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NO. 68508-2-I

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

REC'D

SEP 06 2012

King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ELIJAH MAYFIELD, III

Appellant.

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

The Honorable Christopher Washington, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in overruling counsel's objection to irrelevant and inflammatory victim impact evidence.

2. The prosecutor committed misconduct in eliciting and then urging the jury to convict based on irrelevant and inflammatory victim impact evidence.

3. The court erred in permitting an investigator to testify appellant was the person in the surveillance video recordings.

4. Cumulative error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. Only relevant evidence is admissible and even relevant evidence may be excluded when the danger of unfair prejudice substantially outweighs any minimal probative value. The fact that shoplifting causes millions of dollars in damage to Safeway stores and the cost is passed on to consumers is irrelevant to any element of trafficking in stolen property and is likely to inspire a verdict based on emotion, rather than the elements of the crime. Did this irrelevant and inflammatory evidence deny appellant a fair trial?

2. Prosecutors may not intentionally elicit inadmissible evidence or urge a verdict on improper grounds. The prosecutor questioned a witness and argued in closing about the overall impact of

shoplifting on Safeway stores and on the general public. The prosecutor also violated the court's ruling in limine by eliciting testimony regarding the amount of money appellant made from trafficking and encouraging the jury's anger. Did the prosecutor commit misconduct that denied appellant a fair trial?

3. A witness may not opine as to the identity of a person in a photograph or video recording unless the witness is personally acquainted with the person or is otherwise in a better position to do so than the jury. A Safeway investigator who had never met appellant until the trial testified appellant was seen in a surveillance video taking items without paying. Did the court err in admitting this testimony?

4. Did cumulative error deprive appellant of a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

By amended information, the King County prosecutor charged appellant Elijah Mayfield with four counts of trafficking in stolen property in the first degree. CP 20. The jury found him guilty, and the court imposed concurrent standard range sentences. CP 53-56, 58-60. Notice of appeal was timely filed. CP 67.

2. Substantive Facts

Mayfield admitted shoplifting at the Safeway store in Factoria on three occasions. 2RP<sup>1</sup> 254. However, he explained, the rest of his taped confession, including the intent to resell the items and an additional theft from the Newcastle Safeway store, was untrue and merely the result of his confused responses to clever police interrogation. 2RP 250-51, 254.

Police were led to Mayfield by a chain that began with David Pankratz, an internet reseller who regularly purchased retail items from Mark Ostheller over the course of about two years. 2RP 188-90. Pankratz eventually contacted law enforcement after he became concerned Ostheller's prices were too low. 2RP 190. Pankratz continued buying and selling Ostheller's merchandise, but also sent photographs of it to the Snohomish County Sheriff's Office. 2RP 192-94. Pankratz was never charged with any crime. 2RP 200-01.

Ostheller testified that, during this time, he bought approximately 80% of his merchandise from Mayfield and the rest from another man named Cox. 2RP 208. After a falling out with Cox in early 2009, all of his merchandise came from Mayfield. 2RP 209. Although he and Mayfield were in business together for approximately three years, he testified he

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<sup>1</sup> There are four volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Nov. 30, 2011 and Dec. 5, 2011; 2RP – Feb. 22, 23, 28, 29 2012 (two consecutively paginated physical volumes); 3RP – Mar. 15, 2012.

bought items such as toothbrushes, razors, and dog grooming tools and resold them over the internet without inquiring as to how Mayfield acquired them. 2RP 205-07.

Initially, Ostheller testified, the exchanges occurred in a parking lot. 2RP 206. However, eventually, Ostheller rented a storage locker where he and Mayfield could exchange cash and items more conveniently. 2RP 206. He also began giving Mayfield lists of specific items to procure. 2RP 218.

Ostheller testified he made \$300,000 from this business in 2008 and paid approximately \$100,000 to Mayfield. 2RP 210. He claimed he did not know at the time that the items were stolen, but in hindsight agreed he was reckless and probably should have known. 2RP 214, 222. Ostheller pled guilty to either nine or ten counts of trafficking in stolen property in the second degree. 2RP 207-08.

Before trial, Mayfield objected to Ostheller's testimony, arguing the three-year business relationship and the percent of the wares that came from Mayfield was mere propensity evidence. 2RP 89-91. The prosecutor argued it was necessary to fill the gap of how the items got from Safeway to Ostheller. 2RP 97-98. The court agreed the evidence was admissible for this limited purpose. 2RP 99. Nevertheless, defense counsel renewed his objection. 2RP 99.

Store employees from both the Factoria and Newcastle Safeway stores testified they routinely marked high-theft items with the store number using an ultraviolet pen. 2RP 128-32, 137. They then checked the shelves and computer records daily to identify and report any stolen items. Id. The manager at the Newcastle Safeway testified that on March 8, 2009, she found four of Oral B and Sonicare toothbrushes were missing. 2RP 130. The manager at the Factoria Safeway testified found similar items missing on March 12, March 27, and April 8, 2009. 2RP 138-39.

The court admitted surveillance video from the Factoria Safeway on March 12, March 27, and April 8, 2009, appearing to show a man placing items in his pants and leaving the store without paying. 2RP 154-58. Blahato narrated the video as it was played for the jury, identifying Mayfield. 2RP 156-58. Defense counsel objected to this narration on the grounds that the video could speak for itself. 2RP 157. The court permitted the narration, explaining that defense counsel could cross-examine regarding the accuracy. 2RP 158.

A fourth video from the Newcastle store on March 7 was transferred to a corrupted computer disk and was lost. 2RP 149-50. But Safeway investigator Gene Blahato testified he watched the video before burning it to the disk and recognized Mayfield placing items in his pants and leaving the store without paying. 2RP 149-50. Before trial, Mayfield objected to this

testimony and argued Blahato's identification was based on hearsay. 2RP 69. Blahato had never met Mayfield when he viewed the video, and thus his identification was based on photographs he had seen that someone had told him were of Mayfield. 2RP 69. The court allowed the testimony and ruled Mayfield's criticisms of the identification could be explored on cross-examination and considered by the jury as to the weight of the testimony. 2RP 80.

The court also admitted photographs Pankratz sent to police in March and April 2009 of items he had recently received, including a box of Rogaine. Exs. 6-9. The photographs show the store number marked in ultraviolet ink. 2RP 191-95; Exs. 6-9.

In a taped statement to police, Mayfield admitted stealing from the Factoria Safeway two or three times on March 12, March 27, and April 8, 2009. 2RP 174; Ex. 5. He admitted that on all three occasions he took Sonicare or Oral B toothbrushes by placing them in his pants legs, which were closed at the bottom. Ex. 5. He admitted he would try to sell them, getting \$10 for each of the toothbrushes. Ex. 5.

Mayfield initially denied doing this at any other store, but ultimately agreed he may have stolen from six to eight different stores over the course of the year. Ex. 5. He admitted he had probably been to the Newcastle Safeway, and couldn't remember exactly what he took but he thought it was

probably toothbrushes and replacement heads, as at the other stores. Ex. 5. He admitted that, as with the Factoria items, he would sell them either for cash or drugs. Ex. 5.

Detective Collin Ainsworth from the Snohomish County Sheriff's Office testified Mayfield told him he originally sold Ostheller stolen DVDs, but then Ostheller started giving him a list of items to procure. 2RP 182. The list usually included numerous similar items such as electric toothbrushes and razors and interchangeable heads and battery packs for the toothbrushes. 2RP 183. Mayfield told Ainsworth initially the two met in a parking lot, but later Ostheller rented a storage unit, where he would leave cash and Mayfield would leave merchandise. 2RP 183.

At trial, Mayfield testified that, when he spoke to police, he had no idea what the dates were or precisely which Safeway stores he went to, and simply agreed with the police when they asserted something happened on a specific date at a specific store. 2RP 250-51. He said he was familiar with the Factoria store, but not the Newcastle store. 2RP 251. He admitted stealing items on three different occasions from the Factoria Safeway. 2RP 254. However, he testified he now believed he was confused in his taped statement. 2RP 254. He testified he never went to the Newcastle Safeway and steadfastly denied stealing any Rogaine. 2RP 254.

On cross-examination, Mayfield admitted he had been previously convicted of theft and robbery. 2RP 253. He also admitted he had knowingly failed to appear in court and stayed away for eight months. 2RP 254. Before trial, the court overruled Mayfield's objection to this testimony, ruling the evidence was admissible to help explain the long delay between the 2009 thefts and interviews and the 2012 trial. 2RP 247-48.

In addition to evidence of the four charged incidents, the State presented evidence of the general impact of shoplifting. Blahato testified professional shoplifting has a "very damaging effect" on Safeway stores. 2RP 161. He listed concerns for revenue and for store employees. 2RP 161. He also described concerns that items on the shelf may present a health concern if they have been tampered with. 2RP 161. He worried that purchasers of stolen property could not be certain where an item had been stored or whether "it had rats walking all over it." 2RP 161.

Counsel objected to the relevance of this line of questioning. 2RP 161. The court asked the prosecutor, "Is there any relevance?" The prosecutor responded by asking the investigator "What is the dollar loss to Safeway here?" 2RP 161. The investigator answered, "Millions." 2RP 161. Counsel again objected, and the court overruled the objection. 2RP 161-62. The prosecutor next asked, "And who pays for that in the long run?" 2RP 162. The answer: "We do. When you walk in the store." 2RP 162. This

time, the court sustained Mayfield's objection, and the prosecutor had no further questions. 2RP 162.

During closing argument, the prosecutor argued Mayfield was guilty either by actually selling items to Ostheller or by stealing them with the intent to sell them to Ostheller. 2RP 265. He then returned to the theme of the damage done to Safeway: "When they mark something with an ultra violet pen, they are assuming the possibility that this is going to be stolen, so the goods are already gone. Safeway has already suffered a loss." 2RP 267. He also focused on uncharged misconduct, arguing, Ostheller and Mayfield were in business for three years, and 80% of the items Ostheller sold came from Mayfield. 2RP 270. He told the jury, "You have a right to be angry, that someone like Elijah Mayfield makes a hundred thousand cash by going in and stealing things like toothbrushes, and laxatives, and hair supplies." 2RP 271.

Defense counsel argued Mayfield was only charged with the incidents on these four dates and there was no way to be certain what was taken on any specific day. 2RP 274. He argued 20% of Ostheller's merchandise did not come from Mayfield, which created reasonable doubt. 2RP 277. He argued the same standard should be applied to Ostheller and Pankratz, the brains of the operation. 2RP 280.

In rebuttal, the prosecutor again focused on the damage to Safeway and the public, arguing:

A tragic thing about this whole case is, these store personnel, they don't come in and do this once a month, they don't come in and do it once a week. They do it every day. They check the stolen goods every day. And they go to the computer.

Can you imagine the time drain? Imagine if you own Safeway stores, you own two hundred stores in the Seattle district, and you have to pay people every morning to count how much stuff has been stolen. You have to pay people to go to the computer and check each items against the computer log to make a search of the back stock area, and then go the videos, spending hours going through the video to see who the thief is. Then you have to come to court, your personnel have to come to court, and testify. And every store has to do that. That's the scope of the problem of doing this.

It's not just Safeway. It's department stores, every grocery store, every Big Box store. They are doing the same thing because this is a problem.

2RP 281-82.

C. ARGUMENT

1. INFLAMMATORY EVIDENCE ABOUT THE SCOPE OF DAMAGE FROM SHOPLIFTING VIOLATED MAYFIELD'S RIGHT TO A FAIR TRIAL.

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). Victim impact testimony is improper because it is irrelevant to any question properly before the jury and instead encourages the jury to render a verdict based on

emotion or sympathy. ER 401, 402, 403; City of Auburn v. Hedlund, 165 Wn. 2d 645, 654, 201 P.3d 315, 319 (2009). Blahato testified to concerns about rats walking on merchandise, millions of dollars in damage to Safeway, and costs being passed on to all consumers. 2RP 161-62. Mayfield's right to a fair trial was violated when the prosecutor presented this victim impact evidence that encouraged the jury to convict because of all the damage done to Safeway, other stores, and the general public by shoplifters everywhere.

In admitting this evidence, the court abused its discretion and violated Mayfield's right to a fair trial for three reasons. First, evidence of the damage to Safeway, other stores, and the general public was irrelevant to any element of the offense. Second, it was far more likely to evoke a decision based on emotion than on reason. Finally, this amounted to victim impact evidence. The overall effect deprived Mayfield of a fair trial.

- a. The Amount of Safeway's Loss and the Potential Harm to Consumers Is Irrelevant to the Elements of Trafficking in Stolen Property.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401. To prove Mayfield committed the crime of trafficking in stolen property in the first degree, the State had to prove he knowingly bought, received, possessed or

obtained control of stolen property with the intent to sell it or otherwise dispose of it to another person. RCW 9A.82.010; RCW 9A.82.050. Unlike theft, there is no element requiring proof of the value of the trafficked property or the amount of loss to the victim. Compare RCW 9A.82.010; RCW 9A.82.050 and RCW 9A.56.030.

But the investigator's testimony went beyond even that, presenting to the jury the overall damage and loss to Safeway from shoplifting. 2RP 162, 267, 281-82. Nothing about the extent of Safeway's loss makes it more or less likely that Mayfield, between March 7 and April 8, 2009, knowingly trafficked in stolen goods.

This issue is altogether different from the cases discussing gruesome crime scene and autopsy photographs. Such photographs are admissible if they provide necessary details or shed light on material facts. See, e.g., State v. Giffing, 45 Wn. App. 369, 372, 725 P.2d 445 (1986). In Giffing, autopsy photographs of the victim were held admissible in a murder case, despite the prejudice, because the depth and nature of the wounds were material facts. Id. The wounds showed the assailant must have approached the victim from behind, stabilized her, and then used a very sharp instrument with a large amount of force. Id. This was admissible as evidence of premeditation. Id.

Here, the "millions" of dollars lost by Safeway was not material to whether Mayfield knowingly trafficked in stolen property on four occasions

in the spring of 2009. It was not relevant and, therefore, not admissible. ER 401, 402. Defense counsel's objection to relevance should have been sustained.

b. Evidence of the Effect of Shoplifting on Safeway and the General Public Was Inflammatory and Unfairly Prejudicial.

Evidence of the "millions" of dollars lost by Safeway to shoplifting and the potential harm to consumers in additional costs and rats walking on their retail items was inadmissible because the danger of unfair prejudice far outweighed the utter lack of probative value. ER 403. The evidence was designed to evoke an emotional response based on the global scope of the problem and the extent of the damage to society as a whole.

When the danger of unfair prejudice substantially outweighs any probative value, even relevant evidence may be excluded. ER 403; State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Evidence causes unfair prejudice when it is "more likely to arouse an emotional response than a rational decision by the jury." Hedlund, 165 Wn. 2d at 654 (2009) (quoting State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000)). Commentators have linked unfair prejudice both to emotion and to "erroneous inferences that undermine the goal of the rules to promote accurate fact-finding and fairness." Hedlund, 165 Wn.2d at 655.

The court in Hedlund reversed because the jury was exposed to inflammatory evidence of the impact of the crime that was unrelated to any element of the offense. 165 Wn.2d at 656. Hedlund was charged with driving under the influence, reckless driving, furnishing alcohol to a minor, and furnishing tobacco to a minor. Id. After reversing the driving while intoxicated conviction on other grounds, the court reversed Hedlund's remaining convictions based on trial error. Id. at 654. The trial court permitted the jury to hear a 911 call reporting the accident that resulted from the intoxicated and reckless driving. Id. at 655. The court held it was an abuse of discretion to admit the gruesome description of the accident scene because it was unrelated to the elements of any of the charged crimes. Id. at 656. Additionally, use of the 911 call at trial appeared calculated to inflame the jury's passions and induce a feeling of outrage. Id.

Arousing a sense of outrage at the damage caused by trafficking in stolen property also appears to have been the goal here. The prosecutor explicitly asked Blahato about the amount of losses to Safeway, not just from the items stolen on these occasions, but of cost "professional shoplifting" in general. 2RP 161. Blahato responded by talking of rats walking on merchandise and damage to consumers and employees. 2RP 161. The total amount of damage was "millions." 2RP 161. The prosecutor's question as to who pays in the long run and Blahato's response

that “we all do” encouraged the jury to feel personally affronted and injured by Mayfield’s offenses. 2RP 162. While not as gruesome as the facts of Hedlund, the potential rats and the millions of dollars in damage are also more likely to arouse an emotional response than a rational decision.

c. Mayfield’s Right to a Fair Trial Was Violated When the Court Admitted Improper Victim Impact Testimony.

The few Washington cases discussing victim impact evidence are limited to cases in which it is held admissible in the penalty or sentencing phase of a trial. See State v. Gregory, 158 Wn.2d 759, 850-52, 147 P.3d 1201 (2006) (describing circumstances where victim impact evidence properly admitted in penalty phase of death penalty trial); State v. Cuevas-Diaz, 61 Wn. App. 902, 906, 812 P.2d 883 (1991) (impact on others may justify exceptional sentence). But, as discussed above, evidence likely to provoke an emotional response rather than a rational decision is unfairly prejudicial. Hedlund, 165 Wn.2d at 654. Victim impact testimony falls squarely into this category. Evidence that is only relevant to the impact of the offense on the victim or others has no place in the guilt phase of a criminal trial.

Moreover, other jurisdictions soundly condemn victim impact testimony during the guilt phase of a trial. See, e.g., Clark v. Commonwealth, 833 S.W.2d 793, 796-97 (Ken. 1991) (victim impact

testimony amounts to “sensationalizing tactics which tend to pressure the jury to a verdict on considerations apart from evidence of the defendant’s culpability”); Justice v. State, 775 P.2d 1002, 1010-11 (Wyo. 1989) (victim impact testimony not permitted during guilt phase “unless there is a clear justification of relevance”); United States v. Copple, 24 F.3d 535, 545-46 (3rd Cir. 1994) (victim impact testimony “was designed to generate feelings of sympathy for the victims and outrage toward Copple for reasons not relevant to the charges Copple faced”).

In Justice, the victims of an aggravated robbery testified how it affected their lives thereafter. 775 P.2d at 1010. Like the victim’s testimony in Justice, Blahato’s testimony about the losses suffered by Safeway and the potential harm to the public was “absolutely irrelevant with respect to the issues before the jury.” Id. Blahato’s testimony could in no way serve to establish any of the elements of the trafficking of which Mayfield was accused. Given such utter irrelevance, “[t]he only purpose must have been to attempt to arouse the passions of the jury.” Id.

This irrelevant and inflammatory victim impact evidence affected the outcome because it pervaded the trial, particularly Blahato’s testimony and closing and rebuttal arguments. 2RP 161-62, 267, 281-82. Defense counsel’s initial objections were overruled. 2RP 161. This placed the court’s imprimatur on the victim impact evidence as valid for the jury’s

consideration. See, e.g., State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006) (by overruling objection, trial court augmented prejudice from improper remarks) (citing State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984)).

Although a subsequent objection was sustained when the prosecutor asked who pays for this damage in the long run and the witness answered, “We all do,” the jury was unlikely to be able to put this evidence out of its mind. 2RP 162. This testimony reinforced and drew attention to the fact, likely already part of the jury’s common understanding, that the costs of shoplifting are passed on to the consumer. But this went beyond emphasizing the damage to the victim of the offense. It essentially portrayed the jury as the ultimate victim. Under these circumstances, the admission of unfairly prejudicial victim impact evidence with no probative value affected the outcome of the trial and Mayfield’s convictions should be reversed.

2. PROSECUTORIAL MISCONDUCT IN PRESENTING IMPROPER EVIDENCE AND ARGUMENT DENIED MAYFIELD A FAIR TRIAL.

“A prosecutor may not properly invite the jury to decide any case based on emotional appeals.” In re Detention of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998). Prosecutors are quasi-judicial officers with an independent duty to act in the interests of justice and ensure a fair trial. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). Consistent with these

duties, prosecutors must not urge guilty verdicts on improper grounds. State v. Belgarde, 110 Wn.2d 504, 507-508, 755 P.2d 174 (1988). Nor may they refer to matters outside the evidence. Id. Every trial advocate has a duty not to intentionally introduce prejudicial inadmissible evidence. State v. Montgomery, 163 Wn.2d 577, 593, 183 P.3d 267 (2008).

The right to a fair trial is violated when the prosecutor commits misconduct and that misconduct is likely to affect the jury. Fisher, 165 Wn.2d at 747. Even when there is no objection at the time, misconduct requires reversal when it is so flagrant and ill-intentioned that the resulting prejudice could not have been cured by instructing the jury. Id.

After intentionally eliciting evidence of “millions” of dollars in losses to Safeway and potential harm to employees, consumers, and the general public, the prosecutor continued in closing and rebuttal to argue Safeway was damaged by the mere anticipation of theft, as were all other similar large stores. 2RP 267, 281-82. Mayfield’s right to a fair trial was violated by prosecutorial misconduct when the prosecutor first elicited inflammatory victim impact testimony and then fanned the flames during closing and rebuttal argument.

a. The Prosecutor Committed Misconduct in Eliciting Victim Impact Evidence And Urging a Verdict on that Basis.

As discussed above, the prosecutor intentionally elicited evidence that was relevant only to a sense of outrage at the crime of trafficking and retail theft in general. While some of the witness' comments regarding rats may be seen as uncalled for by the prosecutor's questions, the most damaging aspects of the testimony were directly responsive. It was the prosecutor who, apparently believing he was demonstrating relevance, asked the witness the total amount of losses Safeway incurs from shoplifting, and then continued to ask who pays for it in the long run. 2RP 161-62. The prosecutor committed misconduct by intentionally placing this inflammatory evidence before the jury.

A prosecutor aggravates the prejudicial nature of improper evidence by accentuating it during closing argument. State v. Thang, 145 Wn.2d 630, 645, 41 P.3d 1159 (2002) (prosecutor "exacerbated" trial court's erroneous introduction of bad acts evidence by arguing from the evidence during closing argument). That is precisely what occurred here. During closing argument, the prosecutor emphasized the damage done to Safeway not just from the thefts at issue, but from its attempts to track down theft in general. 2RP 267, 282. He did not stop with Safeway, but pointed out that this damage affects all other "big box" and department stores. 2RP 282.

b. The Prosecutor Violated The Court's Ruling in Limine by Eliciting and Arguing Evidence Mayfield Made \$100,000 from Ostheller in 2008.

“Evidence of a defendant’s past crimes or bad acts is not admissible to show that the defendant likely committed the crime charged, that the defendant acted in conformity with prior bad acts, or that the defendant had a propensity to commit the crime.” State v. Fuller, \_\_\_\_ Wn. App. \_\_\_\_, 282 P.3d 126, 143 (2012). In this case, the court erroneously admitted pure propensity evidence that Mayfield must have trafficked in stolen goods on the charged dates because he was in the business of doing so for the past three years and in fact made \$100,000 from that business in 2008, a year before the charged events. 2RP 207-09.

Mayfield specifically objected to evidence of the quantity of merchandise that was involved in the ongoing business relationship with Ostheller. 2RP 87-99. He argued the State was trying to prove its case by probabilities, essentially propensity evidence banned under ER 404(b). 2RP 91. The State responded it needed evidence of the overarching scheme to show how the items went from Mayfield’s possession to Ostheller’s. 2RP 97-98. The court admitted the evidence for the limited purpose the State described. 2RP 99.

But the State went far beyond this limited purpose when it elicited evidence of the quantity of money Mayfield gained from deals with

Ostheller in 2008. 2RP 210. The amount of money earned in 2008 is irrelevant to how the goods were trafficked from one person or place to another in 2009. The prosecutor then exaggerated the effect of this prejudicial and inadmissible evidence by emphasizing it in closing argument and encouraging the jury's sense of outrage: "You have a right to be angry, that someone like Elijah Mayfield makes a hundred thousand cash by going in and stealing things like toothbrushes, laxatives, and hair supplies." 2RP 271.

c. The State's Reliance on Emotional Appeals Was Flagrant, Ill-Intentioned, and Incurable by Instruction.

The pervasive misconduct in this case requires reversal because it was flagrant and ill-intentioned. Even assuming the prosecutor believed the amount of damage to Safeway was relevant, bringing up the issue of damage to unrelated stores, the entire problem of shoplifting in general, and the jury's anger at how much money Mayfield made went far beyond what was at issue in the case and blatantly invited the jury to strike at Mayfield out of a sense of outrage against the magnitude of the overall problem.

Further objection or request for curative instruction during closing argument would have been futile. The court had already overruled counsel's objection to admitting the evidence of the millions of dollars of losses

suffered by Safeway. 2RP 161. There was no reason for counsel to believe the court would sustain an objection to argument on that basis.

Moreover, the misconduct was not curable by instruction because the prosecutor's pervasive questioning and comments set a tone that appealed to the jury's outrage at traffickers in general. See State v. Echevarria, 71 Wn. App. 595, 860 P.2d 420 (1993). In Echevarria, the prosecutor made repeated references to the war on drugs and described neighborhoods and schools as battlefields. Id. at 598. Echevarria initially objected, but on appeal the State argued the error was not preserved because he did not continue to object. Id. But the court held the comments were so flagrant and ill-intentioned that no instruction could have erased the prejudicial effect. Id.

The court held these comments "set the tone for the entire trial" and were "a blatant invitation to the jury to convict the defendant, not on basis of the evidence, but, rather, on the basis of fear and repudiation of drug dealers in general." Id. at 599. The court agreed the prosecutor's comments "so colored the proceedings," that Echevarria was denied a fair trial. Id.

Here, the prosecutor's comments also set the tone for the entire trial. Evidence and argument was presented that encouraged the jury in a sense of outrage against Mayfield as a representative of traffickers and professional shoplifters. The evidence of Safeway's million dollar losses and potential harm to consumers was exacerbated by testimony of the quantity of money

Mayfield received from Ostheller in 2008, the year before any of the charged incidents. All of this evidence was emphasized in closing argument. Like Echevarria, Mayfield was denied a fair trial and this Court should reverse his convictions.

3. BLAHATO'S TESTIMONY IDENTIFYING MAYFIELD IN THE SURVEILLANCE VIDEO INVADED THE PROVINCE OF THE JURY.

The role of the jury as the ultimate arbiter of fact is held inviolate under Washington's constitution. Montgomery, 165 Wn.2d at 590. Opinion testimony is carefully controlled because it can usurp the jury's role. Id. at 590-91. Lay opinions must be both based on the witness' rational perceptions and helpful to the jury. Id. at 591.

When photographs or videotaped evidence is admitted, the identity of the persons portrayed is generally a factual question for the jury. State v. George, 150 Wn.App. 110, 118, 206 P.3d 697 (2009) (citing United States v. LaPierre, 998 F.2d 1460, 1465 (9th Cir. 1993)). Lay opinion as to the identity of a person in a photograph or video is inadmissible because it interferes with the jury's role unless the witness has a better basis for identifying the person than would the jury. Id. For example, if the witness is personally acquainted with the person, identification is permitted. Id.

The court erred in admitting Blahato's testimony identifying Mayfield on the surveillance video recordings because Mayfield had no

better basis for making that identification than did the jury. His opinion testimony was unhelpful to the jury and usurped its function as the arbiter of disputed facts.

In George, a police officer testified he could identify the defendants in a surveillance video based on their build, their movements, and their clothing. 150 Wn. App. at 115-16. Although he could not make out facial features, he testified they looked very similar at trial to the way they looked the day of the crime. Id. George objected this testimony invaded the province of the jury, but the trial court ruled the jury could determine what weight to give and whether the officer's testimony was credible. Id. at 116. The Court of Appeals held it was an abuse of discretion to admit the officer's identification because he had only seen the defendants briefly the day of the crime. Id. at 119. These were not the type of extensive contacts that would give him a better basis than the jury for comparing the defendants' appearance at trial to the figures on the surveillance video. Id.

Blahato had even less contact with Mayfield than the officer in George. At the CrR 3.5 hearing, Blahato admitted he had never seen Mayfield in person before that day. 2RP 44. Nevertheless, Blahato was permitted to identify Mayfield as the person in all four surveillance videos, including the one that was inadvertently destroyed. 2RP 148-58. Because Blahato had never seen Mayfield in person, he was in no better position than

the jury to determine whether Mayfield was the person in the video recordings. The court abused its discretion in overruling counsel's objections to this evidence. 2RP 69, 80, 157-58; George, 150 Wn.2d at 117-18.

This testimony was particularly harmful with regards to count one, the charge of trafficking on March 7, 2009 at the Newcastle Safeway. The video was not admitted, so the jury could not compare for itself whether Mayfield was the person in the video. 2RP 148-49. And Mayfield denied going to or being familiar with the Newcastle store or stealing any Rogaine. 2RP 251-52. Mayfield's convictions should be reversed because Blahato's improper opinion testimony invaded the province of the jury and denied Mayfield a fair trial.

4. CUMULATIVE ERROR DENIED MAYFIELD A FAIR TRIAL.

Reversal is required when the cumulative effect of errors produces a trial that is fundamentally unfair. State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813 (2011). Improper admission of evidence combined with prosecutorial misconduct in closing argument and usurping the jury's role as factfinder are the types of errors that can have the cumulative effect of denying a fair trial. Id. at 526-27.

The prosecutor set out to demonstrate to the jury that this was a huge scheme, making vast amounts of money for Mayfield and affecting large sectors of the economy. Through testimony and argument, he impressed upon the jury that this earned Mayfield \$100,000 in 2008 and that not just Safeway, but all other similar stores were being constantly damaged to the tune of millions of dollars, a loss which is ultimately passed on to the consumers and jurors. This went far beyond what was necessary or relevant to prove four instances of trafficking.

Without this impermissible evidence and argument, the jury would have been much more likely to accept Mayfield's testimony and acquit. As in Venegas, this case essentially hinged on credibility. Id. at 526-27. The jury would have to acquit if it believed Mayfield's testimony that his answers during in-custody police interrogation were merely the result of confusion and that he was guilty only of theft. The so-called corroboration from Ostheller and Pankratz does not corroborate any specific act of trafficking on any specific date. Particularly when considered cumulatively, the victim impact evidence and argument rendered Mayfield's trial unfair.

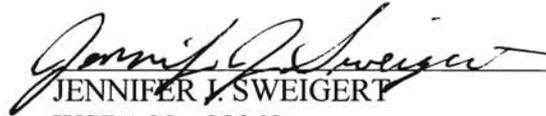
D. CONCLUSION

For the foregoing reasons, Mayfield requests this Court reverse his convictions.

DATED this 6<sup>th</sup> day of September, 2012.

Respectfully submitted,

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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68508-2-1
	)	
ELIJAH MAYFIELD,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6<sup>TH</sup> DAY OF SEPTEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ELIJAH MAYFIELD  
DOC NO. 721980  
CEDAR CREEK CORRECTIONS CENTER  
P.O. BOX 37  
LITTLEROCK, WA 98556

**SIGNED** IN SEATTLE WASHINGTON, THIS 6<sup>TH</sup> DAY OF SEPTEMBER 2012.

x *Patrick Mayovsky*

*2012 SEP -6 PM 4:37*  
COURT OF APPEALS  
STATE OF WASHINGTON