

COURT OF APPEALS  
MASON COUNTY  
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40856-2-II

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

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State of Washington  
Respondent

v.

**ANGELINA C. MATTEUCCI**  
Appellant

40856-2-II

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On Appeal from the Superior Court of Mason County

Cause No. 09-1-00450-1

The Honorable Toni A. Sheldon

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**REPLY BRIEF**

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## II. ARGUMENTS IN REPLY

### 1. THE INDEPENDENT EVIDENCE DID NOT ESTABLISH THE CORPUS DELICTI.

Matteucci challenged the sufficiency of the evidence independent of her own incriminating statements to establish that any crime occurred.

The State acknowledges that the Court will address a corpus delicti challenge in the context of an ineffectiveness claim. Brief of Respondent (BR) 9.

In order to sustain a criminal conviction against a claim of insufficiency of the evidence, where the evidence included an admission by the defendant, the record must show that the State proved “every element of the crime charged by evidence independent of the defendant’s statement.” *State v. Dow*, 168 Wn.2d 243, 254, 227 P.3d 1278 (2010). Independent evidence must corroborate that the specific crime with which the defendant has been charged actually happened. *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006). The evidence must independently corroborate the crime the defendant described. *Brockob*, 159 Wn.2d at 331.

The State mischaracterizes Matteucci’s argument as claiming proof of the corpus delicti requires the State to prove identity of the perpetrator. BR 1. The State then argues at length against this straw man. BR 10-13.

But Matteucci never claimed this. She clearly states that the identity of the perpetrator is not required to establish corpus delicti. Appellant's Brief (AB) 15.

What Matteucci asserts is the State did not produce evidence that these cards were used by anyone on the dates complained of or at any other time. Competent evidence of that would consist of properly authenticated copies of bank records showing the alleged transactions.

Moreover, the State is incorrect that it did not need to prove the accused's mental state. BR 13. Even accepting the Gairnses' unsupported hearsay that bank statements exist that would have shown transactions if the prosecutor had produced them, the State failed to overcome the overwhelming evidence that the mere existence of transactions standing alone establishes a crime. There is no evidence, other than Matteucci's own statement sufficient in this particular case to establish that someone obtained unauthorized control or exerted unauthorized control over anything.

The State is correct that it is possible to establish the corpus delicti with circumstantial evidence. *State v. Marcy*, 189 Wn. 620, 623, 66 P.2d 846 (1937). But there must be sufficient independent evidence to "support a logical and reasonable deduction" that the particular crime charged occurred and that the defendant is the one who did it. *Id.* Ultimately,

substantial evidence must establish guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-62, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

The State concedes that the case law requires proof of all elements. BR 12. And the State further concedes that this includes mental state. BR 13. But the State distinguishes Matteucci's authorities on spurious grounds. BR 14. It is immaterial whether or not the charged offense can be characterized as "victimless." BR 14. The question is whether or not the same conduct can be regarded as innocent activity or criminal conduct depending on the actor's state of mind. If criminal intent is an essential element, then it is part of the corpus delicti, and the State must prove it with evidence independent of the accused's own admissions. *State v. Bockrob*, 159 Wn.2d 311, 150 P.3d 59 (2006).

That is the case here. Angelina used Jessica's cards and PINs all the time. Other people used them from time to time. Therefore, even if the State had proved they were used on this occasion, there was simply no independent evidence that this was anything out of the ordinary.

The State fills pages 11 and 15 of its brief with a recitation of elements, proof of which would constitute the corpus delicti of a crime in this case. But the State does not offer a single cite to the record for actual testimony establishing any of these things. Instead, the State again points to unsubstantiated hearsay from Jessica and Marianne Gairns that certain

activity occurred on their accounts, and their allegations that this activity was criminal. BR 15. But allegations are not proof. The State points to nothing in the way of actual evidence other than Matteucci's own statements.

The State simply fails to meet Ms. Matteucci's challenge to the sufficiency of the evidence. The Court should reverse and dismiss.

2. THE EVIDENCE WAS INSUFFICIENT  
TO SUPPORT THE CONVICTIONS.

The State charged Matteucci with two counts of property theft for stealing two debit cards from a box in Jessica's bedroom, and three counts of identity theft for taking or using the associated PIN numbers to perform three unauthorized transactions with those cards.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *Thomas*, 150 Wn.2d at 874. The State correctly states the nature of Matteucci's burden in sustaining a sufficiency challenge. BR 16. Matteucci has met this burden.

The standard for sufficiency of the evidence is pretty broad, but it is not non-existent. The State must prove every essential fact beyond a reasonable doubt. *Winship*, 397 U.S. at 364. A reviewing court need not be persuaded beyond a reasonable doubt, but it must find in the record the necessary quantum of proof. Accordingly, this Court must find that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107 (2000), *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." Guess, speculation, and conjecture are not substantial evidence. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). The evidence here was insufficient by any standard.

The State failed to document any transactions, authorized or otherwise. Officer Pentz testified that he had seen bank records. RP 67. But they were never produced. The State asserted the documentation was withheld to protect the privacy of the complaining witnesses. RP 233-34. But, if you are going to initiate a criminal prosecution against someone, you cannot claim a privacy interest in the only independent evidence establishing that a crime may in fact have occurred.

Besides that, the State did not produce any evidence supporting its theory of the case. Assuming the jury did not believe any of the defense

witnesses, the State failed to make out a coherent case for how the cards and PIN numbers were stolen. Looking solely at the testimony of the State's witnesses, Jessica kept her cards in her purse. RP 34, 52, 53, 62. There is simply no evidence (except for Matteucci's statement) that Jessica ever left any cards in the box in the bedroom from which Matteucci supposedly stole them.

The State is also wrong in believing the evidence is sufficient without proof of criminal intent. What made the alleged acquisition of these particular ATM cards criminal was the accompanying intent to use the information to commit a crime. CP 50; RP 211. The State did not prove this. Even supposing the jury correctly guessed that Matteucci somehow removed from a box cards that were in Jessica's purse, the State offered no evidence that her intent in doing so was different from her intent all the other times she availed herself of Jessica's ATM cards. Rather, the evidence was overwhelming that Matteucci reasonably relied on the honor system of reciprocity and eventual reimbursement that seemed to be working just fine.

At best, the evidence shows that Matteucci knowingly obtained, etc. financial information of Jessica Gairns and Marianne Gairns. The evidence simply does not prove beyond a reasonable doubt that she had any more intent to commit a crime on this occasion than she did on any of

the myriad other occasions when she had knowingly obtained the same information.

A conviction based solely on a confession must be reversed for lack of evidence. *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). The Court should reverse the convictions and dismiss the prosecution with prejudice.

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

The State claims that testimony — not from Matteucci, but from Jessica Gairns herself — about the personal history of these two women was properly excluded because it had not the slightest relevance. BR 20. This is wrong. This testimony would have enhanced Matteucci's defense by providing a rational explanation for her otherwise bizarre claim that Jessica just happened to be in the habit of lavishing money on her for no apparent reason.

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). A defendant's right to an opportunity to present a defense, including the right to examine the State's witnesses and to offer testimony, is basic in our system of jurisprudence. *Id.* "The right to

confront and cross-examine adverse witnesses is [also] guaranteed by both the federal and state constitutions.” *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002), citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

All relevant evidence is admissible. ER 402. And all evidence having any tendency to make the existence of a material fact more or less probable is relevant. ER 401. The relevance threshold is extremely low. *Darden*, 145 Wn.2d at 621. And “the more essential the witness is to the prosecution’s case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters.” *Darden*, 145 Wn.2d at 619. The general rule is that facts tending to establish a party’s theory of the case are always relevant. *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987), citing *State v. Mak*, 105 Wn.2d 692, 703, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986).

The State now concedes (without conceding that it is doing so) that the trial court erred in granting the State’s motion to exclude the evidence under ER 404(b). BR 19. The State wisely abandons any claim that the evidence is objectionable on any sort of character evidence grounds. Instead, the State now claims that the evidence is inadmissible under the relevance rules, ER 401, 402, 403. This is wrong, too.

Evidence that Matteucci engaged in sexual activity with Gairns that left Matteucci seriously ill and Gairns feeling obligated is evidence of an objective fact that is relevant to the defense. And even if it were evidence of character, it was admissible as “a pertinent trait of character of the victim of the crime offered by an accused... .” ER 404(a)(2).

But this evidence was not offered to denigrate Jessica or attack her character. Rather, it was highly relevant to Matteucci’s defense. It is a defense to a charge of theft that the property was “appropriated openly and avowedly under a claim of title made in good faith,” even though the claim turns out to be untenable. RCW 9A.56.020(2)(a).

The State claims this evidence was more prejudicial than probative. BR 21. This is wrong.

If evidence is sufficiently relevant, the defendant’s right to defend trumps even the most compelling State’s interest in suppressing the evidence. *State v. Jones*, 168 Wn.2d 713, 720-721, 230 P.3d 576 (2010). Moreover, unfair prejudice results where evidence is likely to “arouse an emotional response rather than a rational decision among the jurors.” *Rice*, 48 Wn. App. at 13, quoting *State v. Kitchen*, 46 Wn. App. 232, 250, 730 P.2d 103 (1986).

The fact that the evidence was emotionally charged in addition to being rationally relevant does not make it inadmissible. This evidence

tended to show that Jessica was not, as the prosecution presented her, simply a nice person and good friend whose generosity was criminally abused, but that there was a rational explanation for her apparent largesse sufficient to refute the intent element of the crime. It tended to corroborate Matteucci's claim that she genuinely believed Gairns consented to her using the cards and that the two friends would work things out as they always did.

*Not Harmless:* The State does not claim this error was harmless, and clearly it was not. This was a close verdict. CP 27, 28. If the jury had known about this shared history, one or more of them likely would have entertained a reasonable doubt whether Matteucci might have been telling the truth when she said she using the cards on this particular occasion did not seem like any big deal.

Because this evidence was highly relevant to Matteucci's defense, no degree of prejudice could justify excluding it. Certainly, the fact that it may have subjected Jessica to the disapproval of some jurors did not outweigh its probative value. Reversal is required.

4. THE OFFENSES CONSTITUTED  
SAME CRIMINAL CONDUCT.

Matteucci challenged the court's failure to consider whether the alleged conduct constituted same criminal conduct in the context of an

ineffective assistance of counsel claim. *See, State v. Saunders*, 120 Wn. App. 800, 825, 86 P.3d 232 (2004).

The State correctly recites the individual violations the prosecutor was able to charge. BR 22. But the existence of separate offenses is an essential premise of the same criminal conduct doctrine. “[I]f 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.” RCW 9.94A.589(1)(a).

Crimes constitute the “same criminal conduct” for purposes of calculating the offender score when each is committed (1) with the same criminal intent, (2) at the same time and place, and (3) against the same victim. RCW 9.94A.589(1)(a). The necessary concurrence of intent, time, place, and victim exists if each offense was part of a recognizable scheme or plan and the defendant did not substantially change the nature of his or her “criminal objective” from one offense to the other. *State v. Boze*, 47 Wn. App. 477, 480, 735 P.2d 696 (1987). The focus is on how intimately related the crimes are, whether there was a change in the criminal objective, and whether one crime furthered the other. *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990); *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987).

By that standard, the sentencing court may well have found that the taking of each card and the associated transactions constituted a single scheme in which the “criminal objective” did not substantially change. The objective was to get money out of the accounts. Taking the card certainly facilitated taking the mone; taking the PIN facilitated using the card to facilitate taking the money; and visiting multiple ATM’s was for the sole or identical purpose of taking the money. If Radford could have done this with one stop, he would have.

The language of the identity theft statute does not preclude consideration of same criminal conduct. It says that each crime may be punished separately, not that it must be. RCW 9.35.020(6). This is not an anti-merger clause and it does not indicate any legislative intent to nullify the usual provisions of the Sentencing Reform Act.

Therefore, the court had the discretion to consider a same criminal conduct argument, and it was both deficient and prejudicial for trial counsel not to have asked the court to do so.

5. THE SENTENCING COURT  
ERRONEOUSLY DENIED DOSA.

The State claims the sentencing court acted within its discretion in ignoring the statutory DOSA criteria and instead imposing fictitious

eligibility requirements invented by the prosecutor. BR 26. This is wrong.

The discretion of judges under the SRA is considerable but not unlimited. It is constrained by the strictures of the statute and the principles of due process. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). Moreover, “an offender may always challenge the procedure by which a sentence was imposed.” *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). That applies equally to DOSA.

The Legislature has determined that a treatment alternative under DOSAS is appropriate if the offender has a chemical dependency that has contributed to the offense. RCW 9.94A.607(1). The statutory conditions are set forth at RCW 9.94A.660(1)(a)-(g). Refusing to consider an alternative sentence for a particular class of offenders other than those authorized by the SRA is also forbidden and is a per se abuse of discretion. *Grayson*, 154 Wn.2d at 342.

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

9.94A.660(1)(g). The court included Matteucci in a spurious class of offenders — created by the prosecutor — who are ineligible for DOSA because they did not plead guilty. In reaching this conclusion, the court violated RCW 9.94A.500, which, for a standard range sentence, precludes the court from relying on any information other than what is admitted, acknowledged, or proved at trial or at sentencing. RCW 9.94A.530(2); *Grayson*, 154 Wn.2d at 338.

Specifically, the court ignored its statutory obligation to consider any risk assessment and presentence reports. RCW 9.94A.500(1). The court arbitrarily ignored the DOSA report as inadequate. The court also failed to consider the statutory mandate to consider Matteucci's criminal history. RCW 9.94A.500(1). Instead, the court simply ignored the fact that Matteucci was a first-time offender. A first time offender sentence may be considered unless the defendant is convicted of a sex offense or a drug offense.<sup>1</sup> Matteucci satisfied all the requisite conditions. RCW

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<sup>1</sup> In sentencing a first-time offender the court may waive the imposition of a sentence within the standard sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses. RCW 9.94A.650(2). The court may impose up to one year of community custody unless treatment is ordered, in which case the period of community custody may include up to the period of treatment, but shall not exceed two years. RCW 9.94A.650(3).

9.94A.650(1)(a). Nevertheless, the court did not even mention the possibility of a first-time waiver. This was an abuse of discretion.

The court also exceeded the scope of its sentencing authority by hearing testimony from a completely extraneous officer regarding events totally outside the record of this case, over a timely defense objection.<sup>2</sup> The court acknowledged that it was unlawful to rely on this evidence, but went ahead and did it anyway.

Ms. Matteucci asks the Court to vacate the sentence and remand for resentencing.

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

The State defends the restitution award based on a stipulation to the admission of bank records that the prosecutor never followed up on. BR 27. This left only unsupported hearsay as evidence of the loss.

The rules of evidence do not apply at sentencing. ER 1101(c)(3). But restitution evidence must conform to due process sufficiently that the defendant has an opportunity to refute it, and must be demonstrably reliable. *State v. Pollard*, 66 Wn. App. 779, 784-785, 834 P.2d 51, review denied, 120 Wn.2d 1015 (1992).

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<sup>2</sup> Where, as here, no victim appears at sentencing, the court may hear argument from an “investigative law enforcement officer.” RCW 9.94A.500(1).

The prosecutor elected not to introduce the bank records into evidence. This choice resulted in the absence of any reliable evidence establishing alleged losses by any alleged victims. The Court should vacate the restitution award.

7. MATTEUCCI RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Despite myriad due process violations that went unremarked, the State claims Matteucci received effective representation.

The Court gives considerable deference to counsel's performance and begins by presuming it was effective. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). And performance is not deficient if it can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

But counsel's representation here cannot be defended on either of these grounds. Counsel rendered constitutionally deficient performance in failing to challenge the corpus delicti. This would have kept Matteucci's statements out of court. As discussed, without those incriminating statements, the State could not mount even the semblance of a case.

Failure seek relief is both defective and prejudicial if it appears it likely would have succeeded. *State v. Rainey*, 107 Wn. App. 129, 136, 28 P.3d 10 (2001). That is the case here. Counsel was deficient in not

challenging the offender score and at least asking the court to consider “same criminal conduct.”

At minimum, a criminal defendant has the right to expect her counsel to preserve reversible issues for review. *State v. Padilla*, 69 Wn. App. 295, 300, 846 P.2d 564 (1993). To the extent counsel did not do that here with a timely objection, his representation was deficient and prejudicial.

**III. CONCLUSION**

For the foregoing reasons, Ms. Matteucci asks the Court to reverse and dismiss the convictions for insufficient evidence. At minimum, the Court should address Matteucci’s assignment of error to the offender score and remand for resentencing.

Respectfully submitted this 14<sup>th</sup> day of February, 2011.



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**CERTIFICATE OF SERVICE**

Jordan McCabe certifies that on February 14, 2011, she deposited in the U.S. mail, first class postage prepaid, a copy of this Reply Brief addressed to:

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