins argues this argument was intended to rely on passion and prejudice and not the facts. However, it is clear from the entirety of the

prosecutor's closing argument that she relied on the facts of the case to request the jury convict. 2B RP at 290-408.

Even though the potential misconduct here was of constitutional magnitude, some such errors may still be considered harmless. *State v. Evans*, 96 Wn.2d 1, 4, 633 P.2d 83 (1981). For error of constitutional magnitude to be considered harmless, it must be harmless beyond a reasonable doubt. *Id* (citing *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). When there is overwhelming evidence to support the jury's verdict, the error may be considered harmless beyond a reasonable doubt. *Id*.

Here, it is clear the potential prosecutorial misconduct was harmless beyond a reasonable doubt as it relates to Count 4- Identity Theft. As the State has conceded instructional error requires reversal of counts 1, 2 and 3, the Court does not need to address whether prosecutorial misconduct affected the verdicts on those counts.

Timmins testified to facts sufficient to sustain a conviction for Identity Theft. He testified that he used the victim's debit card and PIN to obtain money from her account, with the intent to use the money for his own purposes. Clearly, these facts meet the statutory requirements that the defendant use the victim's financial information with the intent to commit a crime- and in fact, he didn't just intend to commit a crime, he completed

the crime of theft in this instance. Further, in closing, Timmins conceded he committed the Identity Theft. In closing he stated,

Mr. Timmins admitted he took the card, admitted he developed the intent outside the house to—to use it when he was at the Arco and saw how much money was there, and so he says that he used the card, that's not in dispute. That's—that part's—is fairly easy though you need to wonder why they're covering the same acts with two different charges. So there's that.

2B RP at 411. This alone is enough to find the prosecutorial misconduct was harmless beyond a reasonable doubt, not to mention the evidence presented in the State's case which showed Timmins using the victim's debit card at various locations, and her testimony he had no authority to do so.

Any potential prosecutorial misconduct was harmless beyond a reasonable doubt in relation to the Identity Theft conviction. As such, this Court should affirm Count 4.

IV. THE ISSUE OF SCORING ON ALL FOUR CONVICTIONS IS MOOT

Timmins argues the trial court erred in scoring all four convictions separately. However the State has conceded that instructional error requires reversal and retrial on 3 of the 4 counts. At this point, Timmins'

argument about improper scoring is moot and this Court should not consider it at this time.

D. CONCLUSION

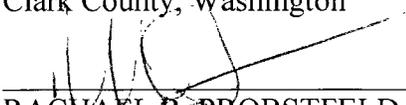
Timmins' convictions for Burglary, Robbery and Theft should be reversed and remanded for a new trial due to instructional error. The other errors Timmins alleges had no impact on Timmins' remaining conviction for Identity Theft as the evidence of that conviction was overwhelming. This case should be remanded for a new trial on counts 1, 2 and 3, and the conviction for count 4 should be affirmed.

DATED this 10th day of January, 2013.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:



RACHAEL R. PROBSTFELD
WSBA #37878
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

January 10, 2014 - 3:20 PM

Transmittal Letter

Document Uploaded: 445131-Respondent's Brief.pdf

Case Name: State v. David Timmins

Court of Appeals Case Number: 44513-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Connie A Utterback - Email: **connie.utterback@clark.wa.gov**

A copy of this document has been emailed to the following addresses:
backlundmistry@gmail.com