COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

NO. 39557-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

DAWN FLEMING, Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 4

ISSUE 1: THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR IDENTITY THEFT IN THE SECOND DEGREE BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MS. FLEMING KNOWINGLY USED MS. CHENEY'S FINANCIAL INFORMATION 5

ISSUE 2: THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MS. FLEMING KNEW THAT THE CARD MR. SKILTON GAVE HER CONTAINED STOLEN INFORMATION 7

ISSUE 3: THE PROSECUTOR COMMITTED PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT AND THE CUMULATIVE EFFECT OF THOSE ACTS OF MISCONDUCT DEPRIVED MS. FLEMING OF A FAIR TRIAL 9

V. CONCLUSION 17

TABLE OF AUTHORITIES

TABLE OF CASES

Washington Cases

In re Det. of Gaff, 90 Wn.App. 834, 841, 954 P.2d 943 (1998) 9
In re Det. of Law, 146 Wn.App. 28, 50-51, 204 P.3d 230 (2008) 9
State v. Aver, 109 Wn.2d 303, 310, 745 P.2d 479 (1987)..... 5
State v. Belgarde, 110 Wn .2d 504, 517-18, 755 P.2d 174 (1988) 9
State v. Boehning, 127 Wn.App. 511, 111 P.3d 899 (2005)..... 14, 15
State v. Brown, 132 Wash.2d 529, 561, 940 P.2d 546 (1997), *cert. denied,* 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998)..... 13
State v. Claflin, 38 Wn.App. 847, 850, 690 P.2d 1186 (1984) 9
State v. Coles, 28 Wash.App. 563, 573, 625 P.2d 713 (1981)..... 14
State v. Dhaliwal, 150 Wn.2d 559, 578, 432 P.3d (2003) 9, 13
State v. Echevarria, 71 Wn.App. 595, 598, 860 P.2d 420 (1993) 9
State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) 5
State v. Henderson, 100 Wn. App. 794, 805, 998 P.2d 907 (2000)..... 10
State v. Hoffman, 116 Wash.2d 51, 94-95, 804 P.2d 577 (1991) 14
State v. Hughes, 118 Wn.App. 713, 727, 77 P.3d 681 (2003)..... 8
State v. Huson, 73 Wn.2d 660, 663, 440 P .2d 192 (1968)..... 9
State v. Jones, 71 Wash.App. 798, 808, 863 P.2d 85 (1993), *review denied,* 124 Wash.2d 1018, 881 P.2d 254 (1994)..... 14
State v. Klok, 99 Wn.App. 81, 85, 992 P.2d 1039 (2000)..... 9
State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995) 9
State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)..... 10
State v. Stamm, 16 Wn.App. 603, 614, 559 P.2d 1 (1976) 9
State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)..... 8

I. ASSIGNMENTS OF ERROR

1. The trial court erred by convicting Ms. Fleming of second degree identity theft without sufficient evidence.
2. The trial court erred by convicting Ms. Fleming of possession of stolen property in the second degree without sufficient evidence.
3. Ms. Fleming was deprived of a fair trial by the prosecutor's repeated misconduct during closing argument.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. There is insufficient evidence to support a conviction for identity theft in the second degree because the State failed to prove beyond a reasonable doubt that Ms. Fleming knowingly used Ms. Cheney's financial information.
2. There is insufficient evidence to support a conviction for possession of stolen property in the second degree because the State failed to prove beyond a reasonable doubt that Ms. Fleming knew that the card Mr. Skilton gave her contained stolen information.

3. The prosecutor committed prosecutorial misconduct in closing argument and the cumulative effect of those acts of misconduct deprived Ms. Fleming of a fair trial.

III. STATEMENT OF THE CASE

On October 26, 2008, Dawn Fleming went into a Sports Authority store with her friend, Shane Skilton. RP1 84. Ms. Fleming and Mr. Skilton had known each other for years. RP1 81. On that day, Mr. Skilton gave Ms. Fleming a Visa gift card to buy herself shoes. RP1 87, 88. Although Mr. Skilton admitted that he knew the card was not his, he never testified that he told Ms. Fleming this. RP1 90.

Ms. Fleming made her purchase with the card and exited the store, but apparently did not leave the parking lot. RP2 171, 173, 175. Mr. Skilton attempted to use another card to make his purchase, but the card would not go through. RP1 87, RP2 172-73. So, Mr. Skilton went to the parking lot, returned with Ms. Fleming, and she used the card he had given her to make his purchases, as well. RP1 87; RP2 175-76. With both purchases, Ms. Fleming signed the store card reader (electronic). RP2 176.

It was later shown that the card Mr. Skilton gave Ms. Fleming was encoded with information from a credit card that had been stolen from Marlys Cheney that morning. RP2 142, 146, 153.

Ms. Fleming was charged with one count of identity theft in the second degree and one count of possessing stolen property in the second degree. CP 1-2.

At trial, the defense objected to the State being permitted to introduce testimony from Ms. Cheney about the initial theft of her purse, because Ms. Fleming had not been charged in this theft and it was irrelevant and overly prejudicial. RP1 8-13. Although the State agreed with the defense that there was no proof Ms. Fleming was involved in the theft,[1] the prosecutor argued that evidence of the theft was relevant and admissible as the "res gestae" of these crimes. RP1 8-13. The court ruled that evidence of the theft of the cards was admissible as the "res gestae" and to show that the victim did not agree to the use of her card and that this evidence was not "overly prejudicial." RP1 15.

Ms. Cheney testified that on October 26, 2008, her parked car was broken into sometime in the morning before noon. RP1 68. She had left

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[1] The prosecutor stated "I don't think there is 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." RP1 9.

her purse in the car and this was taken, along with her driver's license, two credit cards, and two bank cards. RP1 71. She immediately cancelled the bank cards and cancelled the credit cards a short time later. RP1 71-72.

Ms. Cheney said that she had not used her card at Sports Authority and that she did not know Ms. Fleming or give anyone permission to use her credit card. RP1 76. Ms. Cheney never testified that it was her credit card or information used at Sports Authority that day. RP1 73-74.

Deputy Ken Solbrack obtained Ms. Cheney's card information and based on that information, obtained video from the Sports Authority store and copies of the receipts from those transactions. RP1 29-30, 39.

Mr. Skilton testified in Ms. Fleming's trial after pleading guilty to charges of identity theft and possession of stolen property, as well as various drug charges. RP1 81. He testified that he had the card, did not remember who gave him the cards he had that day, and that the card he gave Ms. Fleming was a Visa gift card. RP1 87-88, 95.

Sports Authority security manager Eric Hieber testified that Visa gift cards can be re-encoded with the financial information from stolen credit cards. RP2 181, 187. He testified that this is a common occurrence in identity theft cases. RP2 181. Like a credit card, Visa gift cards require a signature, but, unlike credit cards, no name appears on the card. RP2 188.

The receipts from both transactions showed up in the name Marlys Cheney and recorded as a Visa transaction. RP2 142, 146, 153. Because Mr. Skilton's transaction did not go through, there was no information about the card he used. RP2 150-51. The cashiers never looked at the card used by Ms. Fleming. RP2 181.

Following jury trial, Ms. Fleming was convicted on both charges. CP 21, 22. This appeal timely follows.

IV. ARGUMENT

ISSUE 1: THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR IDENTITY THEFT IN THE SECOND DEGREE BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MS. FLEMING KNOWINGLY USED MS. CHENEY'S FINANCIAL INFORMATION.

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver,* 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The jury was instructed in this case that:

> A person commits the crime of identity theft in the second degree when, with intent to commit or aid or abet any crime, he or she knowingly obtains, possesses, uses, or transfers a means of identification or financial information

> of another person, living or dead, and obtains credit, money, goods, services or anything else that is $1500 or less in value.

CP 34.

An essential element, then is that Ms. Fleming knew she was either using a stolen credit card, or, if it was a Visa gift card, as Mr. Skilton said, that she knew this card was encoded with stolen information. The evidence is consistent with either theory. The store video shows only that Ms. Fleming used a card to make the purchases. The security expert testified that if Ms. Fleming was using a gift card that had been imprinted with stolen information, she would have had to sign for it and the computer would show the credit card was used. RP2 181, 187, 188. No one at the store saw a credit card. RP2 181. Ms. Cheney's card was never found. Mr. Skilton said he gave a gift card to Ms. Fleming, that he knew the card was not his, but never said he told Ms. Fleming. RP1 87, 88, 90.

The State made much in closing of Ms. Fleming's association with Mr. Skilton, a shady character who admitted to being a drug addict, and alluded to the jury that Ms. Fleming and Mr. Skilton had obtained the cards together during a vehicle prowl. Yet, guilt by association is improper evidence. Furthermore, there is absolutely no evidence that Ms. Fleming was even present at the time of the theft of the cards—she was

never charged. Thus, these improper arguments are not evidence that can support an inference of her knowledge.

The State also argued that Ms. Fleming's messy signature on the card reader somehow proved she was trying to conceal her identity. Yet, this is weak evidence indeed since no comparative card reader signature was ever introduced into evidence. And the court order signature placed in evidence is surely not an apples-to-apples comparison. There is no evidence that Ms. Fleming signed Ms. Cheney's name rather than her own. Only, that she signed messily that day on the computer screen as it showed up on the printout. This is insufficient evidence of her knowledge.

Thus, the State failed to present evidence sufficient to convince a fair-minded fact finder that Ms. Fleming knowingly used stolen financial information or a stolen card because it failed to prove Ms. Fleming knew she was using stolen information to make the purchase. Therefore, her conviction for identity theft must be reversed.

ISSUE 2: THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MS. FLEMING KNEW THAT THE CARD MR. SKILTON GAVE HER CONTAINED STOLEN INFORMATION.

There is also insufficient evidence to support the possession of stolen property conviction.

> A person commits the crime of possessing stolen property in the second degree when he or she knowingly possesses a stolen access device.
>
> Possessing stolen property means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

CP 38. "Access device" is defined as:

> Any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.
>
> The phrase "can be used" refers to the status of the access device when it was last in possession of it [sic] rightful owner, regardless of its status at a later time.

CP 39.

As with the identity theft conviction, to support a conviction of second degree possession of stolen property here, the jury had to find beyond a reasonable doubt that Ms. Fleming either had Ms. Cheney's actual stolen credit card or knew the gift card Mr. Skilton gave her was encoded with stolen financial information. As argued above, the State failed to prove beyond a reasonable doubt that Ms. Fleming had that knowledge and therefore, her conviction for second degree possession of stolen property must also be reversed.

ISSUE 3: THE PROSECUTOR COMMITTED PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT AND THE CUMULATIVE EFFECT OF THOSE ACTS OF MISCONDUCT DEPRIVED MS. FLEMING OF A FAIR TRIAL.

First and foremost, a prosecutor has a duty to ensure a verdict is free from prejudice and based on reason, not passion. *State v. Echevarria,* 71 Wn.App. 595, 598, 860 P.2d 420 (1993) (citing *State v. Huson,* 73 Wn.2d 660, 663, 440 P .2d 192 (1968)). It is improper for a prosecutor to invite the jury to decide any case based on emotional appeals or their passions and prejudices. *In re Det. of Gaff,* 90 Wn.App. 834, 841, 954 P.2d 943 (1998); *State v. Claflin,* 38 Wn.App. 847, 850, 690 P.2d 1186 (1984).

Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *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)). A defendant who alleges prosecutorial misconduct must "first establish the prosecutor's improper conduct and, second, its prejudicial effect." *State v. Dhaliwal,* 150 Wn.2d 559, 578, 432 P.3d (2003). A defendant establishes prejudice only if she shows 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).

To preserve a claim of prosecutorial misconduct, a defendant must timely object or move for a mistrial. *See In re Det. of Law,* 146 Wn.App. 28, 50-51, 204 P.3d 230 (2008); *State v. Klok,* 99 Wn.App. 81, 85, 992 P.2d 1039 (2000); *State v. Belgarde,* 110 Wn .2d 504, 517-18, 755 P.2d 174 (1988). Either course allows the trial court to cure the error through a curative instruction. *State v. Stamm,* 16 Wn.App. 603, 614, 559 P.2d 1 (1976). Where the defense fails to timely object to an allegedly improper remark, the error is deemed waived 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). The cumulative effect of repeated instances of misconduct may be so flagrant that no instruction can erase the error. *State v. Henderson,* 100 Wn. App. 794, 805, 998 P.2d 907 (2000).

The prosecutor in this case committed several acts of misconduct during closing argument by appealing to the passions and prejudice of the jury.

First, the prosecutor improperly argued to the jury that Ms. Fleming had been involved in the uncharged act of theft of Ms. Cheney's credit cards from her vehicle when the prosecutor knew there was no evidence that Ms. Fleming was guilty of the theft and when, even had it

been true, this was improper evidence of Ms. Fleming's guilt on these charges.

When the State urged the trial court to permit testimony regarding the theft of Ms. Cheney's cards, the prosecutor told the court:

> I don't think there is 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.

(emphasis added) RP1 9.

Yet, during closing argument, the prosecutor argued to the jury:

> What kind of stuff do [Mr. Skilton and Ms. Fleming] do together? Well, that wasn't answered. But what was going on on October 26th? There was a vehicle that 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.
>
> [Defense Counsel]: Your Honor, I am going to object to this. This is shifting the burden. There is no evidence that's been brought into the case and it's prejudicial.
>
> THE COURT: Well, the jury will be reminded that this is argument, it's not evidence, and they will need to pay attention to the closing instruction and recall the burden of proof in the case.
>
> [Prosecutor continues:] So what was going on is that Ms. Fleming and Mr. Skilton was [sic] apparently involved in getting credit cards, getting gift certificates, or whatever was going on. . . .

> Now, let's read between the lines here. Let's read between the lines. Shane Skilton doesn't have a car. He needs some means of transportation so he can get money so he can get his drugs. Dawn Fleming has a car. He says to Ms. Fleming, "I know, you drive me around so I can do what I need to do and I will give you a gift certificate."

RP2 215-216.

Then, the prosecutor goes on to argue to the jury that Ms. Fleming was involved in Mr. Skilton's drug activities—which is wholly irrelevant and was not in evidence.

> So maybe, I submit to you, I submit to you 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 Counsel]: Your Honor, again I am going to object to all of this and it's improper misconduct.
>
> THE COURT: Well, Ms. [Prosecutor], I am going to ask that you argue based upon the evidence that was presented here.

RP2 217.

Finally, the prosecutor commits misconduct with her "What does a thief look like" argument, again making improper argument that was not based on relevant evidence, and appealing to the passions and prejudices of the jury.

> [The Prosecutor]: 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?
>
> [Defense Counsel]: Your Honor, I am going to object to this. It is improper.
>
> THE COURT: I'll sustain the objection to that last comment.
>
> [The Prosecutor]: Okay. Bernard Madoff was recently convicted of a Ponzi scheme and that means he took money from thousands of people knowing that they 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 this forehead. And I know in some—some societies at some points in time, people have been branded for being thieves.
>
> [Defense Counsel]: Your Honor, I am going to–same objection.
>
> THE COURT: This is closing argument. It is not evidence.
>
> [The Prosecutor]: Thank you, Your Honor.
>
> 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 doe 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.
>
> [Defense Counsel]: I am going to object again. This is improper.
>
> THE COURT: I am going to sustain the objection, Ms. [Prosecutor].

RP2 224-26.

A prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Dhaliwal,* 150 Wash.2d at 578, 79 P.3d 432; *State v. Brown,* 132 Wash.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 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 Wash.2d 51, 94-95, 804 P.2d 577 (1991). However, a prosecutor may not make statements that are unsupported by the evidence and prejudice the defendant. *State v. Jones,* 71 Wash.App. 798, 808, 863 P.2d 85 (1993), *review denied,* 124 Wash.2d 1018, 881 P.2d 254 (1994).

It can be prosecutorial misconduct for a prosecutor to inquire into details of a prior conviction, as in *State v. Coles,* 28 Wash.App. 563, 573, 625 P.2d 713 (1981). In *Coles,* the defendant admitted his two prior convictions for assault during direct examination. *Id.* at 569, 625 P.2d 713. During cross-examination, the prosecutor asked for details about the assaults and raised other uncharged incidents. *Id.* at 569-570, 625 P.2d 713. The prosecutor also revisited the prior convictions during his closing arguments as circumstantial evidence of the defendant's guilt. *Id.* at 571, 625 P.2d 713.

Likewise, it is also misconduct for a prosecutor to repeatedly refer to dismissed charges against the defendant and allude to the jury that these charges somehow corroborated the current charges against him, as in *State v. Boehning*, 127 Wn.App. 511, 111 P.3d 899 (2005). In *Boehning*, the court held:

> The prosecutor's repeated references to the dismissed rape counts and suggestions that that H.R.'s statements supported those charges were uncalled for and impermissibly asked the jury to infer that Boehning was guilty of crimes that had been dismissed and were not supported by trial testimony. *See State v. Torres,* 16 Wash.App. 254, 256, 554 P.2d 1069 (1976). Such argument improperly appealed to the passion and prejudice of the jury and invited the jury to determine guilt based on improper grounds. This error alone compels reversal.

127 Wn. App. at 521.

As in *Cole* and *Boehning*, the prosecutor in this case elicited evidence relating to uncharged bad acts—the vehicle prowl and theft—and then used that to argue to the jury that Ms. Fleming was guilty both of these uncharged acts and the current charges. *Boehning* suggests that such argument is misconduct because it appeals to the passions and prejudice of the jury. Defense counsel objected to the argument,[2] and was sustained in

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[2] Defense counsel's objection to the vehicle prowl argument was that it was erroneous "shifting the burden," rather than a more general misconduct objection. RP2 216. However, she also pointed out to the court that there was no evidence in the record to support the prosecutor's argument. RP2 216. This objection was sufficient to alert the trial court to the problem.

part by the court, showing the awareness of the improper nature of the argument.

Further, the prosecutor knew that Ms. Fleming was not involved in the theft—she says so in her argument to the court that this evidence would not prejudice Ms. Fleming and promises not to make the argument that Ms. Fleming was guilty of the theft—and this in particular shows the flagrant and ill-intentioned nature of the misconduct.

Then, the prosecutor goes even further, referring to the Bernie Madoff scandal, which at the time was a very emotionally-charged public scandal, and comparing him to Ms. Fleming in her "What does a thief look like?" argument. Again, this is misconduct because it improperly refers to matters not in evidence and attempts to appeal to the passions and prejudices of the jury.

The cumulative effect of the prosecutor's misconduct in this case deprived Ms. Fleming of a fair trial. In this case, the video showed that Ms. Fleming was present at the Sports Authority store, but it does not show her knowledge that the card or identity information were stolen, the central issue in the case. In fact, because the card was never recovered and was never actually seen in Ms. Fleming's possession, the only evidence comes from Mr. Skilton, who said it was a Visa gift card he gave Ms. Fleming.

Thus, Ms. Fleming's credibility is at issue—whether she was merely using an unnamed gift card that she did not know was stolen. The direct evidence was equally consistent with the gift card theory as with the stolen credit card theory, which is why the prosecutor's desperation shows in closing argument. Although Ms. Fleming did not testify, the jury had to decide if they would give her the benefit of the doubt in this case. The prosecutor's repeated misconduct in referring to uncharged crimes, comparing her to Bernie Madoff, and appealing to the passions and prejudice of the jury prejudiced Ms. Fleming's right to a fair trial. The repeated misconduct and the damage it caused could not have been cured by further instruction to the jury. You cannot "unring the bell" where the jury's passions and prejudice have been aroused. Therefore, the misconduct in this case requires reversal of the convictions in this case and remand.

V. CONCLUSION

Ms. Fleming's convictions must be reversed because the State failed to provide sufficient evidence that she knowingly possessed stolen property or knowingly used stolen financial information. Further, the prosecutor's flagrant misconduct in closing argument deprived Ms.

Fleming of a fair trial and this, also, requires the reversal of her convictions.

DATED: January 7, 2010

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CERTIFICATE OF SERVICE

I certify that on January 7, 2010, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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