

No. 40856-2

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

V.

ANGELINA C. MATTEUCCI, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon

No. 09-1-00450-1

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>STATE’S COUNTERSTATEMENT OF ISSUES TO PERTAINING APPELLANT’S ASSIGNMENTS OF ERROR</u>	1
B. <u>STATEMENT OF CASE</u>	2
C. <u>ARGUMENT</u>	8
1. The Prosecution Did Establish the Corpus Delictit.....	8
2. The State Presented Sufficient Evidence to Find the Defendant Guilty of Each Offense for Which the Defendant Was Convicted by the Jury.....	16
3. The Defendant Was Not Restricted From Presenting Any Defense That Was Supported by Law and Evidence.....	18
4. The Trial Court Correctly Calculated the Defendant’s Offender Score and Acted Within the Court’s Discretion When Denying the Defendant the Benefit of a DOSA Sentencing Alternative.....	21
a. The Trial Court Correctly Applied the Same Criminal Conduct Doctrine and Correctly Calculated the Offender Score.....	21
b. The Trial Court Correctly Denied the Defendant the Benefit of a DOSA Sentencing Alternative.....	25
5. The Restitution Award Was Correct and Was Supported by the Evidence.....	27

State’s Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

6. Defendant Received Effective Assistance of
Counsel As Defendant Fails to Show
Deficient Performance.....27

 a. Corpus Delicti.....27

 b. Offender Score.....28

D. CONCLUSION..... 28

State’s Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

TABLE OF AUTHORITIES

Page

Table of Cases

State Cases

<i>City of Bremerton v. Corbett</i> , 106 Wn.2d 569, 723 P.2d 1135 (1986).....	10, 13, 14
<i>In re Pers. Restraint of Holmes</i> , 69 Wn. App. 282, 848 P.2d 754 (1993), overruled on other grounds by, State v. Calle, 125 Wn. 2d 769, 888 P.2d 155 (1995).....	24
<i>In re Welfare of Sego</i> , 82 Wn.2d 736, 513 P.2d 831 (1973).....	17, 18
<i>Kappelman v. Lutz</i> , 167 Wn.2d 1, 217 P.3d 286 (2009).....	19
<i>State v. Allen</i> , 150 Wn. App. 300, 207 P.3d 483 (2009), review denied, ___ P.3d ___ (Dec. 1, 2010, No. 83278-1).....	23, 28
<i>State v. Angulo</i> , 148 Wn. App. 642, 200 P.3d 752 (2009), review denied, 236 P.3d 207 (July 9, 2010, No. 82850-4).....	12, 13, 14
<i>State v. Aten</i> , 130 Wn.2d 640, 927 P.2d 210 (1996).....	9, 10, 13, 16
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	9, 10, 12, 13, 14, 16
<i>State v. Burns</i> , 114 Wn.2d 314, 788 P.2d 531 (1990).....	25
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	17
<i>State v. Carver</i> , 113 Wn.2d 591, 781 P.2d 1308 (1989), modified by State v. Carver, 113 Wn.2d 591, 789 P.2d 306 (1990).....	17

State's Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

State v. Cirkovich, 35 Wn. App. 134, 665 P.2d 440 (1983).....19, 18

State v. Costich, 152 Wn.2d 463, 98 P.3d 795 (2004).....18

State v. Cubias, 155 Wn.2d 549, 120 P.3d 929 (2005).....23

State v. Dow, 168 Wn.2d 243, 227 P.3d 1278 (2010).....12

State v. Edwards, 5 Wn. App. 852, 490 P.2d 1337 (1971),
review denied, 80 Wn.2d 1004 (1972).....16, 18

State v. Frodert, 84 Wn.App. 20, 924 P.2d 933 (1996),
review denied, 131 Wn.2d 1017, 936 P.2d 417 (1997).....19

State v. Garcia-Martinez, 88 Wn. App. 322, 944 P.2d 1104 (1997),
review denied, 136 Wn.2d 1002, 966 P.2d 902 (1998).....26

State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005).....26, 27

State v. Greiff, 141 Wn.2d 910, 10 P.3d 390 (2000).....9

State v. Hamrick, 19 Wn. App. 417, 576 P.2d 912 (1978).....13, 14

State v. Johnson, 90 Wn. App. 64, 950 P.2d 981 (1998).....21

State v. Lord, 161 Wn.2d 276, 165 P.3d 1251 (2007).....19

State v. Lung, 70 Wn.2d 365, 423 P.2d 72 (1967).....10, 12, 13, 16

State v. Meyer, 37 Wn.2d 759, 226 P.2d 204 (1951).....10, 12, 14

State v. Nesrallah, 66 Wn.2d 248, 401 P.2d 968 (1965).....16, 18

State v. Neslund, 50 Wn. App. 531, 749 P.2d 725,
review denied, 110 Wn.2d 1025 (1988).....11

State v. Page, 147 Wn. App. 849, 199 P.3d 437 (2008),
review denied, 166 Wn.2d 1008, 208 P.3d 1125 (2009).....9, 10, 28

State’s Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

State v. Pineda, 99 Wn. App. 65, 992 P.2d 525 (2000).....9, 10, 14

State v. Ray, 130 Wn.2d 673, 926 P.2d 904 (1996).....10

State v. Rice, 48 Wn. App. 7, 737 P.2d 726 (1987).....21

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992).....17

State v. Solomon, 73 Wn. App. 724, 870 P.2d 1019 (1994),
review denied, 124 Wn.2d 1028, 883 P.2d 327 (1994).....11

State v. Theroff, 25 Wn. App. 590, 608 P.2d 1254,
aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).....17

State v. Tobin, 132 Wn. App. 161, 130 P.3d 426 (2006),
aff'd, 161 Wn.2d 517, 166 P.3d 1167 (2007).....27

State v. Vike, 125 Wn.2d 407, 885 P.2d 824 (1994).....24

State v. Walker, 143 Wn. App. 880, 181 P.3d 31 (2008).....24, 25

State v. Walton, 64 Wn. App. 410, 824 P.2d 533,
review denied, 119 Wn.2d 1011, 833 P.2d 386 (1992).....17

State v. Whalen, 131 Wn. App. 58, 126 P.3d 55 (2005).....14

Statutes

RCW 9.35.020(1).....3, 11, 15, 25

RCW 9A.08.020.....11, 15

RCW 9A.56.040(1)(c).....3,11, 15, 25

RCW 9.94A.589.....23

RCW 9.94A.660.....26

State’s Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Rules and Regulations

ER 401.....19
ER 403.....20
ER 404(b).....5, 6

Other Authorities

5 Karl B. Tegland, Washington Practice, *Evidence Law
and Practice* § 106, at 250 (2d ed.1982).....21

State’s Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

A. STATE'S COUNTERSTATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the corpus delicti of a property crime offense is established when the prosecution presents prima facie evidence that the crime was committed by someone, or whether the corpus delicti also requires that the identity of the perpetrator also be proved?
2. Whether the intent element of a property crime may be inferred by the facts and circumstances in order to establish corpus delicti or whether the intent must be proved by separate evidence prior to admission of defendant's statements?
3. Whether, once prima facie evidence that a property crime was committed by someone has been established, the defendant's admissions may be considered by the jury for the purpose of establishing the identity of the defendant as the perpetrator of the crime?
4. Whether when considering a challenge to sufficiency of the evidence to sustain a jury trial conviction the reviewing court is required to view the evidence in the light most favorable to the prosecution and to grant to the prosecution the benefit any logical inferences to be drawn from the evidence?
5. Whether the defendant was denied the opportunity to present defenses where potentially inflammatory, prejudicial evidence that was collaterally related to a defense theory was excluded by the court and where adequate other, non-prejudicial evidence was presented to the jury to prove the same point?
6. Whether the trial court may properly exclude evidence proffered by the defendant that is substantially more prejudicial than probative and is of doubtful relevance when there is other admissible evidence available to the

State's Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

defendant, and which in fact was presented to the jury, that adequately proves the same point?

7. Whether crimes that involve different victims or that occur in different times or places constitute the same or different criminal conduct for the purposes of sentencing?
8. Whether the trial court may in its discretion deny the defendant a DOSA when the defendant presents insufficient information to the court in support of the DOSA or where the court after consideration of the facts and circumstances does not find that the DOSA would be a benefit to the defendant or to the community?
9. Whether the court properly exercises discretion when it orders restitution to victims when the restitution is directly related to crimes of conviction committed by the defendant and the amount of the award is supported by evidence in the record and is agreed to by the defendant at the time of sentencing?
10. Whether defendant receives ineffective assistance of counsel when counsel fails to raise frivolous objections or otherwise fails to raise objections that are not supported by law or evidence?

B. STATEMENT OF THE CASE

The defendant, Angelina C. Matteucci, was charged by information with five offenses. (CP 57-59). The jury returned guilty verdicts for each offense. RP 243-245. The five charges are summarized as follows: 1) Ms. Matteucci wrongfully obtained or exerted unauthorized control over a bank card belonging to Marianne Gairns (in

State's Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

violation of RCW 9A.56.040(1)(c)); 2) Ms. Matteucci wrongfully obtained or exerted unauthorized control over a bank card belonging to Jessica Gairns (in violation of RCW 9A.56.040(1)(c)); 3) Ms. Matteucci used Marianne Gairns' pin number to take money from her Bank of America account by accessing a terminal at Mickey's Deli (in violation of RCW 9.35.020(1)); 4) Ms. Matteucci used Marianne Gairns' pin number to take money from her Bank of America account by accessing a terminal at Union 76 (in violation of RCW 9.35.020(1)); and, 5) Ms. Matteucci used Jessica Gairns' pin number to take money from her Peninsula Credit Union account by accessing a terminal at Fred Meyers (in violation of RCW 9.35.020(1)). CP 57-59, RP 24-198.

Jury trial of these charges commenced on March 10, 2010. RP 8.

The parties agreed to a "stipulation to the admissibility of certain bank records without bringing in the custodian or otherwise documenting the bank records further." RP 13.

Jessica Gairns testified that there was a \$200.00 withdrawal from her bank account that was completed without her knowledge or authorization and that the person who made the withdrawal would have had to have possessed her bank card (without her authorization) and would have had to have used her pin number (without her authorization).

RP 29-30, 52-54.

State's Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Marianne Gairns testified that there were two unauthorized withdrawals from her bank account. RP 56-58. She testified that the first withdrawal was from Mickey's Deli and that the second withdrawal was from a Union 76 gas station . RP 57-59. Each withdrawal was from her bank account and was completed without her knowledge or authorization, and the person who made each withdrawal would have had to have possessed her bank card (without her authorization) and would have had to have used her pin number (without her authorization) in the course of each withdrawal. RP 30, 58-60.

Detective Pentz examined the bank records and testified that Marianne Gairns' card had been used at Mickey's Deli to obtain money on one occasion and had been used at Union 76 to obtain money on a different occasion. RP 67. He testified that Jessica Gairns' card had been used once at the Fred Meyer's store at a Bank of America ATM. RP 69-70.

Evidence was presented that Ms. Matteucci had admitted these crimes. RP 70-91. Ms. Matteucci testified at trial and gave further evidence proving her guilt. RP 122-168, 181-186.

Ms. Matteucci sought to introduce evidence that the she and one of the victims in this case, Jessica Gairns, had once engaged in a sexual encounter contemporaneously with a third person and that this three-way

State's Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

sexual encounter had resulted in Ms. Matteucci contracting a sexually transmitted disease that then led to Ms. Matteucci developing cancer. RP 40-41. Ms. Matteucci proffered this evidence on the basis that it corroborated her exculpatory theory that in response to these circumstances Jessica Gairns then began to provide gifts and money to Ms. Matteucci, including use of her bank card, because Jessica Gairns felt guilty for giving Ms. Matteucci a sexually transmitted disease and cancer. RP 40-41. The defense proffered that the jury should know these alleged circumstances so that Ms. Matteucci could corroborate the reasonableness of her asserted belief that she had a reason to expect that, on some later occasion when the crimes were eventually discovered, Jessica Gairns would retroactively acquiesce to Ms. Matteucci's criminal acts. RP 41, 42.

Objecting on the basis of relevance, the prosecution asked the court to exclude testimony and other evidence in regard to the sexual episode, the sexually transmitted disease, or cancer. RP 38-39. The prosecutor then cited ER 404(b) and explained that "basically it would just be done to smear Ms. Gairns' reputation." RP 39, 42-43. The State emphasized the substantial prejudice and confusion of issues this proffered evidence would create, and the State objected again to relevance. RP 42-43. The State's position was that Ms. Matteucci could advance her theory

State's Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

without offering specifics about sexual episodes or sympathetic circumstances that would distract or prejudice the jury. RP 43. The State proffered that Jessica Gairns would “testify that they’re good friends.” RP 43.

The court granted the State’s motion in limine, excluding “any testimony – or mention – of a potential reason tied to a sexual encounter and/or venereal disease and/or that it’s allegedly led to a cancerous situation...” RP 44. The court’s ruling was “on the basis of relevance and on the basis of 404(b) evidence.” RP 44.

Ms. Matteucci presented three witnesses who each corroborated the defense assertion that the relationship between Ms. Matteucci and one of the victims, Jessica Gairns, was particularly close. RP 98-99, 104-105, 112-114.

The jury returned guilty verdicts on all five counts. RP 243-245.

Following conviction by jury trial, sentencing was before the court on April 5, 2010. RP 249. At the sentencing hearing, Ms. Matteucci first raised the issue of a DOSA sentencing alternative. RP 249. The prosecution objected. RP 249-251. Notwithstanding the prosecutor’s objection to a DOSA sentencing alternative, the court issued “an order for a community residential DOSA screen and presentence examination.” RP 253. Sentencing was continued to April 19, 2010. RP 253.

State’s Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

When the sentencing hearing was resumed on April 19, 2010, the court had in its possession a DOSA evaluate and considered the DOSA evaluation in regard to Ms. Matteucci's request for a DOSA. RP 256, 261. The court was not satisfied with the information provided in support of the DOSA and, therefore, again set the sentencing over for two additional weeks so that a more detailed DOSA report could be obtained and provided to the court. RP 261.

On May 11, 2010, the sentencing was again before the court, but was then continued to June 10, 2010. RP 263-264. On June 10, 2010, the sentencing resumed. RP 265. However, on June 10, 2010, the additional information in regard to the DOSA that the court requested had still not been provided to the court. RP 265-266.

At the sentencing hearing that occurred on June 10, 2010, the court heard the testimony of Detective Paul Campbell in regard to Ms. Matteucci's post-conviction conduct. RP 269-274. Ms. Matteucci had opportunity to cross examine the witness, but declined to do so. RP 274. Prior to hearing the witness's testimony, the court provided the following statements for the record:

I will make it extremely clear... that the real facts doctrine would preclude the court – and will preclude the court – from using the information of something that may have occurred after the events that are alleged in the information toward sentencing. Other than to assist the court in deciding whether the alternative that Ms.

State's Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Matteucci has requested is a viable one for her in that she would be successful at the program or had a – and had the additional factor of being a benefit to the community.

RP 269.

The only witness or other evidence provided by the defense was Ms. Matteucci, whose testimony was lacking detail in regard to facts that would support a DOSA sentencing alternative. RP 279. The court considered a variety of factors and rejected a DOSA sentencing alternative for Ms. Matteucci. RP 281-282.

The court ordered restitution to the victims in this case. RP 283-284. In the jury trial of this matter there was a stipulation to the relevant bank records. RP 13. Witnesses testified at the trial in regard to the monetary amount of losses caused by these crimes. RP 29-30, 58-59, 67, 69. At sentencing, there was an agreement by the defense and prosecution in regard to the amount of restitution and the identity of the restitution recipients. RP 284.

C. ARGUMENT

1. THE PROSECUTION DID ESTABLISH THE CORPUS DELICTI

State's Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Because Ms. Matteucci did not raise corpus delicti or object to the admission of her statements below, she is barred from raising this issue for the first time on appeal. *State v. Page*, 147 Wn. App. 849, 855, 199 P.3d 437, 439 (2008). However, because Ms. Matteucci also claims ineffective assistance of counsel because her counsel did not raise the corpus delicti issue below, the following analysis is necessary. *Page*, 147 Wn. App. at 855, citing *State v. Greiff*, 141 Wn.2d 910, 924, 10 P.3d 390 (2000).

When reviewing whether there is sufficient evidence of corpus delicti, the reviewing court assumes the truth of the State's evidence, views the evidence in a light most favorable to the State, and grants the State the benefit of all reasonable inferences from the evidence. *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006); *State v. Aten*, 130 Wn.2d 640, 658, 927 P.2d 210, 219 (1996).

The State's burden of proof is a burden of production rather than a burden of persuasion. *State v. Pineda*, 99 Wn. App. 65, 77, 992 P.2d 525, 532 (2000). The State "need only produce evidence sufficient to support a finding that someone committed a crime." *Id.* at 77.

"The State is not required to prove the corpus delicti beyond a reasonable doubt or even by a preponderance of the evidence." *State v. Page*, 147 Wn. App. 849, 856, 199 P.3d 437, 440 (2008), citing *State v.*

State's Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Aten, 130 Wn.2d 640, 656, 927 P.2d 210 (1996) (quoting *State v. Meyer*, 37 Wn.2d 759, 763, 226 P.2d 204 (1951)). “[T]he corroborating evidence is sufficient if it supports a logical and reasonable inference that the crime occurred.” *Page*, 147 Wn. App. at 856, citing *Aten* at 656. “[S]uch evidence must be consistent with guilt and inconsistent with a hypothesis of innocence.” *Page*, 147 Wn. App. at 856, citing *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006) (quoting *Aten*, 130 Wn.2d at 660, 927 P.2d 210).

Corpus delicti can be established by either direct or circumstantial evidence. *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210, 218 (1996); *State v. Lung*, 70 Wn.2d 365, 371, 423 P.2d 72 (1967).

“The corpus delicti rule requires evidence, independent of the accused's statements, ‘that a crime was committed by someone.’” *State v. Pineda*, 99 Wn. App. 65, 76, 992 P.2d 525, 531 (2000), quoting *City of Bremerton v. Corbett*, 106 Wn.2d 569, 574, 723 P.2d 1135 (1986) (and citing *State v. Ray*, 130 Wn.2d 673, 679, 926 P.2d 904 (1996); *State v. Lung*, 70 Wn.2d 365, 371, 423 P.2d 72 (1967); *State v. Meyer*, 37 Wn.2d 759, 763, 226 P.2d 204 (1951) (further citations omitted)). The corpus delicti “rule does not require evidence ‘of the identity of the person who committed the crime.’” *Pineda*, 99 Wn. App. at 76-77, quoting *Corbett*, 106 Wn.2d at 574, 723 P.2d 1135, and citing *Meyer*, 37 Wn.2d at 763,

State’s Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

226 P.2d 204; *State v. Solomon*, 73 Wn. App. 724, 728, 870 P.2d 1019 (1994); *State v. Neslund*, 50 Wn. App. 531, 542, 749 P.2d 725, *review denied*, 110 Wn.2d 1025 (1988) (further citations omitted).

The evidence of corpus delicti for each offense for which Ms. Matteucci was tried and convicted included evidence, as follows:

1) *someone* obtained or wrongfully exerted unauthorized control over Marianne Gairns's bank card, in violation of RCW 9A.56.040(1)(c); 2) *someone* obtained or exerted unauthorized control over Jessica Gairns's bank card, in violation of RCW 9A.56.040(1)(c); 3) *someone* used Marianne Gairns's pin number at Mickey's Deli to commit or unlawfully aid and abet the misappropriation of cash from her bank account, in violation of RCW 9.35.020(1) and RCW 9A.08.020; 4) *someone* used Marianne Gairns's pin number at Union 76 to commit or unlawfully aid and abet the misappropriation of cash from her bank account, in violation of RCW 9.35.020(1) and RCW 9A.08.020; and, 5) *someone* used Jessica Gairns's pin number at Fred Meyers to commit or unlawfully aid and abet the misappropriation of cash from her bank account, in violation of RCW 9.35.020(1) and RCW 9A.08.020. These are the five offenses for which Ms. Matteucci was charged by information (CP 57-59), and these are the five offenses for which the jury returned guilty verdicts. RP 243-245.

State's Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Each of these offenses are corroborated by evidence independent of Ms. Matteucci's admissions.

“The corroboration does not require proof of all elements of the charged offense.” *State v. Angulo*, 148 Wn. App. 642, 653, 200 P.3d 752, 757 (2009), citing *State v. Lung*, 70 Wn.2d 365, 371, 423 P.2d 72 (1967); *State v. Meyer*, 37 Wn.2d 759, 763, 226 P.2d 204 (1951). This precedent is arguably contradicted, however, by dicta that recently appeared in *State v. Dow*, 168 Wn.2d 243, 254, 227 P.3d 1278 (2010), where the Court wrote that “the State must still prove every element of the crime charged by evidence independent of the defendant's statement.” The Court explained its dicta with the following quotation from *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006), as follows: “A defendant's incriminating statement alone is not sufficient to establish that a crime took place.” However, prior cases hold that corpus delicti is established by prima facie evidence of injury or loss and someone's criminal act as a cause of the loss. *State v. Meyer*, 37 Wn.2d 759, 763, 226 P.2d 204 (1951); *State v. Angulo*, 148 Wn. App. 642, 653, 200 P.3d 752, 757 (2009). It thus follows from this context that, rather than a reversal of long standing precedent, the Court's dicta in *Dow* is a reiteration of the long standing rule that corpus delicti is established if the existence of a

crime is established by prima facie evidence that is independent of the defendant's statement.

Proof of the corpus delicti does not require proof of the perpetrator's mental state; nor does it require proof of the identity of the perpetrator. *State v. Angulo*, 148 Wn. App. 642, 656, 200 P.3d 752, 759 (2009) (citing *State v. Lung*, 70 Wn.2d 365, 371, 423 P.2d 72 (1967); *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210, 218 (1996)). In some cases, however, such as where the offense is the crime of driving under the influence, the identity of the perpetrator may be a necessary component of the proof of corpus delicti because the existence of a crime cannot be prima facie established unless the identity of the driver is known (because mere proximity to, or association with, a motor vehicle while impaired does not establish the crime of driving under the influence). See, e.g., *City of Bremerton v. Corbett*, 106 Wn.2d 569, 723 P.2d 1135 (1986); *State v. Hamrick*, 19 Wn. App. 417 576 P.2d 912 (1978). In seeming contradiction to *State v. Angulo*, 148 Wn. App. 642, 200 P.3d 752 (2009), authority also exists to support an assertion that prima facie proof of the mental state of the perpetrator is necessary to establish corpus delicti. See, e.g., *State v. Brockob*, 159 Wn.2d 311, 150 P.3d 59 (2006) (proof of corpus delicti for offense of unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture

State's Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

methamphetamine requires at least one corroborating factor in addition to mere possession); *State v. Whalen*, 131 Wn. App. 58, 63, 126 P.3d 55, 58 (2005) (“[B]are possession of pseudoephedrine is not enough to *prima facie* establish the *corpus delicti* for an intent to manufacture conviction; at least one additional factor, suggestive of intent, must be present”).

The above cases are distinguishable in that *Brockob*, *Whalen*, *Corbett*, and *Hamrick* each involve crimes that can be characterized as “victimless crimes” because there is no identifiable victim who can come forward and allege an injury or loss as a result of someone’s criminal act (either because the crime is a crime of possession, for which the future intent must be proved, or because the offense is a driving offense and the existence of a crime rests upon the status, and thus the identity, of the driver). Cases such as *Angulo*, however, and cases such as *State v. Meyer*, 37 Wn.2d 759, 226 P.2d 204 (1951) and *State v. Pineda*, 99 Wn. App. 65, 992 P.2d 525, 531 (2000), have as an additional factor an identifiable victim who can declare an injury or loss and a criminal cause, or these cases contain as an additional factor facts from which injury and criminal cause, including mens rea, can be inferred.

Assuming the truth of the State’s evidence, while viewing the evidence in the light most favorable to the State, and granting the State the benefit of all reasonable inferences from the evidence, the evidence

State’s Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

establishes a prima facie case that: 1) *someone* obtained or wrongfully exerted unauthorized control over Marianne Gairns's bank card, in violation of RCW 9A.56.040(1)(c); 2) *someone* obtained or exerted unauthorized control over Jessica Gairns's bank card, in violation of RCW 9A.56.040(1)(c); 3) *someone* used Marianne Gairns's pin number at Mickey's Deli to commit or unlawfully aid and abet the misappropriation of cash from her bank account, in violation of RCW 9.35.020(1) and RCW 9A.08.020; 4) *someone* used Marianne Gairns's pin number at Union 76 to commit or unlawfully aid and abet the misappropriation of cash from her bank account, in violation of RCW 9.35.020(1) and RCW 9A.08.020; and, 5) *someone* used Jessica Gairns's pin number at Fred Meyers to commit or unlawfully aid and abet the misappropriation of cash from her bank account, in violation of RCW 9.35.020(1) and RCW 9A.08.020. These are the five offenses for which Ms. Matteucci was charged by information (CP 57-59), and these are the five offenses for which the jury returned guilty verdicts. RP 243-245.

Jessica Gairns and Marianne Gairns are ascertainable, identified victims who came forward and alleged injury or loss (the misappropriation of their bank cards and the use of their pin numbers to wrongfully obtain money from their bank accounts) and who alleged criminal cause for their injuries or losses (neither victim gave the

State's Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

perpetrator permission to appropriate their bank cards or to use their pin numbers to obtain money from their accounts). This evidence is inconsistent with any reasonable hypothesis of innocence and, additionally, this evidence does not support a logical inference of both criminal and non-criminal cause. Thus, finding the corpus delicti established in the instant case is consistent with established precedent. *State v. Brockob*, 159 Wn.2d 311, 150 P.3d 59 (2006); *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996); *State v. Lung*, 70 Wn.2d 365, 423 P.2d 72 (1967).

2. THE STATE PRESENTED SUFFICIENT EVIDENCE TO FIND THE DEFENDANT GUILTY OF EACH OFFENSE FOR WHICH THE DEFENDANT WAS CONVICTED BY THE JURY

“It is the exclusive province of the trier of fact to review testimony and exercise its discretion, according to it the appropriate weight.” *State v. Cirkovich*, 35 Wn. App. 134, 138-39, 665 P.2d 440 (1983). “It is not the function of [the reviewing] court to retry the facts.” *State v. Edwards*, 5 Wn. App. 852, 856, 490 P.2d 1337 (1971), citing *State v. Nesrallah*, 66 Wn.2d 248, 401 P.2d 968 (1965). An appellate court is not entitled to weigh either the evidence or the credibility of witnesses even though the reviewing court

State’s Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

may disagree with the trial court; this is because the trial court has the witnesses before it and is able to observe them and their demeanor upon the witness stand. *In re Welfare of Sege*, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). The appellate court is required to view the evidence in the light most favorable to the State and to grant deference to the trial court's findings of fact. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992).

The *trier of fact* in the instant case heard the testimony of each witness and was in a position to observe the demeanor and to judge the credibility of each witness. The trial court fact finder's assessment of the credibility of witnesses is not a proper subject for appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992). The trial court fact finder has the sole discretion to decide which facts have been proved beyond a reasonable doubt. “It is the exclusive province of the trier

State's Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

of fact to review testimony and exercise its discretion, according to it the appropriate weight.” *State v. Cirkovich*, 35 Wn. App. 134, 138-39, 665 P.2d 440 (1983). “It is not the function of [the reviewing] court to retry the facts.” *State v. Edwards*, 5 Wn. App. 852, 856, 490 P.2d 1337 (1971), citing *State v. Nesrallah*, 66 Wn.2d 248, 401 P.2d 968 (1965). An appellate court is not entitled to weigh either the evidence or the credibility of witnesses even though the reviewing court may disagree with the trial court; this is because the trial court has the witnesses before it and is able to observe them and their demeanor upon the witness stand. *In re Welfare of Sego*, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973).

As detailed in the facts section of this brief and in the argument section addressing corpus delicti, the record in the instant case contains sufficient evidence to sustain the jury’s verdicts of guilty for each of the jury’s five verdicts.

3. THE DEFENDANT WAS NOT RESTRICTED FROM PRESENTING ANY DEFENSE THAT WAS SUPPORTED BY LAW AND EVIDENCE

On review of a trial court decision, the appellate court may affirm the trial court on any grounds supported by the record. *State v. Costich*,

State’s Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

152 Wn.2d 463, 98 P.3d 795 (2004); *State v. Frodert*, 84 Wn.App. 20, 25, 924 P.2d 933 (1996), *review denied*, 131 Wn.2d 1017, 936 P.2d 417 (1997).

The trial court's decision to exclude evidence is reviewed on appeal for an abuse of discretion. *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286, 288 (2009), citing *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007).

Evidence Rule 401 sets forth the definition of relevant evidence as follows:

‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.

The State asserts that Ms. Matteucci’s naked allegations that Ms. Matteucci and one of the victims had at some time in the past engaged in a three-way sexual encounter with a third person, that Ms. Matteucci had as a result contacted a sexually transmitted disease, and that Ms. Matteucci had also developed cancer, do not logically lead to an inference that any fact of consequence in the case is more or less probable that it would be without such evidence.

Such evidence does, however, risk imposing a substantially prejudicial effect upon the fact finding process itself. Such evidence risks

State’s Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

confusion of the issues and risks a redirection of the focus of the jury to considerations of prejudice against one of the victims or to sympathy for Ms. Matteucci. However, this evidence was of little probative value to Ms. Matteucci's proffered exculpatory theory because the evidence did not logically tend to prove or disprove that Ms. Matteucci had, or would have had, Jessica Gairns' permission to take money from her account. Additionally, the close relationship between Ms. Matteucci and Jessica Gairns was undisputed, and there was ample other, less sensational, evidence available to Ms. Matteucci with which to establish the fact of this relationship. Ms. Matteucci presented three witnesses who each corroborated the defense assertion that the relationship between Ms. Matteucci and one of the victims, Jessica Gairns, was particularly close. RP 98-99, 104-105, 112-114.

Evidence Rule 403 allows the court to exclude this evidence, as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The prosecution asserts that Ms. Matteucci's proffered evidence should be excluded pursuant to ER 403 because the probative value of the

State's Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

evidence, if any, is substantially outweighed by the danger of unfair prejudice, because the evidence would risk confusion of the issues or misleading the jury, and because, in light of the undisputed testimony from three witnesses that Ms. Matteucci and Jessica Gairns were exceptionally close friends, the evidence would have been needlessly cumulative.

“The availability of other means of proof is a factor in deciding whether to exclude prejudicial evidence.” *State v. Johnson*, 90 Wn. App. 64, 62, 950 P.2d 981, 985 (1998), citing ER 403 cmt. “Evidence likely to provoke an emotional response rather than a rational decision is unfairly prejudicial.” *Id.* at 985, citing *State v. Rice*, 48 Wash.App. 7, 13, 737 P.2d 726 (1987) (citing 5 Karl B. Tegland, *Washington Practice, Evidence Law and Practice* § 106, at 250 (2d ed.1982)).

4. THE TRIAL COURT CORRECTLY CALCULATED THE OFFENDER SCORE AND ACTED WITHIN THE COURT’S DISCRETION WHEN DENYING THE DEFENDANT THE BENEFIT OF A DOSA SENTENCING ALTERNATIVE

- a. The Trial Court Correctly Applied the Same Criminal Conduct Doctrine and Correctly Calculated the Offender Score.

State’s Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Ms. Matteucci wrongfully obtained or exerted unauthorized control over two bank cards. One of the bank cards belonged to one victim (Jessica Gairns) and the other bank card belonged to the other victim (Marianne Gairns). Thus, theft of the bank cards constituted two separate offenses.

Ms. Matteucci used Jessica Gairns' bank card and used (or aided and abetted the use of) her pin number to assume the identity of Jessica Gairns in order to obtain cash from her bank account from a machine at Fred Meyer. These acts by Ms. Matteucci constituted a third offense.

Ms. Matteucci used Marianne Gairns' bank card and used (or aided and abetted the use of) her pin number to assume the identity of Marianne Gairns in order to obtain cash from her bank account from a bank machine at Mickey's Deli. This offense involved a separate victim and also a separate place from the crime committed at Fred Meyer, thus constituting a fourth offense.

Ms. Matteucci then used (or aided and abetted the use of) Marianne Gairns' bank card and used (or aided and abetted the use of) her pin number to assume the identity of Marianne Gairns in order to obtain cash from her bank account from a bank machine located at Union 76.

This offense involved a separate place from any other offense and, thus, constituted a fifth offense.

Even though crimes may involve the same victim and intent, if the crimes occur at different times or places they are separate crimes for the purposes of RCW 9.94A.589. *State v. Allen*, 150 Wn. App. 300, 317, 207 P.3d 483 (2009). Crimes involving separate victims constitute separate offenses. *State v. Cubias*, 155 Wn.2d 549, 552-553, 120 P.3d 929, 931 (2005).

It follows that the theft of Jessica Gairns' bank card is a separate and distinct offense from the theft of Marianne Gairns' bank card. It also follows that the use of the pin numbers on three separate occasions are three separate offenses because each use occurred at a distinct and different time and place (just as a bank robber who cannot obtain enough cash from a bank on one occasion who then returns to the same bank for a second robbery or commits robberies at a series of banks has committed separate crimes at each robbery).

The question remains, however, whether the theft of a bank card with the anticipatory intent of using it together with the victim's pin number and the subsequent use of the pin number to wrongfully obtain cash constitute two offenses.

Theft of a bank card and the subsequent unlawful use of that bank card does constitute two separate offenses and can be analogized with the theft of wood and the subsequent illegal trafficking of that wood, which has been held to constitute separate offenses. *State v. Walker*, 143 Wn. App. 880, 181 P.3d 31, (2008).

The argument that the crime of taking a bank card is a separate crime from using it later together with a pin number to wrongfully assume the identity of another in order to obtain cash is further supported by *Walker*, as follows:

As charged here, the crimes required proof of different intents and involved separate intended victims. Intent in this context means the defendant's objective criminal purpose in committing the crime. *In re Pers. Restraint of Holmes*, 69 Wash.App. 282, 290, 848 P.2d 754 (1993). "This, in turn, can be measured in part by whether one crime furthered the other." *State v. Vike*, 125 Wash.2d 407, 411, 885 P.2d 824 (1994).

We agree that, because Walker was the thief, his first degree theft may have furthered his commission of first degree trafficking in stolen property. But this fact alone does not mean that the offender had the same objective intent throughout the offensive conduct. [Footnote omitted]. When viewed objectively, the criminal purposes of the two offenses are different. The first is to steal the wood. The second is to sell the wood to a third party knowing that he does not have the right to do so because it has been stolen.

State v. Walker, 143 Wn. App. 880, 891, 181 P.3d 31, 36 - 37 (2008).

It is also significant that use of the pin numbers to obtain cash from Jessica Gairns' bank account also included as a separate and distinct

State's Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

victim the bank itself. RP 30, 260, 284. In other words, Ms. Matteucci took the bank's money from Jessica Gairns' account, except for the amount that bank was not obligated to reimburse. RP 30. Ms. Matteucci took another bank's money from Marianne Gairns' account, except for the amount that the bank was not obligated to reimburse. RP 260, 284. Irrespective of whether the two banks are also victims, the existence of two victims of theft of the bank cards and the existence of three different times and places where the pin numbers were wrongfully used supports a finding of five separate criminal offenses.

RCW 9.35.020 (use of the pin number) and RCW 9A.56.040 (theft of the card) define two separate criminal offenses. RCW 9.35.020(6) supports a finding that theft of the card and use of the pin number constitute separate offenses.

The appellate court "will not disturb a trial court's same criminal conduct decision unless the trial court abused its discretion or misapplied the law." *State v. Walker*, 143 Wn. App. 880, 890, 181 P.3d 31, 36 (2008), citing *State v. Burns*, 114 Wn.2d 314, 317, 788 P.2d 531 (1990).

- b. The Trial Court Correctly Denied the Defendant the Benefit of a DOSA Sentencing Alternative.

State's Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Whether or not to grant a DOSA is a decision that rests within the sound discretion of the trial court. *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005). A trial court decision to deny a DOSA is reviewed for an abuse of discretion. *Id.*

“A trial court abuses discretion when ‘it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.’” *Id.* at 343, quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

In the instant case, the court did not categorically refuse to consider the DOSA sentencing alternative. The court continued the hearing twice and allowed Ms. Matteucci opportunity to gather and present information to support its request for a DOSA. RP 249-286.

[T]he purpose of DOSA is to provide meaningful treatment and rehabilitation incentives for those convicted of drug crimes, when the trial judge concludes it would be in the best interests of the individual and the community.

Grayson, at 343, citing RCW 9.94A.660.

Ms. Matteucci provided no evidence that her property crimes in this case were drug related. The record is clear that the court considered the DOSA alternative, considered the benefit to Ms. Matteucci and to the community, and properly exercised the court’s discretion and rejected the DOSA. RP 268-269, 281-282.

State’s Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Denial of the DOSA on these facts was within the sound discretion of the trial court. *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005).

5. THE RESTITUTION AWARD WAS CORRECT AND WAS SUPPORTED BY THE EVIDENCE

In the jury trial of this matter there was a stipulation to the relevant bank records. RP 13. Witnesses testified at the trial in regard to the monetary amount of losses caused by these crimes. RP 29-30, 58-59, 67, 69. At sentencing, there was an agreement by the defense and prosecution in regard to the amount of restitution and the identity of the restitution recipients. RP 284.

The trial court properly exercised its discretion and awarded the proper amount of restitution in this case. *State v. Tobin*, 132 Wn. App. 161, 130 P.3d 426 (2006).

6. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AS DEFENDANT FAILS TO SHOW DEFICIENT PERFORMANCE

a. Corpus Delicti

Because the corpus delicti was proved in this case and defendant's statements were properly admitted into evidence, defense counsel's

State's Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

performance was not ineffective for failing to raise a corpus delicti objection to admission of Ms. Matteucci's statements. *State v. Page*, 147 Wn. App. 849, 199 P.3d 437 (2008).

b. Offender Score

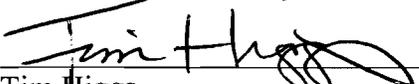
Because the trial court correctly followed the law in finding that each of Ms. Matteucci's convictions constituted separate crimes, there was no legitimate basis to an objection by Ms. Matteucci's counsel based upon an assertion of same criminal conduct; therefore, the defense counsel was not ineffective for failing to bring the objection, where the objection was not supported by law or fact. *State v. Allen*, 150 Wn. App. 300, 207 P.3d 483 (2009).

D. CONCLUSION

In consideration of the law and facts as briefed above, the court should deny Ms. Matteucci's appeal and sustain the verdicts of the jury and the judgment and sentence of the trial court.

DATED: January 26, 2011.

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Mason County
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Tim Higgs
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State's Response Brief
Case No. 40856-2

Mason County Prosecutor
PO Box 639
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360-427-9670 ext. 417

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

STATE OF WASHINGTON,)
)
 Respondent,) No. 40856-2-II
)
 vs.) DECLARATION OF
) FILING/MAILING
) PROOF OF SERVICE
 ANGELINA C. MATTEUCCI,)
)
 Appellant,)
 _____)

I, MARGIE OLINGER, declare and state as follows:

On WEDNESDAY, JANUARY 26, 2010, I deposited in the U.S.
Mail, postage properly prepaid, the documents related to the above cause
number and to which this declaration is attached, BRIEF OF

RESPONDENT, to:

Jordan McCabe
P.O. Box 7212
Bellevue, WA 98008-1212

I, MARGIE OLINGER, declare under penalty of perjury of the laws
of the State of Washington that the foregoing information is true and correct.

Dated this 26th day of January, 2011, at Shelton, Washington.


MARGIE OLINGER

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