IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANGELINA C. MATTEUCCI, Appellant.	No. 40856-2-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — On March 15, 2010, a jury entered verdicts finding Angelina C. Matteucci guilty of two charges of second degree theft contrary to RCW 9A.56.040(1)(c) and three charges of second degree identity theft contrary to RCW 9.35.020. Matteucci appeals her convictions, asserting that her counsel provided ineffective assistance by failing to raise a corpus delicti challenge and failing to ask the court at sentencing to consider her offenses as the "same criminal conduct." Matteucci also argues that insufficient evidence supports her convictions, the court prevented her from presenting a complete defense, and the sentencing court erroneously denied her drug offender sentencing alternative (DOSA), RCW 9.94A.660, request. Because sufficient evidence supports both the establishment of the corpus delicti and Matteucci's convictions, and because her remaining contentions lack merit, we affirm.

FACTS

Background

Jessica Gairns and Matteucci met in 2006 while working together at Starbucks. The women became such close friends that Jessica's[1] mother, Marianne Gairns, thought of Matteucci as "almost an extension of the family." 1 Report of Proceedings (RP) at 63. As such, Matteucci frequently spent time with the Gairnses and even had a spare key to their home. Both women admit to borrowing money from each other and that Jessica loaned Matteucci $900 in September 2009 to pay her rent. Jessica also testified that she occasionally lent Matteucci a debit card connected to her father's account to borrow money.

Jessica has three other cards—a personal credit card, a personal debit card, and a debit card connected to her mother's account—which she never gave Matteucci permission to use. Two defense witnesses, Carol Radich and Jessica Garman, testified that they witnessed Jessica loaning Matteucci a debit card between two and four times. Another defense witness, Tina Philbrook, estimated that Jessica and Matteucci "probably exchanged debit cards over a hundred times." 1 RP at 112.

On October 29, Jessica checked the balance of her personal debit card account and noticed a $200 withdrawal that she had not made. After confirming the charge with the store, Jessica cancelled her card. The next day she went to the bank to report the theft. Shortly thereafter, Jessica's mother, Marianne, called to tell Jessica that someone withdrew money from her account as well. Marianne discovered that her card had been used four times without her

[1] We refer to Jessica Gairns and her mother, Marianne Gairns, by their first names for clarity, with no disrespect intended.

knowledge on October 28. The first transaction occurred at Mickey's Deli when someone withdrew $100. The second transaction was another withdrawal request that was denied for insufficient funds. In addition, someone performed a balance inquiry at a nearby location, the Union 76 Jackpot gas station, and then took out $20.

Thinking that the situation needed to be resolved, the women went to the police and Shelton Police Department Sergeant Virgil Pentz began an investigation into the fraudulent use of their cards. During his investigation, Pentz went to Mickey's Deli and the Union 76 Jackpot gas station. Mickey's Deli did not have working video but Pentz was able to view video footage at the Jackpot. From prior contacts, Pentz recognized Ron Radford using the automated teller machine (ATM) in the video footage. Pentz also went to Fred Meyer (where Jessica's card had been used) but was unable to identify the ATM user from the video tape because the machine was too far out of camera range. Having concluded his investigation, Pentz arrested Radford on November 17.

Matteucci came to the police station shortly after Radford's arrest and, after speaking with Sergeant Pentz for some time, gave a voluntary, taped statement. Pentz informed Matteucci, of her *Miranda*[2] rights at the beginning of the recording. Matteucci acknowledged her rights and then proceeded to tell Pentz that she took Jessica's cards without her knowledge, called Radford, and asked him to use Jessica's cards. Matteucci then told Pentz that she and Radford went to Mickey's Deli and, following that, they might have gone to the Union 76 Jackpot station although she was unsure because she had been talking on her phone. Matteucci also told Pentz that later that day, Radford used Jessica's debit card to buy groceries for her and Jessica. Finally,

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

Matteucci told Pentz that, at the end of the night, she put Jessica's cards back in Jessica's purse.

Procedure

On December 10, the State charged Matteucci with two counts of second degree theft and, on March 10, 2010, amended the charges to include an additional three counts of second degree identity theft. Before trial, both parties agreed by stipulation to admit Matteucci's statements to Pentz without a hearing and to admitting the Gairnses' bank records without bringing in a custodian or otherwise documenting them further. Matteucci's jury trial commenced on March 11 and on March 15 the jury returned a verdict, finding Matteucci guilty of all five counts as charged.

When the court reconvened for sentencing on April 5, defense counsel moved to postpone Matteucci's sentencing for a few weeks because "she wants to pursue the DOSA option and . . . she has, from medical issues, become addicted to pain killers." 2 RP at 249. Over objections from the State, the judge signed an order for a DOSA screening. On April 19, the trial court again postponed sentencing to allow for a "full" DOSA evaluation.[3] On June 10, the court reconvened for sentencing a third time. Defense counsel failed to produce an updated or more thorough DOSA evaluation, and the court proceeded without the full evaluation.

During sentencing, the prosecution asked the trial court to listen to testimony from a "Detective Campbell regarding actions by the defendant in between the date she was convicted and the date in which she testified in Ronald Radford's case." 2 RP at 266-67. The "actions" at

[3] The initial DOSA evaluation was a two- or three-page summary. The judge commented, "We used to get the full evaluation, which told us what drugs and what issues, and those kinds of things, which may be a real benefit at this point to the Court in deciding whether it is an appropriate sentence for Ms. Matteucci and appropriate for the community." 2 RP at 261.

issue involved Matteucci having contact with Radford before his trial, then testifying that she had had no contact with him. The prosecution reasoned that

> the State is proffering this testimony . . . because . . . when we tried to do sentencing last time, it was that DOSA requires that the defendant be honest and that's a critical part of the program. And the State will, basically, demonstrate to the Court that not only was the defendant dishonest, but she basically offered false testimony at trial.

2 RP at 267. Defense counsel objected, noting,

> Ms. Matteucci isn't being sentenced for something that happened, she was – after her conviction – she was convicted of a crime after a jury trial. She stands before the Court to be sentenced for that crime, not for what her testimony was in some later trial, or whether she had contact with some witness in a later trial. That has absolutely no bearing on what is the appropriate punishment for the crime she was convicted of.
>
> . . . [T]he Court shouldn't be considering post-conviction behavior of Ms. Matteucci when they're considering the sentence here.

2 RP at 267-68. Despite this objection, the judge allowed brief testimony explaining,

> When the DOSA program started, we were provided with a summary, but also a large packet of additional information in which answers to specific questions, that helped the Court determine whether or not this was the right choice for an individual [and] whether it would also benefit the community. And that information is no longer, apparently, available through the new format of the report.
>
> So, the Court will permit brief testimony that has been suggested today. I will make it extremely clear, however, 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 the sentencing. Other than to assist the Court in deciding whether the alternate that Ms. Matteucci has requested is a viable one for her in that she would be successful at the program.

2 RP at 269.

Detective Campbell related that, at Radford's trial, Matteucci testified to having no contact with Radford since charges were filed against them. Campbell further testified that,

subsequent to Radford's trial, he came into possession of a Walmart security tape showing Matteucci and Radford together on April 10.[4] Following Campbell's testimony, the judge heard arguments by both sides concerning the possibility for DOSA and the calculation of Matteucci's offender score. The defense did not object to the offender score calculation. The trial court sentenced Matteucci to the standard range for all five counts—two eight-month sentences on the second degree theft charges, and three fourteen-month sentences on the second degree identity theft charges, all to run concurrently plus twelve months of community custody for the three identity theft charges—and, in addition, did not provide for waiver of the standard range or imposition of DOSA. The trial court noted that

> the reason I do that is the number of offenses that are now before the Court, five offenses at very close to the same time – a day or two separating those.
>
> . . . .
>
> The Court finds in this case that there is a breach of trust. There was so much testimony about how close the two young women were.

2 RP at 281-82. Additionally, both parties agreed to a restitution amount. Matteucci timely appeals her conviction.

DISCUSSION

Bank Records

Matteucci contends that the trial court inappropriately allowed hearsay evidence related to the Gairnses' bank records.[5] Because Matteucci raises this issue for the first time on appeal, we

[4] The record is unclear as to when Radford's trial actually occurred. At Matteucci's postponed April 5 sentencing, however, the judge amended Matteucci's prerelease conditions to preclude contact with Radford.

[5] Matteucci does not specifically assert error to her trial counsel failing to object to evidence about Marianne's and Jessica's bank records. A number of Matteucci's assignments of error, however, do relate in some way to this issue. Br. of Appellant at 20 ("Aside from Matteucci's statement to Pentz, the only evidence that any funds were transferred from Marianne's Bank of

do not address it. RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court."). Further, before trial, Matteucci stipulated to inclusion of the bank records and, at sentencing, agreed to a restitution award based on the bank records at issue. Because Matteucci stipulated to the admission of the bank records, she cannot now challenge their admission. Accordingly, all arguments related to these records, including her claim that the State failed to produce sufficient evidence to support the restitution award fail.

Ineffective Assistance of Counsel

Matteucci also argues that her trial counsel's assistance was ineffective because he failed to raise a corpus delicti challenge and did not challenge her offender score calculation. Specifically, Matteucci contends that the State could not independently establish the corpus delicti of the charged offenses absent Matteucci's confessions to Officer Pentz and, also, that because all her convictions related to the same criminal intent, "it was a classic case of same criminal conduct." Br. of Appellant at 31-32. Because the State successfully established the corpus delicti of the alleged crimes and the trial court correctly calculated her offender score, Matteucci's ineffective assistance of counsel claims fail.

Under both the Washington and United States Constitutions, a criminal defendant is entitled to the effective assistance of counsel at critical stages in the litigation. *State v. Page*, 147 Wn. App. 849, 855, 199 P.3d 437 (2008), *review denied*, 166 Wn.2d 1008 (2009). To establish ineffective assistance of counsel, Matteucci must show that (1) her counsel's performance was

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America account was Marianne's unsupported statement."); Br. of Appellant at 23 ("The prosecutor also apparently decided that the strength of the State's case would not be enhanced by introducing bank records with the appropriate foundation to prove beyond a reasonable doubt that the alleged transactions in fact occurred.").

deficient and (2) the deficient performance prejudiced her. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Where the ineffective assistance of counsel claim is based on counsel's failure to make a motion or an objection, a defendant must show not only meritorious grounds for the motion but also that the verdict would have differed had the motion been granted. *See Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). Here, ample evidence established the corpus delicti of the charged offenses and the trial court correctly treated Matteucci's convictions as separate crimes. Accordingly, an objection related to either the corpus delicti or a motion to calculate her offender score using the same criminal conduct doctrine would not have succeeded. As such, Matteucci suffered no prejudice from her trial counsel not raising either nonmeritorious argument and her counsel's performance in this respect was necessarily sufficient.

A. Corpus Delicti

A corpus delicti challenge does not present a question of constitutional magnitude that the defendant may raise for the first time on appeal. *State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010) ("Washington's corpus delicti rule, particularly the requirement that the State present independent, corroborative evidence that the offense occurred, is judicially created and not constitutionally mandated"). Accordingly, we would not normally consider this issue. RAP 2.5(a). Matteucci does argue, however, that her counsel ineffectively represented her by failing to raise the corpus delicti issue below, a constitutional issue Matteucci may raise for the first time on

appeal. As such, we address this issue *solely* in the context of her ineffective assistance of counsel claim. Nevertheless, because the record clearly establishes that the State established the corpus delicti of the charged crimes, this portion of Matteucci's ineffective assistance of counsel claim fails.

Establishing the corpus delicti generally requires only two elements: (1) a specific injury or loss and (2) someone's criminal act as the cause of the injury or loss. *State v. DuBois*, 79 Wn. App. 605, 609, 904 P.2d 308 (1995). *State v. Meyer*, 37 Wn.2d 759, 763-64, 226 P.2d 204 (1951) provides a traditional statement of the "corpus delicti rule":

> The confession of a person charged with the commission of a crime is not sufficient to establish the *corpus delicti*, but if there is independent proof thereof, such confession may then be considered in connection therewith and the *corpus delicti* established by a combination of the independent proof and the confession.
>
> The independent evidence need not be of such a character as would establish the *corpus delicti* beyond a reasonable doubt, or even by a preponderance of the proof. It is sufficient if it *prima facie* establishes the *corpus delicti*.

(Citations omitted.) "Prima facie" in this context means there is "evidence of sufficient circumstances which would support a logical and reasonable inference of the facts sought to be proved." *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). In addition to corroborating a defendant's incriminating statement, the independent evidence "must be consistent with guilt and inconsistent with [a] hypothesis of innocence." *State v. Lung*, 70 Wn.2d 365, 372, 423 P.2d 72 (1967). The evidence must also "support not only the inference that *a crime* was committed but also the inference that a *particular crime* was committed." *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006).

Here, the independent evidence clearly provided proof of the corpus delicti. First, the State established a loss *specifically* related to the crimes for which Matteucci was charged. Both

Marianne and Jessica testified that an unauthorized person used their ATM cards to withdraw money wrongfully. Second, the State established that the specific loss alleged *was traceable to a criminal cause*. Both victims testified that Matteucci did not have permission to appropriate their debit cards or use their personal identification number (PIN). Further, in the instance of the debit card associated with Marianne's account, the State submitted photographic evidence at trial documenting Radford's use of that card. Finally, after learning of the unauthorized withdrawal at Fred Meyer, Jessica immediately cancelled her personal debit card. It is both logical and reasonable to infer that a person would not cancel their debit card after learning of a withdrawal they themselves had not made unless they feared criminal conduct.

Construed in favor of the State, this evidence is sufficient to establish a reasonable and logical inference that someone obtained or wrongfully exerted unauthorized control over Marianne's and Jessica's debit cards and that someone used their PIN numbers intending to commit, or to aid or abet, identity theft. As such, Matteucci's claim that her counsel was ineffective for failing to raise a meritless corpus delicti challenge fails. Under *Strickland*, counsel's failure to raise a losing argument cannot be ineffective assistance.

B. Same Criminal Conduct

Determining whether separate offenses constitute same criminal conduct is a question of law that we review de novo. *State v. Torngren*, 147 Wn. App. 556, 562-63, 196 P.3d 742 (2008). Two or more crimes constitute the "same criminal conduct" for purposes of sentencing 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). We narrowly construe the definition of "same criminal conduct" and require proof of all three elements to support a "same criminal conduct"

determination. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). In deciding whether different crimes encompass the same criminal conduct for sentencing purposes, the focus is on whether the objective criminal intent of the offenses changes from one crime to the next and whether one crime furthered the commission of the others. *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).

Here, Matteucci's two theft convictions do not constitute same criminal conduct because they involve separate victims. *See In re Pers. Restraint of Orange*, 152 Wn.2d 795, 821, 100 P.3d 291 (2004) ("Offenses arise from separate and distinct conduct when they involve separate victims."). In addition, all three incidences of identity theft occurred at different times and places. The trial court appropriately treated these crimes separately for purposes of sentencing. *See State v. Wilson*, 136 Wn. App. 596, 615, 150 P.3d 144 (2007) (where the defendant had time to complete the assault and form a new intent to threaten the victim, the crimes of assault and felony harassment had different objective intents and were not the same criminal conduct). Thus, even if Matteucci's counsel had raised an objection related to same criminal conduct at sentencing, it would have failed. By necessity, her claim of ineffective assistance of counsel must fail as well.

Sufficiency of the Evidence

Matteucci also contends that the State failed to sufficiently provide evidence proving each element of her charged crimes. Specifically, she contends that she "reasonably believed she pretty much had free rein in using Jessica's ATM cards" (Br. of Appellant at 22) and, as a result, lacked the requisite criminal intent to commit identity theft pursuant to RCW 9.35.020(1) ("No person may knowingly obtain, possess, use, or transfer a means of identification . . . with the intent to

commit, or to aid or abet, any crime."). Because any rational trier of fact could conclude that Matteucci intended to commit a crime when taking and using the Gairnses' debit cards to obtain money without the cardholders' knowledge or permission, this argument lacks merit.

Sufficiency of the evidence is a question of constitutional magnitude that the defendant may raise for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the jury's verdict, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the jury to resolve issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

Here, the State presented the jurors with substantial evidence related to the theft of Jessica's and Marianne's debit cards. Both victims testified, the State presented photographic evidence showing Radford using Marianne's card and Matteucci testified that she took and used the cards and then returned them without Jessica's knowledge. In addition, the State played the recording of Matteucci's voluntary statement to Sergeant Pentz, made after Radford's arrest, in which Matteucci admitted to the thefts. Given the overwhelming evidence presented at trial, *any* rational trier of fact would infer that Matteucci intended to steal the Gairnses' identities to obtain money unlawfully.

Denied the Right to a Complete Defense

Next, Matteucci contends that the trial court denied her the right to present a complete defense. Specifically she asserts that the trial court abused its discretion in excluding testimony related to Matteucci's allegedly engaging in sexual activity with Jessica and her boyfriend. Matteucci contends that she contracted human papillomavirus from the encounter and now suffers from cancer as a result. Matteucci contends that, had the jury been able to hear testimony to this effect, her use of Jessica's debit cards would make sense. The State contends that because "there was ample other, less sensational, evidence available to Ms. Matteucci with which to establish the fact of this relationship," any testimony related to a sexual encounter would be needlessly cumulative. Br. of Resp't at 20-21. Because this type of evidence is irrelevant, confuses the issues, and is needlessly inflammatory, the trial court did not abuse its discretion in denying its admission.

A criminal defendant has a constitutional right to present relevant, admissible evidence in her defense. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). But the right of a criminal defendant to present evidence is not unfettered, and the refusal to admit evidence lies largely within the sound discretion of the trial court. *Rehak*, 67 Wn. App. at 162. Generally, we review a trial court's decision to admit or refuse evidence under an abuse of discretion standard. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Powell*, 126 Wn.2d at 258.

Here, the trial court heard defense counsel's offer of proof concerning the sexual encounter, then concluded that "the State's request for the in limine ruling that will preclude 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 on the *basis of relevance* and on the basis of 404(b) evidence." 1 RP at 44 (emphasis added). Undoubtedly, this evidence was inadmissible under ER 403 on relevancy grounds as any probative value did not outweigh the substantial prejudice and confusion of issues addressing such a claim would entail. ER 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues").[6] The trial court did not abuse its discretion in deciding this issue.

DOSA

Last, Matteucci claims that the sentencing court violated the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, and Matteucci's right to due process by ignoring statutory criteria in denying her request for a DOSA. She also contends that the trial court considered impermissible facts in making its decision. The State counters that whether to grant a DOSA rests within the sound discretion of the trial court and, in Matteucci's case, the trial court did not abuse its discretion. The trial court considered Matteucci's DOSA request and did not abuse its discretion in denying Matteucci a DOSA.

Whether to grant a DOSA is a decision that rests within the sound discretion of the trial court. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). While no defendant is entitled to an exceptional sentence below the standard range, "every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *Grayson*, 154 Wn.2d at 342. If a trial court "refuses categorically to impose an exceptional sentence below the standard range under any circumstances," then it has abused the discretion

[6] Because the trial court appropriately excluded this evidence as irrelevant, we do not address Matteucci's arguments related to exclusion of evidence through ER 404(b).

vested to it through the SRA. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998); *see also Grayson*, 154 Wn.2d at 342. We review a trial court decision to deny a DOSA alternative under an abuse of discretion standard. *Grayson*, 154 Wn.2d at 342.

Here, the trial court postponed sentencing several times to allow Matteucci the opportunity to obtain a DOSA screening despite the fact that her problems with drugs had not been presented as an issue at any time prior to sentencing. After the sentencing hearing, the trial court did not consider Matteucci's failure to testify truthfully at Radford's trial and expressed a number of legitimate reasons for denying the DOSA alternative. As previously discussed, the sentencing court based its decisions on the number of Matteucci's offenses and that stealing from Jessica, an extremely close friend, and her mother constituted a breach of trust. Thus, contrary to Matteucci's claim, the court did not categorically oppose a DOSA or rely on impermissible grounds in declining to impose a DOSA. Accordingly, we affirm Matteucci's convictions and 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 in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

WORSWICK, A.C.J.