FILED
JAN 25, 2013
Court of Appeals
Division III
State of Washington

No. 30765-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MELODY L. WRIGHT,

Appellant.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The evidence at trial showed that Melody Wright hatched a plan to wrongfully obtain money from the State's Medicaid program. Consistent with this scheme, Wright exaggerated her mother's impairments to maximize the number of personal care hours her mother qualified for under the Medicaid program known as COPES. As her mother's COPES personal care provider, Wright directly benefitted by claiming payment for 188 hours of personal care per month.

Worse, Wright never provided many of these care hours to her mother. In fact, Wright's mother—who was purportedly so disabled she required feeding assistance—babysat her daughter's children while Wright worked outside the home.

The jury found Wright guilty of first degree theft and of ten counts of knowingly misrepresenting a material fact in applying for payment from Medicaid. Wright now appeals her convictions and sentence on a number of grounds. Her challenges fail because the evidence is sufficient to support her convictions, the crime of theft is not concurrent with—and therefore not preempted by—the crime of Medicaid false statement, and the sentence she received under a first-time offender waiver may not be appealed.

II. RESTATEMENT OF THE ISSUES

1. **Wright claims her theft conviction is invalid because the State failed to prove the element of trespass. Where Washington Supreme Court precedent holds that common law trespass is not an element of statutory theft by taking, should Wright's conviction be affirmed?**

2. **Is the evidence sufficient to support the jury's verdict that Wright committed first-degree theft and ten counts of Medicaid false statement?**

3. **Wright challenges her theft conviction, arguing the specific crime of Medicaid false statement is concurrent with, and therefore must be charged to the exclusion of, the general crime of theft. Crimes are concurrent only when it is impossible to commit the specific crime without also committing the general crime. It is possible to commit Medicaid false statement without wrongfully obtaining another's property. Was Wright properly charged with theft?**

4. **By statute, sentences imposed under a first-time offender waiver are deemed to fall within the standard range and may not be appealed. Under this law, should the court disregard Wright's challenge to her first-time offender sentence?**

5. **Did the trial court act within its discretion in finding that Wright's crimes do not involve the same criminal conduct?**

III. STATEMENT OF THE CASE

For years, Melody Wright had contracted to provide in-home care for her elderly mother through the Medicaid program called Community Options Program Entry System (COPES), which enables individuals to receive personal care in their own homes. Verbatim Report of Proceedings (VRP) at 165-67; Exs. 1, 2; WAC 388-106-0015(2). Through this program, Wright was to provide her mother, Donna Siegfried, with

188 hours of care per month in Siegfried's home. VRP at 155, 167, 178, 181. Each month, Wright submitted telephonic invoices confirming she worked 188 hours. VRP at 154, 204-05. These invoices were processed and Wright was paid accordingly. VRP at 235; Ex. 11.

Wright became the target of a Medicaid fraud investigation in March 2008 following an anonymous telephone tip implicating Wright in a fraudulent scheme. VRP at 257. The tipster reported that Wright had outside employment and was not providing the COPES care hours she was being paid for. VRP at 257, 390.

The resulting investigation revealed that Wright began working full time at Riverview Retirement Community in June 2007. VRP at 258, 299-300; Ex. 8. To determine whether Wright's claimed COPES hours conflicted with her shifts at Riverview, an investigator asked Siegfried's COPES case manager to obtain Wright's time sheets for the previous year. VRP at 167, 258, 390-91, 494. As COPES providers are required to keep accurate time sheets that are accessible to the case managers, VRP at 182, 245, this request was consistent with COPES regulations, WAC 388-71-0515(10). When the case manager contacted Wright, however, Wright reported that she had no time sheets but did have her COPES schedule available. VRP at 185. The case manager then sent Wright some time sheets to fill out. VRP at 493.

The filled-out time sheets Wright returned yielded an hourly total far in excess of the 188 hours of care she had claimed each month by invoice. VRP at 204-05, 259; Exs. 6, 11. Not only did she claim to have provided care to her mother every single day with no days off, but on most of these days she logged 24 hours, and on no day did she log fewer than 10 hours. Ex. 6. Even if Wright were capable of working 24 hours per day for many days in a row, these hours often conflicted with the shifts Wright worked at Riverview. VRP at 390-91; *compare* Ex. 6 (COPES time sheets) *with* Ex. 8 (Riverview time records). Wright was asked to submit a new set of time sheets that reflected the 188 hours she had claimed for payment each month. VRP at 186, 391.

This second set of time sheets, like the first, covered the twelve-month period from May 2007 through April 2008. Exs. 6, 7. Again, many of the hours Wright claimed overlapped with her shifts at Riverview. VRP at 420; Exs. 7, 8, 9.

As a result of these discrepancies, Siegfried was invited for an interview at the Washington State Attorney General's Office in June 2008. VRP at 367, 392. Siegfried appeared with Wright, who waited while Siegfried was questioned about her daughter's time sheets. VRP at 392-93. Siegfried indicated the first set of time sheets—which reflected between 10 and 24 hours of daily care—was incorrect. Ex. 4. She

explained her daughter initially had not known how to complete them. VRP at 393; Ex. 4. However, Siegfried verified the accuracy of the second set of time sheets, acknowledging that they showed the actual times Wright provided care at Siegfried's home. VRP at 396-97; Ex. 5.

Following her mother's interview, Wright agreed to speak with the investigator. VRP at 400. After being advised of her constitutional rights, Wright was presented with each set of time sheets in turn. VRP at 400-01. Although Wright admitted the first set was inaccurate, she insisted the second set correctly reflected the times she actually spent on the designated days caring for her mother. VRP at 401-02; Ex. 7 (second set of time sheets annotated as "accurate" by Wright).

Upon hearing this, the investigator presented Wright with her Riverview time records, calling into question the many overlapping hours on her COPES time sheets. VRP at 403. Confronted with her contradictory Riverview records, Wright reacted by immediately starting to cry. VRP at 403. She pleaded, "'my husband left me and I have kids to take care of and I'm going to lose my house. I'm in debt.'" VRP at 403 (testimony of Investigator Larry Carlier, quoting Wright). She gave no other explanation for the inconsistent hours on her time sheets and submitted a written statement saying the hours she turned in were not correct. VRP at 403-05, 451; Ex. 25.

Even in the months immediately following this encounter, Wright continued to submit inaccurate time sheets. VRP at 187, 406-13. On three days during this period, surveillance was conducted on Wright. VRP at 407-08. For two of these days, Wright later claimed COPES hours—but during these times Wright had been seen taking her son to appointments. VRP at 408-13. On two other dates, an investigator conducted "spot checks" outside Wright's residence. VRP at 406-08. On these two dates, Wright's car was observed in her driveway. VRP at 408. Yet at these same times Wright's time sheets claimed COPES hours—even though Siegfried's assessment provided caretaking was to take place at Siegfried's residence. VRP at 409-10. In light of these inconsistencies, Wright was invited to a second interview. VRP at 413.

When asked at this second interview about these later time sheets, Wright stood by their accuracy. VRP at 414-15. Only after the investigator revealed his surveillance did she retreat from her stance. VRP at 414-16. When faced with this contrary evidence, Wright admitted that her time sheets were incorrect, conceding she had not been caring for her mother during the two spot checks or when she had been seen taking her son to an appointment. VRP at 415-16.

Wright was eventually charged with first-degree theft and multiple counts of making false statements in applying for Medicaid payments.

Clerk's Papers (CP) at 1 (Information). At trial, Wright testified that she had worked the 188 monthly hours that were claimed, but not necessarily at the times she later reported on her time sheets. VRP at 496. Wright explained that she had never been given time sheets or trained on how to use them until around April 2008, when a case manager asked her to fill some out to reflect the previous year's billings. VRP at 492-96. However, a different COPES case manager testified she had given Wright time sheets in May 2007, nearly a year before then. VRP 323-25.

By the time of her second interview, however, Wright realized the importance of proper timekeeping. *See* VRP at 525. At trial, Wright characterized the time sheets discussed at this second interview as "99% accurate" as she "had kept everything down to a T" to avoid further trouble. VRP at 525. She acknowledged that mistakes appeared in these time sheets despite her efforts. VRP at 526, 547.

The State contended that in addition to misrepresenting her hours, Wright also exaggerated the level of care Siegfried needed on annual assessments in order to inflate the number of hours her mother qualified for. VRP at 615. Siegfried's 2005 COPES assessment—which relied primarily on information furnished by Wright—resulted in determinations that Siegfried required extensive assistance with walking outside, transferring to and from furniture, and personal hygiene. VRP at 167-78,

180, 277-78, 280. In the course of this assessment, Wright represented that her mother required extensive assistance in preparing all three meals throughout the day; this meant she was incapable of lifting pans, opening containers, reheating items, cutting, peeling, or chopping. VRP at 178. Subsequent assessments resulted in similar determinations. VRP at 178-79, 323-35; Ex. 3.

Siegfried's case manager began to suspect that these needs had been embellished when she saw Siegfried walking into a grocery store unassisted several years after the initial assessment. VRP at 179-80. At trial, Wright denied overstating her mother's needs, VRP at 496, but other testimony corroborated the case manager's suspicion. An investigator testified that Siegfried repeatedly got herself up from a couch while he interviewed Wright. VRP at 418. One of Wright's neighbors recounted that Siegfried occasionally walked her grandchildren to school—a trip four blocks long each way. *See* VRP at 307-08. Another of Wright's neighbors had never observed Siegfried needing help to walk. VRP at 313, 317.

This same neighbor further testified that Siegfried occasionally babysat the two youngest grandchildren while her daughter worked. VRP at 314-15. And a testifying police officer recalled an incident in which Siegfried told him she stayed at Wright's house during the week to

provide childcare to her seven- and eight-year-old grandchildren while her daughter worked. VRP at 572-73. COPES case managers testified that performing such tasks would be inconsistent with Siegfried's reported care needs. VRP at 165, 180-81, 323, 360.

Moreover, during the time Wright was a COPES provider, the number of COPES care hours allotted to a client depended not only on the client's impairments but also on the client's living arrangement.[1] VRP at 189-90. Clients living with their paid caregivers received fewer monthly hours, as certain hours spent on meal preparation, shopping, and housekeeping were not included. VRP at 189-90. For this reason, clients were required to report any change in living situation. VRP at 190; WAC 388-106-1303(6)(c). Although Siegfried testified she lived in her own apartment and just stayed over at her daughter's house, VRP at 559, other testimony indicated that Siegfried resided at Wright's house while Siegfried's son—a drug addict—lived in his mother's subsidized apartment. VRP at 302, 413, 418, 548.

[1] The regulation that automatically reduced recipients' benefits based on living with their paid caregivers, WAC 388-106-0130(3)(b) (2007), was later invalidated in part by the Supreme Court for violating federal comparability requirements. *Jenkins v. Wash. State Dep't of Soc. & Health Servs.*, 160 Wn.2d 287, 157 P.3d 388 (2007). The assessment process can still provide for a potential reduction in hours on an individualized basis. *Id.* at 384.

In sum, the State presented evidence at trial that Wright submitted time sheets claiming bogus hours, evidence that she overstated her mother's care needs, and evidence that she benefitted from an undisclosed change in her mother's living situation.

After considering all the evidence, the jury found Wright guilty of first degree theft and of ten counts of Medicaid false statement. VRP at 663-64. Following the imposition of judgment and sentence, Wright appealed.

IV. ARGUMENT

Wright challenges her convictions and sentence on a number of grounds. First, she impugns the sufficiency of the evidence to support her first-degree theft conviction, questioning its validity where no trespass was proved. Her argument fails because trespass is not an element of statutory theft by taking under RCW 9A.56.020(1)(a). Second, she argues her Medicaid false statement convictions are invalid because no evidence was presented of any false representations made in any application for payment. However, the evidence shows that Wright knowingly misrepresented that she provided 188 monthly hours of care when she submitted ten monthly telephonic invoices. Third, Wright bases an equal protection challenge to her theft conviction on her assertion that theft is concurrent with Medicaid false statement. But because the commission of

Medicaid false statement does not necessarily coincide with theft, these crimes are not "concurrent" and Wright's theft charge was proper. Finally, Wright's challenge to her sentence fails because she may not appeal her first-time offender sentence, which is deemed to fall within the standard range. Even if she could appeal her sentence, Wright's "same criminal conduct" argument does not avail her because her crimes do not involve the same criminal intent, time, or place.

A. Because Trespass Is Not an Element of Statutory Theft by Taking Under RCW 9A.56.020(1)(a), the Evidence Supports Wright's Conviction for First-Degree Theft

Relying on *State v. Thorpe*, 51 Wn. App. 582, 754 P.2d 1050 (1988), Wright asks this court to hold that theft by taking under subsection (1)(a) of RCW 9A.56.020 requires a trespass, and that her theft conviction therefore rests upon insufficient evidence. This result is foreclosed by our supreme court's decision in *State v. Smith*, 115 Wn.2d 434, 798 P.2d 1146 (1990), which overruled *Thorpe*.

In *Smith*, the defendant paid for a software package by personal check upon delivery, even though the account upon which the check was issued was inadequate to pay the purchase price. *Smith*, 115 Wn.2d at 435-36. The defendant then copied the software program and instruction manual, stopped payment on the check, and returned the original items to

the software company, marking the package as an unauthorized purchase. *Id.* at 436.

The defendant was convicted as charged of theft under subsections (1)(a) or (1)(b) of RCW 9A.56.020. *Id.* at 436-37. On review, the supreme court held that trespass is not required for statutory theft by taking and the evidence therefore supported a conviction under subsection (1)(a). *Id.* at 441 ("As we find theft by taking as defined by statute does not include the common law element of trespass, the contention . . . that there was insufficient evidence to convict under the taking statute is not valid.").

Because Wright's insufficiency argument relies entirely on the legal question of whether trespass is a required element of theft by taking, *Smith* should dispose of her appeal on this issue. Nevertheless, sufficient evidence supports Wright's theft conviction, as discussed below.

B. Sufficient Evidence Supports Wright's Convictions

Courts tasked with reviewing the sufficiency of the evidence consider whether the evidence could support a rational jury's finding of guilt beyond a reasonable doubt. *State v. Rose*, 175 Wn.2d 10, 14, 282 P.3d 1087 (2012). In doing so, the evidence is viewed in the light most favorable to the State; accordingly, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly

against the defendant." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)).

Wright's argument that the evidence was insufficient to sustain her convictions ignores the overwhelming circumstantial evidence supporting the jury's verdicts.

1. The evidence showing Wright submitted ten false telephonic invoices is sufficient to support her convictions for making false statements in applying for payment under a Medicaid program.

Wright was convicted of ten counts of Medicaid false statement under RCW 74.09.230(1). This statute imposes criminal liability on one who "knowingly makes or causes to be made any false statement or representation of a material fact in any application for any payment under any medical care program authorized under this chapter."[2] Wright's convictions must be sustained if a rational trier of fact, viewing the evidence in the light most favorable to the State, could find her guilty beyond a reasonable doubt of knowingly making a false representation of a material fact in applying for COPES payments. *See Rose*, 175 Wn.2d at 14.

[2] The COPES program is funded by Medicaid, VRP at 138-39, which is a "medical care program" authorized under chapter 74.09 RCW, as specified in RCW 74.09.500.

The jury found Wright guilty of making false statements on or about ten specific dates: May 31, 2007; June 30, 2007; July 31, 2007; August 31, 2007; September 30, 2007; October 31, 2007; November 30, 2007; December 31, 2007; January 31, 2008; and February 29, 2008. CP at 139-43 (Second Amended Information); CP at 212-14 (Verdict Form). On each of these dates, Wright submitted telephonic invoices claiming she had worked 188 hours that month. VRP at 204, 232-40; Ex. 11.

Contrary to Wright's argument, ample circumstantial evidence supports the conclusion that Wright knowingly lied in stating she had worked 188 hours each month. Wright's COPES time sheets provide significant support for this conclusion.

Wright discounts the importance of these time sheets because they were not used in calculating her pay. Appellant's Br. at 18, 22. The State does not dispute that Wright's payments were triggered by her monthly telephonic invoices claiming 188 hours. Thus, the argument that her COPES payments did not depend on time sheets is a red herring because it distracts from the real significance of these time sheets: they provide strong circumstantial evidence that Wright never actually worked the hours she claimed by telephonic invoice.

Around May 2008, Wright was asked to submit COPES time sheets covering the previous year. VRP at 186, 188-89, 391-92. Although

Wright claimed that before this request she had never been given time sheets, VRP at 185, 492-93, a COPES case manager testified that in May 2007 she had supplied Wright with time sheets. VRP at 323-25. At that time, Wright assured her she would complete them every month. VRP at 325. Regardless of when she received them, it is undisputed that Wright eventually provided time sheets which purported to reflect the times she provided care to her mother between May 2007 and April 2008. Ex. 7. However, these times substantially overlapped with her 7:00 a.m. to 3:30 p.m. shift at Riverview—a shift Wright worked until she resigned on March 31, 2008. VRP at 300-02, 420, 489; Exs. 7, 8, 9.

At an interview, the investigator thoroughly questioned Wright about these time sheets. VRP at 401-03. He asked her several times whether the time sheets reflected the particular times she actually spent on the designated days caring for her mother. VRP at 402. Wright answered "yes." VRP at 402. After Wright had committed to the accuracy of these time sheets, the investigator revealed the conflicting Riverview time records. VRP at 403, 453. In response, Wright behaved suspiciously: she immediately began to cry over her financial woes ("[M]y husband left me and I have kids to take care of and I'm going to lose my house. I'm in debt."). VRP at 403. She offered no other explanation for the mismatch between her COPES time sheets and her work at Riverview. VRP at 405.

At trial, Wright maintained she did work 188 hours per month, but not necessarily at the times she logged on her time sheets. VRP at 496, 517, 544. She claimed she had not understood that the time sheets were supposed to reflect the days and times she actually worked. VRP at 542. Instead, she claimed to have believed she was only required to document 188 total hours per month without regard to date or time. VRP at 542. A rational jury, however, could view Wright's explanation as self-serving and improbable, especially in light of the self-explanatory nature of the time sheets, which provide spaces to indicate the time service begins and ends on each day. *See* Ex. 7. And based on what transpired at Wright's first interview, a jury could reasonably disbelieve her account.[3]

Aside from the facts surrounding the time sheets, the jury had an additional reason to doubt that Wright had provided her mother with 188

[3] In addition to the contrary testimony offered by other witnesses, the jury could rationally discount Wright's testimony because her credibility was impeached numerous times throughout trial. *E.g.*, *compare* VRP at 534-35 (testimony of Wright, claiming she had not been trained to report an alleged incident of abuse at Riverview Retirement Community) *with* VRP at 296, 578-82 (testimony of Riverview's vice president of administrative services, explaining all new employees are trained in the importance of reporting abuse and neglect) *and* Ex. 34 (policy sheet from Riverview explaining how to report abuse and neglect, signed by Wright on April 16, 2007); *compare* VRP at 487 (testimony of Wright, denying she had used her mother as a babysitter) *with* VRP at 572-73 (police officer's testimony describing encounter with Siegfried, who had said she stayed at Wright's house during the week to watch the two youngest children); *compare* VRP at 491 (Wright's testimony on direct examination, claiming there was no overlap between her working at Riverview and at WSU) *with* VRP at 549 (Wright's testimony on cross-examination, admitting she had, in fact, worked at Riverview and WSU at the same time) *and* VRP at 425 (investigator Larry Carlier's testimony, explaining Wright told him she did not start working for WSU until May 2008, but her bank records showed payroll deposits from WSU beginning in February 2008).

hours of care per month: the evidence showed her mother never needed this level of care in the first place.

Multiple witnesses testified to Siegfried's capabilities: she walked unassisted, babysat, walked her grandchildren to school, and performed basic household tasks. VRP at 307, 308, 315-17, 380, 417-19, 573. Yet Siegfried's assessments qualifying her for 188 hours of care—at least one of which was based mostly on information furnished by Wright—paint a picture of considerable impairment. VRP at 176-78, 278, 280. A COPES case manager testified that someone who required that level of care would typically "need[ ] extensive help with . . . walking, transferring, toileting, moving around" and would not be expected to babysit young children or escort them to school on foot. VRP at 360. Based on this testimony, a rational jury could conclude that Wright had exaggerated her mother's impairments and that Siegfried did not require 188 hours of monthly care. From the evidence that this level of care was unwarranted, a jury could reasonably infer that Wright never provided it.

From all this evidence, the jury had—at a minimum—a reasonable basis on which to conclude that Siegfried did not require 188 hours of care and that Wright lied about providing it because she needed the money.[4]

[4] Wright's own brief comes close to conceding this point. *See* Appellant's Br. at 17 ("[T]he evidence herein suggests that Ms. Wright confirmed or created false impressions to obtain possession of the property of another by falsifying the time sheets

The errors found in the COPES time sheets that were discussed at the second interview, VRP at 415-16, further bolster this conclusion because they suggest an ongoing scheme to fabricate hours.[5] Thus, a rational jury could have found that in each of ten monthly telephonic invoices submitted between May 31, 2007 and February 29, 2008, Wright knowingly made a false representation that she had worked 188 hours. Because Wright was paid by the hour, VRP at 155; Ex. 11, a reasonable jury could conclude her misrepresentations were material to her applications for COPES payment.

As a rational fact finder could find beyond a reasonable doubt that Wright knowingly made or caused to be made a false representation of a material fact in each of these ten applications for COPES payment, her Medicaid false statement convictions should stand.

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submitted to the case managers or by exaggerating the amount of care Mrs. Siegfried actually needed.").

[5] Wright stresses that the time sheets discussed at the second interview, which cover the period between May 2008 and June 2009, fall outside the charging period. Wright believes these time sheets are therefore irrelevant to the theft charged as occurring between June 2007 and April 2008. But viewed in favor of the State, these later time sheets provide strong circumstantial evidence of Wright's continuing scheme to bill the State for care that was never provided. After all, Wright had already received ample education on the importance of proper timekeeping. *See* VRP at 525. Therefore, her inaccurate submissions suggest she continued to seek payment for hours not provided, which supports the inference that she did so during the charging period.

2. The evidence showing a scheme in which Wright wrongfully obtained payments over $1500 with the intent to deprive is sufficient to support her theft conviction.

Viewed in the State's favor, the evidence at trial was sufficient to establish that Wright committed first-degree theft under RCW 9A.56.020(1)(a) and RCW 9A.56.010(21)(c) by wrongfully obtaining the State's property, exceeding $1500 in value,[6] with the intent to deprive the State of its property, in a series of transactions constituting a common scheme or plan.

As discussed in section IV.B.1, the evidence presented at trial supports the conclusion that Wright did not work the hours she claimed by invoice for ten consecutive months. A rational jury could find that this pattern constituted a scheme to obtain payment for hours she did not work. Payment for these purported hours was deposited in Wright's account from which she made regular withdrawals. Exs. 10 (showing warrant date, number, and amount paid), 24 (Wright's bank records).

This more than establishes that the money was "wrongfully obtained" in a series of transactions constituting a common scheme or plan. These payments also topped the $1500 threshold required for first

[6] At the time of the charging period, first degree theft applied when the value of the stolen property or services exceeded $1500.00. RCW 9A.56.030 (2008). Effective July 26, 2009, the value of the stolen property must exceed $5000 for the theft to be chargeable in the first degree. Laws of 2009, ch. 431, § 7.

degree theft. VRP at 147, 229-30, 234-44, 420, 423; Exs. 9 (showing the number of hours Wright later claimed on COPES time sheets that conflicted with her work at Riverview), 10 (showing amount of COPES payments based on overlapping Riverview hours), 11, 24.

As there was no suggestion this money was returned, and Wright's bank records show she continued to make regular withdrawals, Ex. 24, the jury could reasonably infer Wright's intent to deprive the State of its money. Because a rational jury could have found all the elements of first degree theft beyond a reasonable doubt, the evidence is sufficient to sustain Wright's conviction.

C. Because the Statute Defining Medicaid False Statement Is Not Concurrent with the Statute Defining Theft, Wright's Theft Conviction Is Valid

Wright contends that making false claims for Medicaid payment in violation of RCW 74.09.230(1) always constitutes theft. From this premise, she concludes her theft charge was improper because the "more specific" Medicaid false statement statute is concurrent with, and therefore preempts, the "general" theft statute.

Where a special statute is concurrent with a general statute, "'the special statute applies and the accused can be charged only under that statute.'" *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984) (quoting *State v. Cann*, 92 Wn.2d 193, 197, 595 P.2d 912 (1979)). "In

order for statutes to be concurrent, each violation of the special statute must result in a violation of the general statute." *State v. Heffner*, 126 Wn. App. 803, 808, 110 P.3d 219 (2005).

In claiming her theft charge was improper, Wright's arguments reveal two fundamental misunderstandings regarding this area of law. First, she frames the concurrency question as a matter of equal protection, citing *State v. Alfonso*, 41 Wn. App. 121, 125-26, 702 P.2d 1218 (1985). Appellant's Br. at 25. *Alfonso*, in turn, cites to a line of cases culminating in *State v. Zornes*, 78 Wn.2d 9, 475 P.2d 109 (1970), which held that equal protection is violated where statutes prescribe different punishments for the same offense. *Alfonso*, 41 Wn. App. at 125-26. However, to the extent *Zornes* relies on an equal protection analysis, it has been overruled by the United States Supreme Court's decision in *United States v. Batchelder*, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979). *See, e.g.*, *State v. Kirwin*, 165 Wn.2d 818, 829-31, 203 P.3d 1044 (2009) (Madsen, J., concurring) (noting that the *Zornes* equal protection holding was overruled by *Batchelder*); *In re Pers. Restraint of Boot*, 130 Wn.2d 553, 574, 925 P.2d 964 (1996) (reiterating that *Batchelder* overruled the equal protection analysis in *Zornes*); *City of Kennewick v. Fountain*, 116 Wn.2d 189, 192-93, 802 P.2d 1371 (1991) ("[*Batchelder*] overrules *Zornes* as to analysis under the Fourteenth Amendment.").

As properly understood, the special/general rule is a matter not of equal protection but of statutory construction. *See State v. Eakins*, 73 Wn. App. 271, 273 n.5, 869 P.2d 83 (1994) ("The principles mandating a charge under the special statute are entirely different from those implicating equal protection rights. It is the doctrine of statutory preemption that bars a prosecution under the general statute[,] not the equal protection clause.").[7] The rule that the specific statute supersedes a concurrent general statute gives effect to legislative intent to treat a particular subset of conduct differently. *State v. Greco*, 57 Wn. App. 196, 204, 787 P.2d 940 (1990). Giving effect to this legislative intent also prevents "an impermissible potential usurpation of the legislative function by prosecutors." *State v. Danforth*, 97 Wn.2d 255, 259, 643 P.2d 882 (1982).

Wright's second misunderstanding is revealed by the undue emphasis she places on the facts of her case. *See* Appellant's Br. at 26-27 ("If the State's evidence is to be believed, Ms. Wright also committed

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[7] Some courts have continued to refer to equal protection principles in applying the special/general rule, often citing outdated precedent (or precedent relying on outdated precedent). *See, e.g.*, *State v. Rainford*, 86 Wn. App. 431, 441, 936 P.2d 1210 (1997) ("Violation of [the special/general] rule can result in an equal protection violation . . . ."); *State v. McCann*, 74 Wn. App. 650, 652, 878 P.2d 1218 (1994) (referring to equal protection as basis for applying a special statute to the exclusion of a concurrent general one). *But see State v. Presba*, 131 Wn. App. 47, 54 n.10, 126 P.3d 1280 (2005) (acknowledging the State's argument that equal protection analysis is no longer good law under *Batchelder*). In light of *Batchelder*, this court should now disapprove the practice of using an equal protection analysis to evaluate claims that two statutes are concurrent.

theft in every instance of making false statements regarding the number of hours spent providing care to Mrs. Siegfried. Thus, a violation of the more specific fraud statute constituted in each instance a violation of the more general theft statute.").

In evaluating concurrency, however, courts do not consider the circumstances of an individual case. Instead, courts determine whether two statutes are concurrent as a matter of law by evaluating the elements of each statute without regard to the specific facts of the case. *State v. Wilson*, 158 Wn. App. 305, 314, 242 P.3d 19 (2010). Accordingly, it is irrelevant that Wright's theft coincided with her false statements. Wright's focus on this score is misplaced, because the question for the court is *not* whether the circumstances of *Wright's* violation of the special statute (Medicaid false statement) also involved a violation of the general statute (theft). Instead, the question before the court is a hypothetical: is it *possible* to commit Medicaid false statement without committing theft? If so, the statutes defining these crimes are not concurrent. *See Heffner*, 126 Wn. App. at 808 (citing *State v. Karp*, 69 Wn. App. 369, 372, 848 P.2d 1304 (1993)).

Contrary to Wright's argument, it *is* possible to make a false claim for Medicaid payment without committing theft because making a false statement in *applying* for a payment does not necessarily entail *obtaining*

that payment—and no theft occurs unless the payment is *obtained.* RCW 74.09.230(1); RCW 9A.56.020(1)(a). One who knowingly makes a false statement of material fact in applying for a Medicaid payment thereby completes the crime of Medicaid false statement. Nothing more is required. But if, for example, that material misstatement is detected, payment may be withheld—and then there is no theft, even though all the elements of Medicaid false statement have been met. Because Medicaid false statement does not necessitate theft, these crimes are not concurrent. Thus it was permissible to charge Wright with theft, and her conviction for this crime should be affirmed.

D. Because Wright's Sentence Was Imposed Under the First-Time Offender Provisions of RCW 9.94A.650, It May Not Be Appealed

Wright contends the court erred in computing her offender score because her crimes constitute the "same criminal conduct" under RCW 9.94A.589. Not only does this challenge ignore the fact that Wright's offender score was not used to determine her sentence, it disregards the rule that a first-time offender sentence may not be appealed.

Instead of relying on Wright's offender score, the court—following the State's recommendation—waived imposition of a standard-range sentence under RCW 9.94A.650 and imposed 30 days of total confinement, converted to 240 hours of community service under RCW

9.94A.680. VRP at 700, 713; CP at 245-53. Because the court made no use of Wright's offender score, any error in calculating it is harmless. *See State v. Naillieux*, 158 Wn. App. 630, 642, 241 P.3d 1280 (2010) (describing the appellant's "same criminal conduct" argument as "much ado about nothing" where any mistake in calculating the offender score would not change the resulting sentence range).

More importantly, under RCW 9.94A.585(1), "a sentence imposed on a first-time offender under RCW 9.94A.650 shall also be deemed to be within the standard sentence range for the offense and shall not be appealed." *See also State v. Stately*, 152 Wn. App. 604, 607, 216 P.3d 1102 (2009) (noting that a first-time offender's sentence may not be appealed). Because Wright may not challenge her sentence on appeal, her same criminal conduct argument is not properly before the court. Even if her sentence *were* subject to review, her crimes do not encompass the same criminal conduct for the reasons explained below.

E. Assuming That Wright May Appeal Her Sentence, the Trial Judge Did Not Abuse Her Discretion in Declining to Find Wright's Crimes Constituted the Same Criminal Conduct Because the Crimes Required Different Criminal Intents Or Occurred at Different Times Or Places

In calculating an offender score, current convictions are counted separately unless the court finds some or all of these offenses encompass the same criminal conduct. RCW 9.94A.589(1)(a); RCW 9.94A.525. If

offenses are considered the same criminal conduct, they count as one crime for determining the offender score. RCW 9.94A.589(1)(a).

Crimes involve the "same criminal conduct" when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). If any element is missing, the crimes do not encompass the same criminal conduct. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). The same criminal conduct statute "is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act." *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). A trial court's determination of same criminal conduct will be disturbed only if the court abused its discretion or misapplied the law. *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011).

Wright's contention that her crimes encompassed the same criminal conduct fails, as her crimes involved different criminal intents or different times and places.

1. Theft and Medicaid false statement each require different criminal intents.

Whether crimes share the same criminal intent is determined using an objective standard. Courts "focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." *State*

v. Farmer, 116 Wn.2d 414, 428, 805 P.2d 200 (1991) (citing *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987)). This inquiry first examines the underlying statutes to determine if the required intents are the same or different. *State v. Price*, 103 Wn. App. 845, 857, 14 P.3d 841 (2000). If the intents are the same, the facts of the case are evaluated to determine whether the defendant committed the crimes with the same objective criminal intent. *Id.* This "can be measured in part by whether one crime furthered the other." *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). Under the furtherance test, "even crimes with identical mental elements will not be considered the 'same criminal conduct' if they were committed for different purposes." *Price*, 103 Wn. App. at 857 (citing *State v. Haddock*, 141 Wn.2d 103, 113, 3P.3d 733 (2000)).

Wright frames the criminal intent for her crimes as "provid[ing] inaccurate information on time sheets and misstat[ing] or exaggerat[ing] the level and degree of care or assistance." Appellant's Br. at 28. Her argument fails to recognize that courts "do not analyze the defendant's subjective intent, but objectively evaluate criminal intent in light of the crimes committed and the facts presented at sentencing." *State v. Young*, 97 Wn. App. 235, 242, 984 P.2d 1050 (1999); *see also Farmer*, 116 Wn.2d at 428 ("[T]he subjective intent of the criminal is irrelevant.").

Therefore, it is irrelevant that Wright may have committed both crimes to obtain money. As our supreme court emphasized in *State v. Farmer*, a criminal's "ultimate motive" is not equivalent to his or her objective criminal intent. 116 Wn.2d at 428. In *Farmer*, the defendant contended that his criminal intent was that of "sexual gratification" when he twice solicited teenage prostitutes, returning with them to his apartment where they posed for sexually suggestive photographs. *Id.* at 418, 428. The court acknowledged that sexual gratification might have been his ultimate motive, but to determine his *intent*, the court looked to the elements of each crime:

> [W]e find [the defendant's] criminal intent in soliciting the services of Eric and Jim was seeking prostitution services. . . . Analyzing the crime of sexual exploitation of a minor, whether for his own personal gratification or for the purpose of sale, we find Farmer's objective intent was to photograph the minors engaged in sexually explicit conduct. We find this intent to be different from the intent to solicit the services of a juvenile prostitute.

Id.

Applying *Farmer*'s analysis here, Wright's objective criminal intent in committing Medicaid false statement was to make a false representation of a material fact in applying for COPES payment. *See* RCW 74.09.230(1)(a). And her objective criminal intent in committing theft was to wrongfully obtain payments with the intent to deprive the

State of its property. *See* RCW 9A.56.020(1)(a). Therefore, the Medicaid false statement crimes do not involve the same objective criminal intent as the theft.

It is true that *Farmer* involved two crimes each completed separately: first, the defendant solicited the services of minors for purposes of prostitution and second, he exploited them by taking sexually suggestive photographs. By contrast, both of Wright's crimes involved some of the same conduct—the same false statements that led to her Medicaid false statement charges also precipitated her theft. Wright stresses this point, suggesting that because the same act of making false statements both defined her crime of Medicaid false statement and set her theft in motion, her criminal intent must have been the same for both crimes. This argument mistakenly conflates the *act* for the *crime*.

It is established that "'the repeated commission of the *same crime* against the same victim over a short period of time'" falls within the "one clear category of cases where two crimes will encompass the same criminal conduct." *Porter*, 133 Wn.2d at 181 (quoting 13A Seth Aaron Fine, Washington Practice § 2810 at 112 (Supp. 1996)). But where the *same act* is criminalized by two different statutes, different criminal intents may coexist.

This principle is nowhere clearer than in *State v. Bobenhouse*, 166 Wn.2d 881, 214 P.3d 907 (2009). Bobenhouse was convicted of rape and incest based on forcing his two small children to engage in sexual intercourse with each other. *Bobenhouse*, 166 Wn.2d at 886-87, 896. The court regarded the contention that Bobenhouse's crimes involved the same criminal intent as "ha[ving] no merit" because the Legislature intended to punish rape and incest separately, even when committed by the same act. *Id.* at 896.

If Bobenhouse's crimes did not involve the same criminal intent, neither should Wright's. In *Bobenhouse*, the same act constituted two crimes: rape and incest. Here, the act of misrepresenting the number of hours worked constituted only one crime—the crime of Medicaid false statement. While this misrepresentation set the theft in *motion*, it did not *constitute* the theft, nor was this deception a necessary element of the theft. To commit theft by taking, one must "wrongfully *obtain* . . . the property or services of another" with the intent to deprive. RCW 9A.56.020(1)(a) (emphasis added). Thus Wright's theft was not complete until the payments were deposited into her account—which happened several days after she submitted each false invoice. Exs. 11 (noting invoice dates), 10 (noting warrant dates), 24 (bank records).

The fact that Wright's theft was not complete at the time she committed the crime of Medicaid false statement provides yet another basis for finding her crimes involved different criminal intents. At the times she called in her purported hours, Wright had a *present* intent to make a false representation, but she also had a *future* intent to commit theft. The concurrence of a present and future intent strongly suggests different criminal intents. *See State v. Burns*, 114 Wn.2d 314, 788 P.2d 531 (1990) (holding that the simultaneous crimes of delivery of a controlled substance in the present and possession with the intent to deliver in the future involve different criminal intents); *Maxfield*, 125 Wn.2d at 403 (explaining that the crimes in *Burns* "involved different criminal intents—an intent to deliver at the present versus an intent to deliver in the future" and holding that in the case before it, "[t]he growing marijuana in the garage showed intent (in the past and present) to 'manufacture' a controlled substance, whereas the marijuana found in the house in plastic baggies showed the defendant's intent to deliver the drugs in the future.").

The final reason Wright's crimes do not require the same criminal intent is because they were separated by a significant amount of time. When a "substantial break" occurs between crimes, allowing "time to pause, reflect, and either cease or continue," a different criminal intent

exists. *Mutch*, 171 Wn.2d at 655 (finding the defendant "objectively formed new criminal intent" when he stopped between each of five rapes occurring over the course of an evening and the following morning). Here, the theft occurred only once Wright obtained the money in her bank account with the intent to deprive. *See State v. Goodlow*, 27 Wn. App. 769, 773, 620 P.2d 1015 (1980) (noting the crime of theft requires proof that the thief actually gains control of the property). Each deposit occurred days after the fraudulent application for payment was made in violation of the Medicaid false statement statute. *Compare* Ex. 11 (invoice submission dates) *with* Ex. 24 (bank records showing deposit dates). During this time, Wright had ample time to reflect and stop the payments from going through. The fact that she did not do so shows that her intent to obtain money continued long after she made her false statements, and therefore differed from her intent in committing Medicaid false statement. The evidence also establishes that the ten Medicaid false statement offenses do not share the same criminal intent with each other, because each of Wright's misrepresentations was separated by approximately one month. Ex. 11 (invoice submission dates).[8]

[8] Wright's brief seems to suggest *all* her crimes, including her ten Medicaid false statement convictions, constitute the same criminal conduct. Appellant's Br. at 28-29. Wright declined to make this argument at sentencing. VRP at 703 ("[T]he question is not whether each of the Medicaid fraud counts are the same criminal conduct as to each other. It's whether those counts are the same criminal conduct as to the sole ranked

In sum, Wright's theft and Medicaid false statement convictions do not share the same criminal intent for three reasons. First, the statutes defining these crimes require different objective criminal intents. Second, the facts of Wright's case establish that at the time she committed Medicaid false statement, she had two different intents: a present intent to commit that crime and a future intent to commit theft. Finally, these crimes were separated by several days, allowing Wright to change course and stop payment to her account. Because she did not do this, the gap in time shows an independent criminal intent to commit theft.

2. Each crime involved different times or places.

Even if Wright's crimes involved the same criminal intent, Wright has failed to establish that they shared the same time and place. Relying on the entire interval of the charging period for theft—that is, June 4, 2007 through April 2, 2008—Wright contends she committed her crimes at the same "time." This argument incorrectly assumes Wright's theft was continuous throughout this period, when the evidence reveals Wright stole in discrete increments each time she wrongfully obtained money with the intent to deprive. Although these episodes were aggregated into one count of first degree theft under RCW 9A.56.010(21)(c) as part of a common

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offense in this case, which is the first-degree theft."). Therefore, she may not now raise it. *In re Pers. Restraint of Shale*, 160 Wn.2d 489, 494-96, 158 P.3d 588 (2007) (holding that same criminal conduct argument was waived). Even if this argument had been preserved, it lacks merit for the reasons explained above.

scheme or plan, the evidence confirms that this scheme involved discrete transactions and not a free-floating, months-long "theft." VRP at 232-44 (explaining exhibits 11-24); Exs. 10-22, 24. The times for the theft can be determined by the dates the COPES payments were deposited to Wright's account. Exs. 10 (noting warrant dates), 24 (bank records). As discussed earlier, this evidence also shows that the money was wrongfully obtained several days after Wright submitted each false telephonic invoice. *Compare* Ex. 11 (showing invoice submission date) *with* Ex. 24 (showing deposit date). Because of the substantial gap between each Medicaid false statement offense and the resulting deposit of wrongfully obtained money, Wright's crimes do not share the same "time."

And though Wright maintains it is "obvious that the crimes all occurred in the same place," Appellant's Br. at 28, she points to no evidence supporting this assertion. In fact, the record contains no mention of where Wright submitted her monthly telephonic invoices. But it defies common sense to suppose she placed the calls from her bank, the place she wrongfully obtained the funds. At any rate, Wright has not shown how a finding that her crimes do not share the same place represents an abuse of discretion.

In conclusion, the trial court did not abuse its discretion or misapply the law. In addition to failing the "same criminal intent" prong,

Wright's crimes also fail to share the same time and place. Because Wright has failed to show her crimes involve the same criminal intent, time, and place, she has not established the trial court abused its discretion in determining that Wright's offenses do not embrace the same criminal conduct.

V. CONCLUSION

Wright's sufficiency challenges fail because the evidence the jury saw and heard at trial was more than sufficient to support its verdict. Wright's other challenges to her convictions fail as well. As a matter of law, trespass is not an element of statutory theft by taking and the crime of theft is not concurrent with Medicaid false statement. Nor is Wright's sentence properly before the court because first-time offender sentences may not be appealed. Even if her sentence could be appealed, any error in calculating Wright's offender score is harmless because this score was not used to determine her sentence. And though the court need not reach the substance of her challenge, her offender score is nonetheless correct because the trial court acted well within its discretion in finding her crimes did not encompass the same criminal conduct. Because all of Wright's

arguments fail, this court should affirm the trial court's judgment and sentence.

RESPECTFULLY SUBMITTED this 25th day of January, 2013.

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VI. CERTIFICATE OF SERVICE

I certify that on the 25th day of January, 2013, I caused a true and correct copy of the Respondent's Brief to be served on the following in the manner indicated below:

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