

68508-2

68508-2

NO. 68508-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ELIJAH MAYFIELD III,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRIS WASHINGTON

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Evidence that is irrelevant or whose probative value is significantly outweighed by its prejudicial effect is inadmissible. At trial, Mayfield argued an equitable defense to the charges, claiming that his co-defendant was more culpable yet faced a less serious sanction than he did. The trial court admitted limited testimony, relevant to the equities of the case, to the effect that economic crimes like Mayfield's have a substantial impact on victims. Mayfield did not object to the questions that elicited the testimony, did not argue that the evidence was more prejudicial than probative, and did not move to strike the testimony or have the jury instructed to disregard it. And, the evidence against Mayfield was overwhelming: in addition to testimony from his co-defendant implicating him in trafficking in stolen property, the crimes were captured on videotape, Mayfield twice confessed to committing the crimes, and he admitted during cross-examination that he was guilty. Did the court act within its discretion in admitting evidence of the impact of Mayfield's crimes? Did Mayfield waive any error in admitting the testimony by failing to take prompt action? Was the admission of such evidence harmless in light of the evidence adduced at trial?

2. A conviction should be reversed if a prosecutor's unobjected-to misconduct was so flagrant and ill-intentioned that any

resulting prejudice could not have been cured by a limiting instruction. Whether a prosecutor committed misconduct is judged by looking at the entire argument, the issues in the case, the evidence addressed in the argument, and the court's instructions to the jury. Here, the prosecutor elicited evidence and made arguments that addressed Mayfield's equitable defense that he was less culpable than his co-defendant. Mayfield did not object. The jury was instructed that it could not let emotion or prejudice play a role in its deliberations. Were the prosecutor's arguments proper in the context of the record as a whole? Does the overwhelming evidence – including Mayfield's own acknowledgement of his guilt while testifying – obviate any prejudice that could have ensued from the prosecutor's arguments?

3. A witness may not identify a defendant in a video available to the jury unless there is a reason to believe that the witness is more likely to correctly identify the defendant than the jury.

a. Blahato identified Mayfield in a video that was not available to the jury, because it had been destroyed; thus, Blahato had specialized knowledge that the jury did not, and the jury was unable to identify Mayfield without Blahato's testimony. Did the trial court properly exercise its discretion in admitting Blahato's testimony?

b. Blahato identified Mayfield in three clear videos that were available to the jury. Defense counsel did not object. Mayfield also identified himself as the shoplifter in the videos, and admitted to the conduct depicted therein. He told the jury that he was “pleading guilty” to those offenses. Was any error in admitting Blahato’s identification testimony waived and harmless?

5. Where numerous errors infect a trial to the detriment of the defendant’s right to a fair trial, a conviction may be overturned for cumulative error. Mayfield has failed to show any error. His guilt was not only proved by overwhelming evidence, but he conceded it on the stand. Should Mayfield’s claim that prejudicial error affected the outcome of the trial be rejected?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

On October 12, 2010, the State charged defendant Elijah Mayfield, III, and his co-defendant, Mark Thomas Ostheller, with multiple counts of Theft with Intent to Resell in the Second Degree, Trafficking in Stolen Property in the First Degree, and Trafficking in Stolen Property in the

Second Degree. CP 1-9. Ostheller pled guilty to ten counts of Trafficking in Stolen Property in the Second Degree. 2RP 208.<sup>1</sup>

After a lengthy delay occasioned by Mayfield failing to appear for court, the case proceeded to trial before the Honorable Chris Washington. CP 68; 2RP 254. At that time, the State amended the Information to four counts of Trafficking in Stolen Property in the First Degree, alleged to have occurred on March 7, March 12, March 27, and April 8, 2009, respectively. CP 20-22, 68. After a brief trial in which Mayfield took the stand and admitted to his guilt on three of the four counts, he was convicted as charged. 2RP 254-55; CP 53-56.

On March 15, 2012, Judge Washington sentenced Mayfield to 43 months in prison, the low end of the standard range. CP 57-65. This appeal timely followed. CP 67.

## **2. SUBSTANTIVE FACTS**

Starting in 2007, Safeway stores near Seattle were experiencing a high volume of theft of certain high-priced personal-care goods, such as electric toothbrushes and razors. 2RP 132, 148. To address the thefts, Safeway employees began marking the packages of certain high-theft items with ultraviolet pens, recording the store number, employee's

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<sup>1</sup> This brief follows Mayfield's convention for referring to the four volumes of the Verbatim Report of Proceedings: 1RP refers to November 30 and December 5, 2011 (a single volume); 2RP refers to the two consecutively paginated volumes encompassing February 22, 23, 28, and 29, 2012; 3RP refers to March 15, 2012 (a single volume).

initials, and date. 2RP 128-29, 132-35, 139-40, 158-59. The general merchandise managers also checked their stores and inventory daily to track whether and when property went missing. 2RP 132, 137-38, 159. During the course of the investigation, Mayfield was identified as a suspect. 2RP 148.

On March 8, 2009, Teri Pentin, the general merchandise manager for the Newcastle Safeway, discovered two Oral-B toothbrushes and two Sonicare replacement brushes missing from their place in the aisle. 2RP 128-30. After confirming that they had not been sold and were not in the stockroom, she concluded that the items had been stolen between 2:00 p.m. the previous day and 6:00 a.m. that day. 2RP 130.

Gene Blahato, Safeway's organized retail crime investigator, obtained and reviewed video from Safeway's surveillance cameras at its Newcastle location for March 7, 2009. 2RP 145, 148. On that video, he observed Mayfield enter the store, remove items from the shelf, conceal the items in his clothing, and leave the store without paying. 2RP 149-50. He made a digital copy of the video for the police and Safeway, but the discs malfunctioned and could no longer be viewed. 2RP 148-49.

Traci Li, the general merchandise manager for the Factoria Safeway, also was responsible for monitoring high-theft items in her department. 2RP 136-38. She discovered certain high-value items

missing on March 12, March 27, and April 8, 2009, and reported those thefts to Blahato. 2RP 138-39. Li and Blahato together watched video surveillance from those dates at the Factoria Safeway, and were able to observe an individual shoplifting. 2RP 139, 150-51. From watching the videos, they were also able to determine what was being stolen. 2RP 151.

The March 12, 2009, video showed Mayfield shoplifting three Sonicare replacement toothbrush heads, three boxes of Senokot (a laxative), and two boxes of Rogaine. 2RP 151-52, 155-56; Ex. 5. On March 27, 2009, Mayfield shoplifted three Sonicare replacement toothbrush heads and three Oral-B pulsating toothbrushes. 2RP 152, 157; Ex. 5. On April 8, 2009, Mayfield shoplifted two Oral-B pulsating toothbrushes. 2RP 152, 158; Ex. 5.

Mayfield sold the property he stole to Mark Ostheller, who would then resell the goods via eBay or otherwise. 2RP 204-05. Ostheller and Mayfield did business together for about three years, and starting in early 2009, all the property that Ostheller bought for resale he purchased from Mayfield. 2RP 205-09. Mayfield sold him toothbrushes and razors, and delivered the items in garbage bags; Ostheller paid Mayfield in cash. 2RP 206-06. Much of the property that Ostheller bought from Mayfield he later sold to David Pankratz. 2RP 210. Ostheller eventually pled guilty to ten counts of Trafficking in Stolen Property in the Second Degree as a

result of this scheme. 2RP 208. He testified against Mayfield at trial.

2RP 204.

Pankratz testified that he became suspicious of the property he was buying from Ostheller because the prices were way too low, so he contacted the FBI. 2RP 189-90. He began working with Blahato and Snohomish County Sheriff's Office Detective Collin Ainsworth. 2RP 175-76, 191. At their request, he took photographs of property he bought from Ostheller to document whether it was marked with an ultraviolet pen. 2RP 191. He provided some such photos to Ainsworth in March and April of 2009. Two of those photos showed toothbrushes marked as having come from the Newcastle Safeway; a third showed an item marked by Li on March 24, 2009, as a product from the Factoria Safeway. Ex. 6, 7, 9; 2RP 158-60.

As a result of this investigation, Bellevue Police Department Detective James Lindquist and King County Sheriff's Office Detective Jeff Johnson met with Mayfield at the Issaquah Jail on May 11, 2009, and took a recorded statement from him. 2RP 169-74; Ex. 2.<sup>2</sup> Mayfield told the detectives that he stole from the Factoria Safeway two or three times, including on March 12, March 27, and April 8, 2009. Ex. 2. He said he stole things like Oral-B toothbrushes and Sonicare replacement heads; he

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<sup>2</sup> No transcript of the recorded interview was marked for evidence. For the Court's convenience, a transcript of the interview contained in Exhibit 2 is attached to this brief.

denied ever stealing Rogaine. Ex. 2. Mayfield did not mention his arrangement with Ostheller in this interview; instead, he said he would go to the Renton-Skyway area and sell the items for cash and drugs. Ex. 2. When asked about the Newcastle Safeway theft on March 7, 2009, Mayfield said he recalled going there on that date, and confirmed that he stole Oral-B toothbrushes and replacement heads. Ex. 2. He also admitted that he sold those items for cash or drugs as well. Ex 2.

Later, Detective Ainsworth also interviewed Mayfield; Detective Lindquist accompanied him during that interview. 2RP 179-80. Mayfield told Detectives Ainsworth and Lindquist that he stole toothbrushes, toothbrush heads, razors, and other products to sell to Ostheller. 2RP 183. His relationship with Ostheller lasted for three years, and he sold only to Ostheller during that entire period of time. 2RP 182-84.

Mayfield testified at trial. 2RP 250. During direct examination, he acknowledged being familiar with the Factoria Safeway and another Safeway, but wasn't sure if the second Safeway was the one in Newcastle. 2RP 251. He also denied ever stealing Rogaine. 2RP 252.

On cross-examination, Mayfield acknowledged six prior misdemeanor theft convictions, and three other convictions for Attempted Theft in the Second Degree, Theft of Rental Property, and Robbery in the Second Degree. 2RP 253. He also admitted having absented himself from

court for eight months during the course of the proceedings. 2RP 254. Most significantly, Mayfield confessed to shoplifting at the Factoria Safeway on each of the three relevant dates, and admitted that he was the one pictured in the videos admitted into evidence. 2RP 254-55. In fact, he told the prosecutor that he was “pleading guilty” to the three counts involving the Factoria store. 2RP 255.

Redirect examination did not improve things for Mayfield. Although he indicated he could not remember on which date he took which items from which Safeway, he acknowledged that he stole from two Safeways. 2RP 256-57. He also said, “I have a guilty conscience. I confessed to it. They took it on video. I confessed to everything.” 2RP 257. He never claimed that he was coerced, that he was confused, or that he misspoke about what had occurred.

The defense strategy at trial was to focus on an equitable argument: Ostheller was the more culpable party, so Mayfield should be treated more leniently than Ostheller had been. To that end, the defense attempted to paint Ostheller as the main culprit, and Mayfield as just a petty shoplifter. 2RP 184-85. For instance, during defense counsel’s cross-examination of Detective Ainsworth, the following exchange occurred:

Q. Fairly lucrative to Mr. Ostheller, isn't it [the trafficking]?

A. I believe so.

Q. Not so lucrative to Mr. Mayfield?

A. Not as lucrative, no.

2RP 185.

Along the same lines, counsel tried repeatedly to get Ostheller's low sentence – not just his convictions – before the jury, in order to argue that Mayfield should not be punished as harshly. 2RP 100-08, 223-36. When that was unsuccessful, counsel pointed out to the jury in closing argument that even though he was “the brains behind the operation,” Ostheller was out of custody, implying that he was not being punished for his conduct. 2RP 276. The defense also sought to have the jury instructed on the lesser included offense of Trafficking in Stolen Property in the Second Degree, despite the lack of factual basis, because that was what Ostheller was allowed to plead guilty to.<sup>3</sup> 2RP 226-37. When the court declined to give such an instruction, counsel nonetheless argued to the jury that it was unfair that Mayfield, at the low end of the food chain, should be held to a higher standard of knowledge than Ostheller. 2RP 276, 280.

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<sup>3</sup> Trafficking in Stolen Property in the Second Degree is committed when a person transfers, or possesses with the intent to transfer, stolen property to another person, and acts recklessly with respect to whether the property is stolen. RCW 9A.82.010(19), 9A.82.055. Trafficking in Stolen Property in the First Degree, on the other hand, is committed when a person transfers, or possesses with the intent to transfer, stolen property to another person, and acts with knowledge that the property was stolen. RCW 9A.82.010(19), .050. Because Mayfield stole the property himself, he knew the property was stolen.

C. **ARGUMENT**

1. **MAYFIELD'S CONVICTIONS SHOULD BE AFFIRMED BECAUSE HE FAILED TO TIMELY AND SPECIFICALLY OBJECT TO THE ADMISSION OF EVIDENCE, HE DID NOT MOVE TO STRIKE IT, AND ITS ADMISSION, IF ERROR, WAS HARMLESS.**

Mayfield challenges the admission into evidence of testimony regarding the costs of shoplifting to Safeway, the consumer, and the general public. He argues that such evidence was irrelevant and more prejudicial than probative. However, defense counsel did not object to the bulk of the testimony. The challenges that were made were late and non-specific. Moreover, counsel did not ask for the testimony to be stricken, did not request that the jury be instructed to disregard the testimony, and did not seek any other remedy. Finally, in the context of the entire trial – in which the evidence was overwhelming and Mayfield explicitly acknowledged his guilt – any error was harmless. Mayfield's convictions should be affirmed.

A trial court's decision to admit or exclude evidence is given considerable deference, so its evidentiary rulings are reviewed for abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). In order to reverse a lower court's ruling, the challenging party must show that the trial court's decision was manifestly unreasonable, or exercised on

untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Irrelevant evidence is not admissible. ER 402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401.

Mayfield was charged with four counts of Trafficking in Stolen Property in the First Degree. CP 20-22. The pertinent elements of Trafficking are that Mayfield knowingly possessed stolen property with the intent to transfer that property to another person. RCW 9A.82.010(19), .050; CP 20-22, 43-50.

At trial, the prosecutor asked Blahato, “What impact has professional shoplifting had on Safeway stores?” 2RP 161. The defense made no objection to this question. Blahato provided a lengthy answer, saying that shoplifting raises concerns about product quality. In explaining what he meant, Blahato stated, “If the item got stolen . . . where has it been? . . . Maybe it’s been in a garage, in a basement area, in a storage area. Has it had rats walking all over it?” 2RP 161. Defense still did not object. Blahato continued his answer to the same question, noting that shoplifting affected Safeway’s revenues. Not until Blahato mentioned the impact on Safeway’s employees did the defense object, citing

relevance. 2RP 161. Rather than ruling on the objection, the court asked the prosecutor what the relevance was. 2RP 161. The prosecutor said he would ask a more specific question. 2RP 161. Defense counsel did not elaborate on his objection, move to strike, ask that the jury be instructed to disregard the testimony, ask for a sidebar, or take any other action.

The prosecutor then asked a different question, “What is the dollar loss to Safeway here?” 2RP 161. Blahato answered, “Millions.” After that answer, defense objected but did not state the basis for the objection. 2RP 161. The objection was overruled. 2RP 162. Defense counsel did not offer further argument, seek a sidebar to explain, or raise his concerns about the testimony at any other time.

The prosecutor then asked Blahato, “And who pays for that in the long run?” 2RP 162. Again there was no objection. Blahato answered, “We do. When you walk in the store, there is a –” 2RP 162. Defense finally objected, again without stating the basis for the objection. 2RP 162. This objection was sustained. 2RP 162. Defense counsel did not move to strike the testimony, ask that the jury be instructed to disregard it, or take any other action.

Mayfield is correct that Blahato’s testimony regarding the impact of professional shoplifting on Safeway, its employees, and its customers would typically be irrelevant to any fact of consequence to the

determination of whether he committed four counts of Trafficking in Stolen Property in the First Degree. However, where the defense strategy is an equitable one, the State should be allowed to develop some evidence to demonstrate the significance of the defendant's crimes. Here, Mayfield pointed the finger at Ostheller, implied that the main culprit was being barely punished, and argued that Mayfield should get no more than what Ostheller got – in other words, he tried to minimize his conduct by comparing it to Ostheller's. In that context, the trial court did not abuse its discretion in admitting some general evidence that shoplifting crimes have a significant impact on their victims.

Even if this evidence was irrelevant, defense counsel failed to object in a timely and specific manner, as detailed above. Evidence Rule 103 requires that counsel make a timely objection or motion to strike, and that the specific ground of the objection be identified, if it is not apparent from context. ER 103(a)(1). Here, not a single question was objected to; the objections were raised only after Blahato answered, even though the expected nature of his answer (although perhaps not all of the specifics) was foreseeable from the question. As such, the admission of that evidence – even if erroneous – is not reviewable on appeal. See, e.g., State v. Gallo, 20 Wn. App. 717, 728, 582 P.2d 558 (1978) (“An objection which comes after the witness has answered is not timely unless there was

no opportunity to object or it was not apparent from the question that the answer would be inadmissible.” (citation omitted)). Similarly, the admission of the testimony is unreviewable because counsel failed to move to strike or take any other action. Id. (“[W]ere we to consider the objection to have been timely, the issue would still not be considered on this appeal since the objection was not accompanied by a motion to strike.” (citation omitted)).

Evidence Rule 103 does provide an exception for appealability if “a substantial right of the party is affected.” By reframing the complained-of testimony as “inflammatory,” “unfairly prejudicial,” and “improper victim impact testimony,” Mayfield implicitly argues that his substantial rights were affected.<sup>4</sup> Brief of Appellant at 13-17. Mayfield correctly cites Evidence Rule 403 as prohibiting the admission of evidence when “its probative value is substantially outweighed by the danger of

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<sup>4</sup> Mayfield devotes an entire subsection of his brief to “improper victim impact testimony.” Brief of Appellant at 15-17. The analysis of the admissibility of victim impact testimony is indistinguishable from the analysis of testimony that is irrelevant pursuant to ER 402 or unduly prejudicial pursuant to ER 403. Accordingly, the State will not address this argument separately, beyond agreeing that such evidence may often be inadmissible. However, to the extent that Mayfield’s argument can be read to suggest that victim impact testimony is always inadmissible, this Court should reject it. There are occasions where such testimony could be both relevant and more probative than prejudicial. For instance, in sexual assault cases, some limited evidence of victim impact may shed light on the victim’s credibility. It is for this reason that “hue and cry” evidence, sometimes called fact-of-complaint evidence, is admitted in cases of rape. E.g., State v. Fleming, 27 Wn. App. 952, 957, 621 P.2d 779 (1980). Indeed, many excited utterances could be characterized as victim impact testimony. There is no need to create a new rule for victim impact testimony beyond the application of the general rules of evidence, and rules 402 and 403 in particular.

unfair prejudice.” But Mayfield did not object to Blahato’s testimony on the basis of Evidence Rule 403; he objected, if at all, on the basis of relevance. 2RP 161-62. “A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial.” State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

Moreover, the evidence was not particularly inflammatory. This was a case about theft from a big box store, not a topic likely to evoke an emotional response, unlike the cases cited by Mayfield. And, the testimony did not tell the jury anything it did not already know, as Mayfield himself concedes. Brief of Appellant at 17 (acknowledging that the fact that consumers bear the costs of shoplifting was “likely already part of the jury’s common understanding”). It was not error to admit it.

Finally, if this Court accepts Mayfield’s argument that some evidence was erroneously admitted, and finds that the error was adequately preserved for appeal (or that Mayfield’s substantial rights were affected), this Court “must determine . . . within reasonable probabilities, if the outcome of the trial would have been different if the error had not occurred.” State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984) (outlining the test for harmless error when the evidentiary errors are not of constitutional magnitude). If this Court further accepts Mayfield’s claim that the testimony was so inflammatory that it implicated his constitutional

right to a fair trial, then this Court instead employs the constitutional harmless error test to determine whether reversal is required.

“A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” Guloy, 104 Wn.2d at 425.

Under either test, any error was harmless.

As detailed in section B.2, supra, Mayfield was videotaped shoplifting high-value and commonly stolen items from Safeway on four occasions. The stolen items were mostly expensive toothbrushes that Mayfield clearly didn't need; he must have intended to sell them. Ostheller testified that he bought the property from Mayfield and sold it to Pankratz, and Pankratz provided photographs of some of the stolen merchandise with its distinctive markings. The photographs identified the property as having come from the Factoria and Newcastle Safeways around the same dates that Mayfield committed the thefts. Mayfield himself confessed to the police twice that he had committed the thefts and had done so for the purpose of trafficking. And, he acknowledged his guilt in open court in full view of the jury during cross-examination. The evidence against him was simply overwhelming. Any error was harmless.

**2. MAYFIELD'S CONVICTIONS SHOULD BE AFFIRMED BECAUSE THE PROSECUTOR DID NOT COMMIT MISCONDUCT, NOR WERE THE PROSECUTOR'S ARGUMENTS FLAGRANT, ILL-INTENTIONED, AND THE CAUSE OF ENDURING PREJUDICE.**

Mayfield argues that his convictions should be reversed because of prosecutorial misconduct both in offering evidence and in argument. But the evidence that the prosecutor elicited rebutted evidence introduced by Mayfield and was neither objected to below nor complained of on appeal. The prosecutor's arguments, which Mayfield also did not object to during trial, discussed the evidence and addressed Mayfield's equitable defense. The court also instructed the jury that the parties' arguments are not evidence, and that it must decide the case on the evidence, not on emotion or prejudice. The prosecutor's arguments were not misconduct, and if they were, they were not so flagrant and ill-intentioned that Mayfield – who admitted his guilt on the stand – was prejudiced.

A conviction should be reversed when a defendant demonstrates both prosecutorial misconduct and resulting prejudice. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). To determine whether a prosecutor's argument was improper, a reviewing court must examine the entire argument, the issues in the case, the evidence addressed in the argument, and the court's instructions to the jury. Russell, 125 Wn.2d at

85-86; State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

A defendant is prejudiced if a substantial likelihood exists that the misconduct affected the jury's verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); State v. Neslund, 50 Wn. App. 531, 561-62, 749 P.2d 725 (1988). The defendant bears the burden of demonstrating both that the argument was improper and that he was prejudiced. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).

Even if a defendant was prejudiced by prosecutorial misconduct, however, defense counsel's failure to object constitutes waiver. Russell, 125 Wn.2d at 86. In the absence of an objection, a conviction will not be reversed for prosecutorial misconduct unless the misconduct was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been obviated by a curative instruction or other action. Stenson, 132 Wn.2d at 719; Belgarde, 110 Wn.2d at 507; Russell, 125 Wn.2d at 86. Counsel for the defendant may not remain silent, hoping for a favorable verdict, and then claim misconduct for the first time on appeal. Russell, 125 Wn.2d at 93.

Mayfield argues that the prosecutor committed misconduct by eliciting improper evidence regarding the impact on Safeway and consumers of shoplifting, and arguing to the jury in closing about those

costs, the profit enjoyed by Mayfield, and that the jury had a right to be angered by Mayfield's actions.

First, with respect to testimony that Mayfield earned \$100,000 from Ostheller in 2008, the prosecutor did elicit testimony to that effect. 2RP 210. However, defense counsel made no objection either to the specific question that elicited the testimony or to the line of questioning that led up to it. 2RP 206-10. As discussed above, a failure to object constitutes waiver. ER 103; Gallo, 20 Wn. App. at 728.

Moreover, Mayfield did not assign error to the admission of that testimony on appeal, nor argue that it was erroneously admitted. Brief of Appellant at 1. Where an appellant fails to assign error or present argument in support of the assignment of error, this Court will not consider the issue. Ang v. Martin, 154 Wn.2d 477, 487, 114 P.3d 637 (2005); RAP 10.3(g). If there was no error in admitting the evidence, it is unclear how it could be misconduct for the prosecutor to elicit it.

Additionally, the testimony about the amount of money Mayfield made from Ostheller was plainly invited by defense questioning. Evidence or argument is not a basis for reversal, even if otherwise improper, if it is invited, provoked, or occasioned by defense counsel. E.g., State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967); State v. King, 58 Wn.2d 77, 78, 360 P.2d 757 (1961) (“[S]ince the appellants

injected the issue into the case, they cannot be heard to complain if the respondent explored it further.”).

As discussed in section B.2, supra, Mayfield’s defense at trial was an equitable one: Ostheller – the more culpable party (from Mayfield’s perspective) – got away with a 60-day sentence, so it’s not fair for Mayfield to get more. In developing that theme, defense counsel used his entire cross-examination of Detective Ainsworth to depict Ostheller as the primary organizer of the trafficking operation, and to show that Mayfield was but a minor player. 2RP 184-85. During that questioning, defense counsel asked Ainsworth, “Fairly lucrative to Mr. Ostheller, isn’t it?” He replied, “I believe so.” Counsel followed up, “Not so lucrative to Mr. Mayfield?” Ainsworth replied, “Not as lucrative, no.” 2RP 185. These questions invited – opened the door to – the later testimony from Ostheller that Mayfield made \$100,000 in a single year in their dealings together. It was not misconduct for the prosecutor to elicit that testimony.

Second, Mayfield argues that the prosecutor committed misconduct in closing argument by commenting about the amount of money that Mayfield earned, by suggesting that the jury had a right to be angry about Mayfield’s conduct, and by discussing the impact of the crimes on Safeway and other stores. As with the testimony about the amount of money Mayfield earned, argument based on that testimony was

responsive to the picture that defense painted of Ostheller as the primary culprit. It was not misconduct.

Similarly, the prosecutor's comment that the jury had a right to be angry at Mayfield was prompted by the general defense strategy of laying the blame at the feet of Ostheller. The statement was made as part of a larger discussion focused on Ostheller. 2RP 271-72. The prosecutor began by talking about Ostheller, and arguing that he either knew or should have known that the property he was receiving from Mayfield was stolen. 2RP 271. In discussing Ostheller's credibility and relative culpability, the prosecutor agreed with defense counsel's intimation that the jury could rightfully be angry with Ostheller for making \$300,000 in one year selling stolen goods. 2RP 271. The prosecutor used the same phrasing to compare Mayfield's culpability to Ostheller's: "You have a right to be angry, that someone like Elijah Mayfield makes a hundred thousand cash by going in and stealing things like toothbrushes, and laxatives, and hair supplies." 2RP 271. The prosecutor then concluded his argument by suggesting that both Ostheller and Mayfield deserved to be held accountable for their actions, and that Ostheller could not have done what he did without the cooperation of Mayfield. 2RP 271-72.

In isolation, the single sentence that Mayfield focuses on, that the jury had "a right to be angry" with him, seems to improperly ask the jury

to inject emotion into the case. In context, however, it was a comparison of Ostheller and Mayfield in response to defense counsel's overarching strategy of blaming Ostheller, and it was an argument that they were both culpable. Further, the jury was instructed that counsel's comments were argument, not evidence, and that it should allow neither emotion nor prejudice to influence its verdict. CP 26-27. It is presumed that the jury follows the instructions of the court. State v. Costello, 59 Wn.2d 325, 332, 367 P.2d 816 (1962). Taken in the context of the arguments and issues in the case, this comment was not misconduct.

Likewise, the prosecutor's argument to the jury about the impact of shoplifting in general was relevant to the equitable defense raised by Mayfield, just as this evidence was admissible for the same purpose, as discussed in section C.1, supra. Defense counsel himself addressed the prosecutor's argument on this topic by reminding the jury to focus on the instructions, not the impact of theft on retailers generally. 2RP 272. And again, jurors are presumed to follow their instructions that arguments are not evidence, and that they must decide the case on the evidence, not on emotion or prejudice. Considering the issues in the case, the entire argument, and the instructions to the jury, this argument was not misconduct. Russell, 125 Wn.2d at 85-86.

Nonetheless, if any of these statements constituted misconduct, Mayfield was not prejudiced thereby. As noted above, prejudice occurs when there is a substantial likelihood that the misconduct affected the verdict. Belgarde, 110 Wn.2d at 508. Here, Mayfield testified that he was guilty of three of the four counts. 2RP 254-55. And, as discussed in sections B.2 and C.1, supra, the evidence against him was simply overwhelming.

Finally, Mayfield did not object to a single argument that is now the subject of this appeal. In the absence of an objection, a conviction should be reversed only when the misconduct was so flagrant and ill-intentioned that it creates an enduring prejudice that could not have been cured by a jury instruction or other action. Stenson, 132 Wn.2d at 719. Here, there is no evidence that the improper argument was flagrant and ill-intentioned. As Mayfield admits, most of the argument merely reminded the jury of facts that are common knowledge – the costs of shoplifting are borne by us all. Brief of Appellant at 17. Moreover, there is no reason to believe that an instruction could not have cured any prejudice; indeed, it likely would have alerted the prosecutor to any impropriety in his arguments, and curtailed them. And again, in a case where the evidence is so overwhelming that Mayfield himself

acknowledged his guilt on the witness stand, it is hard to imagine that the verdict would have been any different in any event.

**3. BLAHATO'S TESTIMONY IDENTIFYING MAYFIELD AS THE SHOPLIFTER IN THE FOUR VIDEOS DID NOT INVADE THE PROVINCE OF THE JURY.**

Mayfield complains that the trial court erred in admitting lay testimony of a witness who identified him in surveillance video, despite the witness's lack of any specialized knowledge of Mayfield. However, because one video was unavailable, the jury was incapable of evaluating that video for itself; it had to rely on the testimony of the only witness who had seen it. As to the other videos, Mayfield failed to object at the time of Blahato's testimony identifying him as the shoplifter depicted therein, thereby waiving the issue on appeal. Additionally, any error in admitting the testimony was harmless. The video was clear enough that anyone could identify Mayfield as the person depicted therein, and Mayfield acknowledged on the stand that he was the person in those videos. Mayfield's complaints are without merit.

As discussed above, a court's evidentiary rulings are reviewed for abuse of discretion. State v. George, 150 Wn. App. 110, 117, 206 P.3d 697 (2009). A court abuses its discretion when its decision is manifestly unreasonable, or is based on untenable grounds or reasons. Id.

Under ordinary circumstances, a witness may not identify a defendant in a video or photograph available to the jury unless there is a reason to believe that the witness is more likely to correctly identify the defendant than the jury. State v. Hardy, 76 Wn. App. 188, 190, 884 P.2d 8 (1994), aff'd and remanded sub nom. State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996). Such an identification is lay opinion, which may only be admitted if it is rationally based on the perception of the witness and is helpful to a clear understanding of the witness's testimony or a fact in issue. George, 150 Wn. App. at 117; Hardy, 76 Wn. App. at 190.

Here, Blahato testified that he watched Mayfield shoplift on four instances on four different dates in four separate videos. 2RP 147-58. One of the videos, of a shoplift at the Newcastle Safeway, was not offered into evidence because it had been corrupted and was no longer playable. 2RP 148-49; see also 2RP 35-40, 44-45. The other three, all at the Factoria Safeway, were admitted and played for the jury. 2RP 151-58. Blahato had not met Mayfield in person until the Criminal Rule 3.5 hearing, but had seen photographs of him provided by law enforcement. 2RP 164, 167.

First, the court did not abuse its discretion in admitting Blahato's testimony identifying Mayfield as the person he saw in the Newcastle Safeway video. Because Blahato testified that he had seen photographs of

Mayfield, watched the Newcastle video, and watched the three Factoria videos, his testimony was rationally based on his perceptions. And, because the video was not available to the jury, Blahato's testimony was helpful to the determination of a fact in issue: whether Mayfield had shoplifted from the Newcastle Safeway on March 7, 2009. Accordingly, there was "some basis for concluding that [Blahato was] more likely to correctly identify the defendant" in the video than was the jury. George, 150 Wn. App. at 118 (quoting Hardy, 76 Wn. App. at 190-91). Indeed, as the jury could not view that video at all, Blahato provided the only evidence available on the issue.

Moreover, the admission of this evidence did not invade the province of the jury. Testimony invades the province of the jury when it draws conclusions that the jury is equally capable of drawing on its own, such as opinion testimony about a defendant's credibility or guilt. See, e.g., George, 150 Wn. App. at 117 ("A witness may not offer opinion testimony by a direct statement or by inference regarding the defendant's guilt, but testimony is not objectionable simply because it embraces an ultimate issue the trier of fact must decide."); State v. Hager, 171 Wn.2d 151, 163, 248 P.3d 512 (2011) ("Impermissible opinion testimony regarding the defendant's guilt or veracity invades the province of the jury and violates the defendant's constitutional right to a jury trial.").

However, when a witness has special knowledge that the jury does not, testimony based on that special knowledge does not impinge on the jury's function. State v. Jamison, 93 Wn.2d 794, 800, 613 P.2d 776 (1980).

Here, Blahato did have special knowledge that the jury did not: he alone had seen evidence of Mayfield shoplifting at the Newcastle Safeway. The jury was incapable of making a judgment about the identity of the shoplifter on its own. The situation is indistinguishable from Blahato watching Mayfield shoplift via closed circuit television without recording, then identifying Mayfield in open court as the person he had seen. There is no question that such testimony would have been admissible. The mere fact that a recording once existed, but no longer does, should not alter the analysis of the admissibility of Blahato's testimony. It did not invade the province of the jury.

Even if the trial court abused its discretion in admitting Blahato's testimony about the missing Newcastle video, any such error was harmless. Evidentiary error is reversible only if "within reasonable possibilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Brockob, 159 Wn.2d 311, 351, 150 P.3d 59 (2006) (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). The evidence at trial showed that toothbrushes were stolen from the Newcastle Safeway on either March 7 or 8, 2009. 2RP 128-30.

A few days later, that same property – uniquely marked with a UV pen – was acquired by Pankratz from Ostheller. Ex. 6, 7; 2RP 158-60, 192. Ostheller testified that, at that time, he bought all the property that he sold to Pankratz from Mayfield. 2RP 205-09. And, Mayfield confessed to stealing the property. Ex. 2. Although at trial he was somewhat more circumspect, Mayfield never denied stealing the relevant property, but only expressed doubt that the other Safeway he stole from was the one in Newcastle. 2RP 250-51, 54-56.

Second, with respect to Blahato’s testimony identifying Mayfield in the three Factoria videos, Mayfield failed to object to the admission of that evidence. In general, the failure to object to the admission of evidence constitutes waiver, and the issue cannot be raised for the first time on appeal. State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011); State v. Silvers, 70 Wn.2d 430, 432, 423 P.2d 539 (1967). The only exception to this rule is where the party can show a manifest error affecting a constitutional right. Robinson, 171 Wn.2d at 304.

Again, the admission of such testimony, if error, was harmless. The video itself was exceptionally clear. Ex. 5.<sup>5</sup> And, Mayfield

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<sup>5</sup> There are many clear views of Mayfield’s face, body, and movement throughout the three videos in evidence, all contained in Exhibit 5. For examples of clear views of Mayfield’s face, see the March 12, 2009, video at 12:02:52 (lower left screen), the March 27, 2009, video at 10:20:31 (lower left screen), and the April 8, 2009, video at 10:32:49 (upper right screen).

acknowledged to the jury quite explicitly that he was the one depicted on all three of those videos. 2RP 254 (“Q. Now, you saw the videotape played in the courtroom from the Factoria Safeway. A. Yes. I’m not here to deny it either. Q. You admit those three thefts? A. Yes, sir.”); 2RP 255 (“I am not here to – I am pleading guilty, actually. I am pleading my guilt.”). The outcome of the trial with respect to the three Factoria Safeway counts would have been identical if Blahato’s testimony had been objected to and excluded.

**4. CUMULATIVE ERROR DID NOT DEPRIVE MAYFIELD OF A FAIR TRIAL.**

Mayfield finally contends that cumulative error deprived him of a fair trial. But, as discussed above, the evidence Mayfield complains of was properly admitted, and the prosecutor did not commit misconduct. Moreover, the evidence against him was so overwhelming that no other outcome but guilty verdicts was even remotely likely. Mayfield’s convictions should be affirmed.

Under the cumulative error doctrine, this Court may overturn a conviction where the combined effect of errors, each harmless in its own right, worked to deny the defendant a fair trial. State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813, rev. denied, 170 Wn.2d 1003 (2010).

“The doctrine does not apply where the errors are few and have little or no effect on the trial’s outcome.” Id.

Here, as argued above, there was no error. Even if there was, any error was insignificant in comparison to the evidence, which led to but one conclusion. Indeed, the evidence was so clear that Mayfield did not directly challenge any of it, but rather grounded his defense on an equitable argument.

Mayfield’s claim that “[t]he jury would have to acquit if it believed Mayfield’s testimony that his answers during in-custody police interrogation were merely the result of confusion and that he was guilty only of theft” is disingenuous at best. Brief of Appellant at 26. During his direct testimony, Mayfield claimed only that he did not remember the exact dates on which he stole which goods from which Safeway, and that he did not think that he went to the Newcastle Safeway. 2RP 250-52. He did not deny stealing any of the goods or selling them to Ostheller. 2RP 250-52. And on cross-examination, Mayfield acknowledged his conduct in stark terms: “I am pleading guilty, actually. I am pleading my guilt.” 2RP 255. The evidence was so overwhelming that it is hard to imagine the circumstances under which a jury would have returned any other verdict but guilty.

**D. CONCLUSION**

For all of the foregoing reasons, Mayfield's convictions for four counts of Trafficking in Stolen Property in the First Degree should be affirmed.

DATED this 10<sup>th</sup> day of November, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: 

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Senior Deputy Prosecuting Attorney  
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L = Detective Jim LINDQUIST

M = Elijah MAYFIELD

J = Detective Jeff JOHNSON (King County)

L: This is Detective Jim LINDQUIST, Bellevue Police Department, here with Detective Jeff JOHNSON. [There's some noise in the background.] (That's just an Issaquah jailer there...) And I'm here with Elijah MAYFIELD.

Elijah, would you state your complete name and date of birth.

M: Elijah MAYFIELD, date of birth 9/22/65.

L: Okay. It's 5/11/09 at—(what time is it) 1146

J: 1146.

L: 1146. Okay, I'm gonna go ahead and read these rights so we have them on the tape. And you know I'm taping this statement, is that correct, Elijah?

M: Yes, sir.

L: Okay. Before questioning and making any statement, I, Elijah MAYFIELD, have been advised by Detective LINDQUIST of the following: You have the right to remain silent. Any statement you make can be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided to you, without cost to you, if you so desire. You have the right to have an attorney present during questioning. You may exercise any of the above rights at any time before or during questioning and making any statement. I have read or have read to me the above explanation of my Constitutional Rights. I understand them. Do you understand those rights, Elijah?

M: Yes, sir.

L: And I read these to you earlier at 1042, and you actually have signed your name there, is that correct?

M: Yes.

L: Okay. Also, the waiver here, it says: I, Elijah MAYFIELD, have read or have read to me the above statement of my Constitutional Rights. I fully understand what they are and wish to waive them. This statement is freely and voluntarily given and no promises or threats have been made to me about waiving these rights. And then, you also signed there, is that correct?

M: Yes, sir.

L: Okay. I want to ask these questions about the thefts that occurred down in the Safeway in Factoria. And do you remember ever going down to the Safeway in Factoria and taking

anything from that store without paying for it? Remember stealing from that store? You have to answer yes or no because the tape doesn't...

M: Yes.

L: Okay. And how many times do you think you stole from the Safeway in Factoria in the last six months?

M: Uh, just a couple times, two or three times.

L: Two or three times? And when you go in there, how do you get to the store? Tell me how you get there.

M: I drive.

L: And what do you drive?

M: What kind of car?

L: Yeah.

M: A Saab.

L: What year is your Saab?

M: '96.

L: And that's registered to you?

M: Yes, sir.

L: Okay. And so, when you go to the store, you go in there for a specific reason, you go in there to steal some items off the shelves, is that correct?

M: Yes, sir.

L: Okay. And so, I'm gonna refer to, there's a date of March the 12<sup>th</sup>. And do you happen to remember like near the beginning of March, going into the store at Factoria Safeway and taking some items from there?

M: Yes, sir.

L: Okay. And so, did you drive your Saab there that day?

M: Yes, sir.

L: Okay. Anybody else with you in the Saab?

M: No.

L: So, when you went into the Safeway, what were you looking for that day?

M: The Sonicare, I mean Oral B...

L: Sonicare or Oral B or...

M: Oral B's.

L: And when you say that, is that like the whole toothbrush unit or just replacement heads or what are you getting?

M: Toothbrush and replacement heads.

L: Toothbrush and replacement heads? Yes.

L: And how do you get those? I mean do you just hold them in your hand, walk out the store or do you just hide them somewhere, conceal them somewhere?

M: I got them in my pants.

L: Put them in your pants. And like in the front of your pants or down the pant leg or...

M: Down the pants leg.

L: How do you keep them from falling out of your pant leg?

M: Well, it'd be tied at the hem... pants legs so they don't fall off.

L: So, you pre-tie that before you go in the store...

M: They just don't fall out...

L: Okay. So, when you go to the store, you actually know you're gonna be taking some stuff, and you pre-tie the legs, so when you walk in, you just slide it down your leg and it doesn't fall out?

M: Yes.

L: Okay. So, remember taking anything else besides Oral B or Sonicare toothbrush and toothbrush heads, sir?

M: No, sir.

L: Take any other items off the shelf, any other make-up or any other things?

M: No.

L: Okay. On this date here, there's some laxatives and two boxes of Rogaine that were stolen on that day. Do you remember taking those?

M: I did not take that.

L: You feel pretty confident you didn't take it?

M: Yes, sir. Not Rogaine.

L: Okay. You are in the video. It shows you go into several different locations along the aisle, so you took more than just the toothbrushes. Do you know what else you took on that day?

M: It was probably the toothbrush replacement head, that's it.

L: Those are together, right? Aren't those together on the shelf?

M: The... yeah...

L: Yeah.

M: Yeah.

L: But then, you crossed over the aisle. You take some other stuff off the shelf. Remember taking some other stuff?

M: Hu-uh. I don't remember that.

L: You don't remember what you took in it?

M: No, sir?

L: Okay. How many times do you think you went to the Factoria Safeway store?

M: Twice.

L: Okay. And that was in March of this year? March of 2009?

M: Yes. Yes, sir.

L: Okay. There's another day, on March 27<sup>th</sup>. We have a video of you going in the store, doing a similar type thing. And when you went there on March 27<sup>th</sup>, what did you take that day?

M: The same thing.

L: Same thing, Sonicare replacement heads and toothbrushes? Okay. And then, also, we have you in there in the beginning of April, April 8<sup>th</sup>, you go back in there. The first two times, you were wearing a jacket that has a couple stripes going across the back.

M: Uh-huh.

L: This is the third time you went in there and you were in just your T-shirt and pants. No jacket this time. You remember, did you take more of the same thing, Oral B's?

M: The same things.

L: Same type thing? Okay. That's all you were taking?

M: Yes, sir, the same thing.

L: Okay. And then, after you left there, where'd you go with these toothbrushes and what'd you do with them?

M: I planned to sell. I go to the Renton...

L: Okay.

M: Skyway area then try to sell it.

L: Okay. What do you—like I say, if you had like a pack of four toothbrush heads, how much would you get for that? What would you sell them for?

M: I sold them for \$15 apiece.

L: \$15 apiece?

M: No, \$10, \$10 dollars.

L: \$10 apiece? Okay.

M: along with the drugs

L: And did you get drugs along with it?

M: Yeah.

L: So, you might, if you had four of them, you might get 40 bucks?

M: Yes, sir.

L: And then, how much drugs would you get?

M: About \$150 to \$200.

L: \$150 to \$200 worth of what?

M: Cocaine.

L: Crack cocaine or is it...

M: Yes.

L: Okay, alright. And how often do you do cocaine?

M: I'll say maybe once a week.

L: Once a week? Okay.

M: Maybe.

L: Alright. And these are the three Safeway ones. Is there any other stores in Bellevue that you've actually gone in and done a similar thing like a Rite Aide or Bartell's, anything like that and...

M: Nothing else, sir.

L: Nothing else?

M: in Bellevue, No, sir.

L: And how long have you been doing this, this type of theft? I mean has it been for a couple years? Has it been for...

M: Off and on.

L: Off and on for a couple years?

M: Yeah.

L: Okay. Let's say you got caught recently by Kirkland and you got caught by other agencies every once in a while. How many in the last, let's say this year only, since 2009. Okay, we're in May. How many stores do you think you've actually gone to and stolen from?

M: Since when?

L: Yeah, just give—not the exact, since the beginning of this year, just like the first five, four months here. You said you've been to like 50 stores or how many stores?

M: There's stores... six, seven...

- L: Just six or seven? So you go out and do this like once a week. Is that average or is that, or is it more than that?
- M: Sometimes like once a week mostly.
- L: Okay, alright. And then, when you take this stuff, the stolen items and you leave in your car, you go back to your home usually first?
- M: No, I would try to get rid of it.
- L: Try to you get rid of it right away?
- M: If I can't get rid of it, I'll keep it 'til the next day to...
- L: And you keep it in your car sometimes?
- M: Yes, sir.
- L: Okay. Do you ever, do you have, sometimes bring it home and just put it in a box and keep it in the house for a while?
- M: I keep it in my trunk.
- L: Keep it in the trunk?
- M: Yes, sir.
- L: Okay. Is there anything in your trunk right now?
- M: No.
- L: Okay. No stolen items in your trunk?
- M: No.
- L: Okay. That is my questions for you. Detective JOHNSON will ask you some questions from King County.
- J: [muffled] The one in Newcastle Safeway, March 7<sup>th</sup>, 2009, this case number is 2009-108606. Do you recall going to Safeway in Newcastle on March 7<sup>th</sup>?
- M: Yes, sir.
- J: Okay. It was about 11 o'clock in the morning. Do you recall what you took out of the Safeway?
- M: Oh... I think it's the replacement head.

J: Okay. So, if I were to review the case report that came from Loss Prevention there, they're missing Oral B toothbrushes... toothbrush and the brush head replacements. Would that be accurate?

M: Yes, it'd be.

J: Okay. 'Cause I'm basing your statement on what you're saying. That's pretty much gone/

M: Right.

J: Stolen when you went in the store to get it.

M: Yes.

J: Okay, alright. With that, in the Newcastle Safeway, it's the same way, you go and stick it in the front of your pants and then you slide them... a little bit, you walk out with paying, correct?

M: Yes.

J: Okay. And you disposed them the same way... told me you... and you sell them for money or drug...

M: Right.

J: Or a little bit of both?

M: Right.

J: Okay, alright. Now, we talked about the one in Maple Valley on April 1<sup>st</sup>, the Bartell Drug Store. The allegation is you were seen in the store by Loss Prevention, and they were missing some Gillette fusion razor, you know the big, kind of big pack with the razor and... blades in. So, does that ring a bell?

M: All of them ring a bell...

J: Okay, ... Okay. Are there any other Safeways that you can recall, like I said, in the last, first four months of the year that you've been into that we have not talked about?

M: The... There was a lot of those in the... has security... I don't get to go... all the time.

L: There's some QFCs, correct?

M: Uh-huh.

J: You did the same thing again?

M: I just walked in to see...

L: Okay.

J: Where? Any other QFCs?

M: No, sir.

J: Not, not Newcastle QFC?

M: No, no

J: How much do you—why do you do this?

M: Why do I do it?

J: Yeah...

M: ... right now. I've got...

J: Okay. Alright. So, aside from... two, there's no other cases that you can think of that would be either in Burien or...

M: No, no.

J: White Center, SeaTac?

M: No.

J: So, the only areas that you take, you went down to take... into are on the Eastside of King County.

M: Yes, sir.

J: Is that right?

M: Yes, sir.

L: I don't have any further questions, so if you don't, I'll go ahead, end the tape. The time is 1156.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer J. Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ELIJAH MAYFIELD III, Cause No. 68508-2-I, in the Court of Appeals, Division I, for the State of Washington.

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

L Brame

Name

Done in Seattle, Washington

11/20/12

Date