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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated CrR 3.5, Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, when it allowed the prosecutor to introduce statements the defendant made into evidence because the court did not hold a hearing under CrR 3.5 and the defendant did not waive her right to a hearing under this rule.

2. Trial counsel's failure to object when the state elicited an opinion on guilt from a police officer violated the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

3. The trial court erred when it failed to find that the defendant's convictions for identity theft and forgery constituted the same criminal conduct.

Issues Pertaining to Assignment of Error

1. Does a trial court violate CrR 3.5, Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, when, without a CrR 3.5 hearing or a waiver, it allows a prosecutor to introduce involuntary statements a defendant made into evidence?

2. Does a trial counsel's failure to object when the state elicits an opinion on guilt from a police officer violate a defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when a properly made objection would have been sustained and when the jury more likely than not would have returned a verdict of acquittal absent the improper evidence?

3. Does a trial court err if it fails to find that two offenses constitute the same criminal conduct when they were both committed at the same place, at the same time, against the same victim, and with the same objective intent?

STATEMENT OF THE CASE

Factual History

On December 13, 2005, at about 9:40 in the evening, Washington State Patrolman Craig Sahlinger was driving on Interstate 5 near milepost 73 when he pulled over a Mazda 626 for speeding. RP 21-24.¹ As he approached the vehicle, he asked the lone female driver for her license. *Id.* When she responded that she did not have it with her, Trooper Sahlinger asked for her name and date of birth. *Id.* The female responded with the name “Melissa Rogers” and a date of birth of May 18, 1980. *Id.* Trooper Sahlinger gave dispatch this information and shortly received a reply giving him the license information for a “Melissa Rogers” with that date of birth living at 18126 Old Highway 99 in Tenino. RP 26-35. Dispatch also confirmed that the license was clear. *Id.* With this information from dispatch, Trooper Sahlinger filled out a speeding citation and returned to the Mazda, where the driver signed “Melissa Rogers” on the ticket, received her copy, and drove away. *Id.*

During the period of time that the speeding ticket was issued, Melissa Rogers was attending Willamette Law School in Salem, Oregon. RP 13-14.

¹The record in this case includes one volume of verbatim reports of the trial held on June 10, 2008. It is referred to herein as “RP [page #].” It also includes one volume of the sentencing held on September 3, 2008. It is referred to herein as “RPS [page #].”

After graduating in May of 2007, she went to the Washington State Department of Licensing (DOL) in order to get a copy of her driving record to submit with her application to take the Washington bar exam. RP 14-15. Upon receiving a copy of her driving record, Ms Rogers found out for the first time that (1) it listed the 2005 speeding citation, (2) that her privilege to drive had been suspended based upon the failure to pay this ticket, and (3) that the address on her driving record had been changed from her parents address in Olympia to 18126 Old Highway 99 in Tenino. RP 17-19. In fact, the defendant Melissa Weyrauch has lived at 18126 Old Highway 99 Southwest in Tenino since she was five-years-old. RP 63-64. She and Ms Rogers had been best friends in high school, although they had fallen out of touch after Ms Rogers had graduated from college. RP 11-13.

After reviewing the erroneous information on her driving record, Ms Rogers went to the Lewis County District Court and obtained a copy of the citation. RP 18-19. She then took the citation and her driving record to the Lewis County Sheriff's Office, where she filed a complaint stating that someone had used her identity during the citation process and had changed the address on her license, all without her permission. *Id.* When asked, she gave the officer the names of two people she thought might have used her identification. *Id.* One of those people was the defendant, whom Ms Rogers stated was familiar with her birth date. *Id.*

Eventually, Deputy Jason Mauermann was assigned to investigate Ms Rogers complaint. RP 38-39. As part of this process, he went out to the defendant's home in Tenino where she lives with her parents and her three small children. RP 39-40, 63-67. Once at that address, Deputy Mauermann confronted the defendant with the fact that he believed she had used Ms Rogers information in order to get out of the speeding ticket in December of 2006. RP 42-44. According to Deputy Mauermann, the defendant freely admitted using Ms Rogers' name and date of birth and did so to avoid arrest as she had an outstanding warrant out of Thurston County when she was stopped for speeding. *Id.*

The Defendant's version of what happened when Deputy Mauermann came to her house was quite different. RP 74-77. According to the defendant, when Deputy Mauermann came to her house and gave her the information about the speeding ticket, she admitted knowing the registered owner of the vehicle, although she denied driving the Mazda in December of 2005, and denied either signing Ms Rogers' name to the ticket or to giving the false information to Trooper Sahlinger. *Id.* Rather, she claimed that at the time the Trooper issued the citation, she was with friends in St. Helens, Oregon. *Id.* The defendant also claimed that Deputy Mauermann threatened to arrest her and have CPS come take her children if she did not talk to him, and that when he read *Miranda* warnings she told him she wanted to talk to

an attorney before answering any questions. *Id.*

Procedural History

By information filed October 2, 2007, the Clark County Prosecutor charged the defendant Melissa Lynn Weyrauch with one count of second degree identity theft and one count of forgery, alleging that she had falsely signed Melissa Rogers' name to a traffic citation. CP 1-2. The state later amended the information to add a count of bail jumping after she failed to appear for a court date. CP 19-20. At the omnibus hearing in the case, the court noted that it would need to hold a CrR 3.5 hearing in the case, and would do so on the morning of the first day of trial. CP 14. However, on the first day of trial, the court stated "a 3.5 hearing is not necessary as there aren't any custodial statements" RP 3. Thus, the case proceeded to trial before a jury without a CrR 3.5 hearing. *Id.*

During the trial in this case, the state called Ms Rogers, Trooper Sahlinger, and Deputy Mauermann as its only witnesses. RP 10, 22, 38. They testified to the facts contained in the preceding Factual History. *See Factual History, supra.* During his testimony, Trooper Sahlinger was unable to identify the defendant in the courtroom as the person to whom he had issued the speeding citation. RP 21. Deputy Mauermann's testimony included his claims about what the defendant told him when he spoke to her about it at her home in Tenino. RP 22-38. During cross-examination, the

defense elicited the fact from the Deputy that he had not interviewed the other suspect in the case, that he had not tried to obtain fingerprints off of the speeding citation, and that he had not obtained a handwriting analysis to compare the defendant's writing to the signature on the citation. RP 45-53.

Following cross-examination, the state elicited a statement from Deputy Mauermann that he did not do any follow up, such as interviewing other witnesses, checking for fingerprints, or getting a handwriting analysis because in his opinion the defendant was guilty. RP 55-57. The exchange went as follows.

Q. Did the fact that the defendant confessed to you that she did write the citation and forged Ms. Rogers' signature have anything to do with that decision?

A. Yes, that pretty much, I felt, sealed the case.

Q. Now, how come you ruled out Amber Thayer as a suspect?

A. I could not connect through Ms. Rogers – I could not connect Amber Thayer or Justin Thayer to Ms. Rogers. She didn't have any information on the vehicle or know about the vehicle, she didn't know the names of Justin or Amber Thayer. So at that point it left me with the other option of talking to Ms. Weyrauch on top of possibly interviewing Ms. Amber Thayer as a potential suspect.

Q. And, again, did those decisions to rule out those two person's have anything to do with the fact Ms. Weyrauch actually confessed to this.

A. Yeah. When she confessed it gave me no question in my mind. I mean, it's coming from her that she wrote Melissa Roger's signature on the ticket and was familiar with the ticket.

Q. Did she also admit to doing so?

A. Yeah, she admitted to it.

. . . .

Q. Did the fact Ms. Weyrauch confess to this incident also play into that decision as well?

A. Yes. I mean with the confession, I felt there was – it made no sense to have the courts or have any more money spent in processing the case even further when you’ve got a confession from the actual person that is being accused of doing it.

RP 55-57.

Defendant’s counsel did not object to any of this testimony. *Id.*

After the state closed its case before the jury, the defendant took the stand as the only witness for the defense. RP 63. She testified that she was not the person driving the Mazda on the night the Trooper issued the speeding citation. RP 63-74. In addition, she testified that when Deputy Mauermann came to her house and gave her the information about the speeding ticket, she denied driving the Mazda and denied either signing Ms Rogers’ name to the ticket or to giving the false information to Trooper Sahlinger. *Id.* Rather, she told the jury that she was with friends in St. Helens, Oregon, at the relevant time. *Id.* In addition, the defendant also testified that Deputy Mauermann threatened to arrest her and have CPS come take her children if she did not confess and that when he read *Miranda* warnings to her she told him she wanted to talk to an attorney before

answering any questions. RP 74-77.

After the defense rested its case, the court instructed the jury with neither side making any objections. RP 88, 89-99. The jury then heard argument from counsel, retired for deliberation, and later returned verdicts of guilty on all three counts. RP 99-116; CP 92-94. The court later sentenced the defendant on an offender score of two concurrent points on each charge, without ever addressing the issue whether or not the two offenses constituted the same criminal conduct under RCW 9.94A.589. RPS 1-8. With two points, the ranges on the three counts were as follows: (1) 3 to 9 months for second degree identity theft, (2) 2 to 5 months for forgery, and (3) 4 to 12 months for bail jumping from a Class B or C felony. RP 208. The court sentenced the defendant to three months each on Count I and II, and four months on count III, all sentences to run concurrently. CP 111. The defendant thereafter filed timely notice of appeal. CP 116.

ARGUMENT

I. THE TRIAL COURT VIOLATED CrR 3.5, WASHINGTON CONSTITUTION, ARTICLE 1, § 9, AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT, WHEN IT ALLOWED THE PROSECUTOR TO INTRODUCE STATEMENTS THE DEFENDANT MADE INTO EVIDENCE BECAUSE THE COURT DID NOT HOLD A HEARING UNDER CrR 3.5 AND THE DEFENDANT DID NOT WAIVE HER RIGHT TO A HEARING UNDER THIS RULE.

Under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before a defendant's custodial statements may be admitted as substantive evidence, the state bears the burden of proving that prior to questions the police informed the defendant that: “ (1) he has the absolute right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him.” *State v. Brown*, 132 Wn.2d 529, 582, 940 P.2d 546 (1997) (quoting *Miranda*, 384 U.S. 436, 86 S.Ct. 1602). The state bears the burden of proving not only that the police properly informed the defendant of these rights, but that the defendant's waiver of these rights was knowing and voluntary. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991). If the police fail to properly inform a defendant of these four rights, then the defendant's answers to custodial interrogation may only be admitted as impeachment and then only if the defendant testifies and the statements were not coerced. *State v. Holland*, 98

Wn.2d 507, 656 P.2d 1056 (1983).

In order to implement the requirements the United States Supreme Court created in *Miranda*, and in order to give substance to the protections against self-incrimination found in Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, the Washington Supreme Court has adopted a procedure that, absent a waiver, must be followed prior to the admission of any statement by a defendant into evidence, regardless of how the police obtained the statements. This procedure is found in CrR 3.5, which states in part:

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court to Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

CrR 3.5.

As the plain language of the rule states, the court is required to hold a hearing to determine the admissibility of any statement the defendant makes, not just statements the prosecutor claims are the product of custodial interrogation. Even incriminating statements a defendant allegedly makes to a cellmate are subject to a CrR 3.5 hearing if the defendant claims they were not voluntary. *State v. Smith*, 36 Wn.App. 133, 672 P.2d 759 (1983). In addition, where there had been no proper determination of voluntariness of defendant's alleged confession prior to its admission, a defendant is entitled to a proper collateral proceeding and if the court finds the statement was made voluntarily, a verdict of guilt will be upheld, but if involuntary then the defendant is entitled to new trial. *State v. Taplin*, 66 Wn.2d 687, 404 P.2d 469 (1965). This rule is also applicable in juvenile criminal proceedings through JuCr 1.4(b) which states that "[t]he Superior Court Criminal Rules shall apply in juvenile offense proceedings when not inconsistent with these rules and applicable statutes." *State v. Tim S.*, 41 Wn.App. 60, 701 P.2d 1120 (1985). The use of a CrR 3.5 hearing in both adult and juvenile proceeding is mandatory whether requested or not unless the defense waives the hearing. *Id.* The court of appeals stated the following on this issue.

Furthermore, it does not appear from the record that a CrR 3.5

hearing was held, nor was one requested. A CrR 3.5 hearing is mandatory. The purpose of the hearing is to protect constitutional rights, by assuring a defendant of his right to have the voluntariness of the statement or confession determined prior to trial, and to allow the court to rule on its admissibility.

State v. Tim S., 41 Wn.App. at 63 (citations omitted); *see also State v. Nogueira*, 32 Wn.App. 954, 650 P.2d 1145 (1982) (state bears the burden of calling a CrR 3.5 hearing and putting on sufficient evidence to meet the requirements of the rule; defense counsel's failure to ask for a hearing under CrR 3.5 is not a waiver of the rights protected in that rule).

In the case at bar, the trial court originally noted that it would need to hold a CrR 3.5 hearing on the morning of the first day of trial. However, instead of holding the hearing, as is required under the rule, the court simply noted that since there were no "custodial statements," the hearing was unnecessary. The problem with this ruling is that it misinterprets the rule and the court's requirements under it. The existence of "custodial statements" is not the trigger to a CrR 3.5 hearing. Rather, as the rule itself states, the trigger to the hearing is the state's decision to introduce into evidence statements the defendant has made. The first subsection of CrR 3.5 states:

When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible.

CrR 3.5(a) (in part).

In the case at bar, the state did offer “a statement of the accused” into evidence. Thus, under CrR 3.5, absent a waiver, the court should have ordered a CrR 3.5 hearing. In addition, the determination of whether or not a defendant’s statement was made as the result of “custodial interrogation” is not dispositive. Rather, this fact is simply the trigger to the requirement under *Miranda* that the police inform a defendant of certain rights. While the court in this case made an initial determination, apparently with the tacit agreement of the defense attorney, that the defendant was not in custody at the time she made her statements to the Deputy, the rule requires the court to determine whether or not the defendant’s statements are “admissible.” The admissibility of a defendant’s statements includes more than a simple determination that the police either didn’t have to give the defendant *Miranda* warnings or did have to give those warnings. It also includes the issue of voluntariness, and a question concerning a defendant’s invocation of the right to silence or the right to counsel.

In the case at bar, the defendant unequivocally testified that (1) the Trooper told her that she would immediately be arrested and that her children would be taken if she did not confess, and (2) that she invoked her right to silence. Given both of these factual claims, it was incumbent upon the court to call a halt in the trial and hold a CrR 3.5 hearing to make the factual determinations whether or not her claims were true. If the first is true, then

the defendant's statements were coerced, and not admissible under any circumstances, whether she was in custody or not. In addition, if her first statement is true, then a reasonable person in her position might well have believed that she was in custody, thereby triggering the requirements of *Miranda*. Finally, if the defendant's second claim is true, then her statements were not admissible because the officer obtained them after an invocation of the defendant's right to silence, once again regardless of whether or not she was in custody. Thus, the trial court erred when it failed to hold a hearing under CrR 3.5.

In the case at bar, the error in failing to hold the requisite hearing was not harmless because absent the defendant's alleged admissions, there was no evidence that the defendant was the driver of the vehicle at the time the Trooper issued the speeding citation. Even seen in the light most favorable to the state, the evidence (without the admission) is simply that on the date in question, someone used Ms Rogers name and date of birth to get out of a speeding ticket. While the ticket and Ms Rogers license showed an address similar to the defendant's address, this evidence alone does not constitute substantial evidence that the defendant was the driver of the vehicle.

In this case, the state may argue that this court should accept Deputy Mauermann's rebuttal testimony that he did not threaten or coerce the defendant into making a statement. However, any such argument ignores the

rule that this court is not a fact-finding body. As the court is wont to state in many appeals, issues of credibility between witnesses are for the trial court to make, not the court on appeal. *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004). Thus, under the facts of this case, the trial court's failure to hold a hearing under CrR 3.5 constituted an error that entitles the defendant to a new trial.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE ELICITED AN OPINION ON GUILT FROM A POLICE OFFICER VIOLATED THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense

attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object when the state called upon a police officer to give the jury his opinion on the guilt or innocence of the defendant. The defendant sets out this argument.

Under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). In order to sustain this fundamental constitutional guarantee to a fair trial the prosecutor must refrain

from any statements or conduct that express his/her personal belief as to the credibility of a witness or as to the guilt of the accused. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). If there is a “substantial likelihood” that any such conduct, comment, or questioning has affected the jury’s verdict, then the defendant’s right to a fair trial has been impinged and the remedy is a new trial. *State v. Reed*, 102 Wn.140, 684 P.2d 699 (1984).

The reason that no witness whether a lay person or expert may give an opinion as to the defendant’s guilt either directly or inferentially is “because the determination of the defendant’s guilt or innocence is solely a question for the trier of fact.” *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

“[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... ‘merely tells the jury what result to reach.’” (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. “Personal opinions on the guilt ... of a party are obvious examples” of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant’s guilt is an improper lay or expert opinion because the determination of the defendant’s guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

The expression of an opinion as to a criminal defendant’s guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. See *Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

State v. Carlin, 40 Wn.App. 701; See also *State v. Black*, 109 Wn.2d 336,

745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state's expert to testify in a rape case that the alleged victim suffered from "rape trauma syndrome" or "post-traumatic stress disorder" because it inferentially constituted a statement of opinion as to the defendant's guilt or innocence).

For example, in *State v. Carlin, supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a "fresh guilt scent." On appeal the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed noting that "[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial." *State v. Carlin*, 40 Wn.App. at 703.

In the case at bar, the defense elicited the fact from the Deputy that he had not interviewed the other suspect in the case, that he had not tried to obtain fingerprints off of the speeding citation, and that he had not obtained a handwriting analysis to compare the defendant's writing to the signature on the citation. RP 45-53. Following cross-examination, the state elicited a

statement from Deputy Mauermann that he did not do any follow up, such as interviewing other witnesses, checking for fingerprints, or getting a handwriting analysis because in his opinion the defendant was guilty. RP 55-57. The exchange went as follows.

Q. Did the fact that the defendant confessed to you that she did write the citation and forged Ms. Rogers' signature have anything to do with that decision?

A. Yes, that pretty much, I felt, sealed the case.

Q. Now, how come you ruled out Amber Thayer as a suspect?

A. I could not connect through Ms. Rogers – I could not connect Amber Thayer or Justin Thayer to Ms. Rogers. She didn't have any information on the vehicle or know about the vehicle, she didn't know the names of Justin or Amber Thayer. So at that point it left me with the other option of talking to Ms. Weyrauch on top of possibly interviewing Ms. Amber Thayer as a potential suspect.

Q. And, again, did those decisions to rule out those two person's have anything to do with the fact Ms. Weyrauch actually confessed to this.

A. Yeah. When she confessed it gave me no question in my mind. I mean, it's coming from her that she wrote Melissa Roger's signature on the ticket and was familiar with the ticket.

Q. Did she also admit to doing so?

A. Yeah, she admitted to it.

. . .

Q. Did the fact Ms. Weyrauch confessed to this incident also play into that decision as well?

A. Yes. I mean with the confession, I felt there was – it made

no sense to have the courts or have any more money spent in processing the case even further when you've got a confession from the actual person that is being accused of doing it.

RP 55-57.

This evidence not only constitutes an improper opinion on guilt, but it also constitutes a comment on the deputy's own credibility and a comment on the defendant's credibility because the deputy is not simply repeating what he claimed the defendant said. Rather, he is characterizing the defendant's statements and telling the jury that in his opinion she gave him a confession. In other words, he is telling the jury that he told the truth about what she said and that any contrary claim would necessarily be a lie. Allowing this type of evidence would open any criticism by the defendant on cross-examination that the officer did a poor investigation into a method by which the state could elicit the opinion of the officer that no further investigative work was necessary because, in the opinion of the officer, the defendant was guilty.

In the case at bar, this error caused prejudice because the state's chief evidence that the defendant had been the one who got the speeding ticket came from the Deputy's claim that the defendant had admitted to being the driver of the car. By allowing the state to elicit this testimony without objection, defendant's counsel allowed the state to improperly bolster its key evidence. Thus, this failure to object fell below the standard of a reasonably

prudent attorney. In addition, given the weakness of the state's case absent the improper evidence, it is more likely than not that the jury would have returned a verdict of acquittal absent the improper opinion evidence. Thus, the failure to object in this case denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment, thereby entitling her to a new trial.

III. THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT THE DEFENDANT'S CONVICTIONS FOR IDENTITY THEFT AND FORGERY CONSTITUTED THE SAME CRIMINAL CONDUCT.

Under RCW 9.94A.589(1)(a), at sentencing on two or more offenses, if "some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime."² *State v. Vike*, 125 Wn.2d 407, 885 P.2d 824 (1994). Under this statute, the term "same criminal intent" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *State v. Garza-Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993). The term "same criminal intent" as used in this definition does not mean the same "specific intent." *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). Rather, it means the same "objective intent." *Id.*

For example, in *State v. Deharo*, 136 Wn.2d 856, 966 P.2d 1269

²Formerly RCW 9.94A.400.

(1998), the trial court convicted the defendant of Delivery of Heroin, and Conspiracy to Deliver Heroin. At sentencing, the trial court found that these two offenses had the same victim and were committed at the same time and place. However, the court ruled that these two offenses did not constitute the “same criminal conduct” for the purpose of sentencing because they had different intent elements. The defendant appealed this ruling.

The Court of Appeals reversed the trial court on the sentencing issue, holding as follows:

[T]he present case, the “objective intent” underlying the two charges is the same - to deliver the heroin in one or both conspirators’ possession. Possessing that heroin was the “substantial step” used to prove the conspiracy. Since both crimes therefore involved the same heroin, it makes no sense to say one crime involved intent to deliver that heroin now and the other involved intent to deliver it in the future. Nor is there any factual basis for distinguishing the two crimes based on objective intent to deliver some now and some later. Under the reasoning in *Porter*, the two crimes should be treated as encompassing the same criminal conduct.

State v. Deharo, 136 Wn.2d at 858.

Similarly, in *State v. Saunders*, 120 Wn.App. 80, 86 P.3d 232 (2004), a defendant convicted of murder, robbery, kidnaping, and rape out of the same incident argued that his trial counsel had been ineffective when he failed to argue that the rape and the kidnaping constituted the “same criminal conduct” for the purpose of determining his offender score. The court agreed, holding as follows:

Under the facts here, it appears that Williams's primary motivation for raping Grissett by inserting a television antenna in her anus was to dominate her and to cause her pain and humiliation. Because this intent arguably was similar to the motivation for the kidnap, defense counsel was deficient for failing to make this argument. Further, as the case law provides strong support to this argument, the failure was prejudicial. *See State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999); *Edwards*, 45 Wn.App. at 382, 725 P.2d 442; *State v. Taylor*, 90 Wn.App. 312, 321, 950 P.2d 526 (1998).

Thus, counsel's decision not to argue same criminal conduct as to the rape and kidnaping charges constituted ineffective assistance of counsel and requires a remand for a new sentencing hearing where defense counsel can make this argument.

State v. Saunders, 120 Wn.App. at 825.

In the case at bar, the defendant was convicted of identity theft in the second degree and forgery based upon her conduct in using another person's name and date of birth in order to (1) avoid getting a speeding ticket, and (3) avoid being arrested on an outstanding warrant. All of the conduct occurred within the space of a few minutes, and the defendant's objective intent remained the same though out the entire encounter with the officer. Thus, the defendant's objective intent remained the same for both offenses, and both offenses occurred at the same time and place. Finally, Melissa Rogers was the same victim in both offenses. Consequently, there was a unity of time, place, objective intent, and victim in the forgery and the identity theft crimes. As a result, they constituted the "same criminal conduct" under RCW 9.94A.589(1)(a) and the trial court erred when it ruled that these

offenses did not constitute the same criminal conduct, and when the trial court added a offender point to the defendants score for each offenses.

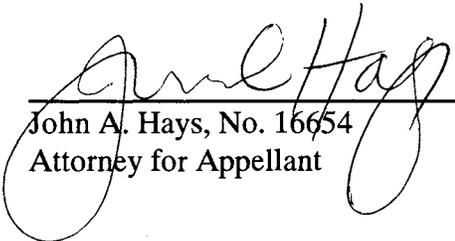
Given the correct offender score of one point on each offense, the standard ranges changed to the following: (1) second degree identity theft - 2 to 6 months instead for 3 to 9 months, (2) forgery - 0 to 90 days instead of 2 to 5 months, and (3) bail jumping from a class B or C felony - 3 to 8 months instead of 4 to 12 months. Even though the sentences imposed fell within the correct standard ranges, the defendant is entitled to have the court exercise its discretion at sentencing based upon an understanding of the correct ranges unless the record makes clear that the trial court would impose the same sentence. *State v. Tili*, 148 Wn.2d 350, 60 P.3d 1192 (2003). In the case at bar, the record indicates the opposite, since the trial court sentenced the defendant at the bottom of each range. Thus, this court should vacate the defendant's sentence and remand for resentencing within the correct ranges.

CONCLUSION

The trial court's failure to hold a CrR 3.5 hearing in light of the defendant's claim that her statements were coerced and taken following an invocation of her rights entitles her to a new trial. In addition, the defendant is also entitled to a new trial based upon the denial of her right to effective assistance of counsel. In the alternative, this court should vacate the defendant's sentence and remand for resentencing in light of the correct offender scores.

DATED this 16th day of April, 2009.

Respectfully submitted,



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Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

RCW 9.94A.589(1)

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, 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. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

CrR 3.5

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court to Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) Rights of Defendant When Statement Is Ruled Admissible. If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

