IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MELISSA LYNN WEYRAUCH, Appellant.	No. 38263-6-II UNPUBLISHED OPINION

Van Deren, C.J. — Melissa Weyrauch appeals her convictions for identity theft, forgery, and bail jumping stemming from her use of Melissa Rogers's name during a 2005 routine traffic stop. She argues that the trial court erred in failing to hold a CrR 3.5 hearing and that her counsel was ineffective for failing to object to testimony implying her guilt. Finally, she argues that the sentencing court erred in failing to consider her identity theft and forgery convictions as the "same criminal conduct" in calculating her offender score. We affirm.

FACTS

In April 2007, Melissa Rogers asked the Department of Licensing in Lewis County for a copy of her driving record for purposes of registering to sit for the Washington State Bar examination. She was told that her license was suspended due to an unpaid speeding ticket from December 13, 2005. She also discovered that the address listed on her driving record had been

changed to an address in Tenino, Washington. Rogers obtained a copy of the 2005 ticket that showed the vehicle involved in the infraction was a Mazda 626. Rogers had never seen or ridden in the listed vehicle. Although the name "Melissa J. Rogers" appeared on the ticket, the signature on the ticket was not hers. Report of Proceedings (RP) at 18. Rogers then called two friends she knew who lived in Tenino; one friend, Weyrauch, Rogers had known since the 7th grade. Weyrauch admitted that her parents lived at the address listed on Rogers's record.

Lewis County Deputy Sheriff Jason Mauermann investigated the use of Rogers's name on the 2005 infraction. On June 13, 2007, Mauermann visited the Tenino address listed on the citation and spoke with Weyrauch. He presented Weyrauch with a copy of the 2005 citation and Weyrauch admitted that she was driving the vehicle at the time of the infraction and that she gave the patrol officer the name Melissa Rogers. She also admitted signing the citation with the name "Melissa J. Rogers." RP at 18.

The State charged Weyrauch with one count of second degree identity theft and one count of forgery. The State later amended the charges to add one count of bail jumping for Weyrauch's failure to appear in court on January 3, 2008.

At trial, Washington State Patrol Trooper Craig Sahlinger testified that he stopped the driver of a Mazda 626 on December 13, 2005, for driving 82 miles per hour in a 70 mile per hour zone on Interstate 5. He asked the driver for her driver's license. She did not have her license with her but identified herself as Melissa Rogers. Sahlinger ran the name and discovered that Rogers's driving record was clear. Sahlinger issued an infraction for speeding. Sahlinger testified that the Mazda was registered to Justin Thayer. At trial, he could not identify Weyrauch as the driver of the Mazda 626.

Mauermann testified that he visited the Tenino address listed on the citation and spoke with Weyrauch. He showed Weyrauch the 2005 citation and asked her if she recognized it. Weyrauch told Mauermann that she recognized the citation and admitted that "she gave the trooper Melissa Rogers'[s] name." RP at 43. When Mauermann asked Weyrauch why she used Rogers's name, she explained that "she had a warrant and she provided Ms. Rogers'[s] information to protect herself from getting arrested for . . . an active warrant." Weyrauch told Mauermann that she signed the citation as "Melissa J. Rogers." RP at 44.

On cross-examination, Mauermann testified that he did not contact the registered owner of the vehicle, Justin Thayer, during his investigation. He testified that a person named Amber Thayer was given a citation while driving the Mazda 626 in 2004, but he did not contact Amber Thayer during his investigation. Weyrauch asked Mauermann why he did not contact Amber Thayer and Mauermann responded:

> Because when I was examining the ticket I noted that . . . the address that was listed on the ticket was coincidentally the same address as where Ms. Weyrauch was possibly currently residing. So that led me to the first clue of there may be more of an association, on top of the fact that Ms. Rogers and Ms. Weyrauch were good friends throughout school in high school.

RP at 47. Further, Rogers told Mauermann she did not know Justin or Amber Thayer.

During redirect, Mauermann explained why he ruled out Rogers and Amber Thayer as the drivers on the night of the citation:

[THE STATE:]	Did the fact that the defendant confessed to you that she did write the citation and forged Ms. Rogers'[s] signature have anything to do with that decision?
[MAUERMANN:]	Yes, that pretty much, I felt, sealed the case.
[THE STATE:]	Now, how come you ruled out Amber Thayer as a suspect?
[MAUERMANN:]	I could not connect through Ms. Rogers -- I could not connect Amber Thayer or Justin Thayer to Ms. Rogers. . . . So at that point it left me with the other option of talking to

	Ms. Weyrauch on top of possibly interviewing Ms. Amber Thayer as a potential suspect.
[THE STATE:]	And, again, did those decisions to rule out those two person[]s have anything to do with the fact Ms. Weyrauch actually confessed to this?
[MAUERMANN:]	Yeah. When she confessed it gave me no question in my mind. I mean, it's coming from her that she wrote Melissa Roger[s]'s signature on the ticket and was familiar with the ticket.
[THE STATE:]	Did she also admit to doing so?
[MAUERMANN:]	Yeah, she admitted to it.

RP at 55-56. The State then asked Mauermann whether Weyrauch's confession also "play[ed] into th[e] decision" to not obtain a handwriting analysis of the citation. Mauermann stated, "Yes. I mean with the confession, I felt there was -- it made no sense to have the courts or have any more money spent in processing the case even further when you've got a confession from the actual person that is being accused of doing it." RP at 57.

Weyrauch testified that she was in Oregon when the citation was issued. She said that she went to St. Helens, Oregon, with Justin Thayer on December 5 or 6, 2005. Thayer left in his Mazda 626 on December 12, 2005, and Weyrauch stayed in St. Helens until December 28, 2005.[1] Weyrauch also testified that, when Mauermann visited her home on June 13, 2007, she told him that she recognized the vehicle listed on the citation, that she knew Mazda's owner, and that she knew Melissa Rogers. She confirmed that the address listed on the citation was her parents' address. Mauermann then asked Weyrauch to give a taped statement and "told [her] that . . . he already knew the truth and that if [she] lied to him he would arrest [her] and [her] kids would be picked up by child services." RP at 77. Weyrauch testified that she agreed to give a taped

[1]Weyrauch admitted that she did not appear in court on January 3, 2008. That conviction was not appealed.

statement because she was afraid of being arrested. Once Mauermann "turned on the recorder and read [her *Miranda*][2] rights," Weyrauch told Mauermann she "didn't want to continue with the statement." "It wasn't that I was denying, I would talk with him, but I did not want to continue until I had spoken with a lawyer." RP at 77.

The jury found Weyrauch guilty of second degree identity theft (count I), forgery (count II), and bail jumping (count III). The trial court calculated Weyrauch's offender score as 2 for each count and sentenced her to 4 months' confinement with the possibility of home detention. Weyrauch did not object at sentencing. Weyrauch appeals.

ANALYSIS

I. CrR 3.5 Hearing

Weyrauch argues that the trial court violated her due process rights when it failed to conduct a CrR 3.5 hearing. She argues that the trigger for a CrR 3.5 hearing is not "[t]he existence of 'custodial statements'" but rather "the [S]tate's decision to introduce into evidence statements the defendant has made." Br. of Appellant at 14. Because the State introduced statements Weyrauch made, "absent a waiver, the court should have ordered a CrR 3.5 hearing." Br. of Appellant at 15. Furthermore, she argues that even "with the tacit agreement of the defense attorney . . . that [Weyrauch] was not in custody," CrR 3.5 "requires the court to determine whether or not the defendant's statements are 'admissible.'" Br. of Appellant at 15.

We review due process challenges de novo. *State v. Joy*, 128 Wn. App. 160, 163, 114 P.3d 1228 (2005). "CrR 3.5 is a mandatory rule." *State v. Kidd*, 36 Wn. App. 503, 509, 674 P.2d 674 (1983). It states, in part, "When a statement of the accused is to be offered in evidence,

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible." CrR 3.5(a). But a defendant's attorney may waive a CrR 3.5 hearing on his client's behalf. *State v. Varnell*, 137 Wn. App. 925, 932, 155 P.3d 971 (2007); *State v. Fanger*, 34 Wn. App. 635, 637, 663 P.2d 120 (1983). Further, CrR 3.5 applies only to statements made while a person is in custody. *State v. DeCuir*, 19 Wn. App. 130, 134, 574 P.2d 397 (1978); *State v. McFarland*, 15 Wn. App. 220, 222, 548 P.2d 569 (1976); *State v. Harris*, 14 Wn. App. 414, 422, 542 P.2d 122 (1975).

A person is in custody if his "freedom of action is curtailed to a ' . . . degree associated with formal arrest.'" *State v. Short*, 113 Wn.2d 35, 40, 775 P.2d 458 (1989) (internal quotation marks omitted) (quoting *State v. Harris*, 106 Wn.2d 784, 789, 725 P.2d 975 (1986)). "Mere suspicion, before the facts are reasonably developed, is not enough to turn the questioning into a custodial interrogation." *State v. Hilliard*, 89 Wn.2d 430, 436, 573 P.2d 22 (1977). *See also Short*, 113 Wn.2d at 40-41. A *Miranda* warning is not required and the questioning is, therefore, noncustodial, when the questioning is part of a routine, general investigation in which the defendant voluntarily cooperated but is not yet charged. *Short*, 113 Wn.2d at 41.

Here, Weyrauch's attorney waived the CrR 3.5 hearing in the following colloquy:

> [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?
> D[EFENSE] C[OUNSEL]: Correct, your Honor.

RP at 3. Further, though any discussion as to whether Weyrauch's statements were custodial occurred in chambers, there is ample evidence on the record to support a determination by the trial court that the statements did not fall under CrR 3.5. Mauermann testified that he visited the

address listed on the citation as part of his investigation. Weyrauch was present at the residence and he spoke with her at the front door. He showed her a copy of the citation and asked her if she recognized it. Weyrauch told Mauermann she recognized the citation. He then asked Weyrauch "whether she gave the trooper Melissa Rogers' name" and Weyrauch "admitted to it." RP at 43.

Weyrauch testified that Mauermann threatened to arrest her if she lied. She testified that Mauermann asked her for a taped statement and, when she agreed, he read her *Miranda* rights. Weyrauch then told Mauermann that she did not want to continue with the statement. Weyrauch seems to argue that once she testified that her statements were coerced, the trial court was required to halt the trial and hold a CrR 3.5 hearing. But according to Weyrauch's testimony, she did not make any incriminating statements during the encounter. Further, her testimony indicates that she did not make any statements to Mauermann following the alleged coercion.

Because Weyrauch's counsel waived a CrR 3.5 hearing and because there is no evidence to show that Weyrauch made any custodial statements, we affirm the trial court's determination that no CrR 3.5 hearing was required.

II. Ineffective Assistance of Counsel

Weyrauch argues that her counsel was ineffective when he "fail[ed] to object when the [S]tate called upon a police officer to give the jury his opinion on [her] guilt or innocence." Br. of Appellant at 18. She argues that Mauermannn's testimony about his decision not to pursue other possible suspects was a statement of Weyrauch's guilt. In the alternative, Weyrauch argues that her trial counsel should have objected because Mauermann's statements were "a comment on [her] credibility." Br. of Appellant at 22.

We review ineffective assistance of counsel claims de novo. *State v. Meckelson*, 133 Wn. App. 431, 435, 135 P.3d 991 (2006), *review denied*, 159 Wn.2d 1013 (2007). To establish ineffective assistance of counsel, the defendant must show that defense counsel's performance was deficient and that this performance deprived him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is established by proof that defense counsel's representation "fell below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). But there is a strong presumption that counsel's representation was effective. *McFarland*, 127 Wn.2d at 335. And legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Further, to establish ineffective assistance of counsel for a failure to object, the defendant must show that the objection would likely have been sustained. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Generally, a witness may not give a direct opinion about the defendant's innocence or guilt. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). To do so invades the jury's fact-finding province, thereby violating the defendant's constitutional right to a jury trial. *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). To determine whether testimony constitutes an impermissible opinion of guilt, courts will generally consider the circumstances of the case, including the following factors: "(1) 'the type of witness involved,' (2) 'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense, and' (5) 'the other evidence before the trier of fact.'" *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (quoting *State v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)). "[T]estimony

that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *Heatley*, 70 Wn. App. at 578.

Here, Mauermann testified that he ruled out other suspects when Weyrauch confessed that she was the driver on the night the traffic citation was issued and that she signed Rogers's name on the citation. He stated, "[T]hat pretty much, I felt, sealed the case." RP at 55. He further stated, "When she confessed it gave me no question in my mind. I mean, it's coming from her that she wrote Melissa Roger[s]'s signature on the ticket and was familiar with the ticket." RP at 56.

Mauermann's testimony did not constitute a direct opinion about Weyrauch's innocence or guilt. *Black*, 109 Wn.2d at 348; *Heatley*, 70 Wn. App. at 578. Rather, Mauermann explained why he did not pursue certain possible suspects in response to Weyrauch's questions during cross-examination. Therefore, it is unlikely the trial court would have sustained an objection had Weyrauch's trial counsel objected. Thus, she cannot overcome the strong presumption that her counsel was effective. Her argument fails.

III. Same Criminal Conduct

Weyrauch also argues that the trial court erred when it failed to find that her convictions for identity theft and forgery constituted the same criminal conduct. She argues that RCW 9.94A.589(1)(a) required that the trial court consider these crimes the same criminal conduct because they occurred at the same time and place, and involved the same victim.

"We review a sentencing court's calculation of an offender score de novo." *State v. Mitchell*, 81 Wn. App. 387, 390, 914 P.2d 771 (1996). A trial court may consider current

convictions involving "same criminal conduct" as one crime for sentencing purposes. RCW 9.94A.589(1)(a). Convictions will count as the "same criminal conduct" only when they (1) share the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006); *see also* RCW 9.94A.589(1)(a).

As a threshold matter, we reject the State's contention that Weyrauch waived this issue, since she did not raise it or object at sentencing. Generally, issues not raised in the trial court may not be raised for the first time on appeal. RAP 2.5(a). Moreover, in the sentencing context the general rule is that "[a] sentence within the standard sentence range for the offense shall not be appealed." RCW 9.94A.585(1). "Illegal or erroneous sentences, however, may be challenged for the first time on appeal." *State v. Nitsch*, 100 Wn. App. 512, 519, 997 P.2d 1000 (2000). Furthermore, "a defendant cannot agree to punishment in excess of that which the Legislature has established." *In re the Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). Therefore, a defendant generally cannot waive a challenge to a miscalculated offender score. *Goodwin*, 146 Wn.2d at 874.

In a similar case where the defendant did not ask the trial court at sentencing for a finding of same criminal conduct, Division One held that the defendant could raise the issue for the first time on appeal.[3] *State v. Anderson*, 92 Wn. App. 54, 61, 960 P.2d 975 (1998). However,

[3] Likewise in *State v. Rowland*, 97 Wn. App. 301, 304, 983 P.2d 696 (1999), Division Three considered defendant's newly raised same criminal conduct challenge to his offender score, noting that "[a] challenge to an offender score calculation is sentencing error that may be raised for the first time on appeal." The *Rowland* court remanded for resentencing, accepting the State's concession that the offenses of conviction constituted the same criminal conduct, thus making the offender score and standard range erroneous. 97 Wn. App. at 305. No similar concession is present here.

Division One did not allow same criminal conduct to be raised for the first time on appeal where the defendant affirmatively agreed to his offender score. *Nitsch*, 100 Wn. App. at 521-22. Here, there is no similar agreement or affirmative acknowledgement of Weyrauch's offender score amounting to waiver. Although Weyrauch's trial counsel agreed with the State's low-end standard range recommendation, our Supreme Court has recently rejected the notion that merely agreeing with a recommendation for a sentence within the standard range as calculated by the State amounts to an affirmative acknowledgement or stipulation barring a subsequent challenge to defendant's offender score. *State v. Mendoza*, 165 Wn.2d 913, 925-26, 928-29, 205 P.3d 113 (2009). Accordingly, Weyrauch may raise this issue for the first time on appeal.[4]

Although Weyrauch may raise the same criminal conduct issue for the first time on appeal, we conclude that her offenses do not constitute the same criminal conduct because they involved different victims. As explained below, Rogers is the only victim of the identity theft, but both Rogers and the State are victims of the forgery. *See State v. Davis*, 90 Wn. App. 776, 782, 954 P.2d 325 (1998) (Two crimes cannot be the same criminal conduct if one involves two victims and the other involves only one.).

RCW 9.35.005(5) defines a "victim" of identity 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." Weyrauch stole Rogers's identity for the purpose of avoiding

[4] We also reject the State's contention that RCW 9.35.020(6)—stating that a person who, in the commission of identity theft commits another crime, may be prosecuted for each crime separately—supersedes RCW 9.94A.589 in this case. The State's reliance on RCW 9.35.020(6) is misplaced. The applicable law is that which is in effect at the time the offense is committed. *State v. Webb*, 112 Wn. App. 618, 620-21, 50 P.3d 654 (2002). Here, the crimes occurred in 2005. Subsection 6 of RCW 9.35.020 was amended in 2008. *See* Laws of 2008, ch. 207 § 4 (effective June 12, 2008). Accordingly, the provisions of former RCW 9.35.020(6) (2004) have no application here.

the outstanding warrant. Rogers suffered the consequences of that theft when her driver's license was suspended. Under the definition of "victim" in RCW 9.35.005(5), the State was not a victim of Weyrauch's identity theft. As statutorily defined, Rogers was the sole victim of this crime.

The forgery offense had two victims. 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 Weyrauch to escape arrest for the outstanding warrant, but it also allowed Weyrauch to avoid payment of the traffic fine causing financial loss for the State. *See State v. Tobin*, 161 Wn.2d 517, 530-31 & n.5, 166 P.3d 1167 (2007) (recognizing the State is a victim when it suffers financial costs due to a defendant's illegal conduct). *See also State v. Hunotte*, 69 Wn. App. 670, 676, 851 P.2d 694 (1993) (using a "but for" factual test to determine whether a causal link exists between the crime and the victim's loss). 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. *Davis*, 90 Wn. App. at 782. *See also State v. Baldwin*, 150 Wn.2d 448, 457, 78 P.2d 1005 (2003) (offenses are not factually the same if they harm different victims). Accordingly, we conclude that the crimes did not constitute the same criminal conduct and that the trial court correctly calculated Weyrauch's offender score by counting each current offense separately. *See Anderson*, 92 Wn. App. at 62-63 (absence of any one of the three required elements of same criminal conduct precludes a finding of same criminal conduct). *See also Nitsch*, 100 Wn. App. at 520-21 (defendant's current offenses "must" be counted separately in calculating the offender score where trial court has not entered a finding that they encompass the same criminal conduct).

We affirm Weyrauch's convictions for identity theft, forgery, and bail jumping.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Armstrong, J.

Quinn-Brintnall, J.