

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

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

NO. 38263-6-II

STATE OF WASHINGTON,
Respondent.

vs.

MELISSA LYNN WEYRAUCH,
Appellant.

On Appeal from the Superior Court of Lewis County

STATE'S RESPONSE BRIEF

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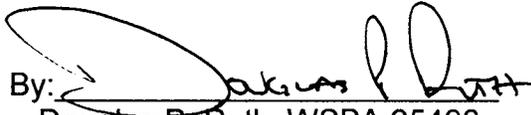
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STATEMENT OF THE CASE

Appellant's version of the statement of the case is adequate for purposes of this response.

ARGUMENT

A. THE TRIAL COURT WAS NOT REQUIRED TO HOLD A 3.5 HEARING BECAUSE THE DEFENDANT WAIVED HER RIGHT TO A HEARING.

Appellant claims that the trial court erred when it failed to hold a separate 3.5 hearing on the admissibility of the Defendant's statements to police. The State disagrees, because the defendant waived her right to such a hearing.

A CrR 3.5 hearing serves the purpose of determining the voluntariness of a confession and other custodial statements. *State v. Myers*, 86 Wn.2d 419, 425, 545 P.2d 538 (1976). Before introducing evidence of a statement of a defendant, a trial court must hold a 3.5 hearing to establish whether the statement freely given. *State v. Kidd*, 36 Wn.App. 503, 509, 674 P.3d 674 (1983). Failure to hold a CrR 3.5 hearing, however, does not render a statement inadmissible when a review of the record discloses that there is no issue concerning its voluntariness. *Kidd*, 36 Wn.App. at 509. A court may also escape holding a CrR 3.5 when a defendant waives the hearing. *State v. Rice*, 24 Wn.App. 562, 566-567, 603

P.2d 835 (1979). This waiver may be made by a defendant or by his trial attorney on behalf of the client. *State v. Fanger*, 34 Wn.App. 635, 637, 663 P.2d 120 (1983).

In the case at bar, the trial court did not hold a 3.5 hearing because Ms. Weyrauch waived the hearing. Ms. Weyrauch's counsel, Mr. Michael Underwood, waived her right to have a 3.5 hearing to review the voluntariness of her admitted statements. This is apparent from an exchange between Mr. Underwood and the court occurring immediately before the trial court instructed the jury to open the trial:

THE COURT: All right. There was an indication in the chambers hearing that a 3.5 hearing is not necessary as there aren't any custodial statements, is that correct?

MR. UNDERWOOD: Correct, your Honor.

While it appears that the actual waiver occurred in the trial court's chambers, Ms. Weyrauch's counsel affirmed in open court that she was not seeking a CrR 3.5 hearing. Consistently, when the State introduced her statements at trial, Ms. Weyrauch did not object to their admission. RP 43-44. Thereafter, she did not request the trial

court to hold a hearing regarding these statements and, most importantly, she made no claim that her admitted statements were involuntary or that the waiver was invalid. She did not claim the waiver was not knowing and intelligent. So, it is beyond refute that Ms. Weyrauch's waiver, both express and implied, alleviated the trial court from its duty to hold a CrR 3.5 hearing. See *Fanger*, 34 Wn.App. at 638 ("a voluntariness hearing is not required 'absent some contemporaneous challenge to the use of the confession'" quoting *Wainwright v. Sykes*, 433 U.S. 72, 86, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977)). Her claim, consequently, fails.

B. MS. WEYRAUCH HAS NOT SHOWN THAT TRIAL COUNSEL WAS INEFFECTIVE.

Ms. Weyrauch's second claim is that her trial counsel was ineffective. She argues that her counsel's failure to object to certain evidence prejudiced her and put the veracity of the trial's outcome in doubt. This argument, too, is without merit.

1. Standard Of Review.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that the defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). The right to

effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S.Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Cronin*, 466 U.S. at 656..

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-pronged test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed. 2d 858 (1996). An appellate court is not likely to find ineffective assistance on the basis of one alleged

mistake. *State v. Carpenter*, 52 Wn.App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. Indeed,

[w]hat decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless . . . for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). In other words, the reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Hendricks*, at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993). Courts should not second-guess a counsel's actions if they constitute a legitimate trial strategy. *In re Personal Restraint of Hubert*, 138 Wn.App. 924, 928, 158 P.3d 1282 (2007) (citing *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999)). So to, courts give deference to a counsel's decision to object. "Only in egregious circumstances, on testimony

central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (1989).

2. Ms. Weyrauch Does Not Meet The First Prong Of The Strickland Test.

Ms. Weyrauch's trial counsel's performance was not deficient. Ms. Weyrauch claims that her attorney's failure to object to testimony by the arresting officer regarding her confession was deficient representation. Citing to no authority, she argues that the officer's statements were inadmissible opinions of her guilt. She fails to establish, however, that this is the case. Her attorney's failure to object to the testimony was, in fact, reasonable since the statements were not opinions on her guilt.

"This court has expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt." *City of Seattle v. Heatley*, 70 Wn.App. 573, 854 P.2d 658 (1993) (citing *State v. Wilber*, 55 Wn.App. 294, 298, 777 P.2d 36 (1989)). To determine whether a claim actually constitutes an impermissible comment on an "ultimate issue," this court examines each case individually and according to the following factors: "the type of witness involved, the specific nature of the testimony, the nature of

the charges, the type of defense, and the other evidence before the trier of fact." *Heatley*, 70 Wn.App. at 579. Applying these factors to the case at bar, it is apparent that Ms. Weyrauch's counsel had good reason not to object to the officer's testimony.

First, the deputy's statements were not direct comments on to Ms. Weyrauch's guilt. He did not tell the jury what result to reach. Nor did he give an opinion that parroted the legal standard or elements of the crime. By no reasonable reading of the statements did the deputy even infer he believed Ms. Weyrauch was guilty *beyond a reasonable doubt*. The deputy's statements were merely a description of the evidence that he felt warranted discontinuing any further investigation into other suspects, not a statement of Ms. Weyrauch's culpability. Moreover, his opinion did not rely upon his judgment of Ms. Weyrauch's credibility, but rested upon his observations during the investigation. *See State v. Baird* 83 Wn.App. 477, 486, 922 P.2d 157, 161 (1996) (statements by a physician that cuts to the victim were made deliberately were permissible opinions.). "The fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt." *Heatley*, 70 Wn.App. at 579. In fact, the deputy's decision not to

continue investigating other suspects was not even solely based upon evidence supporting Ms. Weyrauch's guilt. Instead, the deputy initially explained that he did not continue investigating the two other suspects because there was no connection between them and the facts of the crime. Once the prosecuting attorney suggested that Ms. Weyrauch's confession might also have been a factor, the deputy cited her admission as an influence. But even then, he observed that his decision was a practical one based on the costs and benefits of proceeding after receiving a confession:

"... I mean with the confession, I felt here 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 57.

Clearly, the deputy's decision to end his investigation was not a decision on the "ultimate issue" in the case, but was simply a judgment of the value of using more of the public's resources for the investigation. This was not a decision made according to the "beyond a reasonable doubt" standard. Thus, the jury could both conclude that the deputy disregarded the other suspects as much due to a lack of evidence pointing to them, as due to any belief in Ms. Weyrauch's guilt, and that this decision carried little significance to the judgment they were charged with making. As the Supreme

Court has observed, "police officers' opinions on guilt have low probative value because their area of expertise is in determining when an arrest is justified, not in determining when there is guilt beyond a reasonable doubt." *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267, 276 (2008).

The deputy's statements also were also unrevealing. The statements did not inform the jury of anything they did not already know. The vast majority of criminal cases brought to trial are initiated by an arrest after the conclusion of an investigation. This arrest occurs because an officer ultimately focused his investigation on one person and obtained sufficient evidence to establish, in his judgment, probable cause for the arrest. Thus, the very act of an arrest indicates an officer's negative judgment on a defendant's culpability. *Any* statement informing the jury that a defendant was arrested, charged, and brought to trial implies that the defendant is guilty. Each of these actions requires an official to make some judgment as to the defendant's guilt. And it is inescapable that in every trial jurors are aware, consciously or subconsciously, of this routine exercise of judgment by these officials.

In this case, the deputy's statements simply acknowledged this recognition that an officer makes judgments of the defendant as she conducts an investigation. It is difficult to see how the deputy's testimony would be notable to a jury. Any reasonable juror would expect that the deputy concluded his investigation after he received a confession. Consequently, we can expect that the deputy's statement had little impact on the jurors' minds. Ms. Weyrauch gives us no reason to conclude otherwise.

Finally, the deputy's testimony was unobjectionable because it was given in response to Ms. Weyrauch's defense. Ms. Weyrauch's trial counsel opened the door to the deputy's investigatory thought process when he cross examined the deputy regarding his failure to investigate other suspects. RP 45-47. The jury would be aware that the deputy's purpose in making his statements was to refute this defense rather than provide an opinion of Ms. Weyrauch's guilt. Also, since Ms. Weyrauch's counsel opened the door to the topic, it is unlikely that the trial court would have granted an objection and denied the deputy an opportunity to respond. To do so would have been patently unfair to the prosecution.

The fact that the Ms. Weyrauch's counsel did open the door to this questioning could be seen as further evidence of his ineffective representation. But it is clear that pursuing this line of questioning was a strategic decision by counsel. Ms. Weyrauch's attorney apparently decided to attempt to throw doubt upon the deputy's investigation as a means to establish her innocence. This strategy did result in the deputy noting that Ms. Weyrauch's confession sealed his investigation. Still, pursuit of this strategy was reasonable in light of the rest of the attorney's defense. The record reveals that Ms. Weyrauch and her counsel were relying on her denial of making a confession and the possibility that Mr. Thayer had committed the crimes to establish reasonable doubt. Considering this defense, Ms. Weyrauch's counsel could reasonably conclude that his client had only something to gain by his attempt to throw doubt on the thoroughness of the deputy's investigation into the source of the forgery. Any doubt about the deputy's thoroughness supported Ms. Weyrauch's theory that Mr. Thayer might be the guilty party. And the risk of this strategy leading the deputy to testify that he relied on her confession carried little significance when Ms. Weyrauch would be denying that she made the confession at all.

In a parallel argument, Ms. Weyrauch claims that the deputy's testimony was a comment on her credibility and her counsel was remiss for not objecting on this basis as well. The state fails to understand how the deputy's statements lead the jury to inevitably conclude that "any contrary claim would necessarily be a lie." Reasonably, a jury could conclude that *the deputy* would believe that any contrary claim to his statement would be a lie. Because witnesses are instructed to tell the truth, this is a reasonable conclusion of any witness. But the deputy did not imply that he believed Ms. Weyrauch was untruthful. He spoke only to the basis for his decision to conclude his investigation and arrest Ms. Weyrauch. His testimony neither directly nor indirectly addressed her credibility when she later denied confessing.

If Ms. Weyrauch is arguing that the deputy's testimony implicitly reveals his judgment that the confession was reliable, there is no reason that this opinion should be excluded. The implication of the statement is that Ms. Weyrauch is *truthful*, not untruthful. Moreover, this inference, at best, regards Ms. Weyrauch's credibility in making her confession, which she argued never occurred, not her credibility at trial.

In the final analysis, Ms. Weyrauch's counsel's failure to object to the deputy's testimony was not an "egregious circumstance" requiring reversal of her conviction. If the deputy's testimony did reveal his beliefs about her guilt, it was not a sufficiently direct comment on her culpability to be objectionable. Even in light of his statements, the truth of the confession and Ms. Weyrauch's guilt were still left to the jury to determine. Ms. Weyrauch has not shown the contrary. Consequently, the representation provided by Ms. Weyrauch's counsel fails the first prong of the *Strickland* standard. As the state will next show, it fails the second standard as well.

3. Ms. Weyrauch Fails To Establish That Any Deficiency In Representation Was Prejudicial.

Ms. Weyrauch asserts but never explains, let alone establishes, why the deputy's testimony "bolsters its key evidence." Appl. Br. at 22. The testimony only reiterated the confession that was already in evidence. And it is unlikely that the jury placed a higher significance on this confession because it was one of the reasons the deputy gave for ignoring other possible suspects. Despite his testimony, the jury could still conclude that the confession did not occur or that it wasn't reliable. The deputy's

testimony regarding his investigation decisions would not influence the jury's consideration of those possibilities. The testimony simply established that the deputy did not believe it valuable to spend any more time and resources towards gathering additional evidence. This decision to move the case to the next step in the criminal justice system would not necessarily affect the jury's conclusions, based upon a beyond a reasonable doubt standard, at the end of that system. To the extent the testimony did reveal the deputy's judgment as to his belief in Ms. Weyrauch's ultimate guilt or her reliability of the confession, the jury did not need the testimony to come to this conclusion. Even without the deputy's statement, the jury would expect a law enforcement officer to conclude an investigation after receiving what he believed was a reliable confession. Surely, the jury's response to the testimony was a yawn, and not raised eyebrows. Thus, Ms. Weyrauch has failed to show a reasonable probability that the trial outcome would have been different had counsel objected to the testimony. Her argument fails to establish either the deficient representation or prejudice standards of the *Strickland* holding.

C. THE CRIMES OF IDENTITY THEFT AND FORGERY DO NOT CONCERN THE SAME CRIMINAL CONDUCT.

In her third challenge, Ms. Weyrauch argues that the sentencing court erred when it added an offender point for each of her offenses because she was charged with two crimes that derive from the same criminal conduct. The challenge lacks merit.

This Court reviews for abuse of discretion a trial court's determination of whether two crimes constitute the "same criminal conduct." *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). Under the same criminal conduct test, two or more offenses are counted as one crime only if they (1) have the same objective criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589. "If any one element is missing, multiple offenses cannot be said to encompass the same criminal conduct, and they must be counted separately in calculating the offender score." *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Reversal of a sentence is warranted only for a clear abuse of discretion or a misapplication of the law. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

1. Ms. Weyrauch Waived Her Same Criminal Conduct Claim By Not Raising It At Sentencing.

Initially, the state observes that Ms. Weyrauch neither requested the sentencing court make a same criminal conduct determination, nor did she challenge the trial court's calculation of her offender score. In fact, the court found that the sentence was agreed upon by Ms. Weyrauch. 9/3/08 RP 4. In so doing, Ms. Weyrauch waived her right to raise the same criminal conduct issue for the first time on appeal. *State v. Wilson*, 117 Wn.App. 1, 21, 75 P.3d 573 (2003). Accordingly, this court should dismiss this argument as contrary to RAP 2.5(a).

2. RCW 9.35.020(6) Supersedes RCW 9.94A.589.

Her challenge fails on substantive grounds as well. The "same criminal conduct" rule today is a statutory creation limiting punishment for crimes that amount to the same criminal act. Under RCW 9.94A.589, "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." This requirement, however, is subject to abrogation by other statutes. As a general rule, if two statutes conflict and cannot be harmonized, the "more specific statute supersedes a general

statute." *State v. Conte*, 159 Wn.2d 797, 810, 154 P.3d 194, 200 (2007). Where the provisions of the identity theft statute and the same criminal conduct statute conflict, the identity theft statute provisions control since Ms. Weyrauch was tried for violating that statute. Under RCW 9.35.20(6),

"Every person who, in the commission of identity theft, shall commit any other crime may be punished therefore as well as for the identity theft, and may be prosecuted for each crime separately."

This requirement is in direct conflict with the provisions of RCW 9.94A.589. The requirements of that statute mandate that a court punish persons committing identity theft and another crime for only one of the two crimes. The same criminal conduct statute counts the crimes as one for sentencing purposes. This conflicting result reveals the Legislature's intent to restrict application of RCW 9.94A.589 when a person is charged with committing identity theft crimes. Thus, the trial court was prevented from applying the same criminal conduct rule to Ms. Weyrauch's two offenses. The court was required to impose sentences for both crimes and did not err when it did so.

3. The Same Criminal Conduct Requirements Do Not Apply To The Crimes Of Identity Theft And Forgery

Even if this court were to apply RCW 9.94A.589 to Ms.

Weyrauch's two offenses, these offenses do not derive from the same criminal conduct. In order for RCW 9.94A.589 to apply to both offenses, the offenses must involve the same victim. This is not the case here.

To establish second degree identity theft, the State had to prove that Ms. Weyrauch knowingly used Ms. Roger's means of identification with the intent to commit a crime. RCW 9.35.020(1). To establish a forgery violation, the state needed to prove that Ms. Weyrauch, with intent to injure or defraud, (a) falsely made, completed, or altered a written instrument or, (b) possessed, uttered, offered, disposed of, or put off as true a written instrument which she knew to be forged. With both these crimes, Ms. Weyrauch's intent was to both defraud the officer and to avoid arrest on her outstanding warrant.

The victim of Ms. Weyrauch's commission of identity theft was Ms. Rogers. RCW 9.35.005(5) defines a victim of identify theft as "a person whose means of identification or financial information has been used or transferred with the intent to commit,

or to aid or abet, any unlawful activity." Ms. Weyrauch stole Ms. Rogers' identity for the purpose of avoiding the outstanding warrant. Ms. Rogers suffered the consequences of that theft when her driver's license was suspended. She was the sole victim of this crime. According to the definition of "victim" under 9.35.005, the state was not a victim of Ms. Weyrauch's identity theft.

In contrast, the forgery violation had two victims. Ms. Rogers was the victim of the forgery since the state suspended her license as a result of the forged ticket. The state is also a victim of this crime. Not only did the forged ticket permit Ms. Weyrauch to escape arrest for the outstanding warrant, but it allowed Ms. Weyrauch to avoid payment of the traffic fine causing financial loss for the State. See *State v. Tobin*, 161 Wn.2d 517, 530-531, 166 P.3d 1167, 1173 (2007) (the State is a victim when it suffers financial costs due to a defendant's illegal conduct). Thus, the two crimes fail the second prong of the same criminal conduct test. Because the offenses involved different victims, they must be counted separately. See *State v. Baldwin*, 150 Wn.2d 448, 457, 78 P.2d 1005 (2003). (offenses are not factually the same if they harm different victims); see also *State v. Davis*, 90 Wn.App. 776, 954 P.2d 325 (1998) (two crimes cannot be the same criminal conduct if

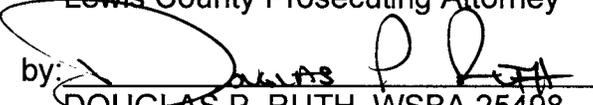
one involves two victims and the other involves only one). Accordingly, this court should conclude that the crimes did not constitute the same criminal conduct and that the trial court's calculation of Ms. Weyrauch's offender score was correct.

CONCLUSION

The trial court did not err. After Ms. Weyrauch waived a 3.5 hearing, it was not required to review the voluntariness of her statements. Similarly, it was not required to review the same criminal conduct of identity theft and forgery. The statutory same criminal conduct provisions do not apply to identity theft. As well, the requirements do not apply where the crimes have different victims. And, Ms. Weyrauch waived this argument. Finally, Ms. Weyrauch's counsel appropriately did not object to the arresting deputy's statements. Even if his failure to do so was improper, the statements were not prejudicial. For these reasons, this court should affirm Ms. Weyrauch's conviction and sentence.

RESPECTFULLY submitted this 18th day of May, 2009.

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Lewis County Prosecuting Attorney

by: 
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Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
Respondent,)
vs.)
MELISSA WEYRAUCH,)
Appellant.)
_____)

NO. 38262-6

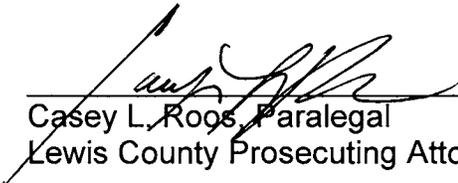
DECLARATION
MAILING

COURT OF APPEALS
DIVISION II
09 MAY 20 AM 11:40
STATE OF WASHINGTON
BY *Casey L. Roos*
DEPUTY

Ms. Casey Roos, paralegal for Lori Smith, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On May 18, 2009, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

John A. Hays, Esq.
1402 Broadway Suite 103
Longview WA 98632

DATED this 18th day of May 2009, at Chehalis, Washington.



Casey L. Roos, Paralegal
Lewis County Prosecuting Attorney Office