

COURT OF APPEALS  
DIVISION II

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40856-2-II

STATE OF WASHINGTON  
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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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State of Washington  
Respondent

v.

**ANGELINA C. MATTEUCCI**  
Appellant

40856-2-II

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On Appeal from the Superior Court of Mason County

Cause No. 09-1-00450-1

The Honorable Toni A. Sheldon

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**BRIEF OF APPELLANT**

**Jordan B. McCabe, WSBA No. 27211**  
**Attorney for Appellant, Angelina C. Matteucci**  
LAW OFFICE OF JORDAN MCCABE  
P.O. Box 6324, Bellevue, WA 98008-0324  
425-746-0520~jordan.mccabe@yahoo.com

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## II. ASSIGNMENTS OF ERROR AND ISSUES

### A. Assignments of Error

1. The evidence was insufficient to establish the corpus delicti of any of the charged offenses.
2. Even if the corpus delicti was established, the evidence was insufficient to support the convictions.
3. The court prevented Appellant from presenting a complete defense in violation of Const. art. 1, § 22 and the Sixth and Fourteenth Amendments.
4. The sentencing court erroneously failed to consider whether any of the crimes constituted same criminal conduct.
5. The sentencing court erroneously denied DOSA.
6. The evidence did not support the restitution award.
7. Appellant received ineffective assistance of counsel.

### B. Issues Pertaining to Assignments of Error

1. Did the State produce sufficient evidence, independent of Appellant's own statements, that any crime occurred?
2. Did the State produce sufficient evidence that Appellant stole access devices and PIN numbers as alleged?
3. Did the court mischaracterize evidence of objective facts as character evidence and erroneously exclude it under ER 404(b)?
4. Was Appellant entitled to have the sentencing court consider whether some of the convictions constituted same criminal conduct for the purpose of calculating the offender score?

5. Did the sentencing court erroneously deny DOSA because Appellant did not plead guilty?
  - (a) Did the sentencing court rely on impermissible facts?
  - (b) Did the sentencing court ignore facts it was statutorily required to consider?
6. Was the evidence sufficient to support the restitution award?
7. Was trial counsel ineffective —
  - (a) for failing to argue corpus delicti?
  - (b) for failing to request a 'same criminal conduct' ruling?

### III. STATEMENT OF THE CASE

*Independent Evidence:* Jessica Gairns and Appellant, Angelina C. Matteucci, were the closest possible friends. RP 40. Like sisters; inseparable; peas in a pod. RP 97, 104. They shared everything, including clothes and money. RP 112. They frequently exchanged ATM cards and passwords to access each other's funds. RP 27, 28, 98, 101, 104.

Jessica<sup>1</sup> had her own debit card and also a credit card. RP 27. In addition, her parents had entrusted Jessica with their own ATM cards. RP 27, 34, 57. She had Marianne's card to use for emergencies while caring for her little brother. RP 34, 57. Jessica used this card for shopping, however. RP 35. At one point, Jessica said she kept her copy of her mother's card at her house. RP 34. But she repeatedly contradicted this and testified that she did not keep any ATM cards at her house. RP 52. She kept all the cards in her purse, either in a wallet or in a pocket in the purse. RP 53. She definitely kept Marianne's card in her purse. RP 62.

Jessica was pretty sure all the cards were in her purse on October 28, 2009. RP 53. Jessica thought her own card was in her purse because she used that card for everything. She never carried cash, and kept the

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<sup>1</sup> Jessica Gairns and her mother, Marianne Gairns are referred to by their first names for clarity, with no disrespect intended. Where appropriate, Ms. Matteucci is also referred to by her first name for symmetry.

card with her so she could eat and buy gas and cigarettes, etc. RP 28-29, 113. Her debit card was definitely in her purse on October 29. RP 29. Jessica never gave Angelina that PIN. RP 35. And she definitely did not have the PIN to her own debit card written down anywhere. RP 35.

Instead, Jessica allowed Angelina to use only her father's ATM card and password, because that account had a \$200 daily withdrawal limit. RP 51.

Besides Matteucci, two friends testified that Jessica gave Angelina her debit card and PIN sometimes. RP 98. Hundreds of times. RP 112. Maybe a thousand times. RP 124. Jessica always wrote down the PIN for Angelina. RP 102, 105, 113. This was because Matteucci was incapable of remembering a 4-digit number. RP 113. As of October 28, 2009, Angelina owed Jessica about \$900. RP 34.

Defense witness Tina Philbrook testified that Jessica had lent Philbrook her debit card one time and gave Philbrook the PIN. RP 113. Jessica denied this. RP 191. Jessica did admit giving her credit card information to a friend, Ron Radford, on one occasion to pay a bill. RP 31. Mr. Radford was known to the police. RP 68.

Jessica first said she remembered the date of Oct. 28, 2009, but immediately contradicted this and said she did not remember a single thing that happened that day. RP 28-29. On cross examination, she

remembered that she met with Angelina and Radford to plan Halloween.

RP 50.

On October 29, 2009, Jessica discovered an unauthorized \$200 cash withdrawal dated October 28 at the Fred Meyer ATM. RP 29. This transaction occurred at 5:30 p.m. RP 133. She cancelled the card on October 29. The next day, October 30 she reported the theft to the bank. RP 30. The bank reimbursed her but withheld \$50.00 because the unauthorized user must have had her PIN. RP 30. Shortly after, Jessica's mother, Marianne Gairns, claimed funds were missing from her account also. RP 30. Marianne and Jessica went to the police station together. RP 58. Marianne said that \$100 had been withdrawn at the deli. Then a second withdrawal attempt was denied at a gas station, a balance check was done, and the remaining funds in the account were withdrawn. RP 58-59. [The State would later request restitution of \$60 for Marianne and \$183.25 for her bank. RP 260.] Jessica professed to have no idea how any of these transactions could have happened. RP 31.

Jessica had a conversation with Matteucci and Ron "a week after Oct 28" in which Angelina apologized about the situation with Ron. RP 45. She asked Jessica to drop the charges, but Jessica refused. RP 33-34. Matteucci did not admit anything to Jessica. RP 45.

On November 2<sup>nd</sup> or 3<sup>rd</sup>, Shelton Police Sergeant Virgil Pentz investigated the transactions. Pentz recognized Ron Radford in the gas station ATM security video. RP 68. Jessica later corroborated this identification. RP 32. On November 17, Pentz went to Radford's house and arrested him. RP 68, 70, 82.

***Matteucci's Admissions:*** After Radford was taken away, Matteucci told the officers it was all a misunderstanding and that Jessica had told her she was willing to drop the charges. According to Pentz, Matteucci said Jessica had said this either the day before, a few days earlier, or a couple of weeks earlier. RP 71-72. Matteucci repeatedly asked what was going to happen to Radford and Pentz told her would go to jail. RP 72, 79. He invited Matteucci to come to the station and give a statement, which she did. RP 72, 74.

Matteucci first said Jessica gave Marianne's card to her and she gave it to Radford. RP 74. Then she said she never used Marianne's card at all. RP 74, 75. Then she said she took the card by mistake, failing to notice Marianne's photograph in the middle of the card. RP 74. Then she said Jessica had given her Marianne's card one time to pay a bill for Radford. RP. 77.

After going around a few times, Pentz told Matteucci to stop lying but reminded her that Radford was going to jail. RP 78. Matteucci asked

for some time to think about it. RP 79. After sitting alone in the office for a while and going outside for a cigarette, she agreed to give a taped statement. RP 80. Pentz characterized this statement as “a story” and as “a version of events.” RP 73.

Marianne’s Card: After being read her Miranda rights, Matteucci said that she had taken the cards (plural). RP 83. She said she went to Jessica’s house to open the door for Jessica’s little brother who had an early release day at school. “And I went into her bedroom and took them out of our money chest thing. We have, like, a money box, because ... I don’t know why.” RP 84. Matteucci had not asked Jessica if she could use the cards. RP 85.

Matteucci said she then let the dog out and went back to work. RP 85. After that, she called Radford and told him she had taken the cards and wanted him to use them. RP 85-86. In court, Matteucci implied that Radford was with her the whole time. She said Radford stopped by Jessica’s work to get the key. RP 135, 137. (Even though Matteucci had her own key, RP 49.) She also testified that Jessica had previously told her to grab two debit cards and take them to see which one had money in the account. RP 134, 137. Matteucci did grab two. RP 134.

At Mickey’s Deli, Ron went inside with Marianne’s card while Matteucci took a phone call in the car. RP 86-87. He also used the card

at a gas station, again while Matteucci was on the phone in the car. RP 87. Then she went back to work. RP 87. And “then, later on in the evening, she gave us the debit cards again to go get groceries.” RP 134.

Jessica’s Card: Matteucci told Pentz that Jessica finished work at 5:00 p.m. on October 28, Matteucci a little later. RP 88. Jessica hung out with Angelina and Ron. RP 88. They sat and talked and did girl stuff, including dressing up in lingerie and doing a photo shoot. RP 88. After that, Jessica and Angelina sent Radford to the store with Jessica’s debit card to buy food. RP 125. They did not want to go themselves because one of them had been crying. RP 88. Matteucci testified that Jessica gave Radford her debit card and wrote the PIN on the card. RP 126-27. He returned with groceries and cash. RP 88. Matteucci said she retrieved both cards from Radford and surreptitiously threw them into Jessica’s purse when she was not looking. RP 89.

The State charged Matteucci, as a principal or an accomplice, with one count of second degree theft and one count of second degree identity theft for taking Jessica’s card and using her PIN at the Fred Meyer. She was also charged with one count of second degree theft and two counts of second degree identity theft for the taking and two uses of Marianne Gairns’s card. CP 57-59.

At the jury trial, the State did not present any records or bank statements to prove the alleged thefts. Other than Matteucci's confession, the only evidence that any crime had occurred was the unsupported statements of Jessica and Marianne.<sup>2</sup> Matteucci's own testimony collapsed under cross-examination.

Matteucci repeatedly told Pentz it was all a mistake. RP 90. She had been certain Jessica would not be too upset. RP 78. Jessica would forgive her. RP 79. "She'll still love me." RP 86.

***Exclusion of Relevant Defense Evidence:*** During the trial, the prosecutor and defense counsel had a conversation with Jessica Gairns in the hallway outside the courtroom. RP 37. The prosecutor reported to the court that Jessica had just told them that when Matteucci approached her a week after the alleged theft and expressed remorse, Matteucci excused her conduct because of a certain unmentionable thing Jessica had done to her in the past. RP 38. The prosecutor wanted to elicit testimony from Jessica that Matteucci was angry at her, but he did not want the jury to learn how this came about. RP 38, 39. Without giving any specifics, the State asked the court to rule that the explanation was inadmissible under ER 404(b), because its sole relevance was to smear Jessica's reputation. RP 39.

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<sup>2</sup> Marianne Gairns had a record of crimes of dishonesty. RP 13, 36.

Defense counsel enlightened the court and made a record that Jessica had just told them that she paid Angelina's rent a month before the alleged theft. RP 41.<sup>3</sup> The reason she did this — as well as making countless other gifts of money on a more or less continuous basis — was that in 2007 Matteucci had engaged in three-way sex with Gairns and Gairns's then-boyfriend and that Matteucci had contracted a venereal disease called HPV (Human Papilloma Virus), and that Matteucci now had cancer as a result. RP 41.

The court inquired why this was not inadmissible under ER 404(b) as evidence of prior acts offered to prove a character trait and action in conformity therewith. RP 41-42. Defense counsel explained that the sexual episode was not offered to prove character or propensity. Rather, it was an objective fact that was relevant and necessary to show the nature of the relationship between Jessica and Angelina for the purpose of corroborating Matteucci's claim that she had no intention of committing a crime and was shocked to learn that Jessica regarded the ATM transactions of October 28<sup>th</sup> as felonious. RP 42. Counsel argued that Matteucci was entitled to present this to the jury to explain the otherwise far-fetched claim that Jessica was in the habit of just letting Matteucci use her debit cards. RP 42.

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<sup>3</sup> This would explain why Angelina owed Jessica \$900. RP 34.

The prosecutor argued that the defense could show that the two women were close friends without the sexual encounter evidence, and that Jessica would testify that they were close friends. RP 42.

Defense counsel invoked the analogy of a car accident in which a person lost a leg because of another's negligent driving, resulting in the driver's feeling obligated. This was an essentially identical situation except for the sexual component. Just as the accident scenario was not inadmissible character evidence, likewise, evidence of the sexual encounter was an objective fact that provided information the jury needed in order to evaluate whether Matteucci's claims were plausible. RP 43.

The court granted the State's motion and precluded any mention of the incident in front of the jury, "on the basis of relevance and on the basis of 404(b) evidence." RP 44. The prosecutor then elicited from Jessica that she lavished money on Matteucci solely because she was such a "good friend." RP 49. The prosecutor belabored this during closing argument, painting Jessica as saint and Angelina as a grasping villain. RP 236-37.

The State argued that taking the cards constituted the property theft in Counts I and II, and that using the cards was the criminal conduct constituting identity theft in Counts III, IV, and V. Specifically, using the PIN is what constituted stealing the identity. RP 220.

The jury convicted Matteucci on all counts. CP 23-26.

*Sentencing:* Matteucci was a first-time offender. CP 7. She requested a DOSA alternative sentence. RP 256. She was evaluated for DOSA and was found to have a drug problem and to be amenable to treatment. RP 258. She had a bed date for the next day. RP 260. The amount of time served under a treatment alternative would have been about the same — six months with DOSA versus seven months actually served on a 14-month sentence. RP 260.

The DOSA evaluation found that Matteucci had a drug problem and was amenable to treatment, but the prosecutor perceived “something wanting” in the report. RP 258. In his  $\frac{3}{4}$  of a year’s experience, he had observed that people who seek a drug treatment alternative tend to have drug problems and that DOSA evaluations reflect this. RP 258. Therefore, the prosecutor urged the court to ignore the DOSA report. RP 258-59.

The prosecutor repeated several times that DOSA is intended only for people who plead guilty. RP 257, 258, 274.

And the State argued that DOSA applies solely to crimes committed directly in furtherance of drug use, and that Matteucci was ineligible because the money was not stolen for the sole purpose of buying

drugs but (according to testimony in Radford's subsequent trial) was used to pay bills. RP 259.

Without citing specifics, the prosecutor claimed the trial evidence showed that Matteucci was "manipulative and dishonest." RP 257. In fact, not one person testified that Matteucci was anything but open and up front about her conduct, to the point of making Radford go to a second ATM on October 28, so they could get receipt for Jessica. RP 143.

The court rejected the DOSA report as inadequate and requested a more detailed report. Sentencing was set over for two months. RP 261. No additional report was forthcoming, so the court proceeded with sentencing. RP 266.

State presented testimony by Detective Paul Campbell to prove that Matteucci had told a lie following her conviction which violated a DOSA requirement that the offender be completely honest. RP 267-68, 269. Over a defense objection, Campbell testified that Matteucci had violated a post-conviction no-contact order by contacting Radford, and that she later denied it. RP 270-71. The prosecutor also alleged that Matteucci committed perjury at Radford's trial. RP 267. The prosecutor argued that this constituted dishonesty of the sort that automatically disqualified a person from treatment. RP 267. Defense counsel objected that the SRA limited the facts properly before the court to those in

Matteucci's own case record regarding the crimes Matteucci was convicted of. RP 268. The State responded that the court should go outside the record because the standard DOSA evaluation report was inadequate. RP 268.

The court acknowledged the limits on the facts it could consider. RP 269. The court nevertheless concluded that the DOSA report was too cursory to serve its purpose and that additional evidence about the defendant's post-trial conduct was appropriate. RP 269.

Campbell then testified that Matteucci had stated she had no post-conviction contact with Radford. RP 270-71. But, after the conclusion of Radford's trial, Campbell came across a security video that allegedly showed contact between Matteucci and Radford in a department store parking lot. RP 271-72.

The court denied DOSA and imposed high end standard range sentences, each based on an offender score of four. CP 8-9, RP 281.

Matteucci filed this timely appeal. CP 5. She claims the evidence was insufficient to support the convictions and that the sentencing court did not observe the requirements of the Sentencing Reform Act.

#### IV. ARGUMENT

##### 1. THE STATE DID NOT PRODUCE SUFFICIENT INDEPENDENT EVIDENCE TO ESTABLISH THE CORPUS DELICTI.

Matteucci made incriminating statements to the police immediately following the seizure of Ron Radford. Incriminating statements alone, however, will not sustain a conviction unless they are corroborated by independent proof sufficient to establish the corpus delicti of the crime. *State v. Riley*, 121 Wn.2d 22, 32, 846 P.2d 1365 (1993).

“Corpus delicti” means “body of the crime” and prevents convictions for crimes that never occurred. *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996), quoting 1 MCCORMICK ON EVIDENCE § 145, at 227 (John W. Strong, ed., 4th ed.1992). The purpose of the rule is to ensure that defendants are not unjustly convicted based on confessions alone. *State v. Dow*, 168 Wn.2d 243, 247, 227 P.3d 1278 (2010).

The corpus delicti doctrine arose to protect defendants from what happened to Angelina Matteucci, namely “the possibility of an unjust conviction based upon a false confession alone.” *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). Thus, in order to sustain a criminal conviction against a claim of insufficiency of the evidence, where the evidence included an admission by the defendant, the record must

show that the State proved “every element of the crime charged by evidence independent of the defendant’s statement.” *Dow*, 168 Wn.2d at 254. “The purpose of the rule is to ensure that other evidence supports the defendant’s statement and satisfies the elements of the crime.” *Dow*, 168 Wn.2d at 249.

At minimum, there must be evidence of sufficient circumstances to support “a logical and reasonable inference” that a crime in fact occurred. *City of Bremerton v. Corbett*, 106 Wn.2d 569, 579, 723 P.2d 1135 (1986); *State v. C.M.C.*, 110 Wn. App. 285, 288, 40 P.3d 690 (2002), quoting *State v. Flowers*, 99 Wn. App. 57, 59-60, 991 P.2d 1206 (2000). More than this, though, independent evidence must corroborate not just that a crime occurred, but that *the specific crime* with which the defendant has been charged actually happened. *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006). The evidence must independently corroborate, or confirm, “*the crime described in a defendant’s incriminating statement.*” *Brockob*, 159 Wn.2d at 331.

Here, there was no substantial independent evidence that any theft — either of property or identity — actually happened. Specifically, there was no evidence independent of Matteucci’s statement to Pentz that either cards or PINs were in a box in Jessica’s bedroom on October 28, 2009, or

that they were taken from there by anyone in general or by Matteucci in particular.

Where independent evidence does not support the defendant's statement and satisfy the elements of the crime, a conviction cannot rest solely on the confession. *Dow*, 168 Wn.2d at 249; *Brockob*, 159 Wn.2d at 327-28.

The independent evidence need not amount to proof beyond a reasonable doubt, or even a preponderance of the evidence. *Riley*, 121 Wn.2d at 32, citing *State v. Meyer*, 37 Wn.2d 759, 763, 226 P.2d 204 (1951). It is possible to establish the corpus delicti on a foundation of circumstantial evidence. *State v. Marcy*, 189 Wn. 620, 623, 66 P.2d 846 (1937). But the independent evidence must be sufficiently substantial to "support a logical and reasonable deduction" that the particular crime charged in fact occurred and that the defendant is the one who did the crime. *Id.*, quoting *State v. Hamrick*, 19 Wn. App. 417, 419, 576 P.2d 912 (1978).

Finally, the State need not independently prove the identity of the person who committed the crime, but after proving independently that a crime was committed by someone, the State must prove that the defendant was the person who committed the crime in addition to the corpus delicti in order to convict. *Meyer*, 37 Wn.2d at 763.

Here, the so-called independent foundational evidence was entirely circumstantial. It was also so confused and conflicting that it could not serve as a foundational support for a jay-walking ticket, let alone a felony conviction.

Corpus delicti is a rule both of admissibility and of sufficiency. *Dow*, 168 Wn.2d at 251. Here, admissibility is not at issue, because Matteucci did not challenge the admissibility of her statement. Matteucci is challenging the sufficiency of the evidence to show that any crime in fact occurred. *See, Dow*, 168 Wn.2d at 254. Absent such evidence, the defendant's admissions cannot be used to prove her guilt at trial. *Aten*, 130 Wn.2d at 656.

Ultimately, substantial evidence must establish guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-62, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). This means the State cannot throw up a handful of confetti then point to one or two scraps as proof of anything. Substantial evidence has to mean more than this.

***The State's Evidence Fails:*** The State charged Matteucci with two counts of property theft for stealing two debit cards from a box in Jessica's bedroom, and three counts of identity theft for taking or using the associated PIN numbers to perform three unauthorized transactions with the cards. Assuming the jury did not believe any of the defense witnesses,

the State failed to make out a coherent case for how the cards and PIN numbers were stolen. The State failed to propose a plausible theory of the crime that can account for the following facts:

Jessica and Angelina routinely exchanged ATM cards and passwords to access each other's bank accounts. RP 27, 28, 98, 101, 104.

Jessica's Card: Jessica repeatedly testified that she did not keep any ATM cards at her house but kept all the cards in her purse, either in a wallet or in a pocket in the purse. RP 52, 53. Specifically, she definitely kept Marianne's card in her purse. RP 62. The only independent evidence that Jessica's card was stolen was Jessica's testimony that someone must have used the card at an ATM at 5:30 p.m. at Fred Meyer on October 28 because she did not authorize that transaction.

The Prosecutor elected to proceed on the theory that Matteucci took Jessica's card from the bedroom during the daytime on October 28. RP 219. But Jessica was pretty sure her card was in her purse where she always kept it. She always kept it with her because she carried no cash and used the card for everyday living, such as lunch, gas, cigarettes.

The State's claim that Jessica broke with her usual practice and left the ATM cards at home on October 28<sup>th</sup> rests entirely on her testimony that she had absolutely no recollection of anything that happened at any time on that day. This is not proof of anything. Rather, it is a hole in the

evidence that wholly defeats any possibility to make the case, independent of Matteucci's statement, that this is what happened.

Moreover, it is inconceivable that a reasonable juror could believe that a person could have discovered on the 29<sup>th</sup> that an unauthorized \$200 cash withdrawal occurred on the 28<sup>th</sup>, and not have asked herself where (a) she herself was and (b) where her ATM card was at that particular time only the day before, early enough in the evening that presumably sobriety still prevailed. Particularly when the theft was reported to the bank on the 30<sup>th</sup>, a reasonable juror had to realize that the bank would have demanded this information and directed her attention to this point.

Marianne's Card: We know that two copies of Marianne's card were in existence, and that Jessica and Marianne both had one. The State presented no evidence as to which of these two cards was used on October 28. Both Jessica and Marianne testified that Jessica kept all her cards in her purse, including Marianne's card. RP 34, 52-53. Therefore, Marianne's card was not taken from the bedroom. It could only have been taken from the purse.

Jessica told the police she had no idea how either card could have been stolen. Marianne and Jessica told Sergeant Pentz that both cards may have been stolen from their purses at a restaurant a week before October 28<sup>th</sup> or on some other occasion when Jessica and Marianne were both

present. RP 31. If so, this would mean that Marianne's own copy of her card was obtained and used, not Jessica's copy. It would also mean Marianne's PIN must have been with the card. This speculation also cannot be reconciled with the evidence from Jessica and others that she could not get through a morning without her card, let alone a week.

Identity Theft: The State emphasized that the conduct constituting identity theft was taking and using the PIN numbers attached to these accounts. RP 220.

First, the independent evidence was overwhelming that Jessica and Angelina exchanged financial information routinely. RP 34, 98, 102, 105, 112, 113. When Angelina asked, Jessica would say, "you know where my purse is," and Angelina would take the card and Jessica would once again write down the PIN for her. RP 105. Jessica also conceded she had given her account information to Radford. RP 31. And she may have handed this information over to Tina Philbrook. RP 113. (Or not. RP 191).

Second, the bank was clearly convinced that neither Jessica's nor Marianne's PIN was "stolen." The bank reimbursed Jessica only \$150 of the claimed \$200 loss because the transaction could only have been conducted by a person who had Jessica's PIN. RP 30. Likewise, the State would later request restitution of \$60 for Marianne in addition to \$183.25 for her bank. RP 260. The bank's underlying premise appears to have

been that an access card can be stolen, but — absent some evidence to the contrary — the associated PIN has to be given away. If Jessica could not persuade the bank by a preponderance that she did not voluntarily disclose her PIN, then the evidence is necessarily insufficient as a matter of law to prove the same proposition at trial beyond a reasonable doubt.

Third, the State presented no evidence suggesting any plausible scenario as to how the PINs could conceivably have been stolen. Jessica was adamant that her own PIN was not written down anywhere. She said her mother's PIN was in her 'planner,' not in the money box she shared with Angelina. RP 35, 84.

Finally, Angelina said she threw both cards in Jessica's purse after Radford returned from Fred Meyer. RP 89. Both cards were in Jessica's purse the following day. RP 29. Yet Jessica, after making it through the workday without the wherewithal to buy lunch, did not notice anything odd about the sudden appearance, loose in her purse, of two cards she had left in a box in her bedroom, and that she otherwise tucked safely in her wallet or in a pocket of the purse. RP 52, 53, 62.

Aside from Matteucci's statement to Pentz, the only evidence that any funds were transferred from Marianne's Bank of America account was Marianne's unsupported statement. RP 58-59. Likewise, Jessica's

unsupported statement was the only evidence that an unauthorized transaction occurred at Fred Meyer.

The Court should reverse the convictions and dismiss the prosecution. “[R]etrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998), quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

2. THE EVIDENCE IS INSUFFICIENT TO  
SUPPORT THE CONVICTIONS EITHER FOR  
PROPERTY THEFT OR FOR IDENTITY THEFT.

Even if Matteucci’s admissions were properly admitted, the State did not establish the essential elements of RCW 9.35.020(1). That statute provides: “No person may knowingly obtain, possess, use, or transfer 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.”

(Emphasis added.)

***No Showing of Intent to Commit a Crime:*** The State characterized the act constituting the offense of identity theft as obtaining financial information **knowingly**. Not by theft or any other unlawful means. What made the acquisition criminal was the accompanying intent to use the information to commit a crime. CP 50; RP 211.

But, even supposing the jury believed Matteucci removed Jessica's card and Marianne's card from the box they were not in, the State offered no evidence establishing the intent element. Rather, the evidence was overwhelming that Matteucci reasonably believed she pretty much had free rein in using Jessica's ATM cards under an honor system of reciprocity and eventual reimbursement. It was undisputed that Jessica had loaned Angelina a total of \$900 in the period leading up to October 28. RP 34.

The test for sufficiency of the evidence is whether the State actually produced the evidence, not whether the record suggests the State probably could have done so if the prosecutor had felt like it.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *Thomas*, 150 Wn.2d at 874.

At best, the State showed that Matteucci knowingly obtained, etc. financial information of Jessica Gairns and Marianne Gairns. The evidence simply does not prove beyond a reasonable doubt that she had

any more intent to commit a crime on this occasion than she did on any of the myriad other occasions when she had knowingly obtained the same information.

Jessica and Angelina routinely exchanged ATM cards and passwords to access each other's bank accounts. RP 27, 28, 98, 101, 104.

Jessica repeatedly testified that she did not keep any ATM cards at her house and kept all the cards in her purse, either in a wallet or in a pocket in the purse. RP 52, 53. She definitely kept Marianne's card in her purse. RP 62.

The prosecutor also apparently decided that the strength of the State's case would not be enhanced by introducing bank records with the appropriate foundation to prove beyond a reasonable doubt that the alleged transactions in fact occurred — let alone that they were unauthorized. Handwaving statements by the Gairnses and Officer Pentz do not constitute sufficient evidence.

Bank records are subject to the hearsay rules. The information they contain may be admitted, but only if a sufficient foundation is laid. *State v. Ben-Neth*, 34 Wn. App. 600, 602-603, 663 P.2d 156 (1983). This is to guard against the admission of evidence that is unreliable because of "arithmetic error, incorrect posting of charges, credits, or debits, entry of information onto the wrong account, and numerous other potential

mistakes caused by human fallibility or by mechanical or electronic failure. Given the complexity of modern institutions one cannot expect routine record-keeping to be completely error-free.” *Id.*; RCW 5.45.020.

If the documentary bank record itself is too unreliable to be admitted without foundation, then a lay witness’s testimony based on a purported bank record surely is inadmissible. This is particularly true where, as here, the State offers such shoddy evidence in a criminal prosecution where its burden is beyond a reasonable doubt. *Winship*, 397 U.S. at 361-62.

Here, Pentz’s evidence of unauthorized bank account activity consisted of double hearsay in the form of out-of-court statements by Jessica and Marianne Gairns alleging unsubstantiated information from bank statements that were never produced.

Again, the Court should reverse the convictions and dismiss with prejudice.

### 3. MATTEUCCI WAS DENIED THE RIGHT TO PRESENT A COMPLETE DEFENSE.

Wash. Const. art 1, § 22 and the Sixth and Fourteenth Amendments guarantee “a meaningful opportunity to present a complete defense,” including all relevant evidence. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, 844 P.2d

1018, *cert. denied*, 508 U.S. 953, 113 S. Ct. 2449, 124 L. Ed. 2d 665 (1993); *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d. 503 (2006).

Generally, all evidence having any tendency to make the existence of a material fact more or less probable is relevant. ER 401, 402. The relevance threshold is extremely low. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). The court may exclude “vague, argumentative, or speculative” evidence. *Id.* This evidence is none of those. Moreover, “the more essential the witness is to the prosecution’s case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters.” *Darden*, 145 Wn.2d at 619. The defense has the burden to overcome a relevance challenge and show the evidence is admissible. *Rehak*, 67 Wn. App. at 162. A challenge to the court’s construction of the evidence rules is reviewed de novo. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Trial counsel made an adequate showing here that the proffered evidence shed light on the nature of the relationship between Matteucci and Gairns and was highly relevant to the defense. The court erred in invoking ER 404(b) to exclude this evidence.

The court here erroneously subjected this evidence to some sort of ER 404(b) test. But the plain language of ER 404(b) limits its application

to criminal defendants. “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). Use of the term “other crimes” necessarily implies that the person referred to in the rule is charged with some crime for the “other” crime to be “other” to.

The only character evidence rule that conceivably could apply here would be ER 404(a): “Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.” But that rule clearly does not apply either.

First, although the concept of “character” is amorphous, for purposes of the rules regarding admission of character evidence, it generally includes traits such as honesty, temperance, and peacefulness.<sup>4</sup> *City of Kennewick v. Day*, 142 Wn.2d 1, 6, 11 P.3d 304 (2000). Here, evidence that Gairns and Matteucci engaged in a three-way sexual encounter that left Matteucci afflicted with a venereal disease and cancer and Jessica feeling obligated is not evidence of character or a trait of character. It is evidence of an objective fact that is relevant to the defense.

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<sup>4</sup> “Sexual morality” is a pertinent character trait of defendants in prosecutions for sexual offenses. *State v. Woods*, 117 Wn. App. 278, 280, 70 P.3d 976 (2003). But not otherwise.

Second, even if the evidence could be shoe-horned into a character evidence category, it was nevertheless admissible as “evidence of a pertinent trait of character of the victim of the crime offered by an accused... .” ER 404(a)(2). It was ‘pertinent’ for Matteucci to show that Jessica was not simply a “good friend” being manipulated by an artful sponger into handing out debit cards and PINs, but that there was instead a rational explanation for her apparent largesse. Moreover, the evidence was relevant to corroborate Matteucci’s testimony that she genuinely believed that Gairns would not perceive her using the cards as an offense and that the two friends would work things out as they so often had in the past.

Another possibly marginally relevant exception to ER 404(a) is that evidence of a witness’s character is admissible under ER 608. ER 404(a)(3). ER 608(b) says that specific instances of a witness’s conduct may be inquired into on cross examination if probative of the witness’s truthfulness. Again, this was neither character evidence or impeaching evidence. It was not offered to challenge Gairns’s truthfulness, but to help the jury make sense of the otherwise bizarre circumstance wherein Jessica was in the habit of throwing money at Matteucci on a regular basis.

The judge repeated essentially the same error during the State’s rebuttal questioning of Sergeant Pentz. Pentz said he did not pause the

tape during Matteucci's statement. The prosecutor asked whether it was his practice ever to pause a tape during interviews. Defense counsel questioned the relevance of this, and the prosecutor explained that, if Pentz never did it, it was more likely he did not do it on this occasion. Defense counsel then objected that this was inadmissible "propensity evidence." The court agreed and sustained the objection. RP 194. That was not character evidence any more than Matteucci's sexually transmitted disease evidence was.

***The Error Was Not Harmless:*** This error had a huge potential impact on the verdict.

First, it is a defense to a charge of theft that the property was "appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable[.]" RCW 9A.56.020(2)(a). By excluding the disputed evidence, the court denied Matteucci an opportunity to argue that she believed in good faith that, by time-honored mutual understanding and belief, she was privileged to take and use ATM cards in Jessica's possession so long as there was money in the account and she produced a receipt and was ultimately accountable for the funds.

Second, the record shows that the verdict was a close call. The jurors sent out inquiries telling the court they could not agree. CP 27, 28. Some jurors may well have perceived Jessica as at least equally culpable

because of her violation of the parents' trust and the cavalier way she threw around not only her own ATM cards and PIN but also theirs.

Accordingly, if the jury had been told about the shared history of Jessica and Angelina, at least one juror may have been persuaded that Matteucci may well have believed in good faith that using the cards on this particular occasion was no different than the other times because Jessica justifiably felt obligated to take care of Matteucci, and that it was reasonable to believe that the worst that could happen was that Jessica would be annoyed and get over it, as she had always done in the past.

Those jurors would have voted to acquit.

Instead, the whole truth was withheld. As a result, the prosecutor could argue that darling Jessica lavished money and goods on horrible Angelina solely because she was such a good friend. RP 49. This was doubly prejudicial by painting Jessica as a simple, generous soul and Matteucci as a thief and a liar who preyed upon her friend's kindness.

Reversal is required.

**4. THE SENTENCING COURT FAILED TO EXERCISE ITS DISCRETION TO APPLY THE SAME CRIMINAL CONDUCT DOCTRINE.**

The calculation of an offender score is reviewed de novo. *State v. Tili*, 139 Wn.2d 107, 122-23, 985 P.2d 365 (1999) (*Tili I*). Remand is

necessary when the offender score has been miscalculated unless the record makes clear that the trial court would impose the same sentence. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

This court will intercede in a same criminal conduct matter if it finds a clear abuse of discretion or misapplication of the law. *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440, *cert. denied*, 498 U.S. 838, 111 S. Ct. 110, 112 L. Ed. 2d 80 (1990). A trial court necessarily abuses its discretion by failing to exercise its statutory discretion in sentencing. *State v. Partee*, 141 Wn. App. 355, 362, 170 P.3d 60 (2007) (sentencing court thought it lacked authority to “stack” sanctions for probation violations, 141 Wn. App. at 359.) A judge must exercise some sort of meaningful discretion. *State v. Grayson*, 154 Wn.2d 333, 335, 111 P.3d 1183 (2005).

Here, trial counsel contributed to the error by not asserting the same criminal conduct doctrine at sentencing. Therefore, Matteucci may raise the issue for the first time on appeal in the context of an ineffective assistance of counsel claim. *See, State v. Saunders*, 120 Wn. App. 800, 825, 86 P.3d 232 (2004). Please See Issue 7 at page 37.

RCW 9.94A.589(1)(a) provides in relevant part that, “if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one

crime.” Crimes constitute the “same criminal conduct” for purposes of calculating the offender score when each is committed (1) with the same criminal intent, (2) at the same time and place, and (3) against the same victim. RCW 9.94A.589(1)(a).

The courts narrowly construe the definition of same criminal conduct, and all three elements must be present. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). The focus is on how intimately related the crimes are, whether there was a change in the criminal objective, and whether one crime furthered the other. *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990); *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). The relevant inquiry is the extent to which the criminal intent, when viewed objectively, changed from one crime to the next. *Tili I* at 123. The necessary concurrence of intent, time, place, and victim exists if each offense was part of a recognizable scheme or plan and the defendant did not substantially change the nature of his or her “criminal objective” from one offense to the other. *State v. Boze*, 47 Wn. App. 477, 480, 735 P.2d 696 (1987).

By that standard, the taking of each card and the transactions conducted with each card constituted a recognizable scheme in which the “criminal objective” did not substantially change. The objective was to get money out of the accounts. Therefore, it was a classic case of same

criminal conduct. Taking the card certainly facilitated taking the money, and visiting multiple ATM's with Marianne's card was for the sole or identical purpose of taking all the money that was available. If Radford could have done this with one stop, he would have.

The language of RCW 9.35.020(6) does not preclude consideration of same criminal conduct. It provides: Every person who, in the commission of identity theft, shall commit any other crime **may** be punished therefor as well as for the identity theft, and may be prosecuted for each crime separately. RCW 9.35.020(6). It does not say "must." This is not an anti-merger clause and it does not indicate any legislative intent to nullify the usual provisions of the Sentencing Reform Act.

Accordingly, as with any other separately prosecuted offenses that constitute the same course of criminal conduct, Ms. Matteucci was entitled to ask the court to treat the offenses as one for purposes of calculating the offender score.

##### 5. THE SENTENCING COURT ERRONEOUSLY DENIED A DOSA ALTERNATIVE SENTENCE.

The sentencing court violated the SRA and Matteucci's right to due process by ignoring the statutory criteria and instead imposing fictitious eligibility requirements that were invented by the prosecutor.

Judges have considerable discretion under the SRA, but they must act “within its strictures and principles of due process of law.” *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). Generally, a decision not to grant a DOSA is not reviewable, but “an offender may always challenge the procedure by which a sentence was imposed.” *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005).

The court may include treatment as part of the sentence whenever the court finds that the offender has a chemical dependency that has contributed to his or her offense. RCW 9.94A.607(1). The offender is eligible for a special drug offender sentencing alternative subject to certain statutory conditions. RCW 9.94A.660(1)(a)-(g). Refusing to consider an alternative sentence for a particular class of offenders other than those authorized by the SRA is also forbidden and is a per se abuse of discretion. *Grayson*, 154 Wn.2d at 342.

***The Court Ignored Statutory Eligibility:*** Matteucci satisfied all the statutory conditions and was eligible. She was not convicted of a sex offense, a drug offense or a driving felony. RCW 9.94A.660(1)(a) – (d). She was not subject to deportation. RCW 9.94A.660(1)(e). The top of her standard range was more than one year. RCW 9.94A.660(1)(e). And she had not received an alternative sentence in the preceding year. RCW

9.94A.660(1)(g).<sup>5</sup> The court included Matteucci in a spurious class of offenders — created by the prosecutor — who are ineligible for DOSA because they did not plead guilty.

***The Court Considered Impermissible Facts and Declined to Consider Required Facts.*** Due process and statutory constraints govern the facts a sentencing court may rely on in deciding whether to grant a DOSA alternative sentence. *Grayson*, 154 Wn.2d at 338.

In Washington, RCW 9.94A.500 governs the conduct of sentencing hearings. For a standard range sentence, the trial court may rely on “no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. RCW 9.94A.530(2); *Grayson*, 154 Wn.2d at 338.

The court is statutorily required to consider any risk assessment and presentence reports. RCW 9.94A.500(1). Here, the court arbitrarily accepted the novice prosecutor’s recommendation to ignore the DOSA report as inadequate.

The court must also consider the defendant’s criminal history. RCW 9.94A.500(1). Here, the court simply ignored the fact that Ms. Matteucci was a first-time offender. RCW 9.94A.650 permits the court to

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<sup>5</sup> See also House Bill Report, HB 2763 at <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bill%20Reports/House/2763.HBR.pdf>.

waive the standard range sentence for a first-time who is not convicted of a sex offense or a drug offense.<sup>6</sup> Matteucci satisfied the requisite conditions. RCW 9.94A.650(1)(a). Nevertheless, the court simply failed even to mention the possibility of a first-time offender waiver. This was an abuse of discretion.

No victim or victim's representative appeared at Matteucci's sentencing. Therefore, in addition to the prosecutor and defense counsel, the court was permitted to hear argument regarding sentencing from an "investigative law enforcement officer." RCW 9.94A.500(1).

The "investigative law enforcement officer" referred to in the statute cannot mean just any random police officer. The court exceeded the scope of this authority by hearing testimony from a completely extraneous officer regarding events totally outside the record of this case.

If the defense raises a timely and specific objection to facts offered at sentencing, the court must either not consider the fact or hold an

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<sup>6</sup> In sentencing a first-time offender the court may waive the imposition of a sentence within the standard sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses. RCW 9.94A.650(2). The court may impose up to one year of community custody unless treatment is ordered, in which case the period of community custody may include up to the period of treatment, but shall not exceed two years. RCW 9.94A.650(3).

evidentiary hearing. *Grayson*, 154 Wn.2d at 339; RCW 9.94A.530(2); *Mail*, 121 Wn.2d at 712. Here, defense counsel did raise a timely objection, which the court ignored and went ahead and considered Campbell's testimony. The court went so far as to acknowledge that it was unlawful to rely on this evidence, but went ahead and did it anyway.

This Court should vacate the sentence and remand for resentencing. The Court should also order Ms. Matteucci released pending the remainder of the appeal process to avoid a manifest injustice.

#### 6. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE RESTITUTION AWARD.

The sentencing court has discretion to determine the amount of restitution. *State v. Mark*, 36 Wn. App. 428, 433, 675 P.2d 1250 (1984). But that discretion cannot be exercised in a manner that is manifestly unreasonable, or based on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The rules of evidence do not apply at restitution hearings. Nevertheless, the evidence presented must be sufficient to support a finding of restitution in the amount the court orders. The evidence admitted at a sentencing hearing must conform to due process sufficiently that the defendant has an opportunity to refute it, and must be demonstrably reliable. *State v. Pollard*, 66 Wn. App. 779, 784-785, 834 P.2d 51, *review denied*, 120

Wn.2d 1015 (1992). Certainty of damages need not be proven with specific accuracy. At minimum, the evidence must afford a reasonable basis for estimating loss and not subject defendants to mere speculation or conjecture. *Mark*, 36 Wn. App. at 434.

As shown above, the State for some reason elected not to introduce the bank records into evidence. Possibly this kept the jury from learning uncomfortable things about the Gairns family. But this choice resulted in the absence of any reliable evidence establishing alleged losses by any alleged victims. The Court should vacate the restitution award.

#### 7. MATTEUCCI RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant in a criminal prosecution has the constitutional right to the effective assistance of counsel. Wash. Const. art. I, § 22; U.S. Const. amend. VI. This Court employs the familiar standard for ineffective assistance set forth in *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

The Court determines (1) whether counsel's performance was deficient and (2) whether it resulted in prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). An appellant establishes prejudice

by showing a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Thomas*, 109 Wn.2d at 226.

The Court gives considerable deference to counsel's performance and begins by presuming it was effective. *Thomas*, 109 Wn.2d at 226. Accordingly, performance is not deficient if it can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). But an attorney's failure to investigate the relevant statutes under which his client is charged cannot be characterized as a legitimate tactic. *In re Hubert*, 138 Wn. App. 924, 929-30, 158 P.3d 1282 (Div. 1, 2007).

Counsel here rendered constitutionally deficient performance in two ways.

First, it was deficient performance not to raise a corpus delicti argument in order to keep Matteucci's statements out of court. As discussed in Issue 1, there is no way the State could have answered a corpus delicti challenge. Acquiescing to the admission of Matteucci's statements was manifestly prejudicial, because, without them, the State could not have established that Matteucci committed any crime at Jessica Gairns's house on October 28, 2009.

Second, counsel was deficient in not challenging the offender score and at least asking the court to consider "same criminal conduct."

Again, the prejudice is obvious because the SRA would permit the court to count multiple offenses as one for sentencing purposes under these facts.

In neither instance can counsel's failure be characterized as legitimate strategy.

V. **CONCLUSION**

For the foregoing reasons, Angelina C. Matteucci asks this Court to vacate the judgment and sentence. The Court should reverse and dismiss the convictions for insufficient evidence. At minimum, the Court should address Matteucci's assignment of error to the offender score and remand for resentencing.

Respectfully submitted this 25<sup>th</sup> day of October, 2010.

A handwritten signature in black ink, reading "Jordan B. McCabe", written over a horizontal line.

Jordan B. McCabe, WSBA No. 27211  
Counsel for Angelina C. Matteucci

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**CERTIFICATE OF SERVICE**

Jordan McCabe certifies that on October 25, 2010, she deposited in the U.S. mail, first class postage prepaid, a copy of this Appellant's Brief addressed to:

Monty Dale Cobb  
Mason County Prosecutor's Office  
521 North 4<sup>th</sup> Avenue, Suite A  
Shelton, WA 98584-0639

Angelina Matteucci, DOC No. 339950  
Washington Corrections Center for Women  
9601 Bujacich Road NW  
Gig Harbor, WA 98332-8300



Jordan McCabe, WSBA No. 27211  
City of Bellevue, Washington  
October 25, 2010