# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>DAWN MICHELLE FLEMING,<br><br>Appellant. | No. 39557-6-II<br><br><br><br><br>UNPUBLISHED OPINION |

Hunt, J. — Dawn Michelle Fleming appeals her jury convictions for second degree identity theft and second degree possession of stolen property stemming from her October 26, 2008 Visa card purchases at a Sports Authority store. She argues that (1) there is insufficient evidence to sustain either jury conviction because the State did not prove beyond a reasonable doubt that she knowingly used or possessed a stolen credit card, and (2) prejudicial misconduct during the State's closing argument denied her a fair trial. We affirm.

FACTS

I. Identity Theft and Possession of Stolen Property

At around 10:30 AM on October, 26, 2008, Marlys Cheney left her car at a Puyallup trailhead parking lot and went for a walk. She returned around noon to discover that her car had

been broken into and that her credit cards, bank cards, and driver's license had been stolen from the center console. She called immediately to cancel her bank debit cards, called the police to report the car prowl, and headed home to get the phone numbers for her credit card companies so that she could cancel her Visa cards. While reporting her Visa credit cards stolen, she learned that one of her Visa cards showed recent activity.

At approximately 2:30 PM, Dawn Fleming and Shane Skilton entered the Tacoma Sports Authority store. At 2:35 PM, Fleming swiped Cheney's Visa credit card[1] to purchase shoes and accessories, signed an illegible signature to "authorize" the purchase, 2 Verbatim Report of Proceedings (VRP) at 145, and left the store with her purchased items. Shortly thereafter, Skilton attempted to purchase some shoes and accessories with a different credit card; but when his card was declined, he, too, left the store. Although the record does not reflect where Skilton next went, the store's video surveillance showed Fleming pulling her car around to the front of the store a few minutes later and Fleming and Skilton exiting the car and reentering Sports Authority.

At 2:41 PM, again using Cheney's Visa credit card, Fleming purchased the same shoes and accessories that Skilton had unsuccessfully attempted to purchase. During these transactions, Fleming swiped Cheney's card in the electronic card reader and signed for the Visa purchases in the electronic signature capture device; the sales cashier neither took the Visa card from Fleming nor compared Fleming's signature with the signature on the back of the swiped card. Fleming's

[1] According to Sports Authority loss prevention manager Eric Hieber, (1) when a Visa credit card is used, the card holder's name is recorded in the store's transaction record; (2) but when a Visa gift card is used, no cardholder name is recorded; and (3) because Cheney's name was in the transaction records here, her transactions involved Cheney's Visa credit card, not a generic gift card.

signatures for these transactions (exhibits 1 and 3) were illegible and they did not match her legible signature from the pre-trial scheduling order (exhibit 9).

## II. Procedure

The State charged Fleming with second degree identity theft and second degree possession of stolen property. The State also charged Skilton for these crimes; but he pled guilty to second degree theft and two counts of possession of stolen property and testified for the State against Fleming.

At trial, Skilton testified that he and Fleming had been friends for six years, occasionally hung out together, and had decided to go shopping on October 26, 2008. He further testified that (1) he had possessed a number of Visa cards that he knew did not belong to him; (2) he did not know that the Visa cards were stolen but that he would not have cared if they had been stolen because he was high on methamphetamine; (3) he had given one of the Visa cards to Fleming just before her shoe purchase, but it was a Visa gift card, not a Visa credit card; and (4) having been high on methamphetamine at the time, he could not recall how he had obtained the Visa cards, why he had decided to go shopping that day, how he had arrived at the Sports Authority store, or that he had even been shopping at Sports Authority.

During closing argument, the State attacked Skilton's credibility and attempted to fill in the gaps in his testimony with inferences from other evidence. Fleming objected six times, asserting prosecutorial misconduct[2]; the trial court sustained two of the objections. Fleming

[2] With respect to the first three objections, defense counsel alleged that the prosecution shifted the burden of proof and argued facts not in evidence. The trial court disagreed, but did give an instruction to the jury: "Well, the jury will be reminded that this is argument, it's not evidence, and they will need to pay attention to the closing instruction and recall the burden of proof in the

neither moved for a mistrial nor moved to strike any portions of the State's argument.

The jury found Fleming guilty as charged. Fleming appeals.

## ANALYSIS

### I. Sufficiency of the Evidence

Fleming first argues that the evidence was insufficient to support either conviction because the State never proved beyond a reasonable doubt that she knowingly used or possessed a stolen credit card. With respect to second degree identity theft, Fleming asserts that the State did not prove that she "knowingly" used Cheney's financial information, namely Cheney's stolen Visa credit card. Br. of Appellant at 5. With respect to second degree possession of stolen property, Fleming asserts that the State did not prove that she "knowingly" possessed stolen information, namely Cheney's stolen Visa credit card. Br. of Appellant at 7. These arguments fail.

#### A. Standard of Review

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We do not have to be convinced of the defendant's guilt beyond a reasonable doubt, only that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn.

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case." 2 RP at 216.

With respect to objections four through six, defense counsel objected to the prosecutor's use of a rhetorical questioning to the jury and her discussion about the Bernard Madoff Ponzi scheme. The trial court sustained two of these objections and reminded the jury that "[t]his is closing argument. It is not evidence." 2 RP at 225. At this point, the prosecutor moved on and continued her argument without further objection.

App. 714, 718, 995 P.2d 107, (citing *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied*, 119 Wn.2d 1003 (1992), *abrogated on other grounds by State v. Trujillo*, 75 Wn. App. 913, 833 P.2d 329 (1994)).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn" from it. *Salinas*, 119 Wn.2d at 201. We must draw all reasonable inferences from the evidence in favor of the verdict and interpret them strongly against the defendant. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable for purposes of drawing inferences. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

B. Knowledge Elements

To satisfy the knowledge element of second degree identity theft, a defendant must knowingly[3] obtain, possess, use, or transfer a means of identification or financial information of another person. RCW 9.35.020(1)-(3). Consistent with this statutory requirement, the trial court instructed the jury that "[t]o convict" Fleming, it had to find the State had proved beyond a reasonable doubt that she "knowingly possessed or used a means of identification or financial information[4] of another person." Clerk's Papers (CP) at 37. When a defendant knowingly

[3] A person acts knowingly or with knowledge when "(i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense." RCW 9A.08.010(1)(b). The trial court's instruction was consistent with this definition.

[4] The trial court instructed the jury that "[f]inancial information" includes account numbers and balances, transactional information concerning an account, and other information held for the purpose of account access or transaction or initiation. Clerk's Papers (CP) at 35.

possesses and uses another person's credit card, he or she has knowingly used the financial information of another. *See State v. Leyda*, 157 Wn.2d 335, 351, 138 P.3d 610 (2006).

To satisfy the knowledge element of second degree possession of stolen property, a defendant must possess a "stolen access device."[5] RCW 9A.56.160(1)(c). A credit card is an access device. *See State v. Ose*, 156 Wn.2d 140, 145-146, 124 P.3d 635 (2005). "Possessing stolen property" means knowingly to receive, to retain, to possess, to conceal, or to dispose of stolen property knowing that it has been stolen and to withhold or to appropriate stolen property to the use of any person other than the true owner or person entitled to possess it. RCW 9A.56.140(1). Consistent with these statutes, the trial court instructed Fleming's jury that "[t]o convict" Fleming, it had to find that the State had proved beyond a reasonable doubt that she knowingly possessed stolen property and "acted with knowledge that the property had been stolen." CP at 40.

Here, there was sufficient evidence for any rational juror to conclude that Fleming knew that she possessed and used a stolen Visa card and that she acted with knowledge that it was stolen when she made her purchases at the Sports Authority and signed for the transactions. First, there was evidence that Fleming knew the card was not hers. Fleming did not bring the Visa card with her into the store; instead, Skilton gave her the Visa card inside the Sports Authority store, knowing that the card did not belong to him. Second, Cheney's name appeared in the signature-capture-device transaction records from Fleming's purchase, indicating that

[5] The trial court instructed the jury that an "[a]ccess device" is "any card, plate, code, account number, or other means of account access . . . that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument." CP at 39.

Fleming's transactions were made with a Visa credit card, not with a Visa gift card. Moreover, if Cheney's name appeared on the transaction record, it also would have been on the Visa card that Fleming used, visible to her before she swiped it in the card reader. A reasonable law abiding citizen in Fleming's position would have realized that the Visa card did not belong to her before swiping the card and signing to authorize its use. When Fleming signed the signature capture device to confirm her card purchases, her signatures were illegible and did not match her legible signature from her signed trial-scheduling order. It is, therefore, reasonable to infer that Fleming was attempting to avoid leaving a paper trail when she knowingly used the stolen credit card. Had the card been a gift card as Skilton claimed, Fleming would likely have signed her own name in a legible manner as she did on the trial scheduling order.

Drawing all reasonable inferences in the light most favorable to the State, we hold that any rational juror could conclude that Fleming (1) knew she possessed and used Cheney's stolen credit card when she made her purchases at the Sports Authority (possession of stolen property) and (2) knew she used or possessed the financial information of another when she possessed and used the stolen credit card (identity theft). Substantial evidence thus supports both convictions.

## II. Prosecutorial Misconduct

Fleming next argues that she was denied her right to a fair trial when the prosecution committed prejudicial misconduct by appealing to the passions and prejudices of the jury during closing argument. She further argues that the cumulative effect of this misconduct deprived her of a fair trial. This argument also fails.

A. Standard of Review

The prosecution has wide latitude in closing argument to draw reasonable inferences from the evidence and to invite the jury to do the same. *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005) (citing *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991)). A prosecutor, however, may not make statements that are unsupported by the evidence[6] or invite the jury to decide a case based on emotional appeals to their passions and prejudices. *In re Det. of Gaff*, 90 Wn. App. 834, 841, 954 P.2d 943 (1998); *State v. Claflin*, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). We review a prosecutor's alleged improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

A defendant bears the burden of showing that prosecutorial misconduct violated her right to a fair trial. *Dhaliwal*, 150 Wn.2d at 578. Accordingly, Fleming must show that (1) the prosecutor committed misconduct, and (2) the misconduct prejudiced her. *Dhaliwal*, 150 Wn.2d at 578. In this, Fleming fails.

B. Misconduct

1. Objections 1, 2, and 3

We begin our misconduct analysis by reviewing Fleming's first three objections in which she asserted that the prosecution argued facts not in evidence and shifted the burden of proof. The prosecutor challenged the credibility of Skilton's testimony, especially his memory lapse and his "gift card theory." In challenging his credibility, the prosecutor explained that under

[6] *State v. Jones*, 71 Wn. App. 798, 808, 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018 (1994).

instruction 1, the jury would consider Skilton's demeanor, his biases, and his allegiances with friends when weighing the credibility of his testimony. In addition, the prosecutor underscored that much of what actually occurred before Skilton and Fleming entered the Sports Authority was unclear given Skilton's supposed memory lapse resulting from his drug use.

Filling in gaps in Skilton's testimony, the prosecutor further argued it was likely that Fleming was actually aware of Skilton's drug use and illegal activity on October 26. Attempting to piece together a plausible story of what might have actually happened that day, the prosecutor argued:

> [L]et's look at what was going on on October 26. Mr. Skilton indicated that he was hanging out with friends and that he considers Dawn Fleming to be his friend. They hang out together. They hang out together.
>
> What kind of stuff do you do together? Well, that wasn't answered. But what was going on on October 26th? There was a vehicle prowled in a parking lot. And I think common sense tells you that usually an automobile is involved when a suspect is going around prowling vehicles. You have got to have a vehicle to drive around and get away from the scene. You have got to have some place to store all your stolen stuff. Ms. Fleming had a vehicle.

2 RP at 215-216. When Fleming objected to this argument (objection 1), the trial court replied, "Well, the jury will be reminded that this is argument, it's not evidence, and they will need to pay attention to the closing instruction and recall the burden of proof in the case." 2 RP at 216.

The prosecutor then continued, "I submit what was going on on October 26th is that Mr. Skilton needed wheels so he could go around and get his drugs. Ms. Fleming had wheels." 2 RP at 217. When Fleming again objected (objection 2), the trial court replied, "I am going to ask that you argue based upon the evidence that was presented here." 2 RP at 217. The prosecutor then moved on and discussed Skilton and Fleming's actions inside the store:

> Now, why did they shop separately? If you're friends, if you are going in together, you hang around together during each other's transactions.
>
> . . .
>
> So that's a little unusual. Why would you do that? Well, if you knew that the card was stolen, if you knew that each of you had stolen cards, then what you might want to do is leave separately so if one got caught—.

2 RP at 219-220. When Fleming again objected (objection 3), the trial court responded, "[T]his is closing argument; it is not evidence." 2 RP at 220.

The evidence supported the prosecutor's evidentiary inferences; and, in light of Skilton's equivocal testimony and unclear memory of events, these inferences were within the wide latitude accorded the State. *Boehning*, 127 Wn. App. at 519. Not only had Cheney's Visa card been stolen from her car in Puyallup between 10:30 AM and noon, but by 2:30 PM, Fleming possessed and used Cheney's Visa card in nearby Tacoma. In addition, video footage captured Fleming and Skilton getting out of Fleming's car before they returned to the store for Fleming's second purchase. This circumstantial evidence supported the inference that Fleming was driving Skilton around in her car both before and after they went shopping together, thus, potentially linking Skilton and Fleming to Cheney's car prowl a short time before shopping with Cheney's Visa card.

In addition, the trial court instructed the jury to consider only the evidence admitted during trial and not to consider as evidence the parties' closing arguments. We presume that the jury followed the trial court's instruction. *See Dhaliwal*, 150 Wn.2d at 578. As the trial court noted, the State's closing argument was reasonable. The argument was based on the evidence; it did not improperly appeal to the jury's emotions, passions, or prejudices. Because, there was no

misconduct, we need not address the prejudice prong of the test. We hold that Fleming has failed to establish prosecutorial misconduct with respect to the portions of the State's closing argument to which she made objections one through three.

2. Objections 4, 5 and 6

Fleming's fourth, fifth, and sixth objections were to a separate portion of the prosecutor's argument. The prosecutor asked the jury a rhetorical question, "What does a thief look like? How can you know a thief when you see a thief?" 2 RP at 224. Although the trial court sustained Fleming's objection (objection 4), Fleming neither requested a curative instruction nor moved to strike the question. Fleming again objected (objection 5) when the prosecutor discussed Bernard Madoff:

> Okay. Bernard Madoff was recently convicted of a Ponzi scheme and that means he took money from thousands of people. . . . He looks like any other average person. No "T" on his forehead. And I know in some—some societies at some points in time, people have been branded for being thieves.

2 RP at 225. This time the trial court replied to Fleming's objection, "This is closing argument. It is not evidence." 2 RP at 225. The prosecutor continued:

> In some societies, some points in time, people who have committed thefts have had their arms chopped off or their hands chopped off. We don't do that in this society. So how do you know what a thief looks like? Well, basically you don't know what a thief looks like.
>
> The defendant in this case is an attractive young woman. She looks healthy. She looks wholesome.

2 RP at 225. Again, Fleming objected (objection 6), the trial court sustained the objection, and Fleming neither requested a curative instruction nor moved to strike the State's comment.

Fleming now asserts that these comments improperly appealed to the jury's passions and prejudices because the State compared Fleming to Madoff, whose national scandal was very emotionally-charged and public at the time of Fleming's trial. Although the argument was inartful, it does not appear, as Fleming contends, that the prosecutor was actually comparing Fleming's case to Madoff's case. On the contrary, it appears that the State was attempting to explain to the jury that, simply by looking at someone, it could not tell whether a normal looking person (a successful person in Madoff's case and a good looking person in Fleming's case) is guilty based on his or her appearance alone. In other words, the prosecutor was asking the jury to disregard appearances and to look instead at the evidence presented. We hold, therefore, that this argument did not constitute prosecutorial misconduct.

Even assuming without so holding, however, that these "Madoff" arguments were improper, they do not require reversal because Fleming has not established that these comments prejudiced her. Prejudice is established where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." *Dhaliwal*, 150 Wn.2d at 578 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). In order to warrant reversal, arguments that appeal to the jury's prejudice and passions must be so prejudicial that no curative instruction would have sufficed to erase the prejudice. *See State v. Claflin*, 38 Wn. App. 847, 849-850, 690 P.2d 1186 (1984). This is a high standard. *See e.g.*, *State v. Belgarde*, 110 Wn.2d 504, 506-10, 755 P.2d 174 (1988). Here, in contrast, the prosecutor's comments do not meet this high standard; on the contrary, any prejudicial effect could have been cured with an instruction to the jury to disregard the comment.[7]

Moreover, the *Claflin* prosecutor's use of imagery in describing rape's effect on victims, *Claflin*, 38 Wn. App. at 849-50, and the *Belgarde* prosecutor's description of "butchers and madmen who killed indiscriminately," *Belgarde*, 110 Wn.2d at 508, were far more inflammatory than those at issue here. Unlike the prosecutors' comments in *Claflin* and *Belgarde*, Fleming's prosecutor closed her "what does a thief look like" argument, 2 RP at 224, with the relatively benign rhetorical question, "So how do you know what a thief looks like? Well, basically you don't know what a thief looks like." 2 RP at 225. This rhetorical question was not so inflammatory that its prejudicial effect could not have been cured by an instruction had Fleming requested one. *Claflin*, 38 Wn. App. at 849-50. Accordingly, we hold that Fleming has failed to show that the prosecutor's comments prejudiced her.

C. Cumulative Error

Fleming also argues that cumulative error from numerous instances of misconduct prejudiced the jury and deprived her of her right to a fair trial. An accumulation of errors that do not individually require reversal may still require reversal if, in total, the errors deny a defendant a fair trial. *State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994). Here, however, there were not multiple instances of misconduct; thus, the cumulative error doctrine does not apply.

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[7] Furthermore, sua sponte the trial court had already given curative instructions following Fleming's first and third objections to the State's closing argument. After the second objection, the trial court asked the prosecutor to argue based on the evidence, but it did not at that time instruct the jury to disregard argument not based on the evidence. And, after Fleming's fifth objection, to the "Madoff comments," the trial court again reminded the jury, "[T]his is closing argument. It is not evidence." 2 RP at 225. The jury is presumed to follow the trial court's instructions that counsel's arguments are not evidence. *State v. Stenson*, 132 Wn.2d 668, 729-30, 940 P.2d 1239 (1997); *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982), *review denied*, 153 Wn.2d 1024 (2005). Thus, the trial court's admonishments to the jury throughout closing argument minimized any prejudice flowing from the State's closing argument.

Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Armstrong, PJ.

Quinn-Brintnall, J.