

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

REBECCA RUTH MORELAND,

Appellant.

No. 40463-0-II

UNPUBLISHED OPINION

Johanson, J. — A jury convicted Rebecca Moreland of two counts of second degree identity theft and two counts of second degree theft. Moreland argues that the trial court erred in calculating her offender score by not treating the identity theft and theft convictions as same criminal conduct. Alternatively, she argues that her trial counsel provided ineffective assistance of counsel by not challenging the calculation of her offender score. Concluding that she waived her challenge to her offender score and that she does not meet her burden of showing ineffective assistance of counsel, we affirm.¹

I. FACTS

At about 2:45 pm, Moreland and her sister, Patti Yates-Starns, walked into a hair salon where Carolyn Perry was employed as a cosmetologist. While Perry was occupied, Yates-Starns

¹ A commissioner of this court initially considered Moreland's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

took her purse and hid it in an oversized purse. Moreland and Yates-Starns left the salon and went back to their car. At about 3 pm, Perry noticed that her purse was missing. She called to cancel her credit card and was informed that her credit card had already been used at an Albertson's and was currently being used to make a purchase at Cigar Land.

A short time later, Moreland and Yates-Starns walked into Budget Blinds and Closet Tailors in Gig Harbor, where Linda Macauley was employed as a salesperson. While Moreland talked to Macauley, Yates-Starns stole a wallet from Macauley's purse. Moreland and Yates-Starns left after about eight minutes. When the store closed at 5 pm, Macauley discovered that her wallet was missing. She called to cancel her credit card and was informed that someone had already attempted to use it.

According to Yates-Starns, she and Moreland divided up the credit cards they found in Macauley's wallet and Perry's purse. She and Moreland tried to use a credit card and PIN found in Macauley's wallet at an ATM, but were unsuccessful. Yates-Starns also said Moreland tried to use a credit card at Target, but the card was declined.

According to Moreland, at about 3:30 p.m. she and Yates-Starns went into Albertsons. Inside Albertsons, Yates-Starns gave Moreland a credit card to pay for the items Moreland was purchasing, but Moreland did not know where the credit card came from. Yates-Starns also handed Moreland three American Express gift cards to purchase with that same credit card. With that credit card, Moreland attempted to purchase the three American Express gift cards among other items. After the cashier rang up the items, Moreland slid the credit card over and noticed that the credit card had the name "Carolyn" on it; Moreland then pushed "cancel" on the terminal.

III Report of Proceedings at 243, 245. She realized it was not her sister's credit card, did not purchase the gift cards, and paid cash for the other items.

At that time, Albertson's policy was that credit card gift cards could be purchased only with cash or a debit card, not a credit card. According to the cashier, Moreland ran the credit card and then he explained Albertson's policy of not permitting credit card gift card purchases with a credit card. The cashier voided the gift card purchases, and Moreland paid cash for the other items.

The State charged Moreland with one count of second degree identity theft and one count of second degree theft committed against Perry. It also charged her with one count of second degree identity theft and one count of second degree theft committed against Macauley. A jury convicted her of all four counts. At sentencing, Moreland's counsel agreed with the State's calculation that Moreland's offender score was 3 for each offense. The trial court imposed concurrent sentences at the high end of the range as to all four convictions.

Moreland argues that the trial court miscalculated her offender scores. She contends that as to each victim, the second degree identity theft and the second degree theft were "same criminal conduct" under RCW 9.94A.589(1)(a), such that they should have been considered as a single crime for sentencing purposes. She bases this argument principally on Yates-Starns' testimony that her and Moreland's plan was to steal purses or wallets in order to be able to purchase things using credit cards in those purses or wallets. As a result, she contends that her offender score for each conviction should have been 1, not 3.

However, Moreland did not claim at her sentencing that her convictions as to each victim

were “same criminal conduct”. Her failure to do so waives her opportunity to challenge her offender score on appeal. *State v. O’Neal*, 126 Wn. App. 395, 433-34, 109 P.3d 429 (2005), *aff’d*, 159 Wn.2d 500, 150 P.3d 1121 (2007); *State v. Wilson*, 117 Wn. App. 1, 21, 75 P.3d 573, *review denied*, 150 Wn.2d 1016 (2003).

Moreland also argues that her trial counsel’s failure to argue at sentencing that her convictions as to each victim were “same criminal conduct” constitutes ineffective assistance of counsel. To prevail on a claim of ineffective assistance, Moreland must show that: (1) her counsel’s performance was deficient in that it fell below an objective standard of reasonableness based on all the circumstances; and (2) the deficient performance prejudiced her because, had it not occurred, the result probably would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). Moreland has the burden to establish both elements. *McFarland*, 127 Wn.2d at 335.

Under RCW 9.94A.589(1)(a), “[s]ame criminal conduct” means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” Moreland argues that as to each victim, the crimes of second degree identity theft and second degree theft required the same criminal intent and were committed at the same time and place, so her counsel performed deficiently in not making that argument at sentencing. But a finding of same criminal conduct rests in the discretion of the trial court, and had Moreland challenged it at sentencing, we would have reviewed the trial court’s finding for an abuse of discretion. *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006). Given that there was

No. 40463-0-II

some difference in time, and clearly a difference in place, between the theft of the credit cards and their attempted use, a trial court could find that the crimes were not “same criminal conduct” and would not have abused its discretion in doing so.

Moreland does not meet her burden of showing that the result of her sentencing probably would have been different had her counsel argued for findings of same criminal conduct. Accordingly, her claim of ineffective assistance of counsel fails.

We affirm Moreland’s sentence.

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.

Johanson, J.

We concur:

Hunt, J.

Penoyar, C.J.