IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27537-0-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
ROSE A. HENDERSON,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J. — A Walla Walla jury convicted Rose Henderson of presenting a false or fraudulent insurance claim. She argues in this appeal that her trial attorney was ineffective and that she did not violate the statute because she was not the one who actually tendered the claim to her insurance company. We disagree with both contentions and affirm.

FACTS

Ms. Henderson purchased an automobile insurance policy from Progressive in March 2005, by making a down payment. She cancelled the policy on April 14, 2005,

without making any further payments. She received written confirmation mailed to her home in Walla Walla.

One year later, at about 2:30 p.m. on April 21, 2006, Ms. Henderson rear-ended Shiloh Akari's vehicle, inflicting about $2,400 of damage and totaling it. An officer arrived at the scene and asked for her insurance information. Ms. Henderson advised that she did not have her insurance card and would fax it to the officer later in the day. She then proceeded home and contacted Progressive, which reported that her policy had been cancelled 12 months earlier. She then purchased a new policy which became effective at 3:22 p.m. Ms. Henderson then faxed that information to the officer.

Later that day, Ms. Henderson advised the Akari family that she was insured by Progressive. The Akaris then contacted Progressive to file a claim. Progressive investigated the claim and denied coverage on the basis that the policy was not purchased until after the accident. The Akari family insurer, Safeco, ultimately paid their claim.

In May, Ms. Henderson admitted to Detective Steve Potter of the Walla Walla Police Department that she purchased the policy after the accident and was not insured when the accident occurred.

The prosecutor filed a single count of presenting a false or fraudulent claim in violation of RCW 48.30.230(1), a class C felony. A jury ultimately convicted her as

charged. She then timely appealed to this court.

ANALYSIS

Ms. Henderson argues that her counsel was ineffective and that her actions did not violate the statute. We will address those issues, both governed by well-settled standards of review, in the order stated.

Ineffective Assistance. The Sixth Amendment guarantees the right to counsel. More than the mere presence of an attorney is required. The attorney must perform to the standards of the profession. Counsel's failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

The primary[1] accusation against counsel is that she did not ask the State to prove venue in Walla Walla County. There is no apparent reason why she should have done so.

Venue is not an element of a crime. *State v. Dent*, 123 Wn.2d 467, 479, 869 P.2d 392 (1994). A venue challenge ordinarily must be brought before trial and will be

[1] Appellant also contends that trial counsel did not adequately challenge the sufficiency of the evidence. Since we address the merits of that issue in this opinion there is no reason to consider it as a derivative issue in this context.

decided by a judge. *Id.* at 480. When a venue challenge is raised because of evidence presented during trial, the State must prove venue by a preponderance of the evidence. *Id.* at 480-481. Ms. Henderson did not raise a venue challenge.

She argues, however, that because the prosecutor included a venue allegation in the charging document, her counsel should have required the prosecutor to prove venue. Once an extraneous element is included in a jury instruction, the State then has the burden of proving that additional element beyond a reasonable doubt. *E.g.*, *State v. Hickman*, 135 Wn.2d 97, 101-103, 954 P.2d 900 (1998). However, Ms. Henderson has not provided any authority that suggests a prosecutor can be compelled to add and prove an extraneous element. Thus, she has failed to show that her attorney erred.

We also question how Ms. Henderson would have been harmed by the absence of a venue allegation. All of the evidence suggests venue was properly in Walla Walla County. The accident occurred in the City of Walla Walla, and all of the actions that set the claim in motion occurred there. Venue does not appear to be proper in any other location. There is no reason to believe venue was in question.

Ms. Henderson has failed to establish that her attorney erred or that she was harmed by the alleged error. The claim of ineffective assistance is without merit.

Sufficiency of the Evidence. Ms. Henderson claims the evidence against her was

insufficient because she never submitted the insurance claim. Properly viewed, the evidence permitted the jury to find that she caused the claim to be submitted.

The sufficiency of the evidence to support a verdict is reviewed according to long-settled principles. The reviewing court does not weigh evidence or sift through competing testimony. Instead, the question presented is whether there is sufficient evidence to support the determination that each element of the crime was proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.*

The State alleged that Ms. Henderson violated RCW 48.30.230(1), which states:

> (1) It is unlawful for any person, knowing it to be such, to:
> (a) Present, or cause to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss under a contract of insurance; or
> (b) Prepare, make, or subscribe any false or fraudulent account, certificate, affidavit, or proof of loss, or other document or writing, with intent that it be presented or used in support of such a claim.

The offense is a gross misdemeanor, except that a claim in excess of $1,500 constitutes a class C felony. RCW 48.30.230(2). The amended information charges the crime in the language of subsection (1)(a), and alleges a felony level claim in excess of $1,500.

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Ms. Henderson argues that the evidence is insufficient because *she* did not personally present an insurance claim and because the claim was genuine since it arose from an actual accident. She also maintained that she made an innocent mistake with no intent to defraud anyone. The evidence, however, certainly permitted the trier-of-fact to conclude otherwise. Ms. Henderson acquired the policy after the accident, reported the new policy number to the police and victim, and then told the insurance adjustor that the accident occurred after the policy was purchased. This evidence easily permitted the jury to find that Ms. Henderson was attempting to defraud the insurance company by trying to provide a basis for the new policy covering the accident.

While it is true that the Akari family presented the claim for damages, they acted from information provided by Ms. Henderson. The statute makes it unlawful for anyone to "cause to be presented" a false claim. Ms. Henderson's actions "caused" the Akaris to present the uninsured claim to Progressive. She knew that the accident was not covered by the new policy, but nonetheless provided to police and to the family the policy number for the after-acquired policy. She followed that up by falsely claiming the accident occurred after the policy was purchased. In short, the evidence permitted the jury to conclude that Ms. Henderson tried to convince the police, the Akaris, and Progressive

that the accident was insured by the new policy.

Properly viewed, the evidence was sufficient to support the charge and the jury's verdict. The conviction is affirmed.

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

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Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Sweeney, J.