

No. 96599-4

NO. 49284-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT DAVIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Jennifer A. Forbes, Judge

AMENDED BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Charges, co-defendants, verdicts, and sentence</u>	2
2. <u>Overview of substantive facts</u>	4
3. <u>Trial testimony</u>	6
a. <u>Police investigation following victim's disappearance</u>	6
b. <u>Testimony of selected State's witnesses</u>	11
i. <i>Wilson's testimony and impeachment by defense</i>	11
ii. <i>Waggoner's testimony</i>	17
iii. <i>Small's testimony</i>	19
iv. <i>Goodloe's testimony and impeachment by State</i>	23
c. <u>Testimony of co-defendant Pry</u>	25
C. <u>ARGUMENT</u>	26
1. <u>FLAGRANT, PREJUDICIAL PROSECUTORIAL MISCONDUCT DENIED DAVIS A FAIR TRIAL</u>	26
a. <u>The constitution prohibits prosecutorial misconduct</u>	27
b. <u>The State commits misconduct when it treats impeachment evidence as substantive evidence in arguing that an accused has committed a crime</u>	28

TABLE OF CONTENTS (CONT'D)

	Page
c. <u>The prosecutor committed flagrant and incurable misconduct when it misused impeachment evidence as substantive evidence.</u>	29
d. <u>The misconduct affected the verdict</u>	32
2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S MISCONDUCT. .	34
3. DEFENSE COUNSEL WAS ALSO INEFFECTIVE FOR OPENING THE DOOR TO PREJUDICIAL TESTIMONY THAT A WITNESS AGAINST DAVIS HAD BEEN THREATENED BASED ON DISLOYALTY TO HIM.....	37
4. THE CUMULATIVE EFFECT OF THE ERRORS IDENTIFIED AT HEADINGS 1 THROUGH 3 ABOVE DENIED DAVIS A FAIR TRIAL.....	42
D. <u>CONCLUSION</u>	43

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Glasmann</u> 175 Wn.2d 696, 286 P.3d 673 (2012).....	27
<u>State v. A.N.J.</u> 168 Wn.2d 91, 225 P.3d 956 (2010).....	35, 40
<u>State v. Avendano Lopez</u> 79 Wn. App. 706, 904 P.2d 324 (1995) <u>review denied</u> , 129 Wn.2d 1007 (1996)	38
<u>State v. Babich</u> 68 Wn. App. 438, 842 P.2d 1053 (1993).....	29
<u>State v. Boehning</u> 127 Wn. App. 511, 111 P.3d 899 (2005).....	27, 28
<u>State v. Bourgeois</u> 133 Wn.2d 389, 945 P.2d 1120 (1997).....	38
<u>State v. Clark</u> 143 Wn.2d 731, 24 P.3d 1006 (2001).....	42
<u>State v. Clinkenbeard</u> 130 Wn. App. 552, 123 P.3d 872 (2005).....	29, 32
<u>State v. Dickenson</u> 48 Wn. App. 457, 740 P.2d 312 (1987).....	28
<u>State v. Emery</u> 174 Wn.2d 741, 278 P.3d 653 (2012).....	36
<u>State v. Ermert</u> 94 Wn.2d 839, 621 P.2d 121 (1980).....	36
<u>State v. Gefeller</u> 76 Wn.2d 449, 458 P.2d 17 (1969).....	38

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Hancock</u> 109 Wn.2d 760, 748 P.2d 611 (1988).....	29
<u>State v. Johnson</u> 40 Wn. App. 371, 699 P.2d 221 (1985).....	28
<u>State v. Jones</u> 144 Wn. App. 284, 183 P.3d 307 (2008).....	28
<u>State v. Kosanke</u> 23 Wn.2d 211, 160 P.2d 541 (1945).....	41
<u>State v. Lindsay</u> 180 Wn.2d 423, 326 P.3d 125 (2014).....	36
<u>State v. McFarland</u> 127 Wn.2d 322, 899 P.2d 1251 (1995).....	35
<u>State v. Monday</u> 171 Wn.2d 667, 257 P.3d 551 (2011).....	6, 27
<u>State v. Pinson</u> 183 Wn. App. 411, 333 P.3d 528 (2014).....	33, 34
<u>State v. Reeder</u> 46 Wn.2d 888, 285 P.2d 884 (1955).....	31
<u>State v. Reichenbach</u> 153 Wn.2d 126, 101 P.3d 80 (2004).....	35
<u>State v. Russell</u> 125 Wn.2d 24, 882 P.2d 747 (1994) <u>cert. denied</u> , 514 U.S. 1129 (1995).....	28
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	35, 37

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Venegas</u> 155 Wn. App. 507, 228 P.3d 813 <u>review denied</u> , 170 Wn.2d 1003 (2010)	42
<u>State v. Walker</u> 182 Wn.2d 463, 341 P.3d 976 (2015).....	27
<u>State v. Weber</u> 159 Wn.2d 252, 149 P.3d 646 (2006) <u>cert. denied</u> , 551 U.S. 1137 (2007)	28
 <u>FEDERAL CASES</u>	
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	35
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
1 MCCORMICK ON EVIDENCE, § 47 (John W. Strong ed., 4th ed. 1992)	38
13 WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4505 (3d ed. 2004)	36
ER 801	14
Former RCW 9.35.020(1) (2008)	2
Former RCW 9.35.020(2).....	2
Former RCW 9.35.020(3).....	2
RCW 9.94A.535	3
U.S. CONST. Amend. VI	27
U.S. CONST. Amend. XIV.....	27
CONST. Art. I, § 22.....	27, 35

A. ASSIGNMENTS OF ERROR

1. Incurably prejudicial prosecutorial misconduct in closing argument denied the appellant a fair trial.

2. Defense counsel was ineffective for failing to object to the improper argument.

3. Defense counsel was also ineffective for opening the door to damaging evidence that a witness had received threats for testifying against the appellant.

4. Cumulative trial errors (errors 1 through 3 above) denied the appellant a fair trial.

Issues Pertaining to Assignments of Error

1. A prosecutor commits misconduct by referring to facts not in evidence during closing argument. Here, during closing argument, the prosecutor argued the appellant had arranged for a woman, Sheila Costello, to help the appellant's associates commit identity theft. But, while the State had asked a witness about statements to detectives to that effect, such evidence was not admitted substantively, only for impeachment. Did the prosecutor's argument therefore constitute flagrant, prejudicial misconduct, denying the appellant a fair trial?

2. Was defense counsel ineffective for failing to object to the misconduct?

3. Was defense counsel also ineffective for opening the door to damaging testimony that a witness has been threatened for testifying against the appellant?

4. Based on the accumulation of prejudice from the foregoing errors, did cumulative error deny the appellant a fair trial?

B. STATEMENT OF THE CASE¹

1. Charges, co-defendants, verdicts, and sentence

The State charged Robert Davis with first degree felony murder based on second degree robbery (count 1), first degree robbery (count 2), and second degree identity theft (count 3).² The named victim as to each

¹ This brief refers to 46 verbatim reports as follows: 1RP – 2/5/16; 2RP – 2/18/16; 3RP – 2/19/16; 4RP – 2/26/16; 5RP – 3/4/16; 6RP – 3/9/16; 7RP – 3/10/16; 8RP – 3/4/16; 9RP – 3/15/16; 10RP – 3/17/16; 11RP – 3/22/16; 12RP – 3/25/16; 13RP – 4/4/16; 14RP – 4/25/16; 15RP – 4/26/16; 16RP – 4/27/16; 17RP – 4/28/16; 18RP – 5/3/16; 19RP – 5/4/16; 20RP – 5/5/16; 21RP – 5/9/16; 22RP – 5/10/16; 23RP – 5/11/16; 24RP – 5/12/16; 25RP – 5/16/16; 26RP – 5/17/16; 27RP – 5/18/16; 28RP – 5/19/16; 29RP – 5/23/16; 30RP – 5/24/16; 31RP – 5/25/16; 32RP – 5/26/16; 33RP – 6/6/16; 34RP – 6/7/14; 35RP – 6/8/16; 36RP – 6/9/16; 37RP – 6/13/16; 38RP – 6/15/16; 39RP – 6/16/16; 40RP – 6/20/16; 41RP – 6/21/16; 42RP – 6/22/16; 43RP – 6/23/16 (closing arguments); 44RP – 6/27, 6/28, 6/30, 7/5, and 7/6/16 (jury questions and verdicts); 45RP – 7/22/16 (sentencing continuance); and 46RP – 8/5/16 (Davis sentencing and plea to charge under separate case number).

² An identity theft conviction requires proof that the defendant or an accomplice knowingly obtained, possessed, used, or transferred a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime. Former RCW 9.35.020(1) (2008); CP 12 (accomplice liability instruction in this case). First degree identity theft requires proof that the defendant obtained “credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value[.]” Former RCW 9.35.020(2). Second degree identity theft is a violation not amounting to first degree identity theft. Former RCW 9.35.020(3).

charge was Robert Hood. The crimes were alleged to have occurred in mid- to late-December of 2015. CP 1219-22 (second amended information). Co-defendants Robert Pry and Arnold Cruz were tried with Davis.³ But the court severed the trial of a third co-defendant, Joshua Rodgers-Jones. 2RP 18.

A jury acquitted Davis of counts 1 and 2, as well as the lesser degree offense of second degree robbery, but it found him guilty of second degree identity theft. 44RP 5282; CP 1468-69. The court sentenced Davis to 57 months of confinement, the high end of the standard range.⁴ 46RP 28; CP 1471-81.

Davis timely appeals. CP 95.

³ The State charged Pry with first degree felony murder, first degree kidnapping, first degree robbery, second degree identity theft, possession of stolen property, and witness tampering. CP 1418, 1424, 1426, 1440. The State also alleged aggravating circumstances as to many of those crimes. 44RP 5282. Cruz, who was not alleged to have been involved with the robbery, was charged with rendering criminal assistance and removal or concealment of a deceased body, based on a theory that he helped conceal Hood's body. CP 1443, 1445. The jury convicted Pry and Cruz as charged, except it found the single aggravator alleged as to Cruz did not apply. 42RP 5280-87.

⁴ At Davis's sentencing, he pleaded guilty to another charge under a separate cause number. 46RP 3-10. As part of the plea, the parties agreed that a 33-month below-standard-range sentence should be imposed on that conviction, but that under RCW 9.94A.535(2)(c) (high offender score aggravator), the sentence should run consecutively to the 57-month identity theft sentence, reflecting an exceptional sentence upward. 46RP 11-15. The sentencing court imposed 46 rather than 33 months of incarceration on that conviction, reflecting a total sentence of 103 months for both case numbers. 46RP 28.

2. Overview of substantive facts

Robert Hood, a reclusive 89-year-old man, disappeared from his home on Barker Creek Road in Kitsap County sometime after December 16, 2015. 21RP 1437-38. His body was found in a barrel in a backyard in Belfair, Mason County, on December 30, 2015. 22RP 1586; 33RP 3614; 34RP 3676; 27RP 4290.

The entrance to Baker Creek Road is located on Tracyton Boulevard. Two residences pertinent to this case are located 2.4 miles apart on Tracyton. 42RP 4926. Davis, who previously dated co-defendant Pry's mother, resided at 8686 Tracyton Boulevard with roommate Christina Waggoner, who owned the residence. 35RP 3868; 42RP 147. Pry had briefly resided at Waggoner's residence as well, but around the time of the events in question, Pry moved to a duplex at 5734 Tracyton Boulevard (the duplex). Police eventually raided and searched that residence as part of the investigation in this case. 24RP 1889-90; 35RP 3868-69; 41RP 48-49.

At trial, the State alleged that various individuals including Pry, Rodgers-Jones, and Davis plotted to rob Hood. 21RP 1394 (State's opening statement). The State alleged that the robbery, committed by Pry and Rodgers-Jones, turned violent, and Hood was killed. E.g. 37RP 4204-06; 39RP 4574-77; 43RP 5002-03. After the robbery, a group of co-conspirators, including the three men named above, plotted to steal from

Hood's bank accounts. 21RP 1399. According to the State, the plan was revealed after Alisha Small, an acquaintance of Davis who was— unbeknownst to Davis—also working as a confidential informant, contacted the police. As part of a plea deal, Small testified that she spent time with Davis, Pry, Rodgers-Jones and others, including Pry's sister and his girlfriend, who wanted her to transfer an individual's funds to accounts they could access. 21RP 1399; 36RP 4034. Following the arrest of Pry's girlfriend, Ocean Wilson, she also pointed the finger at the co-defendants. Both Small and Wilson received a substantial reduction in charges in exchange for their testimony. 27RP 2502-11.

Heavy methamphetamine use pervaded the events leading up to, and following, Hood's death. Not knowing if Hood was alive or dead, but suspecting the latter, police pursued leads across multiple counties before finally locating his body in Mason County. 22RP 1586-91.

In contrast, Davis argued he was in the wrong place at the wrong time. 21RP 1412-14. Davis was not part of any plan to rob or murder Hood. Davis had planned to visit the casinos near Tacoma with Pry's sister and others to celebrate her recent release from prison. 40RP 4796; 41RP 58, 146-48. Thus, he was in physical proximity to, but not a part of, Pry and the other co-conspirators' scheme to extract money from Hood's bank accounts. By the time the other participants decided that Hood's body had

to be moved to prolong the scheme, Davis was long absent. Davis was, moreover, the victim of witnesses' desire to cut deals with the State, and he made an attractive target because he had dealt drugs. 27RP 2502-11 (Ocean Wilson deal); 36RP 4026 (Alisha Small testimony she was considering targeting Davis to satisfy her confidential informant contract); see also 43RP 5120 (Davis closing argument).

3. Trial testimony

a. Police investigation following victim's disappearance

Two decades younger than Hood, Candyce Gratton was a longtime family friend. Hood had no living family. 21RP 1428-29. Gratton looked after Hood, checking on him a few times a week at his wooded property located at 1270 Barker Creek Road Northwest outside Bremerton. 21RP 1433, 1442; 22RP 1481-82; 23RP 1714. Gratton called Hood almost daily. 21RP 1433.

Gratton was, however, busier than usual in December of 2015. 21RP 1437. She visited Hood mid-day on December 16, a Wednesday. 21RP 1437-38. When she called his home phone the following Monday, December 21, there was no answer. 21RP 1438.

Gratton went to Hood's residence later that morning to check in. She had a key, but the front door would not open. 21RP 1441. She

contacted her son, who had to force the door open. 21RP 1442. Hood was not there. 21RP 1443. But the cap he always wore was on the floor, and his documents, normally stacked in piles, were strewn about. 21RP 1443, 1445, 1454, 1462; 37RP 4281. In addition, the hidden compartment in the bathroom, where Hood usually kept a substantial amount of cash in \$100 bills, was empty. 21RP 1448; 39RP 4499. Hood's shotgun was missing from his bedroom, as were his wallet and checkbook. 21RP 1149-50; 39RP 4501-02. Gratton called the police. 21RP 1444. Police arrived at the house around 6:00 p.m. 22RP 1472. They found traces of blood in the bathroom. 23RP 1733.

Police had been to the residence that morning as well. 23RP 1707. A few months before the events in question, Kitsap Detective Jason Bowman offered Alisha Small a deal after she was charged with drug-related crimes. 23RP 1673; 36RP 4022 (Small's testimony). In exchange for acting as a confidential informant (CI), her drug charges would be reduced. 23RP 1675. Small had to meet certain requirements and stay in touch with Bowman. 23RP 1675. Bowman received a text from Small's phone on Saturday, December 19. He spoke with her later that day and became concerned for her safety. The next day, they spoke by phone again. 23RP 1678. After that call, Bowman began investigating the possible robbery of an unknown elderly man. Based on the information provided by

Small, Bowman surmised the man in question could be Hood. 23RP 1680, 1691. Bowman went to Hood's residence but was unable to locate him. 23RP 1708-10.

Edward Scholfield lived at 8161 Tracyton Boulevard near the entrance to the more secluded Barker Creek Road, where Hood lived. 23RP 1823. On December 17, he returned home around 6:00 p.m. and saw a car he did not recognize in his next-door neighbor's driveway. 23RP 1831. Scholfield blocked the car with his car. A man got out, and Scholfield asked what he was doing. The man said he had been walking home and his sister stopped to pick him up. 23RP 1832. From the car, Scholfield heard a woman urging man to get in the car. 23RP 1832. Scholfield wrote down Oregon license plate number 105-DCB. 23RP 1832-33.

The car with that license plate number was a dark-green Honda sedan. 24RP 1989. Small had borrowed the Honda from her roommate to travel to Bremerton to meet Davis the evening of December 16. 36RP 4027-28, 4030. According to Small, Davis took the keys to move the car but never returned them. 36RP 4036.

Based on information provided by Small, police learned Donald Goodloe, a friend of Davis, had checked into the Days Inn in Fife, near the Emerald Queen Casino (EQC), the evening of December 17 at 10:24 p.m. 24RP 1915-20; 26RP 2228-29.

Police obtained surveillance video and photos from the Days Inn for the evening of December 17 through the morning of December 18. 26RP 2231-33, 2240-72. The videos show Goodloe checking into room 104 and show Small at the front desk the following morning. They also show vehicles that appear consistent with Small's Honda, Davis's Excursion, and a Mercedes associated with Goodloe. 24RP 1919; 26RP 2261-65. A car that may be Davis's is seen leaving the area of room 104 around noon on December 18. 26RP 2266. Goodloe checked out early the afternoon of December 18. 26RP 2272. Around that time, Small can be seen getting into an Excursion. 26RP 2290.

On December 18, Small's phone was used to contact Bank of America regarding Hood's accounts. 24RP 1963. One call was recorded.⁵ 24RP 1964. Pry, who testified at trial, admitted to calling Bank of America to attempt to set up online banking to access to Hood's account. 41RP 87-88, 104-05; 42RP 4841.

Police obtained search warrants for the duplex at 5734 Tracyton Boulevard after an occupant called the police about Pry and other individuals staying there. 24RP 1889. Police raided the duplex. Pry,

⁵ A portion was played for the jury. 38RP 4263-68; Ex. 116A2 (audio); Exs. 116B1 and 116C (transcripts not admitted, but provided to jurors as listening aids).

Wilson, Rodgers-Jones and Pry's sister Shawna were arrested. 24RP 1889-90.

Pry spoke with police officers following his arrest. 24RP 1978-79. He admitted to being at the EQC and that others in his group had gone into the casino to try to cash Hood's checks. 24RP 1981. He admitted to using Small's phone to call regarding Hood's account. 24RP 1982; 37RP 4417. Police contacted Bank of America, which revealed the call came from Small's phone number. 24RP 1983 (Bowman testimony).

At the duplex, police located a folder containing Hood's financial documents, his driver's license, and other items identified as Hood's. 24RP 1985-86; 29RP 2854-65; 30RP 2876, 2887-93, 2896-98, 2921-22; 31RP 3074, 3080-82; 37RP 4281; 39RP 4498; 39RP 4503-04. Pry's fingerprint was found on one of the items. 26RP 2331-39; 27RP 2457-60.

Small's Honda was found at a Bremerton residence on December 23. 24RP 1870, 1993. It had been spray-painted black. 24RP 1995. Police found Hood's DNA in the trunk. 34RP 3670, 3675; 35RP 3835-38. The State presented several witnesses regarding the movement of the Honda after it left the Days Inn. E.g., 23RP 1784-96; 25RP 2062-75; 25RP 2157-75; 27RP 2422-43; 37RP 4191. The State did not allege Davis was involved with the movement of the Honda, other than trying to retrieve it for Small on December 22. See 37RP 4204, 4250-53 (testimony by Rodgers-Jones's

associate Miranda Bond that Davis came to the duplex looking for the Honda).⁶ Similarly, the State did not allege Davis was involved in the concealment of Hood's body. 27RP 2424.

Alisha Small was arrested on December 23. During a search incident to arrest, police found a corner of one of Hood's checks, listing his full name and address, as well as a business card in Gratton's name, in Small's belongings. 26RP 2219-23, 2301.

b. Testimony of selected State's witnesses

i. *Wilson's testimony and impeachment by defense*

Wilson, Pry's girlfriend, testified at trial. 27RP 2379. She testified pursuant to a "felony diversion program" to avoid charges of possession of a stolen vehicle, which was unrelated to the present case, as well as rendering criminal assistance for this case.⁷ 27RP 2386-87, 2478.

In mid-December, Wilson resided with Pry in the living room of the Tracyton Boulevard duplex. 27RP 2381-83. Another tenant, the woman

⁶ Bond testified Rodgers-Jones told Davis that something had happened and he could not have the car back. Davis replied, "This is too much. I don't want [anything] to do with it. Just keep the girl's car," before storming off. 37RP 4205.

⁷ Despite Wilson's involvement in crimes against Hood, if she complied with the agreement, she would not serve any time in prison despite facing up to 10 years. Part of Wilson's diversion agreement required her to testify consistently with her prior statements. 27RP 2502-11.

who called the police on December 22, lived there with her children. Pry, his sister Shawna, and Rodgers-Jones were also staying there. 27RP 2383-84. Shawna and Rodgers-Jones were residing in a room together. 27RP 2384. At the time, Wilson was using about \$50 worth of methamphetamine each day. 27RP 2385, 2488.

According to Wilson, about four days before the group's trip to the Days Inn, Pry and Rodgers-Jones began talking about a "lick" they wanted to "hit."⁸ It would be easy. 27RP 2387. There was a house near the duplex where a substantial amount of money could be obtained. 27RP 2387-88. Wilson could not recall if Davis was part of the initial conversations, but she recalled he said he could help. 27RP 2387-88. Wilson was high on methamphetamine when she overheard these conversations. 27RP 2387-88.

The day the "lick" occurred, Wilson was at the duplex with various individuals who seemed to be having conversations outside Wilson's presence. 28RP 2563-64. At some point, Wilson got into a Ford Excursion with Pry, Rodgers-Jones, and Shawna. Davis was driving the Excursion. 27RP 2390. As they drove, Pry and Rodgers-Jones put on dark clothing and beanies. 27RP 2391. Davis pulled to the side of the road and the two men got out. 27RP 2390. Wilson claimed that Davis told them "[d]on't fuck

⁸ Wilson testified that in the "drug world" a "lick" meant taking items of value from someone's home. 27RP 2406, 2496.

this up, don't get us caught." 27RP 2390. Pry and Rodgers-Jones told Davis not to worry. 27RP 2390.

Davis, Wilson and Shawna then drove to Davis's residence. 27RP 2391. Davis ushered Wilson to his bedroom. 27RP 2391. A woman introduced as "Bonnie," whom Wilson later learned was Alisha Small, was sitting in Davis's bedroom with a laptop. 27RP 2391, 2393, 2516-17. Small was injecting methamphetamine, while Wilson smoked it. 28RP 2545-46. Davis said Small was there to "handle" some "paperwork" that Wilson had. 27RP 2391-92. Wilson explained that she had previously obtained some documents by stealing them from mailboxes.⁹ 27RP 2538-39.

Sometime later, Davis handed Small's car keys to Wilson and told her to give them to Shawna. 27RP 2392. Wilson followed Shawna outside and saw Rodgers-Jones near the Excursion. Shawna and Rodgers-Jones discussed needing to pick up Pry. 27RP 2394. They got in Small's Honda and told Wilson to go back inside. 27RP 2394-95.

Shortly thereafter, Davis told Wilson and Small to get in the Excursion and they drove off. 27RP 2394. They stopped at a gas station,

⁹ Wilson claimed she did not see any paperwork related to Hood until later, when she and the others went to the Days Inn. 28RP 2564-65. This appeared to conflict with Small's testimony that she saw paperwork related to Hood or "Bob Barker," in Wilson's possession, shortly after her arrival at Davis's. 36RP 4030-36.

and Davis had Wilson call Shawna. Shawna said they had just picked up Pry, and Shawna directed them to meet up the duplex. 27RP 2396.

At the duplex, Shawna had a backpack and pillowcases filled with various items. Shawna said one pillowcase was Rodgers-Jones's, but the others belonged to Pry. 27RP 2397. Wilson overheard Rodgers-Jones and Pry discussing wallets. Rodgers-Jones told Pry he had given the wallets to Davis.¹⁰ 27RP 2400.

Small and Rodgers-Jones argued about Small's Honda and who would drive it. 27RP 2396. Eventually, however, Small got in the Excursion. Small and Davis rode in the front, while Wilson and Pry rode in the back. 27RP 2397. They drove toward the EQC in Fife. The plan was for Shawna and Rodgers-Jones to follow in the Honda. 27RP 2397.

On the way, Pry pulled various items out of a pillowcase. 27RP 2398-2400. When Pry handed Davis various coins, Davis called them "garbage" and demanded more items. 27RP 2400; 28RP 2655-56. On the ride, while everyone was smoking methamphetamine, Pry commented that he had been confronted by a neighbor while waiting for Shawna. 27RP 2404, 2406. According to Wilson, Davis said, "What the fuck? You're going to get us caught." 27RP 2407.

¹⁰ This statement was admitted as a statement of a co-conspirator in furtherance of the conspiracy. 27RP 2403; ER 801(d)(2)(v).

The Excursion arrived at the EQC, but the Honda was nowhere to be found. 27RP 2407-06. Pry handed Small some checks, and Pry and Small began filling them out.¹¹ 28RP 2571-72, 2576-77. Pry said the checks were Hood's. 27RP 2408. Davis and Small went into the EQC because they had identification, and the others did not. 27RP 2408, 2579; 41RP 83.

Wilson and Pry, still in the Excursion, discussed what Pry had obtained in the "lick." 27RP 2466. He showed Wilson about \$800 in hundred-dollar bills and mentioned that there was money in "the wallets," but he did not know where they had gone.¹² 27RP 2466.

About an hour later, Wilson went to the Days Inn across the road from the EQC, where a room had been rented. 27RP 2409; 28RP 2581-82. Pry retrieved some documents and began working on a laptop. 27RP 2409. Shawna and Rodgers-Jones arrived the wee hours of the next morning, reporting that the Honda had broken down on the way. 27RP 2409-10. Pry and Rodgers-Jones discussed having robbed Hood. 27RP 2410-11. The court instructed the jury that the following conversation was admissible as to Pry only. 27RP 2410. Pry said he had gone to the old man's house, knocked on the door, and told the man he was "God." They tied up the man,

¹¹ Pry later testified Davis did not participate in the discussion about checks. 41RP 152-53.

¹² The court instructed the jury that this testimony could be only be used against Pry. 27RP 2466-67.

hit him, and left him “snoring” on the floor. 27RP 2411. They joked about returning to eat the old man’s snacks. 27RP 2411. Davis was not present for the conversation. 28RP 2567, 2583.

Later, Pry borrowed the Honda to take Wilson to visit her mother. When Wilson returned to the Days Inn, Small was there, and she was angry the Honda had been taken again. 27RP 2418. An altercation ensued.¹³ The group settled down after smoking more methamphetamine. 27RP 2418; 28RP 2569-71.

Davis entered the room at one point and said “okay, this isn’t solving anything.” 27RP 2419. At that point, Pry and his sister started working on laptop computers. 27RP 2419. Pry called a bank pretending to be Hood. 27RP 2419-20. Small attempted to obtain prepaid bank cards. 28RP 2571, 2580.

At some point, Pry gave Small money to pay for another night at the Days Inn. 27RP 2420. But the plan changed shortly thereafter. 27RP 2421. Pry, Shawna, and Rodgers-Jones left in the Honda, leaving Small and Davis at the casino. 27RP 2422-23. Wilson did not see either Davis or Small again. 27RP 2424; 28RP 2583.

¹³ Small testified she tried to recover the keys to the Honda, but Pry and Shawna refused to return them. 36RP 4058. Then, either Rodgers-Jones or Pry put a gun to Small’s head to dissuade her from pursuing the matter. 36RP 4059, 4103.

Wilson later saw documents in Hood's name at the duplex, in the area where she and Pry were staying. 27RP 2471-72. Wilson was at the duplex on December 22 when it was raided by police. 27RP 2470-71. She gave a statement to police that night, as well as additional statements over the following weeks and months. 27RP 2471.

On cross-examination, Pry's and Davis's attorneys confronted Wilson with the fact that the day after her arrest, she told detectives that Pry and Rodgers-Jones left the duplex on foot, and she made no mention of Davis dropping them off. 27RP 2538; 28RP 2598; see also 40RP 4737 (Detective Cory Manchester testimony to that effect). However, at trial, Wilson had changed her story, and she testified they had been dropped off. 28RP 2598, 2602-03. She claimed Pry and Rodgers-Jones left on foot another time, but they just went to the end of the road. 28RP 2610.

Detective Jerry Swayze testified he obtained surveillance video of the location where Wilson said Pry and Rodgers-Jones were dropped off, near the entrance to Barker Creek Road. 40RP 4670-74, 4677. According to Swayze, the video showed that no car stopped at the location during the relevant time period. 40RP 4673-74, 4678, 4681.

ii. *Waggoner's testimony*

The Ford Excursion belonged to Christina Waggoner, the homeowner at 8686 Tracyton Boulevard, and Davis's roommate. 54RP

3869. Waggoner had introduced Davis to Hood, whose property was near Waggoner's, as the crow flies. 35RP 3870. Davis had borrowed the Excursion from Waggoner. 35RP 3871. On December 19, she asked for Davis to return it, but he refused. 35RP 3875. Davis's friend Donald Goodloe eventually returned the Excursion on December 22, after Davis was arrested. 35RP 3875.

Waggoner said Alisha Small was at her residence on three consecutive days starting December 17. 35RP 3873-74, 3879. Pry, Shawna and others also visited her home around that time. 35RP 3880, 3889-91.

During cross-examination by Davis's attorney, Waggoner testified she had inherited the residence from her grandmother, and she acknowledged her neighbors did not like her. 35RP 3891. On the State's motion, the court ruled that this inquiry, suggesting that Waggoner had a motivation to testify against Davis, had opened the door to testimony regarding threats she had received. 35RP 3865 (pre-testimony ruling that door could be opened); 35RP 3893-97 (post-testimony ruling that door had been opened). The State was permitted to introduce the fact that Waggoner had received threats from various individuals—although not Davis—questioning Waggoner's "loyalty" and inquiring if Waggoner had Davis's best interests at heart. 35RP 3899.

iii. *Small's testimony*

Small testified pursuant to a negotiated deal in which she would plead to charges related to the present case, as well as the charges she had previously faced, in exchange for a recommendation that she serve only 30 months of incarceration. 36RP 4021-22.

Small had met Detective Bowman in August of 2015. In October, she agreed to work as a CI. 36RP 4023-24; 38RP 2240. Small was a heavy methamphetamine user. At some point before December 16, 2015, Small's boyfriend, Phil Thomes, who was incarcerated in Kitsap County, recommended that she contact Davis if she needed drugs. 36RP 4025-26. Small called Davis the following day. They spoke briefly, but Davis never returned her call. 36RP 4026. Small called back a few days later, on December 14 or 15, to purchase methamphetamine. 36RP 4026. Small admitted she had contemplated targeting Davis as part of her CI contract, but she admitted did not notify Detective Bowman about this plan. 36RP 4026; 37RP 4280 (Bowman testimony).

Nothing happened until December 16, when Small called Davis again looking for drugs. 36RP 4026-27. During that call, Davis told Small he had heard from Thomes that Small was good with money and

accounting.¹⁴ 36RP 4027. Davis said he had a large account he wanted Small to work on.¹⁵ 36RP 4027.

Small, who was in Seattle, borrowed her friend's Honda and met Davis at a gas station off Tracyton Boulevard the evening of December 16.¹⁶ 36RP 4028. Davis had Small drive his nearby residence. 36RP 4029. At the residence, she followed Davis into a back bedroom. 36RP 4030. Wilson was sitting on the bed with a pink plastic folder containing various documents. 36RP 4030-34; Ex. 94.¹⁷ Small saw bank statements under a name she recalled as "Bob Barker." 36RP 4034. Small retrieved her laptop computer and began attempting to transfer money between bank accounts. 36RP 4031-36, 4101.

Small acknowledged that Davis did not sit down and discuss any plan, or what her role should be. 36RP 4096. She drew an inference based

¹⁴ Small had previously managed a doctor's office. 36RP 4027-28.

¹⁵ On cross-examination, Small appeared to acknowledge that during each of her telephone conversations with Davis, they only talked about drugs. 36RP 4096. On redirect, however, she again claimed that they had discussed an account. 36RP 4106.

¹⁶ When Small's testimony is compared to other evidence including Days Inn records, it can be surmised that either Small testified inaccurately about the day she arrived from Seattle—that she, in fact, arrived on the 17th—or that she essentially lost track of a day due to drug use. E.g. 36RP 4027-41, 4048-49.

¹⁷ Police later found such a folder, containing Hood's documents, at the duplex. 40RP 4684 (Detective Bowman's testimony); Ex. 94.

on "the way we were talking." 36RP 4096. Small admitted she had used methamphetamine before leaving Seattle, and she used again at Davis's residence. 36RP 4048.

Davis left the bedroom. About 10 minutes later, he returned and asked for Small's car keys because the Honda was blocking another car. 36RP 4035. Davis took the keys. He returned a few minutes later without the keys and explained that he had given them to someone else. 36RP 4036. But he assured Small that the Honda would be fine. 36RP 4036.

Small soon learned that the "lady of the house" wanted her to leave. 36RP 4037, 4094-95. Small collected her belongings and got into a Ford Excursion with Davis, Wilson, and Pry. 36RP 4038. They drove to the duplex, where Shawna and Rodgers-Jones (to whom Small was later introduced) were loading items into the Honda. 36RP 4037-39, 4041.

After about 10 minutes, Small, Davis, Pry, and Wilson left in the Excursion headed for Fife. 36RP 4040-42. The plan was for Rodgers-Jones and Shawna to follow in the Honda. 36RP 4041. The Honda did not, however, arrive in Fife until later. 36RP 4043-44.

According to Small, while parked outside at the casino, Pry asked Small to cash a \$500 check because Small had identification and Pry did not. 36RP 4044-45, 4100. However, the EQC rejected the check. 36RP

4045. Pry gave Small another check to cash. Small tried again, but was again unsuccessful. 36RP 4045.

At the EQC, Davis and Small met up with Davis's friend Goodloe. 36RP 4043-44, 4046-47. Davis gave Small \$1,000 in cash. 36RP 4046-47. After Shawna and Rodgers-Jones arrived in Fife, Small went to the Days Inn. 36RP 4049-50. By then, Small believed, it was the early morning of December 17. 36RP 4049. Small spent time in the motel room with Pry, Shawna, Wilson, and Rodgers-Jones. 36RP 4049-50. Small used her laptop to attempt to transfer money from Hood's bank accounts to a new account that Small set up. 36RP 4050-51. She was unsuccessful. 36RP 4054. There was too much commotion in the room and Pry was trying to call the bank at the same time. 36RP 4050-51, 4054. Davis was in and out of the room. 36RP 4055.

The group left for good the next day around noon. 36RP 4056. The plan was to stay longer but everyone got "sketched out" after Pry called the bank. 36RP 4056-58.

Small never recovered the Honda keys and she eventually left Fife in the Excursion with Davis and Goodloe. 36RP 4059, 4090. They returned to Davis's residence. Davis told Small to stay there, but he left. After waiting a few hours, Small left on foot. 36RP 4091. Small called Detective

Bowman that day. 36RP 4092. Small texted Davis about the Honda, but she never got it back. 36RP 4091-92.

When Small was arrested on December 23, police discovered a corner of one of Hood's checks during a search incident to arrest. 36RP 4089. Small testified Wilson gave her the check at Davis's residence when they first met. 36RP 4089.

iv. *Goodloe's testimony and impeachment by State*

Davis contacted his friend Goodloe and asked him to meet at the EQC on December 17. 30RP 2963-65. The men gambled together frequently. 30RP 2987-88.

Goodloe's friend Sheila Costello drove him to Fife. 30RP 2970; 40RP 4760. Costello, a heroin addict, agreed to drive Goodloe because Davis said he would give her some heroin. 40RP 4749-61, 4769, 4772-73. In Fife, Davis asked Goodloe to rent a room at the Days Inn. 30RP 2966-68. Davis was irritated at his companions because they failed to bring identification and therefore could not enter the casino or rent their own rooms. 30RP 2989. Goodloe let Pry and Wilson into the room at the Days Inn, then returned to the EQC, where Davis was already gambling. 30RP 2966, 2968-69.

Throughout the night, Goodloe spent most of his time partying with Davis and Small at the EQC. 30RP 2969-70, 2990, 2976-77, 3004-06. Goodloe returned to the Days Inn briefly. He chatted with Pry and smoked methamphetamine with Wilson and the others. 30RP 2971-72, 3005, 3008.

Early the next morning, Goodloe left with Costello, who went to the emergency room in Silverdale for a bladder infection. 30RP 2973; 40RP 4755, 4767 (Costello testimony). Costello drove Goodloe back to Fife to check out of the Days Inn. 30RP 2974; 40RP 4755 (Costello testimony). Back in Fife, Goodloe reunited with Davis. 30RP 2974-75. Small left Fife with Goodloe and Davis, but Small and Davis fought, and Davis left her at his house. 30RP 2976, 2995. Goodloe and Davis spent the next few days gambling and towing Davis's old Jeep. 30RP 2996, 3000-01.

The State, who called Goodloe to the stand, was permitted to ask him several questions to impeach him. The court instructed the jury that it could only consider the questions and answers in evaluating Goodloe's credibility, not as substantive evidence. 30RP 2984. Goodloe denied telling a Kitsap detective that he overheard Pry discuss hitting and tying up an old man. He denied telling the detective he overheard Pry call a bank posing as Hood. He also denied telling the detective that Davis had asked him to bring Costello to Fife because she was good at forging documents. 30RP 2986-87.

Detective Ray Stroble, who interviewed Goodloe, testified Goodloe had made the foregoing statements. 30RP 3018-22. However, the court also instructed the jury that Stroble's testimony in this respect could only be used to evaluate Goodloe's credibility. 30RP 3021-22.

Davis, still with Goodloe, was arrested at another casino on December 22. 31RP 3133; 32RP 3237-40, 3264-66. Police searched Davis's home at 8686 Tracyton Boulevard as well as the Excursion but discovered nothing of interest. 32RP 3266.

c. Testimony of co-defendant Pry

Pry conceded that he committed identity theft, but pinned the blame for the Hood robbery on Rodgers-Jones. 41RP 61, 87; 42RP 4834.

While Pry was in the process of moving from Waggoner's residence to the duplex, Davis and the others were planning a trip to a casino to celebrate his sister's release from prison. 41RP 54-58, 73-74.

As part of the move, Pry and his sister borrowed Small's Honda to take Pry's belongings to the duplex. Rodgers-Jones rode with them. 41RP 59-60. On the way to the duplex, Rodgers-Jones asked to be let out of the car. 41RP 61. According to Pry, Rodgers-Jones had discussed his plans to burglarize an abandoned house in the neighborhood. So, when Rodgers-Jones showed up at the duplex on foot carrying a pillowcase full of loot, Pry was not surprised. 41RP 78-81. The loot included checkbooks. 41RP 80.

Small became interested in helping deal with Hood's accounts after filling out checks in the Excursion. 41RP 169-72.

Pry found Rodgers-Jones odd, but he did not realize that Rodgers-Jones had robbed Hood until he revealed that fact at the Days Inn. 41RP 105-06, 108-09, 180-81; 42RP 4844, 4923. Davis was not present when that conversation occurred. 42RP 4908. Similarly, Davis was not involved in the call to Hood's bank. 42RP 4889-90; 41RP 173-76. Pry acknowledged he had taken Small's Honda without permission, essentially ditching her at the casino. 41RP 178.

C. ARGUMENT

1. FLAGRANT, PREJUDICIAL PROSECUTORIAL MISCONDUCT DENIED DAVIS A FAIR TRIAL.

A prosecutor commits misconduct by referring to facts not in evidence during closing argument. Here, during closing argument, the prosecutor argued that Davis had arranged for Small and Sheila Costello to help the others commit identity theft. But, although the court had allowed the State to ask Goodloe whether he told a detective that Davis had asked him to bring Costello to forge documents, such evidence was not admitted substantively, only to impeach Goodloe.

The State urged jurors to treat the evidence as if it had been admitted substantively. This evidence was, moreover, crucial to the State's argument

that Davis was guilty of identity theft. This argument constituted flagrant, prejudicial misconduct, denying the Davis a fair trial, and reversal is therefore required.

a. The constitution prohibits prosecutorial misconduct

A prosecutor has a duty to ensure an accused person receives a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). “A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law.” State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). At the same time, a prosecutor “functions as the representative of the people in a quasijudicial capacity in a search for justice.” Id. A prosecutor fulfills neither role by securing a conviction based on proceedings that violate a defendant’s right to a fair trial. Rather, such convictions undermine the integrity of the criminal justice system as a whole. State v. Walker, 182 Wn.2d 463, 476, 341 P.3d 976 (2015).

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington state Constitution. In re Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). When a prosecutor commits misconduct, she may deny the accused a fair trial. Id.; Boehning, 127 Wn. App. at 518.

It is misconduct “to make prejudicial statements unsupported by the record.” State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008) (citing State v. Weber, 159 Wn.2d 252, 276, 149 P.3d 646 (2006), cert. denied, 551 U.S. 1137 (2007)). Even where an accused does not object to the misconduct, reversal is nonetheless required where the prosecutor’s remark is so “‘flagrant and ill intentioned’ that it causes enduring and resulting prejudice that a curative instruction could not have remedied.” Boehning, 127 Wn. App. at 518 (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995)).

- b. The State commits misconduct when it treats impeachment evidence as substantive evidence in arguing that an accused has committed a crime.

It is error for the State to rely on evidence admitted solely for impeachment as substantive evidence of guilt. A witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with his testimony in court, even if such a statement would otherwise be inadmissible as hearsay. State v. Dickenson, 48 Wn. App. 457, 466, 740 P.2d 312 (1987). Impeachment evidence affects the witness’s credibility, but it is not probative of the substantive facts encompassed by the evidence. State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985).

Because such evidence cannot be used as substantive proof of guilt, the State may not use impeachment to submit to the jury substantive

evidence that would otherwise be inadmissible. State v. Babich, 68 Wn. App. 438, 444, 842 P.2d 1053 (1993). The concern behind this prohibition is that prosecutors will exploit the jury's difficulty in making the subtle distinction between impeachment and substantive evidence. State v. Clinkenbeard, 130 Wn. App. 552, 570, 123 P.3d 872 (2005) (citing State v. Hancock, 109 Wn.2d 760, 763, 748 P.2d 611 (1988)).

Clinkenbeard, for example, involved a charge of sexual misconduct with a minor. The only evidence supporting the element of sexual intercourse consisted of hearsay statements by the alleged victim. But these statements were only admissible to impeach the alleged victim's denial that sexual intercourse had occurred. The State, however, relied on such evidence in closing argument to urge jurors to convict Clinkenbeard of the charged crime. Id. at 570. The Court found the prosecutor had committed misconduct in doing so, although it went on to consider whether reversal was required based on insufficient evidence. Id. at 570-72.

- c. The prosecutor committed flagrant and incurable misconduct when it misused impeachment evidence as substantive evidence.

This case implicates the precise concern identified in Clinkenbeard. Here, in closing, the State advanced its theory of identity theft as to Davis:

So [Davis is] going to take the easy cash, the hard currency, and he's going to let [Pry and the others] deal with the bank accounts, which is a much riskier proposition and a

much more difficult proposition. There's a much easier paper trail when you're calling banks. He tells them, "I have Alisha Small for you, she'll help you out with all of this."

He tells them that he's bringing in Sheila Costello to help. Whether that's true or not, that's what he tells them. He says, "I'm going to set you up in a hotel room to help you with these accounts." He doesn't put them across the hall from him. He puts them across the street, away from him. He distances himself from them and their further criminal acts and he sits up there in the casino and gambles with his buddy, Don Goodloe. Now, meanwhile at the Days Inn, things are not going very well for this crew.

43RP 5009-10.

Thus, the State described conversations Davis *might have had* with Pry and the others. Essentially, the prosecutor suggested that Davis took the cash recovered by the others in the robbery and arranged for Small and Costello to help the others commit identity theft. Although there is no evidence of any such conversations, the argument regarding Small was *arguably* reasonable, considering the totality of the evidence in the light most favorable to the State.

But as to Costello, the State went too far. The argument improperly alluded to Goodloe's statements, which were never admitted as substantive evidence, to argue Davis had secured Costello's presence to help the others commit identity theft.

Costello flatly denied that Davis asked her to go to Fife for that purpose. 40RP 4750. And, even though the State had been permitted to ask

Goodloe whether he told a detective that Davis asked him to bring Costello to forge documents, such evidence was not admitted substantively. 30RP 2984-87 (Goodloe testimony, accompanied by limiting instruction); see also 30RP 3022 (detective's testimony, also accompanied by limiting instruction). Yet the State urged jurors to treat the evidence as if it had been admitted substantively, to find Davis guilty of identity theft. This was flagrant misconduct.

State v. Reeder, 46 Wn.2d 888, 285 P.2d 884 (1955) is instructive. Reeder was charged with murdering his second wife. Id. at 888. During cross-examination of Reeder, the prosecutor referred to a divorce complaint filed by Reeder's first wife. Id. at 891. The prosecutor asked, "Now isn't it a fact. . . [t]hat she stated that the defendant has struck this plaintiff on numerous occasions, and threatened her with a gun." Id. Reeder denied this accusation. Id. In closing argument, however, the prosecutor referred to Reeder threatening his first wife with a gun as evidence supporting the charged offense. Id. at 891-92.

The Washington Supreme Court held the prosecutor's misconduct warranted a new trial. Id. at 894. The Court explained, "There is not one word of testimony in the record that the defendant threatened his first wife with a gun. The only testimony concerning that question is that he did not do so." Id. at 892. The prosecutor knew the court had excluded the divorce

complaint and that it was not in evidence. Id. The court emphasized the prosecutor “ha[d] no right to mislead the jury,” as “a quasi-judicial officer whose duty it is to see that a defendant in a criminal prosecution is given a fair trial.” Id. Even though defense counsel did not object, “the harm had already been done and it could not have been cured by instructions to disregard the statements so flagrantly made.” Id. at 893.

Here, similarly, the prosecutor was clearly aware Goodloe’s statements to the detective were not admissible as substantive evidence. 30RP 2984-87, 3020; see also 31RP 3202-04 (colloquy regarding *timing*, but not propriety, of instruction limiting Goodloe’s hearsay statements to impeachment use). Yet, despite this limitation on use of testimony, the State relied on this very evidence to argue Davis was guilty of identity theft.

Such misconduct was not only flagrant; it was also incurable by instruction. The distinction between impeachment and substantive evidence is subtle and difficult for a layperson to understand. Clinkenbeard, 130 Wn. App. at 570. The State exploited this subtle distinction by relying on this impeachment evidence as substantive evidence of Davis’s guilt.

d. The misconduct affected the verdict

To prevail on his prosecutorial misconduct claim, Davis must also show that the misconduct had a substantial likelihood of affecting the jury’s

verdict. State v. Pinson, 183 Wn. App. 411, 419, 333 P.3d 528 (2014).

Davis has made this showing.

Here, the evidence that Davis had asked Goodloe to bring Costello to Fife to assist in an identity theft enterprise was crucial to the State's case, given the other evidence at the State's disposal. Ocean Wilson implicated Davis in a scheme to rob Hood. But Wilson's testimony was consistently *inconsistent* with other witnesses' testimony. E.g. 28RP 2564-65; 36RP 4030-36. Defense counsel repeatedly impeached Wilson's credibility by confronting her with her own prior statements. E.g. 27RP 2390-91, 2538; 28RP 2598; 40RP 4737. Davis's counsel was, moreover, able to point to the fact that video surveillance evidence showed no "drop off" could have occurred as Wilson claimed it did. 40RP 4670-81. This was particularly devastating to her credibility. Wilson, who was clearly implicated in several crimes related to Hood, also obtained a lucrative plea deal to testify on behalf of the State, which further undermined her tenuous credibility. 27RP 2386-87, 2478, 2502-11.

Small was a marginally better witness than Wilson, but she too had ample reasons to testify against Davis. Like Wilson, Small potentially faced serious charges related to her involvement in the incident. Yet Small received a highly beneficial plea bargain in exchange for her testimony.

36RP 4021-22. She was, moreover, likely to be biased against Davis, who was instrumental in wresting her friend's Honda from her possession.

And aside from her bias, Small's credibility was questionable for other reasons. A regular methamphetamine user—who used throughout the events in question—Small mixed up several details, including crucial dates. 26RP 2240-72; 36RP 4027-41, 4048-49. She also acknowledged that *she* initially sought out Davis, in part because he was a potential target she could use to satisfy her CI contract. 36RP 4026; 36RP 4096. Moreover, Small acknowledged that Davis never explicitly instructed her to manipulate Hood's accounts. Rather, she merely drew inferences about what was expected of her. 36RP 4096-97.

Given the relative weakness of the other evidence, the improper argument, urging the jury to use Goodloe's out-of-court statements as substantive evidence to find Davis guilty of second degree identity theft, was likely to have affected the jury's verdict on that charge. Reversal is therefore required. Pinson, 183 Wn. App. at 421.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S MISCONDUCT.

Defense counsel was also ineffective for failing to object to the misconduct described above.

Every accused person is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and article I, section 22 of the state constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

A person asserting ineffective assistance must show (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor performance prejudiced him. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (citing Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

This Court reviews claims of ineffective assistance de novo, as they present mixed questions of law and fact. A.N.J., 168 Wn.2d at 109.

With respect to the deficient performance prong, "[t]here is a strong presumption that defense counsel's conduct is not deficient," but an accused rebuts that presumption if "no conceivable legitimate tactic explain[s] counsel's performance." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). To meet the prejudice prong, an accused person must show a reasonable probability "based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation." McFarland, 127 Wn.2d at 337.

When a prosecutor resorts to improper argument, counsel has a duty to interpose a contemporaneous objection “to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks.” State v. Emery, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012) (quoting 13 WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4505, at 295 (3d ed. 2004)).

Counsel’s failure to preserve error constitutes ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980). If objections are necessary to preserve error, no reasonable strategy or tactic explains failure to object on the record. Even if declining to object is a reasonable tactic to avoid drawing attention to the misconduct, defense counsel may still object to misconduct outside the presence of the jury, after arguments have concluded. See State v. Lindsay, 180 Wn.2d 423, 430-31, 326 P.3d 125 (2014) (recognizing that moving for a mistrial after a prosecutor’s rebuttal argument preserves the issue of prosecutorial misconduct for appellate review).

There could be no valid strategic reason to allow the State to misuse Goodloe’s hearsay as substantive evidence of guilt. Davis’s theory of the case was that he was in the wrong place at the wrong time. Davis’s counsel mounted concerted attacks on the credibility of key witnesses Wilson and Small. E.g. 43RP 5118-19, 5121-26. Other than Wilson and Small’s

testimony, Goodloe's hearsay statements about Costello were the single most damaging evidence regarding identity theft. But they were not substantive evidence of guilt and could not be used as such.

For the reasons stated in argument 1 above, Davis has also shown prejudice. Although Wilson and Small had strong incentives to implicate Davis, Goodloe was Davis's longtime friend and would have no similar animus. His statements to police were not admissible as substantive evidence. Thus, the State's argument that Davis brought not only Small, but Costello, into the conspiracy was intensely prejudicial to his defense.

In summary, Davis has established both deficient representation and prejudice. Counsel's failure to object to the State's argument therefore constituted ineffective assistance of counsel, denying Davis a fair trial on the identity theft charge.

For this reason, as well, this Court should reverse Davis's conviction. Thomas, 109 Wn.2d at 232.

3. DEFENSE COUNSEL WAS ALSO INEFFECTIVE FOR
OPENING THE DOOR TO PREJUDICIAL TESTIMONY
THAT A WITNESS AGAINST DAVIS HAD BEEN
THREATENED BASED ON DISLOYALTY TO HIM.

Defense counsel was, likewise, ineffective for opening the door to prejudicial testimony that Davis's roommate Waggoner had been threatened due to her planned testimony against Davis.

Counsel's actions were not reasonable. The line of questioning that opened the door was of little benefit to the defense. Yet the evidence allowed in based on counsel's actions was highly prejudicial to the defense.

Where a witness's credibility has not been attacked, the State is not allowed to bolster that witness's credibility. State v. Bourgeois, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997) (quoting 1 MCCORMICK ON EVIDENCE, sec. 47, at 172 (John W. Strong ed., 4th ed. 1992)). But, under the "open door" doctrine, evidence that would be inadmissible if offered by the opposing party may open the door to normally impermissible witness examination, to explain or contradict the initial evidence. State v. Avendano Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995), review denied, 129 Wn.2d 1007 (1996). The purpose of the doctrine is to preserve fairness: "It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it." State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

Waggoner's testimony was not *initially* particularly prejudicial to Davis. Waggoner testified that Davis had met victim Hood, who lived nearby; that she had seen Small at her house over the course of several days; and that Davis refused to return Waggoner's Excursion on December 19, *after* the Fife trip. 35RP 3867-75.

Before Waggoner testified, however, the State moved to admit evidence that Waggoner had received threats due to her planned testimony at trial. 35RP 3853. The court ruled that the threats would be excluded, unless the door was opened by the defense. 35RP 3865-66. The court stated:

She's not going to testify about the threats unless there's cross-examination as to her credibility. From my review of the case law[, that] could open the door to rehabilitation about her motivation and biases. . . . [A]s I understand it . . . , it's not something that's appropriate [on direct examination].

If it is opened up in cross-examination, then that may be appropriate. But let's address that before we go there outside the presence of the jury.

35RP 3865-66.

On cross-examination of Waggoner, Davis's counsel asked whether her neighbors disliked her and wanted her out of the neighborhood. Waggoner explained that she had inherited the home from her grandmother, and she acknowledged that she was having difficulties with her neighbors.¹⁸ 35RP 3891.

After this cross-examination, the State argued that it should be permitted to introduce the fact that Waggoner had received threats. 35RP

¹⁸ Waggoner's testimony about all-night gatherings at her house provides a clue as to the potential source of the neighbors' discontent. E.g. 35RP 3877-83.

3893-94. Davis's counsel argued the door was not open, but she appeared to acknowledge that the questions about Waggoner's neighbors were intended to show that Waggoner was biased against Davis. 35RP 3897. The court ruled the State would therefore be permitted to introduce the threat evidence. 35RP 3898-99.

Waggoner then testified as follows on redirect examination:

Q. Have you received threats related to your testimony in this case?

A. I have.

Q. Can you describe just the general character or nature of those threats.

A. It's come to me that--has been asked if I have [Davis's] best interest at heart, kind of my loyalty on this matter and would I stand-in-his-corner type. Are my intentions good for him? Do I believe in him and everything? If I don't, kind of pretty much just go away.

Q. How many times have you been contacted about this?

A. Four different times.

35RP 3899.

Again, a person asserting ineffective assistance must show (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor performance prejudiced him. A.N.J., 168 Wn.2d at 109. Davis's counsel was ineffective when she knowingly opened

the door to this testimony. It was unreasonable to pursue this line of questioning. It was dangerous, given the court's pre-testimony ruling, yet it provided little benefit. Waggoner's testimony was not particularly damaging to Davis. Eliciting Waggoner's bias was, therefore, not particularly beneficial to Davis's case.

But it allowed evidence of threats to flood in. The threat testimony suggested that Davis was a dangerous person. Even more damagingly, it suggested he had a guilty conscience. See State v. Kosanke, 23 Wn.2d 211, 215, 160 P.2d 541 (1945) (“[c]onduct on the part of an accused person, or that of [someone] acting in his behalf at his request or with his knowledge and consent, having for its purpose the prevention of witnesses appearing and testifying at his trial” suggests consciousness of guilt).

The threat testimony could have led jurors to believe the threats were the product of a guilty conscience, and that, therefore, Davis was guilty. Considering the overall weakness of the case against Davis, this evidence was likely to have affected the outcome of trial.

Because, for this reason as well, ineffective assistance of counsel denied Davis a fair trial, reversal is required.

4. THE CUMULATIVE EFFECT OF THE ERRORS IDENTIFIED AT HEADINGS 1 THROUGH 3 ABOVE DENIED DAVIS A FAIR TRIAL

Reversal is also required under the cumulative error doctrine.

The cumulative effect of the misconduct and ineffective assistance of counsel discussed above denied Davis a fair trial. This Court should reverse a conviction when the combined effect of trial errors effectively denies the defendant his right to a fair trial, even if each error standing alone may not itself warrant a new trial. State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813, review denied, 170 Wn.2d 1003 (2010). Once the appellant establishes error, a reviewing court may then measure the errors' cumulative effect. State v. Clark, 143 Wn.2d 731, 771-72, 24 P.3d 1006 (2001).

Here, even if the trial errors asserted under headings 1 through 3 do not individually warrant reversal, their combined effect does. Taken in combination, there is a reasonable likelihood these trial errors affected the verdict and denied Davis a fair trial on the identity theft count. This Court should order a new trial. Venegas, 155 Wn. App. at 527.

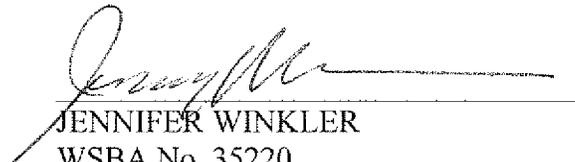
D. CONCLUSION

The prosecutor's misconduct in closing argument denied Davis a fair trial. Defense counsel was, moreover, ineffective for failing to object to the misconduct. Counsel also provided ineffective assistance by opening the door to damaging evidence that Davis's roommate had received threats for testifying against him. Each of these errors warrant reversal. But if this Court nonetheless finds that these errors, taken alone, do not require reversal, their cumulative effect does. This Court should reverse Davis's second degree identity theft conviction and remand for a new trial.

DATED this 12TH day of May, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


JENNIFER WINKLER
WSBA No. 35220
Office ID No. 91051

Attorney for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

May 12, 2017 - 1:46 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49284-9
Appellate Court Case Title: State of Washington, Respondent v. Robert L. Davis, Arnold M. Cruz, & Robert Pry, Appellants
Superior Court Case Number: 16-1-00002-7

The following documents have been uploaded:

- 7-492849_Briefs_20170512134400D2758965_9425.pdf
This File Contains:
Briefs - Appellants - Modifier: Amended
The Original File Name was ABOA 49284-9-II.pdf

A copy of the uploaded files will be sent to:

- wapofficemail@washapp.org
- lila@washapp.org
- valerie.marietrombley@gmail.com
- rsutton@co.kitsap.wa.us
- winklerj@nwattorney.net
- marietrombley@comcast.net

Comments:

A Copy was sent to: Robert Davis 958015 Airway Heights Corrections Center PO Box 2049 Airway Heights, WA 99001

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Jennifer M Winkler - Email: winklerj@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20170512134400D2758965