

No. 44513-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

vs.

**David Timmins,**

Appellant.

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Clark County Superior Court Cause No. 12-1-01820-1

The Honorable Judge John F. Nichols

**Appellant's Opening Brief**

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Timmins's convictions for theft, robbery, and burglary violated his Fourteenth Amendment right to due process.
2. The trial court erred by instructing the jury on uncharged alternative means of committing theft, robbery, and burglary.

**Issue I:** A person may not be tried for an uncharged offense. Here, the trial court instructed the jury on uncharged alternative means of committing theft, robbery, and burglary. Did Mr. Timmins's convictions for these three offenses violated his Fourteenth Amendment right to due process?

3. The trial court violated Mr. Timmins's Sixth and Fourteenth Amendment right to present a defense.
4. The trial court infringed Mr. Timmins's right to present a defense by restricting his attorney's arguments during closing.
5. The trial court erred by preventing defense counsel from arguing to the jury that the state's failure to introduce Kimberling's blood test results should be held against the prosecution.

**Issue II:** An accused person has a constitutional right to present a defense, and a trial court may not prohibit defense counsel from making a proper argument to the jury. Here, the trial judge prevented the defense from raising a missing evidence argument. Did the trial judge infringe Mr. Timmins's constitutional right to present a defense?

6. The prosecutor's misconduct infringed Mr. Timmins's Fourteenth Amendment right to due process.
7. The prosecutor improperly urged the jury to convict based on passion and prejudice rather than facts introduced at trial.
8. The prosecutor improperly "testified" to "facts" not in evidence.

9. The prosecutor improperly argued that Mr. Timmins's bad character established guilt and a lack of credibility.
10. The prosecutor improperly told jurors that Mr. Timmins had been released from jail the morning of the offense, in violation of the court's order *in limine*.

**Issue III:** A prosecutor may not urge conviction based on passion and prejudice rather than facts in evidence. Here, the prosecutor argued that jurors should convict out of sympathy for Kimberling and because of Mr. Timmins's bad character. Did the prosecutor commit reversible misconduct that was flagrant and ill-intentioned?

**Issue IV:** A prosecutor may not "testify" to "facts" not in evidence. Here, the prosecutor told jurors that Kimberling lived in poverty, that Mr. Timmins had taken all of her money, and that lab test results showed Kimberling had not used methamphetamine. Did the prosecutor's reliance on "facts" outside the record infringe Mr. Timmins's right to a verdict based on the evidence admitted at trial?

**Issue V:** A prosecutor may not violate a court's order *in limine* by introducing prejudicial evidence excluded by the court. Here, the prosecutor told jurors that Mr. Timmins had been released from jail the morning of the offense. Did the prosecutor's violation of the order *in limine* excluding this information violate Mr. Timmins's right to a fair trial?

11. The trial court failed to properly determine Mr. Timmins's offender score.
12. The trial court erroneously believed it lacked discretion to score offenses together for same criminal conduct analysis if the offenses were distinct for double jeopardy purposes.
13. The trial court abused its discretion by failing to exercise discretion on the issue of same criminal conduct.

14. The trial court should have determined whether or not Mr. Timmins's burglary and robbery charges comprised the same criminal conduct.
15. The trial court should have determined whether or not Mr. Timmins's theft and identity theft charges comprised the same criminal conduct.
16. The trial court should have determined whether or not Mr. Timmins's theft charge constituted the same criminal conduct as the burglary/robbery charges.

**Issue VI:** Multiple offenses comprise the same criminal conduct if committed at the same time and place, against the same victim, with the same overall criminal purpose. Here, the trial judge erroneously believed he lacked discretion to find that Mr. Timmins's offenses comprised the same criminal conduct because the crimes were distinct for double jeopardy purposes. Did the trial judge abuse his discretion by failing to exercise discretion based on a misunderstanding of the law?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

David Timmins and Karen Kimberling met through a mutual friend. RP 302. Over the next year, Mr. Timmins went to Kimberling's house several times where they drank alcohol and used methamphetamine. RP 303.

Kimberling is an alcoholic who lives alone. RP 107, 131. Her alcohol consumption has affected her physically and mentally. RP 175. Kimberling frequently blacks out as a result of drinking. RP 132, 210. Her drinking has also caused her to fall in the past. RP 133.

One afternoon in September, Mr. Timmins went to Kimberling's apartment where the two drank alcohol and used meth together. RP 303-04. Upon running out of alcohol, an intoxicated Kimberling gave Mr. Timmins her debit card and PIN and asked him to go buy more vodka, meth, and cigarettes. RP 305-07.

Mr. Timmins admits to using Kimberling's debit card beyond that for which he had been authorized. RP 307. When he saw Kimberling's account balance, he decided to make additional transactions for personal use. RP 307. Mr. Timmins made several ATM withdrawals and purchases using Kimberling's debit card. RP 308. He never returned to her apartment. RP 308.

The next day, Kimberling called 911 because she was experiencing shortness of breath. RP 67. When the paramedics arrived, Kimberling smelled of alcohol and could only speak in one-to-three-word sentences. RP 67-68. The paramedics noticed that Kimberling had a black eye, which she said she received as the result of a fall. RP 67-68, 124. Later, Kimberling claimed that she had been punched. RP 67.

Kimberling told the nurses and social worker that she had received her injury from falling. RP 76, 91. Upon further questioning by the social worker, Kimberling again claimed that she had been punched. RP 91-92.

Detective Harris attempted to interview Kimberling at the hospital. RP 119-20, 193. Kimberling told Harris that her black eye was the result of a fall. RP 134, 193, 205. Again, when pressed, she claimed to have been punched. RP 134, 193, 206. Kimberling told Harris that she did not want to talk to him and cut off the interview. RP 194, 205.

While she was at the hospital, Kimberling received a call from her bank, which informed her of a suspect transaction involving her debit card. RP 119. Kimberling didn't want to file a police report, but her sister persuaded her to do so. RP 290. Kimberling went and spoke with Harris again the next day. RP 290.

Kimberling told Harris that Mr. Timmins had robbed and assaulted her. RP 110-114, 120. She said that Mr. Timmins had knocked on her

door and that she had let him into her apartment. RP 111. She claimed that he had never been to her apartment before. RP 109. Kimberling stated that Mr. Timmins asked if she had any credit cards and she asked him to leave. RP 111-12, 114. Kimberling claimed that he punched her in her face, found her debit card in her bedroom, and asked for her PIN. RP 112, 114, 116. Kimberling said she gave Mr. Timmins her PIN against her will and he left. RP 114, 116.

Kimberling told Harris that she had drunk a half-gallon of vodka and some beer in the two-to-three-day period before the incident. RP 209. She told him that she had run out of alcohol when Mr. Timmins arrived and that she wanted more. RP 212. She became frustrated several times during the interview and said that she couldn't remember the details of the incident. RP 212. Kimberling testified that "her memory wasn't working" during her interview with Harris. RP 135.

The state charged Mr. Timmins with second-degree theft, first-degree identity theft, first-degree robbery, and first-degree burglary. CP 1-2.

The Information charged him with a single alternative means of committing theft by "wrongfully obtain[ing] or exert[ing] unauthorized control over an access device." CP 2. The state charged Mr. Timmins with the alternative means of committing robbery by "in the commission

of said crime or in immediate flight therefrom... inflict[ing] bodily injury upon” another person. CP 1. Mr. Timmins was charged with the single means of committing burglary by “in entering or while in the building or in immediate flight therefrom... intentionally assault[ing] any person.”

CP 1.

The state moved *in limine* to admit evidence that Mr. Timmins was released from jail – which is located near Kimberling’s apartment – on the morning of the incident. RP 4. The court denied the motion. RP 4-6.

The state again argued for the admission of Mr. Timmins’s recent release from jail on the second day of trial. RP 247-55. The court again ruled the evidence inadmissible. RP 255.

During direct-examination of Harris, however, the prosecutor asked him about Mr. Timmins’s release from jail:

PROSECUTOR: 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?

HARRIS: Correct.

RP 325.

Mr. Timmins objected and moved for a mistrial based on the prosecutor’s violation of the court’s ruling. RP 325-26. The prosecutor claimed that the statement was an accident and the court denied Mr. Timmins’s motion for a mistrial. RP 326, 334. The court attempted to cure the error by telling the jury that the prosecutor had meant to say that

Mr. Timmins had left court the morning of the incident, rather than jail.

RP 337.

The state provided late discovery of Kimberling's hospital records, which made it impossible for Mr. Timmins to call the hospital social worker as a witness. RP 9-10, 79, 296-97. Mr. Timmins moved to exclude the records based on the discovery violation, but the court denied the motion. RP 13. The court admitted notes made by non-testifying nurses and the social worker over Mr. Timmins's objection. RP 78-84.

The medical records and testimony offered by the state did not include the results of any lab tests given to Kimberling at the hospital. RP 71-93. Nonetheless the prosecutor asked Mr. Timmins on cross-examination to explain why the lab tests did not show meth in Kimberling's system:

PROSECUTOR: Do you know that they took lab tests?

MR. TIMMINS: I did not.

PROSECUTOR: Has that been discussed previously in your presence?

MR. TIMMINS: I've heard it talked about.

PROSECUTOR: Okay. So you know that she took lab tests while she was at the hospital, correct?

MR. TIMMINS: Sure, yes.

PROSECUTOR: Okay. How do you explain that them -- there was no methamphetamine in her system?

RP 313.

In closing, defense counsel attempted to argue that the state's failure to produce Kimberling's lab test results suggested that the evidence

would have been harmful to the prosecution. RP 428-29. The court sustained the state's objection to Mr. Timmins's argument. Id.

During the state's closing, the prosecutor argued that Mr. Timmins is the type of person who takes advantage of a poor old woman:

He drained her account as quickly and as fast as possible until there was nothing in it and he was able to get no more money from it. This was the person who – whose credibility is at issue. He hadn't intended to take her money. He just happened to clean out her entire bank account. You saw what she -- who -- you saw this woman. This is the account -- he -- this – you think that she has means for this? The kind of person who is going to go drain the account of a woman who's obviously very limited in her income, he took every single thing she had.  
RP 439.

Defense counsel objected to this line of argument, but the court did not rule. RP 439. The prosecutor's argument continued in the same vein:

[H]e's saying to you today that that's not the kind of person that he is. That's really what happened when he testified in front of you today. I'm not that type of person, I am a good person, I only just took her money. I wouldn't have done this, I'm not the kind of person who would punch an old lady in the eye and stay at her house and take her debit card. That's exactly what every one of his actions has shown you. He didn't just go take something, he didn't just go buy a dirt bike that he doesn't even need from Wal-Mart, he took everything she had. That's the kind of person he is. His credibility's at issue.

....

I submit to you this man is exactly what he's shown you.  
RP 439-40.

The court's instructions included alternative means of committing theft, burglary, and robbery that were not charged in the Information. The

to-convict instruction for theft included each of the following alternative means:

- (a) wrongfully obtained or exerted unauthorized control over property of another; or
  - (b) by color or aid of deception, obtained control over property of another; or
  - (c) appropriated lost or misdelivered property.
- CP 46.

The robbery to-convict instruction included the means penalizing:

- (a) that in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon; or
  - (b) that in the commission of these acts or in immediate flight therefrom the defendant displayed what appeared to be a firearm or other deadly weapon; or
  - (c) that in the commission of these acts or in immediate flight therefrom the defendant inflicted bodily injury.
- CP 48.

Finally, the court instructed the jury regarding the following means of committing burglary:

That in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged was armed with a deadly weapon or assaulted a person.  
CP 44.

The jury convicted Mr. Timmins of each of the four charges. RP 450-51.

At sentencing, Mr. Timmins argued that his theft and identify theft convictions stemmed from the same criminal conduct, as did his robbery and burglary convictions. RP 465, 471; CP 52-68. The court responded

only by ruling that the two pairs of charges did not merge for double jeopardy purposes. RP 476. The court stated that it “had[d] to treat them as four separate crimes even though they took place at the same time.” RP 476. The court scored each of the offenses separately. RP 476; CP 5. This timely appeal follows. CP 17.

### ARGUMENT

**I. THE COURT’S INSTRUCTIONS PERMITTED THE JURY TO CONVICT MR. TIMMINS OF UNCHARGED MEANS OF COMMITTING THEFT, ROBBERY, AND BURGLARY.**

A. Standard of Review.

The constitutional issue of whether the jury instructions permitted conviction for an uncharged alternative means is reviewed *de novo*. *State v. Brewczynski*, 173 Wn. App. 541, 549, 294 P.3d 825 (2013). Manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

B. Mr. Timmins’s convictions violated his right to due process because the court instructed the jury on uncharged alternative means of committing theft, robbery, and burglary.

An accused person has a due process right not to be tried for an offense for which s/he wasn’t charged. U.S. Const. Amend. XIV; Wash. Const. art. I, § 22; *Brewczynski*, 173 Wn. App. at 548. It is reversible error to instruct the jury on alternative means that are not described in the

charging document. *Brewczynski*, 173 Wn. App. at 549. Instructing the jury in such a manner permits the jury to convict for an uncharged offense regardless of the strength of the evidence. *State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003).

An erroneous instruction given on behalf of the prevailing party is presumed prejudicial. *Chino*, 117 Wn. App. at 540. Additionally, constitutional error requires reversal unless the state can prove that it was harmless beyond a reasonable doubt. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). Accordingly, instructing the jury in a manner inviting it to consider uncharged alternative means requires reversal unless the state can show that the jury did not convict based on the uncharged means.

1. The court instructed the jury on uncharged alternative means of committing theft.

Theft is an alternative means offense. *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010). The means of committing theft include:

- (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
- (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

- (c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

RCW 9A.56.020.

Mr. Timmins was charged only with the means described in subsection (a): exerting unauthorized control over the property of another. CP 2. The Information does not mention the means delineated in subsections (b), or (c) of the theft definition. CP 2; RCW 91.56.020.

Nonetheless, the jury was instructed that it could find Mr. Timmins guilty of theft by finding that he:

- (a) Wrongfully obtained or exerted unauthorized control over property of another; or
  - (b) By color or aid of deception, obtained control over property of another; or
  - (c) Appropriated lost or misdelivered property of another.
- CP 47.

This instruction invited the jury to convict Mr. Timmins of an uncharged alternative means. *Brewczynski*, 173 Wn. App. at 549. The state cannot show that this error was harmless beyond a reasonable doubt. *Coristine*, 177 Wn.2d at 380.

The state repeated each of the uncharged alternative means in its closing. RP 391. Furthermore, the evidence could have supported a conviction under any of the uncharged means. Mr. Timmins testified that Kimberling voluntarily gave him her debit card and PIN. RP 305-07. He

stated that he only later formed the intent to take additional money out of her account for personal use. RP 307. The jury could have taken Mr. Timmins’s version of events to support a conviction for theft by “color or aid of deception” or by “appropriating lost or misdelivered property.”

The court’s instructions – permitting the jury to convict Mr. Timmins for an uncharged means of theft – violated his right to due process. *Brewczynski*, 173 Wn. App. at 549. Mr. Timmins’s theft conviction must be reversed. *Id.*

2. The court instructed the jury on uncharged alternative means of committing robbery.

First-degree robbery is an alternative means offense. *State v. Roche*, 75 Wn. App. 500, 510, 878 P.2d 497 (1994). The statute permits a finding of guilt if:

- (a) In the commission of a robbery or of immediate flight therefrom, he or she:
  - (i) Is armed with a deadly weapon; or
  - (ii) Displays what appears to be a firearm or other deadly weapon;or
- (iii) Inflicts bodily injury.

RCW 9A.56.200.

Mr. Timmins was charged only with the alternative means described in subsection (a)(iii) of the statute. CP 1. The Information provides that: “... in the commission of said crime or in immediate flight

therefrom, the Defendant inflicted bodily injury upon Karen Lisa Kimberling...” CP 1.

The court’s instructions, however, permitted the jury to convict based on the uncharged means as well. The to-convict instruction for robbery stated that the jury must find Mr. Timmins’s guilty if it found, inter alia:

- (a) That in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon or
  - (b) That in commission of these acts or in immediate flight therefrom the defendant displayed what appeared to be a firearm or other deadly weapon ; or
  - (c) That in commission of these acts or in immediate flight therefrom the defendant inflicted bodily injury.
- CP 38-39.

This instruction invited the jury to convict Mr. Timmins of an uncharged means of committing robbery. *Brewczynski*, 173 Wn. App. at 549. The state cannot show that this error was harmless beyond a reasonable doubt. *Coristine*, 177 Wn.2d at 380.

The court’s instructions allowed the jury to convict Mr. Timmins of an uncharged means of committing robbery. This error violated his right to due process. *Brewczynski*, 173 Wn. App. at 549. Mr. Timmins’s robbery conviction must be reversed. *Id.*

3. The court instructed the jury on uncharged alternative means of committing burglary.

Finally, first-degree burglary is an alternative means offense. *Brewczynski*, 173 Wn. App. at 549. The statute encompasses burglary in which a participant in a burglary is armed with a deadly weapon or assaults a person. RCW 9A.52.020.

Mr. Timmins was charged only with the alternative means involving assault. CP 1. The Information provided that: “in entering the building or in immediate flight therefrom, the defendant or another participant in the crime did intentionally assault any person therein.” CP 1.

Nonetheless, the court’s instructions permitted conviction based on the uncharged means of being armed with a deadly weapon as well. CP 44. The burglary to-convict instruction required the jury to find, *inter alia*:

That in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged was armed with a deadly weapon or assaulted a person...

*Id.* This instruction invited the jury to convict Mr. Timmins of a means of committing burglary with which he was not charged.

*Brewczynski*, 173 Wn. App. at 549. In fact, this error is identical to that compelling reversal in *Brewczynski*. *Id.* The state cannot show that the error was harmless beyond a reasonable doubt. *Coristine*, 177 Wn.2d at 380.

The court's instructions, which permitted the jury to convict Mr. Timmins for uncharged alternative means of theft, robbery, and burglary, violated his right to due process. *Brewczynski*, 173 Wn. App. at 549. Mr. Timmins's convictions for theft, robbery, and burglary must be reversed. *Id.*

**II. THE COURT VIOLATED MR. TIMMINS'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.**

A. Standard of Review.

Constitutional errors are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 702, 257 P.3d 570 (2011).

B. The court erred by prohibiting Mr. Timmins's argument regarding missing medical evidence.

Accused persons have a constitutional right to present a complete defense. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22; *State v. Otis*, 151 Wn. App. 572, 578, 213 P.3d 613 (2009). A court violates this right by denying the accused the opportunity to make a permissible argument in his/her defense. *Hannah v. Com.*, 306 S.W.3d 509, 515 (Ky. 2010).

Under the "missing witness" or "missing evidence" rule, when a party fails to introduce evidence that is within its control and would properly be part of the case, the jury may infer that the evidence would

have been unfavorable to that party. *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991) (internal citation omitted).

The issue of availability does not depend on whether the evidence or witness could be properly subpoenaed by either party. *Blair*, 117 Wn.2d at 490. Rather, the inquiry turns on whether there is:

...such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging.

*Id.* (internal citation omitted). The reasoning behind the rule is that a party with a close connection to evidence or a witness will introduce that evidence unless it would be adverse to that party's interest. *Id.*

At Mr. Timmins's trial, the state provided late discovery of Kimberling's medical records. RP 9-10. Mr. Timmins moved to exclude the evidence based on a discovery violation, but the court denied the motion and admitted the medical evidence. RP 13. The state did not, however, introduce any evidence regarding the results of those blood tests. RP 71-93. The prosecutor improperly mentioned evidence of lab tests of Kimberling's blood during her visit to the hospital on cross-examination of Mr. Timmins. RP 312-13.<sup>1</sup>

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<sup>1</sup> As argued elsewhere in this brief, the prosecutor committed misconduct by making that argument.

During closing, defense counsel attempted to argue that the state's failure to produce the lab test results permitted the inference that the evidence would have been adverse to the state's case. RP 428-29. When the state objected, however, the court cut off that line of argument. RP 429. Mr. Timmins was not permitted to argue that, based on the missing evidence rule, the jury could make the inference that the lab test results would have been harmful to the prosecution. *Id.*

The alleged victim's lab test results were in the state's control. *Blair*, 117 Wn.2d at 490. The state called a nurse to testify regarding other portions of Kimberling's medical treatment but did not elicit any testimony regarding her lab tests. RP 71-93. The missing evidence rule permitted Mr. Timmins to argue that the state's failure to produce the lab test results created the inference that the evidence would have been harmful to the prosecution. *Blair*, 117 Wn.2d at 490.

The court's ruling prohibiting defense counsel the opportunity to inform the jury of the missing evidence rule inference denied Mr. Timmins his constitutional right to present a defense. *Blair*, 117 Wn.2d at 490; *Otis*, 151 Wn. App. at 578. Mr. Timmins's convictions must be reversed. *Blair*, 117 Wn.2d at 490.

**III. PROSECUTORIAL MISCONDUCT DENIED MR. TIMMINS A FAIR TRIAL.**

A. Standard of Review.

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Absent an objection, a court can consider prosecutorial misconduct for the first time on appeal, and must reverse if the misconduct was flagrant and ill-intentioned. *Id.*

Furthermore, an appellant can argue prosecutorial misconduct for the first time on review if it creates manifest error affecting a constitutional right. RAP 2.5(a)(3). Prosecutorial misconduct that violates the constitutional rights of the accused necessitates reversal unless the court finds it harmless beyond a reasonable doubt. *State v. Fuller*, 169 Wn. App. 797, 813, 282 P.3d 126 (2012) *review denied*, 176 Wn.2d 1006, 297 P.3d 68 (2013). A reviewing court analyzes the prosecutor's statements during closing in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008).

B. The prosecutor committed misconduct by encouraging the jury to rely on passion and prejudice, "testifying" to "facts" not in evidence, and violating the court's ruling *in limine*.

Prosecutorial misconduct can deprive the accused of a fair trial. *Glasmann*, 175 Wn.2d at 703-04; U.S. Const. Amends. VI, XIV, Wash.

Const. art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3-5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

1. The prosecutor committed prejudicial misconduct by encouraging the jury to rely on passion and prejudice rather than the facts of the case.

A prosecutor must "seek convictions based on probative evidence and sound reason." *Glasmann*, 175 Wn.2d at 704. A prosecutor should not make arguments designed to inflame the passions and prejudices of the jury. *Id.*

It is prosecutorial misconduct to encourage the jury to consider sympathy for the alleged victim when deciding guilt or innocence. *Moore v. Morton*, 255 F.3d 95, 117 (3d Cir. 2001). Such an argument invites the

jury to rely on passion and prejudice, rather than the evidence in the case.

*Id.* It is also misconduct for a prosecutor to argue “facts” that have not been admitted into evidence. *Glasmann*, 175 Wn.2d at 696.

Evidence of the accused’s character is not admissible to show conformity therewith. ER 404(a). It is prosecutorial misconduct to argue that a defendant’s bad character is evidence of guilt. *Washington v. Hofbauer*, 228 F.3d 689, 699 (6th Cir. 2000).

During closing, the prosecutor encouraged the jury to rely on passion and prejudice, facts not in evidence, and Mr. Timmin’s alleged bad character instead of the evidence in the case.

First, the prosecutor encouraged the jury to rely on sympathy for Kimberling in determining Mr. Timmins’s guilt:

[Y]ou saw this woman. [Y]ou think that she has means for this? The kind of person who is going to go drain the account of a woman who’s obviously very limited in her income, he took every single thing she had.  
RP 439-40.

Mr. Timmins objected to this argument, but the judge did not rule.

RP 439-40. This argument continued after the objection:

[H]e’s saying to you today that that’s not the kind of person that he is. That’s really what happened when he testified in front of you today. I’m not that type of person, I am a good person, I only just took her money. I wouldn’t have done this, I’m not the kind of person who would punch an old lady in the eye and stay at her house and take her debit card. That’s exactly what every one of his actions has shown you. He didn’t just go take something, he didn’t

just go buy a dirt bike that he doesn't even need from Wal-Mart, he took everything she had. That's the kind of person he is. His credibility's at issue.  
RP 440.

The state did not offer any evidence regarding Kimberling's income or socioeconomic status. RP 106-180. The prosecutor's reliance on "facts" not in evidence was misconduct. *Glasmann*, 175 Wn.2d at 696.

Additionally, the argument encouraged the jury to make a decision based on sympathy for Kimberling rather than the evidence presented at trial. *Moore*, 255 F.3d at 117.

Finally, the argument invited the jury to find Mr. Timmins not credible and guilty based on the prosecutor's assessment of his character. The argument attempted to present Mr. Timmins's "bad character" as direct evidence of credibility and guilt. The argument constituted prosecutorial misconduct. *Hofbauer*, 228 F.3d at 699.

This case turned on Mr. Timmins's word against Kimberling's. The prosecutor's appeal to sympathy for Kimberling and contention that Mr. Timmins was a bad person likely tipped that balance in the jurors' minds. Mr. Timmins was prejudiced by the prosecutor's improper argument.

The prosecutor committed prejudicial misconduct by encouraging the jury to rely on sympathy rather than the facts of the case. *Moore*, 255 F.3d at 117. Mr. Timmins’s convictions must be reversed. *Id.*

2. The prosecutor committed misconduct by “testifying” to “facts” not in evidence.

It is misconduct for a prosecutor to argue facts that have not been admitted into evidence. *Glasmann*, 175 Wn.2d at 696. It is a long-standing rule that “consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is reasonable ground to believe that the defendant may have been prejudiced.” *Id.*

Likewise, it is misconduct for a prosecutor to insinuate to the jury that unavailable evidence would have corroborated the state’s version of events. *Boehning*, 127 Wn. App. at 522.

Finally, a prosecutor may not attempt to impeach a witness by referring to extrinsic evidence that is not introduced at trial. *State v. Miles*, 139 Wn. App. 879, 886, 162 P.3d 1169 (2007). It is misconduct for a prosecutor to attempt to use impeachment as a means of submitting otherwise unavailable evidence to the jury. *Id.*

During the state’s cross-examination of Mr. Timmins, the prosecutor referred to extrinsic evidence of Kimberling’s lab tests. RP 312-13. Mr. Timmins’s testified that he and Kimberling had used

methamphetamine together. RP 303-04. In response, the prosecutor asked Mr. Timmins to explain the absence of methamphetamine in Kimberling's system when she went to the hospital the next day. RP 312-13. The results of Kimberling's lab tests, however, were never introduced into evidence. RP 71-03.

The prosecutor's question impermissibly attempted to submit evidence to the jury that had not been properly admitted. *Glasmann*, 175 Wn.2d at 696; *Miles*, 139 Wn. App. at 886.

Mr. Timmins was prejudiced by the prosecutor's improper statement. Because Kimberling's lab records were not submitted at trial, Mr. Timmins had no opportunity to rebut the prosecutor's claim regarding their contents. The jury likely took the prosecutor's statement as the final word on the matter. Though the court sustained defense counsel's objection to the improper comment, a "bell once rung cannot be unring." *State v. Powell*, 62 Wn. App. 914, 919, 816 P.2d 86 (1991).

The prosecutor committed prejudicial misconduct by "testifying" to "facts" that were not in evidence. *Glasmann*, 175 Wn.2d at 696. Mr. Timmins's convictions must be reversed.

3. The prosecutor committed misconduct by violating the court's ruling *in limine* excluding evidence of Mr. Timmins's recent release from jail.

Finally, the prosecutor committed misconduct by violating the court's ruling *in limine* excluding mention of Mr. Timmins's release from jail shortly before the alleged offenses occurred.

On the first day of trial, the court denied the state's motion *in limine* to introduce Mr. Timmins's recent release from jail. RP 4-6. The parties argued extensively about the issue again the second day of trial. RP 247-55. The court again ruled that the state would not be permitted to elicit that Mr. Timmins had recently been released from jail. RP 255.

Nonetheless, the prosecutor asked Detective Harris on direct-examination about Mr. Timmins's release from jail the day of the alleged offenses. RP 325. Mr. Timmins objected and moved for a mistrial based on the prosecutor's violation of the court's ruling *in limine*. RP 326. In response, the prosecutor indicated that the statement had been an accident. *Id.* The prosecutor claimed not to have even argued for the admission of Mr. Timmins's recent time in jail.

The court denied Mr. Timmins's motion for mistrial. RP 334. In an attempt to cure the error, the court told the jury that the prosecutor had meant to say that Mr. Timmins had just gotten out of court, rather than jail. RP 337.

The prosecutor's violation of the court's ruling *in limine* prejudiced Mr. Timmins. The state's theory was largely based on the

assertion that Mr. Timmins was a bad person. RP 439-40. Improperly informing the jury that Mr. Timmins was released from jail on the morning of the alleged offenses likely corroborated that theory in the jurors' minds. The prejudicial effect of the evidence is too great to have been remedied by the court's attempt to cure the error. *Powell*, 62 Wn. App. at 919.

The prosecutor committed prejudicial misconduct by violating the court's ruling *in limine* excluding evidence of Mr. Timmins's recent release from jail. Mr. Timmins's convictions must be reversed. *Glasmann*, 175 Wn.2d at 704.

4. The cumulative effect of the prosecutor's misconduct requires reversal of Mr. Timmins's convictions.

The cumulative effect of repeated instances prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 164 Wn.2d 724, 295 P.3d 728 (2012).

Here, the prosecutor encouraged the jury to find guilt based on sympathy for Kimberling and Mr. Timmins's alleged "bad character" rather than the evidence in the case, submitted facts not in evidence to the

jury, and violated the court's ruling *in limine* excluding testimony regarding Mr. Timmins's recent release from jail.

All of these instances of misconduct, whether considered individually or in the aggregate, require reversal of Mr. Timmins's convictions. *Id.*

**IV. THE COURT ABUSED ITS DISCRETION BY SCORING ALL FOUR COUNTS SEPARATELY.**

A. Standard of Review.

Sentencing decisions are reviewed for abuse of discretion. *State v. Williams*, 29931-7-III, 2013 WL 4176076 (Wash. Ct. App. Aug. 15, 2013). A court abuses its discretion if a decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Id.* A court's failure to exercise discretion is itself an abuse of discretion. *Brunson v. Pierce Cnty.*, 149 Wn. App. 855, 861, 205 P.3d 963 (2009).

B. Multiple offenses comprise the same criminal conduct if committed at the same time and place, against the same person, and with the same criminal purpose.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. When calculating the offender score, a sentencing judge must determine how multiple current offenses are to be scored. Under RCW 9.94A.589(1)(a),

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime... “Same criminal conduct,” as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim...

RCW 9.94A.589(1)(a).

The analyses for same criminal conduct and double jeopardy are distinct. *State v. Tili*, 139 Wn.2d 107, 119, n. 5, 985 P.2d 365 (1999). The “unit of prosecution” inquiry for double jeopardy focuses on the legislature’s intent. *Id.* The same criminal conduct analysis, on the other hand, focuses on the criminal intent, time, place, and victim involved in an offense.<sup>2</sup> *Id.*

**Theft and identity theft.** Mr. Timmins’s theft and identity theft offenses stemmed from the same criminal conduct. RCW 9.94A.589(1)(a). Mr. Timmins’s theft conviction was for obtaining or exerting unauthorized control over an access device. CP 2. His identity theft conviction was for using a means of identification or financial

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<sup>2</sup> Likewise, the burglary anti-merger statute is not determinative of the same criminal conduct test. *State v. Williams*, 29931-7-III, 2013 WL 4176076 (Wash. Ct. App. Aug. 15, 2013). A court must exercise its discretion in determining whether a burglary offense stems from the same criminal conduct as another offense, regardless of the anti-merger provision. *Id.*

information of another person. CP 2. The two offenses involved the same continuing course of conduct that started when Mr. Timmins obtained the access card and continued until he completed his last transaction. The offenses took place at the same times and places, required the same intent, and involved the same victim. RCW 9.94A.589(1)(a).

**Theft and burglary/robbery.** In the alternative, Mr. Timmins's theft and robbery convictions involved the same criminal conduct. RCW 9.94A.589(1)(a).<sup>3</sup> If Mr. Timmins's theft offense was not part of the same course of criminal conduct as the identity theft offense, it is because it was completed upon removing Kimberling's debit card from her possession. In that case, it took place at the same time and place, required the same intent, and involved the same victim as the burglary and robbery offenses. RCW 9.94A.589(1)(a).

**Robbery and burglary.** Finally, Mr. Timmins's robbery and burglary offenses arose from the same criminal conduct. Again, the time, place, criminal intent, and victim of the two offenses were the same. The convictions stemmed from the acts -- occurring within minutes of each other -- of remaining in Kimberling's apartment after being asked to leave

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<sup>3</sup> Mr. Timmins did not argue below that his theft and robbery convictions stemmed from the same criminal conduct. Nonetheless, the court's failure to engage in the same criminal conduct analysis constituted an abuse of discretion. *Brunson*, 149 Wn. App. at 861.

and punching her. Both of these criminal acts were undertaken in order to secure Kimberling's debit card.

Mr. Timmins argued at sentencing that two pairs of convictions<sup>4</sup> arose from the same criminal conduct. RP 465, 471; CP 52-68. Mr. Timmins also argued that the two charges merged for double jeopardy purposes. CP 52-68. The court responded by ruling only that the charges did not merge. RP 476. The court stated that it "ha[d] to treat them as four separate crimes even though they took place at the same time." RP 476.

The court appears to have considered the same criminal conduct issue resolved upon determining that the offenses did not merge. The court misapprehended the connection between the merger and same criminal conduct inquiries. *Tili*, 139 Wn.2d at 119. The court abused its discretion when it failed to exercise its discretion in determining whether Mr. Timmins's offenses made up the same criminal conduct. *Brunson*, 149 Wn. App. at 861.

The court abused its discretion by failing to inquire into whether Mr. Timmins's convictions comprised the same criminal conduct. *Id.*;

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<sup>4</sup> Theft/identity theft and burglary/robbery. Counsel did not argue that the theft and burglary/robbery comprised the same criminal conduct. However, the court was obligated by statute to make the determination.

RCW 9.94A.589(1)(a). The case must be remanded for resentencing. *State v. Williams*, 29931-7-III, 2013 WL 4176076 (Wash. Ct. App. Aug. 15, 2013).

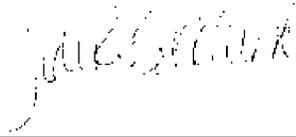
### **CONCLUSION**

Mr. Timmins's right to due process was violated when the court instructed the jury on uncharged alternative means of committing theft, robbery, and burglary. The court violated Mr. Timmins's right to present a defense when it prevented him from making an argument based on the missing evidence rule. The prosecutor committed prejudicial misconduct by encouraging the jury to rely on sympathy for the alleged victim and the prosecutor's assessment of Mr. Timmins's character, by introducing facts not in evidence, and by violating the court's ruling *in limine*. Mr. Timmins's convictions must be reversed.

In the alternative, the court abused its discretion by failing to properly conduct the same criminal conduct analysis as sentencing. Mr. Timmins's case must be remanded for resentencing.

Respectfully submitted on September 23, 2013,

**BACKLUND AND MISTRY**



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## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

David Timmins, DOC #874382  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

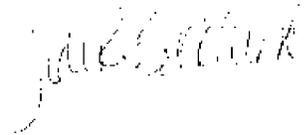
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney  
prosecutor@clark.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 23, 2013.



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Jodi R. Backlund, WSBA No. 22917  
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**BACKLUND & MISTRY**

**September 23, 2013 - 12:53 PM**

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