70099-5

70099-5

No. 70099-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

AMALIA M. CASTILLO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Cases

Statutes

A. ASSIGNMENTS OF ERROR

1. The information charging conspiracy to commit first degree murder omitted essential elements of the crime.

2. The State did not prove beyond a reasonable doubt that Ms. Castillo possessed a "firearm."

3. The State did not prove Ms. Castillo's criminal history for purposes of calculating the offender score.

4. The trial court erred in failing to determine whether Ms. Castillo's two prior convictions were the same criminal conduct.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Constitution requires that the charging document set forth all essential elements of the charged crime. Two essential elements of the crime of conspiracy are that the accused agreed with another person to commit a crime and that at least one of them took a substantial step toward completion of the agreement. Was the information charging Ms. Castillo with conspiracy to commit first degree murder constitutionally deficient where it omitted these two essential elements?

2. To prove the crime of unlawful possession of a firearm, the State must prove beyond a reasonable doubt that the accused possessed

a "firearm." A gun that is inoperable is not a "firearm" unless it can be rendered operable with reasonable effort and within a reasonable time period. Did the State fail to prove Ms. Castillo possessed a "firearm," where the gun's firing pin was missing and the State did not prove the gun could be rendered operable with reasonable effort and within a reasonable time period?

3. To prove the crime of unlawful possession of a firearm, the State must prove beyond a reasonable doubt that the defendant was in actual or constructive possession of a firearm. Constructive possession requires proof of dominion and control over the item or the premises where it was found. Did the State fail to prove Ms. Castillo was in constructive possession of firearms found in the car, where she was merely a passenger in the car and did not have dominion and control over it or the guns?

4. The State bears the burden of proving an offender's criminal history for purposes of calculating the offender score. The State may not rely on bare allegations unsupported by evidence. Did the State fail to prove Ms. Castillo's criminal history where it merely listed her alleged prior convictions and presented no evidence to prove the allegations?

5. When an offender's criminal history includes prior convictions that were sentenced on the same date and ordered to be served concurrently, the Sentencing Reform Act (SRA) requires the current sentencing court to determine whether the prior convictions were the "same criminal conduct" before including them in the offender score. Here, the trial court included two prior convictions that were sentenced on the same date and ordered to be served concurrently in Ms. Castillo's offender score, without determining whether they were the same criminal conduct. Did the court violate the statute?

C. STATEMENT OF THE CASE

1. **The incident**

Amalia Castillo has known Francisco Mendoza-Gomez for a few years and the two were close friends. 12/17/12RP 31; 4/24/13RP 89. She worked for him, doing odd jobs such as running errands, doing his banking, translating for him,[1] managing his cars, and helping him to sell drugs. 12/17/12RP 33, 90; 4/24/13RP 84-85, 88-89.

On the afternoon of September 30, 2011, Ms. Castillo was on her way to the bank with her brother-in-law Agalega Pua to deposit

[1] Mr. Mendoza-Gomez speaks Spanish and cannot speak English. Ms. Castillo speaks both Spanish and English. 4/16/13RP 75; 4/18/13RP 92.

some money on behalf of Mr. Mendoza-Gomez, when he called her on her cell phone. 12/17/12RP 42-43; 4/24/13RP 21-22. He sounded scared and nervous and said he needed her help. 12/17/12RP 43-44; 4/24/13RP 22-24. He said he was at his brother's apartment and a man was threatening to kill him or beat him up. 12/17/12RP 43-44; 4/24/13RP 22-24.

Ms. Castillo drove to Mr. Mendoza-Gomez's brother's apartment. 12/17/12RP 44-45; 4/24/13RP 24. When she arrived, Mr. Mendoza-Gomez told her he had caught his brother's wife on the sofa having sex with Juan Zuozo-Moreno. 12/17/12RP 47; 4/24/13RP 26-27. Mr. Zuozo-Moreno was still at the apartment, standing outside by the door. 12/17/12RP 45-46; 4/24/13RP 28. Mr. Mendoza-Gomez was very angry and Ms. Castillo told him to calm down. 12/17/12RP 49. She persuaded him to leave and the two of them drove away in her car. 12/17/12RP 51; 4/24/13RP 29.

About a half hour later, Ms. Castillo and Mr. Mendoza-Gomez arrived at Mr. Pua's room at the Traveler's Choice Motel in Tukwila. 12/17/12RP 52; 4/24/13RP 30. Mr. Zuozo-Moreno was there, along with Mr. Pua, Mr. Mendoza-Gomez's brother, and others. 12/17/12RP 52-54; 4/24/13RP 31. Mr. Mendoza-Gomez became angry again and

grabbed a baseball bat that was in the room. He swung it at Mr. Zuozo-Moreno's legs, saying to him, "You f___ed up," in Spanish.[2] 12/17/12RP 55-56; 12/13/12RP 110-11; 4/24/13RP 32-35. Mr. Zuozo-Moreno put his hand down to defend himself and the bat hit his little finger, breaking it. 12/17/12RP 55; 12/13/12RP 110-11; 4/24/13RP 36.

Ms. Castillo took the bat from Mr. Mendoza-Gomez and told him to settle his disagreement with Mr. Zuozo-Moreno elsewhere. 12/17/12RP 55-56. She told Mr. Zuozo-Moreno to leave, but because he did not have a car, she offered to drive him. 12/17/12RP 57; 4/24/13RP 36. She took Mr. Mendoza-Gomez's Acura MDX, intending to drive Mr. Zuozo-Moreno to his cousin's house in Tacoma. 12/17/12RP 58. Mr. Pua also came, sitting in the back of the car with Mr. Zuozo-Moreno. 12/17/12RP 60-61; 4/24/13RP 40.

On the way to Tacoma, Ms. Castillo stopped in Federal Way to pick up her friend Eric Tharp, who sat in the front passenger seat. 12/17/12RP 63-64; 4/24/13RP 44. The car was acting up and Mr. Tharp said it was having transmission problems. 12/17/12RP 63-64. He suggested they stop at the Walmart to get some transmission fluid. 12/17/12RP 64; 4/24/13RP 45. They stopped at the store and Mr.

---

[2] Mr. Zuozo-Moreno spoke only Spanish and could not speak or understand English. 12/13/13RP 80.

Tharp went inside and bought two bottles of transmission fluid. 12/17/12RP 65; 4/24/13RP 46. Then they drove to a Shell station nearby to get a paper funnel to use to pour in the fluid. 12/17/12RP 65-66; 4/24/13RP 52-53. Mr. Tharp went into the Shell station store, got the funnel, and poured the transmission fluid into the car. 12/17/12RP 67; 4/24/13RP 54.

As Ms. Castillo was driving away from the Shell station, Mr. Zuozo-Moreno suddenly jumped out of the car and ran into the store. 12/17/12RP 68-72; 4/24/13RP55-56. Mr. Pua ran after him, followed by Mr. Tharp. 12/17/12RP 68-72; 4/24/13RP 56. Mr. Zuozo-Moreno jumped over the front counter and Mr. Pua and Mr. Tharp caught up to him and punched and kicked him several times as he lay on the floor. 12/03/12RP 65. Ms. Castillo did not see what happened inside the store. 4/17/13RP 43. Mr. Pua and Mr. Tharp ran back outside, jumped in the MDX and Ms. Castillo drove away. 12/17/12RP 72-74; 4/24/13RP 58.

The Shell station cashier and a bystander called 911. 4/11/13RP 125-27. The police arrived, followed by medics who treated Mr. Zuozo-Moreno. 11/28/12RP 18-20. During the beating, Mr. Zuozo-

Moreno received a dislocated jaw and a laceration on his face. 12/17/12RP 129.

Ms. Castillo testified that Mr. Zuozo-Moreno was free to leave at all times and no one pointed a gun at him or forced him into the car. 12/17/12RP 57, 66. She did not see a gun at any time during the incident. 12/17/12RP 70, 96-97; 4/24/13RP 58. Mr. Mendoza-Gomez did not tell her to take Mr. Zuozo-Moreno anywhere or to have him killed, and she never told Mr. Zuozo-Moreno that Mr. Mendoza-Gomez wanted him killed. 12/17/12RP 57, 71; 4/24/13RP 60-61.

Mr. Zuozo-Moreno denied having an affair with Mr. Mendoza-Gomez's wife but admitted he was at her apartment that day talking to her. 12/13/12RP 86-87; 4/15/13RP 42-44. He said Mr. Pua pointed a gun at him at the apartment and pushed him into a car. 12/13/12RP 94-96, 100-01; 4/15/13RP 54-57. He was driven to the Traveler's Choice, where Mr. Mendoza-Gomez hit him on the hand with the baseball bat. 12/13/12RP 104-09. Mr. Mendoza-Gomez then gave Mr. Pua another handgun. 12/13/12RP 108; 4/15/13RP 76-79. Mr. Pua pointed the gun at Mr. Zuozo-Moreno and pushed him into the MDX. 12/13/12RP 111-12. Mr. Zuozo-Moreno said he could not get out of the car because Ms. Castillo locked the doors and Mr. Pua was pointing the

gun at him. 12/13/12RP 115. He said that as they drove, he asked Ms. Castillo in Spanish to let him go but she said, "They told me to kill you and I'm going to kill you." 12/13/12RP 116; 4/15/13RP 95-96. He said he was able to escape at the Shell station only because Ms. Castillo had neglected to lock the doors again when Mr. Tharp got back in the car. 12/13/12RP 124-25; 4/15/13RP 108-09.

In return for a reduction in charges, Mr. Pua agreed to plead guilty and testify against Ms. Castillo. 11/29/12RP 5; 4/16/13RP 71. He said that on September 30, 2011, Ms. Castillo called him at the Traveler's Choice and said she needed his help. 11/29/12RP 6, 9-10; 4/16/13RP 76-78. He said when he got to Mr. Mendoza-Gomez's brother's apartment, Ms. Castillo handed him a gun and told him Mr. Mendoza-Gomez said to take Mr. Zuozo-Moreno in the car and kill him. 11/29/12RP 11-12, 18-19; 4/16/13RP 84-91. Mr. Pua admitted beating Mr. Zuozo-Moreno inside the Shell station store but said Ms. Castillo did not tell him to beat him. 11/29/12RP 57-58; 4/16/13RP 129. He said Mr. Mendoza-Gomez later gave him $300 and a small amount of methamphetamine for his participation in the incident. 11/29/12RP 61; 4/16/13RP 131-33. He did not know whether Ms. Castillo was paid. 11/29/12RP 61; 4/16/13RP 131-33.

2. **Ms. Castillo's arrest**

After some investigation, the police identified Ms. Castillo as a suspect and she was arrested several days later after the police stopped a Jeep Cherokee in which she was riding. 11/28/12RP 81. Mr. Tharp was driving the Jeep and Ms. Castillo was sitting in the front passenger seat. 12/04/12RP 78-79. Ms. Castillo's young son was sitting in a child seat in the passenger seat behind her and another man was sitting in the other rear passenger seat. 12/04/12RP 78-79. The Jeep belonged to someone named "Nicole." 12/10/12RP 29-31.

The police searched a purse that Ms. Castillo had been carrying, which was located on the front passenger seat. 11/28/12RP 74; 12/05/12RP 12. Inside the purse was a quantity of methamphetamine and a .380 semiautomatic pistol. 11/28/12RP 75; 12/05/12RP 52-55; 12/10/12RP 96-97. Mr. Castillo was not carrying the handgun during the incident; Mr. Mendoza-Gomez gave it to her afterward for her protection after she began receiving threatening text messages from Mr. Zuozo-Moreno's cousin. 12/17/12RP 76-77. She never used the gun. 12/17/12RP 78. The methamphetamine found in her purse was for her own personal use. 12/17/12RP 90.

The magazine in the pistol in Ms. Castillo's purse contained five live rounds. 12/05/12RP 52-55. But when the police test-fired the gun, it would not fire because the hammer failed and it did not have a firing pin. 12/05/12RP 61-62, 96. The police found three other handguns and two rifles in the Jeep. 12/05/12RP 56, 69-78, 94-95, 102.

3. **The criminal charges and the two trials**

Ms. Castillo was charged with (1) conspiracy to commit murder in the first degree, RCW 9A.28.040(1) and 9A.32.030(1)(a), with a firearm enhancement allegation; (2) first degree kidnapping, alleging she intentionally abducted Moreno with intent to inflict bodily injury, RCW 9A.40.020(1)(c), with a firearm enhancement allegation; (3) unlawful possession of a firearm in the second degree, RCW 9.41.040(2)(a)(i); and (4) possession of methamphetamine with intent to deliver or manufacture, RCW 69.50.401(1), (2)(b). CP 17-19.

Following a trial at which she was tried alone, the jury found Ms. Castillo guilty of first degree kidnapping while armed with a firearm; guilty of unlawful possession of a firearm in the second degree; and guilty of the lesser crime of possession of methamphetamine. CP 116-19. The jury was deadlocked on the conspiracy and the court declared a mistrial. 12/19/12RP 2, 9; CP 120.

The court joined Ms. Castillo's case with Mr. Mendoza-Gomez's case for the retrial. 3/05/13RP 32. Following the second trial, the jury found her guilty as charged of conspiracy to commit first degree murder while armed with a firearm. CP 217-18.

4. **The sentencing hearing**

At sentencing the court found the kidnapping and conspiracy were the same criminal conduct. 7/12/13RP 4. The court imposed a standard-range sentence based on an offender score of four. 7/12/13RP 6; CP 125, 127, 220, 222.

D. ARGUMENT

1. **The information omitted essential elements of the charged crime of conspiracy to commit first degree murder**

a. To ensure the accused receives adequate notice of the charge, the Constitution requires the charging document contain all essential elements of the crime

It is a fundamental principle of criminal procedure, embodied in the state and federal constitutions, that an accused person must be informed of the criminal charge she is to meet at trial and cannot be tried for an offense not charged. U.S. Const. amend. VI;[3] Const. art. I,

[3] The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation."

§ 22;[4] State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995). All essential elements of the crime must be included in the information so as to apprise the accused of the charge and allow her to prepare a defense, and so that she may plead the judgment as a bar to any subsequent prosecution for the same offense. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991).

The judicially approved means of ensuring constitutionally adequate notice is to require a charging document set forth all of the essential elements of the alleged crime. See State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d 571 (2000). This "essential elements rule" has long been settled law in Washington and is constitutionally mandated. State v. Quismundo, 164 Wn.2d 499, 503, 192 P.3d 342 (2008) (citing Vangerpen, 125 Wn.2d at 788).

A charging document is constitutionally adequate only if all essential elements are included on the face of the document, regardless of whether the accused received actual notice of the charge. Vangerpen, 125 Wn.2d at 790.

---

[4] Article I, section 22 provides: "In criminal prosecutions the accused shall have the right to . . . demand the nature and cause of the accusation against him [and] to have a copy thereof."

When an information is challenged for the first time on appeal, it is to be construed liberally and will be deemed sufficient if the necessary facts appear in any form, or by fair construction may be found, on the face of the document. Kjorsvik, 117 Wn.2d at 105. Although it is not necessary "to use the exact words of a statute in a charging document," an information will be deemed sufficient only if "words conveying the same meaning and import are used." Id. at 108. "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Moavenzadeh, 135 Wn.2d 359, 362-63, 956 P.2d 1097 (1998) (internal quotation marks and citation omitted).

b. The information omitted the essential elements that Ms. Castillo agreed with one or more persons to engage in criminal conduct, and that any one of them took a substantial step in pursuance of the agreement

The conspiracy statute sets forth the following elements:

> A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

RCW 9A.28.040(1). The essential elements of the crime that must be included in the information are (1) that the accused agreed with one or more persons to commit a crime, and (2) that any one of them took a substantial step toward completion of the agreement. Moavenzadeh, 135 Wn.2d at 364.

An information that alleges the accused "did conspire with another or others" to commit a crime may be sufficient to allege the required element of an agreement among two or more persons to commit a crime. Moavenzadeh, 135 Wn.2d at 361, 364. That is because the meaning of the word "conspiracy" is commonly understood to include an agreement to commit a crime. Id. at 364.

But the term "conspiracy" is not by itself sufficient to allege the "substantial step" element. Id. "The mere use of the term 'conspiracy' does not necessarily imply that any member of the conspiracy took a substantial step in furtherance of the agreement." State v. McCarty, 140 Wn.2d 420, 427, 998 P.2d 296 (2000). That is because "[t]he mere existence of an agreement implies nothing about whether any of the conspirators acted on it." Id.

Here, the information omitted both of the essential elements of the crime of conspiracy. Count I of the information provided:

> I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse AMALIA M. CASTILLO AKA AMALIA M. CERVANTES and FRANCISCO MENDOZA-GOMEZ, and each of them, of the crime of **Conspiracy to Commit Murder in the First Degree**, a crime of the same or similar character as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:
>
> That the defendants AMALIA M. CASTILLO AKA AMALIA M. CERVANTES and FRANCISCO MENDOZA-GOMEZ, and each of them, together with others, in King County, Washington, on or about September 30, 2011, with intent that conduct constituting the crime of Murder in the First Degree of Isais Lozano aka Juan Zuozo-Moreno, to-wit: with premeditated intent to cause the death of Isais Lozano aka Juan Zuozo-Moreno, be performed, agreed with to engage in or cause the performance of such conduct, and the defendant or took a substantial step in the pursuance of such agreement.
>
> Contrary to RCW 9A.28.040(1) and 9A.32.030(1)(a), and against the peace and dignity of the State of Washington.[5]

First, the information omitted the essential element that Ms. Castillo agreed with one or more persons to commit a crime. The information alleged that, with intent to commit first degree murder, Ms.

---

[5] This document, the Fifth Amended Information, was filed as Sub #90 in the court file of Ms. Castillo's co-defendant, Francisco Mendoza-Gomez. A supplemental designation of clerk's papers has been filed in this Court designating the document as part of Ms. Castillo's appeal.

Castillo "agreed with to engage in or cause the performance of such conduct." Id. The information omitted the essential element that Ms. Castillo "agree[d] with *one or more persons* to engage in or cause the performance of such conduct." RCW 9A.28.040(1) (emphasis added).

Second, the information omitted the essential "substantial step" element. The information alleged that "the defendant or took a substantial step in the pursuance of such agreement." The information omitted the essential element that "*any one* of [the conspirators] t[ook] a substantial step in pursuance of such agreement." RCW 9A.28.040(1). The State was required to allege not just that Ms. Castillo took a substantial step, but that "*any member* of the conspiracy" took such a substantial step. McCarty, 140 Wn.2d at 427 (emphasis added). Although the use of the term "conspiracy" in the document may have been sufficient to allege that Ms. Castillo agreed with one or more persons to commit a crime, it was not sufficient to allege that any one of the conspirators acted on it. Id.

The necessary fact that *any member* of the conspiracy took a substantial step in furtherance of the agreement does not appear in any form on the face of the document. The information is therefore constitutionally deficient. Kjorsvik, 117 Wn.2d at 105.

c. The conspiracy conviction must be reversed and the charge dismissed without prejudice

If the reviewing court concludes the necessary elements are not found or fairly implied in the charging document, the court must presume prejudice. McCarty, 140 Wn.2d at 425. The remedy is reversal of the conviction and dismissal of the charge without prejudice to the State's ability to re-file the charge. Vangerpen, 125 Wn.2d at 792-93. Because essential elements are missing from the information, Ms. Castillo's conspiracy conviction must be reversed and the charge dismissed without prejudice.

2. **The State did not prove beyond a reasonable doubt that Ms. Castillo possessed an operable firearm, as required to sustain the conviction for unlawful possession of a firearm**

It is fundamental that an accused is presumed innocent of a criminal charge and the State has the burden of proving guilt beyond a reasonable doubt. State v. Copeland, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). Constitutional due process requires the State to prove every element of the charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

In reviewing the sufficiency of the evidence to uphold a criminal conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The reviewing court presumes the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). But the existence of a fact cannot rest upon guess, speculation, or conjecture. Id.

To prove the charged crime of second degree unlawful possession of a firearm, the State was required to prove beyond a reasonable doubt that, on the day she was arrested,[6] Ms. Castillo "knowingly had a firearm in her possession or control." CP 18, 107; RCW 9.41.040(2)(a)(i).

The State did not prove the elements of the crime because (1) it did not prove the handgun found in Ms. Castillo's purse, which was

---

[6] The charging period for the unlawful possession of a firearm charge was "October 12, 2011 through October 13, 2011." CP 18, 107. The charge therefore applied only to the firearm(s) allegedly in Ms. Castillo's possession on the date of her arrest.

inoperable, amounted to a "firearm" under the statute; and (2) it did not prove Ms. Castillo had "possession or control" over any of the other guns found in the Jeep in which Ms. Castillo was riding at the time of her arrest.

a. The State did not prove the handgun found in Ms. Castillo's purse, which could not fire a projectile because it was missing its essential firing pin, amounted to a "firearm" under the statute

A "firearm" is defined as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(9). When Ms. Castillo was arrested, she had a .380 semiautomatic pistol in her purse.[7] 11/28/12RP 75; 12/05/12RP 52-55; 12/10/12RP 96-97. The State did not prove the pistol was a "firearm" for purposes of the statute because it did not prove the gun could fire a projectile. Although the gun's magazine contained several bullets, the gun was not operable because it was missing its firing pin. 12/05/12RP 52-55, 62-62, 96. Ms. Castillo had possessed the gun for only a short period of time and never fired it. 12/17/12RP 76-78. The firearm expert who test-fired the gun testified it would not fire. 12/05/12RP 61-62, 96. The State presented no

testimony or other evidence to show whether, or under what conditions, the gun could ever be rendered operational.

In State v. Pam, 98 Wn.2d 748, 753-55, 659 P.2d 454 (1983), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988), the Supreme Court held that, to prove a gun is a "firearm" for purposes of the statute,[8] the State must prove the gun is "deadly in fact." To prove a firearm is "deadly in fact," the State must prove the firearm is operable. Id. In Pam, a rational jury could have a reasonable doubt as to whether the State proved the firearm in question was operable because the weapon fell apart as the defendant was running away from the scene, police recovered only the wooden forestock of "what appeared to be a shotgun," and no shots were fired or bullets recovered. Id. at 754-55.

The Court of Appeals has also consistently held that, to prove an accused was armed with a "firearm" under RCW 9.41.010, the State must prove the gun was operable, or at least that the gun could be

---

[7] Ms. Castillo was prohibited by law from carrying an operational firearm because she had a prior felony conviction. CP 27; RCW 9.42.040(2)(a)(i).

[8] The court applied the following definition of "firearm": a "weapon from which a projectile may be fired by an explosive such as gun powder." Pam, 98 Wn.2d at 75 (internal quotation marks and citation omitted).

rendered operable with reasonable effort and within a short period of time. See State v. Raleigh, 157 Wn. App. 728, 736, 238 P.3d 1211 (2010), review denied, 170 Wn.2d 1029, 249 P.3d 624 (2011) ("A firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm within the meaning of former RCW 9.41.010(1)"; evidence was sufficient where, although gun's firing pin did not work, officer testified it could be easily repaired within a short period of time); State v. Pierce, 155 Wn. App. 701, 705, 714, 230 P.3d 237 (2010) ("To uphold a firearm enhancement, the State must present the jury with sufficient evidence to find a firearm operable . . . ."; evidence was not sufficient where State proved only that, during a burglary, the accused "was holding what appeared to be a handgun" and presented no evidence that the gun was capable of firing a projectile); In re Pers. Restraint of Rivera, 152 Wn. App. 794, 797-98, 803 n.22, 218 P.3d 638 (2009), aff'd sub nom., In re Pers. Restraint of Jackson, 175 Wn.2d 155, 283 P.3d 1089 (2012) ("our courts have held that there must be sufficient evidence to find a firearm operable to uphold a firearm enhancement"; evidence was sufficient where State proved defendant actually shot victim with firearm) (citing Pam, 98 Wn.2d at 754-55); In re Pers. Restraint of Delgado, 149 Wn. App. 223,

237, 204 P.3d 936 (2009) ("a weapon is not a 'firearm' under the statutory definition unless it is operable"); State v. Releford, 148 Wn. App. 478, 490-91, 200 P.3d 729 (2009), review denied, 166 Wn.2d 1028, 217 P.3d 336 (2009) (State proved defendant was armed with a "firearm" where "all that the pistol required in order to be fully operable was ammunition" and, "based on the evidence introduced by the State, the jury reasonably could have concluded that Releford could have obtained the ammunition for the pistol with reasonable effort and in a reasonable time"); State v. Padilla, 95 Wn. App. 531, 535-36, 978 P.2d 1113 (1999) ("a disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm within the meaning of RCW 9.41.010(1)"; evidence was sufficient where State proved disassembled pistol could be reassembled in a matter of seconds); but see State v. Faust, 93 Wn. App. 373, 381, 967 P.2d 1284 (1998) (court held gun was firearm, although it jammed when the police inserted magazine, because "a malfunctioning gun can be fixed").

Under the weight of this authority, a gun that is incapable of firing because it is missing its firing pin does not amount to a "firearm" for purposes of the statute unless the State proves it can be rendered

operational with reasonable effort and within a short period of time. The State made no such showing in this case. The only evidence the State presented was that the gun *could not* be fired. 12/17/12RP 61-62, 96. The State presented no evidence to show whether, and under what conditions, the gun could be rendered operational. Because the State did not prove beyond a reasonable doubt that the gun in Ms. Castillo's purse was an operational "firearm," the State may not rely on that gun to sustain the unlawful possession of a firearm conviction. RCW 9.41.010, .040(2)(a)(i).

b. The State did not prove Ms. Castillo had possession or control over any of the other guns found in the Jeep

At the time of Ms. Castillo's arrest, there were several other guns in the Jeep in which she was riding. One handgun was located on the rear passenger side floor, another was under the driver's seat, and a third was inside a laptop bag in the back of the Jeep. 12/05/12RP 56, 69-78, 94-95, 102. All of these handguns—except the one found in Ms. Castillo's purse—were operational. 12/05/12RP 61-62, 68, 71-77, 104. In addition, two rifles, which were not test-fired, were found in the trunk of the car. 11/28/12RP 76; 12/05/12RP 56, 80, 95.

Because Ms. Castillo was not in actual possession of any of these other firearms, the State could not rely upon them to prove the crime of unlawful possession of a firearm unless it proved she had "constructive possession" of the other guns. State v. Chouinard, 169 Wn. App. 895, 899, 282 P.3d 117 (2012), review denied, 176 Wn.2d 1003, 297 P.3d 67 (2013). In order to prove "constructive possession," the State was required to prove Ms. Castillo had dominion and control over the firearms. Id. Mere proximity to a firearm is insufficient to show dominion and control. Id. Knowledge of the presence of a gun, without more, is likewise insufficient. Id. "Courts have found sufficient evidence of constructive possession, and dominion and control, in cases in which the defendant was either the owner of the premises or the driver/owner of the vehicle where contraband was found." Id. at 899-902 (and cases cited).

In Chouinard, Chouinard was convicted of unlawful possession of a firearm after he was arrested while riding in a car in which a firearm was found. Id. at 897-98. He had been riding in the backseat. When a police officer searched the car, he saw that the backrest on the backseat had been detached from the car, creating a gap between the backrest and the rear dash; a rifle barrel was protruding from the trunk

through the gap. Id. Chouinard admitted he had seen the gun behind the backseat. In addition, the driver of the car testified that a person sitting in the backseat could lean forward and pull the seat forward to reach over the backseat and grab contents from the trunk. Id.

Although Chouinard knew about the gun and had been sitting in near proximity to it, the Court held the evidence was insufficient to prove he had dominion and control over the gun. Id. at 902-03. Chouinard was merely a passenger in the car. Although he admitted knowing about the gun, the State presented no evidence to show he owned or used it. The Court held "Chouinard's mere proximity to the weapon and his knowledge of its presence in the vehicle" was not sufficient to sustain a conviction for constructive possession of a firearm. Id.

Under Chouinard, the evidence in this case is similarly insufficient to sustain a conviction for constructive possession of a firearm. Ms. Castillo denied knowing about the other guns in the car. 4/24/13RP 64. Even if it can be reasonably inferred that she had such knowledge, her mere proximity to the guns, combined with any knowledge of their presence, was insufficient to show she had dominion and control over them. Id. The State presented no evidence

to show Ms. Castillo owned or ever touched any of the other guns. She was merely riding as a passenger in the car and did not own the car. 12/04/12RP 78-79; 12/10/12RP 29-31.

In sum, the evidence was insufficient to prove Ms. Castillo had dominion and control over any of the guns in the car other than the one found in her purse. Chouinard, 169 Wn. App.at 902-03. But the State did not prove beyond a reasonable doubt that the gun in her purse was capable of firing a projectile. See RCW 9.41.010(9). Thus, the evidence as a whole was insufficient to sustain Ms. Castillo's conviction for unlawful possession of a firearm.

3. The court erred in imposing a sentence based upon an offender score of "four"

At sentencing, the court calculated Ms. Castillo's offender score as a "four" and imposed a standard-range sentence based upon that score. CP 124-33, 219-29; 2/21/13RP 105-06; 7/12/13RP 17-18. The court included two alleged prior convictions in the offender score. Id. The court erred in relying upon those alleged prior convictions because (1) the State presented no evidence to prove its allegations regarding the prior convictions; and (2) the court did not make an independent determination of whether the two convictions, which were purportedly sentenced on the same date, constituted the "same criminal conduct."

a. The State did not sustain its burden of proving the facts necessary to determine whether the two alleged prior convictions should be included in the offender score

In Washington, a sentencing court's calculation of a criminal defendant's standard sentence range is determined by the "seriousness" level of the present offense as well as the court's calculation of the "offender score." RCW 9.94A.530(1). The offender score is determined by the defendant's criminal history, which is a list of her prior convictions. See RCW 9.94A.030(11); RCW 9.94A.525.

Constitutional due process[9] requires the State to prove the existence of prior convictions by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999); RCW 9.94A.530(2). The State bears the burden of proving not only the existence of prior convictions, but also any facts necessary to determine whether the prior convictions should be included in the offender score. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); Ford, 137 Wn.2d at 480.

Despite its general reluctance to address issues not preserved in the trial court, the Washington Supreme Court "allow[s] belated

[9] The Fourteenth Amendment provides: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

challenges to criminal history relied upon by a sentencing court." State v. Mendoza, 165 Wn.2d 913, 919-20, 920, 205 P.3d 113 (2009) (citing Ford, 137 Wn.2d at 477-78). The purpose is to preserve the sentencing laws and to bring sentences in conformity and compliance with existing sentencing statutes and avoid permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court. Mendoza, 165 Wn.2d at 920.

The Supreme Court has consistently held the Sentencing Reform Act (SRA) must be interpreted in accordance with principles of due process. State v. Hunley, 175 Wn.2d 901, 913-15, 287 P.3d 584 (2012); Mendoza, 165 Wn.2d at 920; Ford, 137 Wn.2d at 482. For a sentence to comport with due process, the facts relied upon by the trial court must have some evidentiary basis in the record. Mendoza, 165 Wn.2d at 926; Ford, 137 Wn.2d at 481-82. "It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination." Mendoza, 165 Wn.2d at 926 (citing Ford, 137 Wn.2d at 480). The SRA expressly places this burden on the State because it is "inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove."

Ford, 137 Wn.2d at 480 (citation omitted). Where the State fails to meet its burden of proof, the defendant may challenge the offender score for the first time on appeal. Mendoza, 165 Wn.2d at 929; Ford, 137 Wn.2d at 484-85.

That is not to say that a defendant cannot affirmatively acknowledge his criminal history and thereby obviate the need for the State to produce evidence. Mendoza, 165 Wn.2d at 920; RCW 9.94A.530(2). But the mere failure to object to the prosecutor's assertions of criminal history does not constitute such an acknowledgement. Mendoza, 165 Wn.2d at 928. Instead, the Supreme Court has "emphasized the need for an *affirmative* acknowledgment by the defendant of *facts and information* introduced for the purposes of sentencing." Id. (emphases in Mendoza).

"Nor is a defendant deemed to have affirmatively acknowledged the prosecutor's asserted criminal history based on his agreement with the ultimate sentencing recommendation." Id. In other words, a defendant who agrees with the State's calculation of the offender score does not thereby "affirmatively agree" with the implicit factual assertions underlying that calculation.

A defendant must *explicitly agree* to the prosecutor's asserted facts in order to waive her right to challenge them on appeal. State v. Lucero, 168 Wn.2d 785, 230 P.3d 165 (2010). In Lucero, at sentencing, the defendant recited a standard sentencing range that was apparently based on the inclusion of a California burglary conviction in the offender score. Id. at 787. But he did not "affirmatively acknowledge" that his California conviction was comparable to a Washington felony. Id. at 789. At most, he *implicitly* acknowledged that his offender score included the California burglary conviction. Id. But "[t]hat is not the 'affirmative acknowledgement' of comparability that Mendoza requires." Id. Instead, the defendant must *explicitly agree* to the asserted facts in order to waive his right to challenge them on appeal. Id.

Here, defense counsel did not object to inclusion of the two alleged prior convictions in Ms. Castillo's offender score but neither did she "affirmatively acknowledge" any facts or information introduced by the State for purposes of sentencing. Counsel agreed the offender score was a "four," but this was not the "affirmative acknowledgement" required in order to waive Ms. Castillo's right to

challenge the criminal history determination on appeal. Lucero, 168 Wn.2d at 789; 2/21/13RP 100.

If the court erroneously includes a prior offense in the offender score and the defense fails to "specifically object" before imposition of the sentence, the case is remanded for resentencing and the State is permitted to introduce new evidence. State v. Lopez, 147 Wn.2d 515, 520, 55 P.3d 609 (2002). Because Ms. Castillo did not waive her right to challenge her offender score, but did not specifically object, she is entitled to be resentenced at a hearing at which the State may present additional evidence.

b. The trial court erred by failing to independently determine whether the two alleged prior convictions, sentenced on the same date, constituted the "same criminal conduct"

The State alleged Ms. Castillo had two prior convictions for controlled substance violations, both sentenced on February 21, 2013. CP 130, 225. The current sentencing court had a mandatory duty to determine whether the two prior convictions encompassed the "same criminal conduct" before including them in the offender score. RCW 9.94A.525(5)(a)(i).

A current sentencing court must calculate an offender score based on an offender's "other current and prior convictions." RCW 9.94A.589(1)(a). If a prior sentencing court found multiple offenses "encompass the same criminal conduct,"[10] the current sentencing court must count those prior convictions as one offense. RCW 9.94A.525(5)(a)(i). If the prior sentencing court did not make this finding, but nonetheless ordered the offender to serve the sentences concurrently, the current sentencing court must independently evaluate whether those prior convictions "encompass the same criminal conduct" and, if they do, must count them as one offense. Id. ("The current sentencing court *shall* determine with respect to other prior adult offenses for which sentences were served concurrently . . . , whether those offenses shall be counted as one offense or as separate offenses using the 'same criminal conduct' analysis found in RCW 9.94A. 589(1)(a)") (emphasis added).

Where an offender has two prior convictions that were sentenced on the same date and the prior sentencing court did not make a finding regarding same criminal conduct, the current sentencing court

---

[10] Prior convictions encompass the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

has a *mandatory* duty to make that determination. State v. Williams, 176 Wn. App. 138, 307 P.3d 819 (2013), review granted (Feb. 27, 2014) (No. 89318-7); State v. Torngren, 147 Wn. App. 556, 563, 196 P.3d 742 (2008) ("A sentencing court . . . *must* apply the same criminal conduct test to multiple prior convictions that a court has not already concluded amount to the same criminal conduct"), abrogated on other grounds by State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013); State v. Reinhart, 77 Wn. App. 454, 459, 891 P.2d 735 (1995) ("the language of the statute appears clear and unambiguous in mandating that the current sentencing court determine whether to count prior offenses, served concurrently, as separate offenses").

In Williams, the defendant had two prior convictions sentenced on the same date and the prior court ordered the sentences to be served concurrently. Williams, 176 Wn. App. at 140-42. Under those circumstances, the current sentencing court had a mandatory duty to apply the same criminal conduct test. Id. at 142. Although the determination of whether the two offenses *in fact* encompassed the same criminal conduct was itself a discretionary decision subject to the abuse of discretion standard of review, the court had no discretion in deciding *whether or not* to apply the same criminal conduct test. Id. at

142, 144. In other words, the court could not simply include the prior offenses as separate convictions in the offender score without deciding whether they encompassed the same criminal conduct. Id.; RCW 9.94A.525(5)(a)(i).

Here, as in Williams, the State alleged Ms. Castillo had two prior offenses that were sentenced on the same date. CP 130, 225. Presumably the prior sentencing court ordered the sentences for the two convictions, which were for controlled substance violations, to be served concurrently. Id. Under these circumstances, the current sentencing court had a mandatory duty to determine whether the two prior offenses encompassed the same criminal conduct.[11] Williams, 176 Wn. App. at 142-44; Torngren, 147 Wn. App. at 563; Reinhart, 77 Wn. App. at 459.

---

[11] There are many possible scenarios under which two controlled substance violations, occurring at the same time and place, may encompass the same criminal conduct. See, e.g., State v. Vike, 125 Wn.2d 407, 412-13, 885 P.2d 824 (1994) ("concurrent counts involving simultaneous simple possession of more than one controlled substance encompass the same criminal conduct for sentencing purposes"); State v. Garza-Villarreal, 123 Wn.2d 42, 49, 864 P.2d 1378 (1993) (convictions for delivery of cocaine and delivery of heroin in same transaction amounted to same criminal conduct); State v. Bickle, 153 Wn. App. 222, 234-35, 222 P.3d 113 (2009) (convictions for marijuana manufacture and marijuana possession encompassed same criminal conduct).

Where the court is required to make a same criminal conduct determination but fails to do so, the remedy is to remand for such a determination. Reinhart, 77 Wn. App. at 459. Thus, the case must be remanded for a hearing at which the court must determine whether Ms. Castillo's two prior alleged controlled substance convictions encompass the same criminal conduct.

4. **The judgment and sentence contains an error that must be corrected**

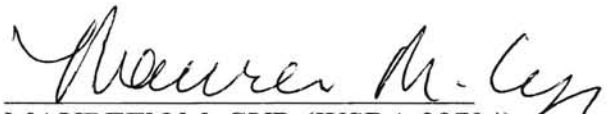
The judgment and sentence states Ms. Castillo was convicted of one count of "Violation of the Uniform Controlled Substances Act—Possession with Intent to Manufacture or Deliver Methamphetamine." CP 124 (citing RCW 69.50.401(1), (2)(b)). This citation is erroneous. Although Ms. Castillo was charged with possession of methamphetamine with intent to deliver or manufacture, the jury found her guilty only of the lesser-included offense of simple possession of methamphetamine. CP 17-19, 119. Thus, the judgment and sentence must be corrected.

E. CONCLUSION

The information alleging conspiracy to commit murder omitted two essential elements of the crime, requiring that the conviction be reversed and the charge dismissed without prejudice. The State did not

prove the elements of unlawful possession of a firearm, requiring that that conviction be reversed and the charged dismissed with prejudice. Finally, the court erred in sentencing Ms. Castillo based on an offender score of four, requiring that Ms. Castillo be resentenced.

Respectfully submitted this 13th day of March, 2014.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70099-5-I
v.	)	
	)	
AMALIA CASTILLO,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF MARCH, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] AMALIA CASTILLO 336951 WCC FOR WOMEN 9601 BUJACICH RD NW GIG HARBOR, WA 98332-8300	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF MARCH, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710