Supreme Court No. 91153-3
COA No. 70099-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

AMALIA M. CASTILLO,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Amalia M. Castillo requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Castillo, No. 70099-5-I, filed November 10, 2014. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. The essential elements of the crime of conspiracy 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. Here, the Court of Appeals upheld the charging document charging the crime of conspiracy, which alleged that Ms. Castillo and her co-defendant "with premeditated intent to cause the death of Isais Lozano aka Juan Zuozo-Moreno, be performed, agreed with [sic] to engage in or cause the performance of such conduct, and the defendant or [sic] took a substantial step in the pursuance of such agreement." Does the Court of Appeals opinion conflict with case law and constitutional principles requiring all essential elements of the crime be contained in the charging document?

2. This Court held in State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009) and State v. Lucero, 168 Wn.2d 785, 230 P.3d 165

(2010), that a defendant does not "affirmatively acknowledge" facts necessary to compute her offender score—and thereby waive her right to challenge her offender score on appeal—by merely agreeing with the State's understanding of the standard sentencing range. Here, defense counsel agreed with the State that the offender score was four and that Ms. Castillo had two prior convictions for VUCSA. But counsel did not affirmatively agree that the two prior VUCSA convictions, which had been prosecuted under the same cause number and sentenced on the same date, were not the "same criminal conduct" for purposes of the current offender score. Does the Court of Appeals' conclusion that counsel affirmatively acknowledged the necessary facts, and thereby waived her client's right to challenge her offender score, conflict with Mendoza and Lucero, warranting review? RAP 13.4(b)(1), (4).

3. The Sentencing Reform Act (SRA) states that when an offender's criminal history includes prior convictions for which sentences were served concurrently, the current sentencing court "shall" determine whether the prior convictions were the "same criminal conduct" before including them in the current offender score (if the prior sentencing court did not already find they encompassed the same criminal conduct). Here, the trial court included two prior

convictions that were sentenced on the same date under the same cause number in Ms. Castillo's offender score, without determining whether they encompassed the same criminal conduct. Should this Court grant review to make clear that the court had an affirmative duty to perform a same criminal conduct analysis? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Following an incident that occurred in February 2011, Ms. Castillo and her co-defendant Francisco Mendoza-Gomez were charged in King County with one count of conspiracy to commit murder in the first degree, with a firearm enhancement; one count of first degree kidnapping, with a firearm enhancement; one count of unlawful possession of a firearm in the second degree; and one count of possession of methamphetamine with intent to deliver or manufacture. CP 17-19.

After a trial at which Ms. Castillo was tried alone, a jury found her guilty as charged of first degree kidnapping and unlawful possession of a firearm in the second degree, and guilty of the lesser crime of unlawful possession of methamphetamine. CP 116-20. The jury deadlocked on the conspiracy count. CP 120. Following a second

jury trial, Ms. Castillo was convicted as charged of conspiracy to commit first degree murder. CP 217-18.

At sentencing on the first three convictions, the following exchange occurred between the court and defense counsel:

> THE COURT: All right. Thank you. And, Ms. Cruz, before I hear from you, do you agree that the offender score of 4 is accurate?
> MS. CRUZ: That is correct, Your Honor.
> THE COURT: All right. Thank you.
> MS. CRUZ: We do agree. . . . If you look at her priors, she has one prior with two counts, and those were indeed for prior VUCSAs.

2/21/13RP 100-01.

Counsel did not ask the court to determine whether the two prior VUCSAs, which were sentenced on the same date under the same cause number, see CP 130, were the same criminal conduct for purposes of calculating the current offender score. The court imposed a standard-range sentence based on an offender score of four. 7/12/13RP 6; CP 125, 127, 220, 222.

Ms. Castillo appealed, arguing the information was constitutionally deficient because it omitted the two essential elements of the crime of conspiracy to commit first degree murder. She also challenged her offender score, arguing the trial court erred in failing to determine whether her two prior convictions for VUCSA constituted

the "same criminal conduct" for purposes of calculating the offender score. The Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

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

It is well-established that constitutional due process requires all essential elements of the crime be included in the charging document. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); U.S. Const. amend. VI; Const. art. I, § 22. 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. State v. Vangerpen, 125 Wn.2d 782, 790, 888 P.2d 1177 (1995).

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.

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. State v. Moavenzadeh, 135 Wn.2d 359, 364, 956 P.2d 1097 (1998).

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.

CP 234-36.

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.

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.

2. The Court of Appeals' conclusion that Ms. Castillo waived her right to challenge her offender score on appeal conflicts with State v. Mendoza and State v. Lucero. RAP 13.4(b)(1), (4)

At sentencing, defense counsel agreed with the State's assertion that Ms. Castillo's offender score was a four, and agreed that she had two prior convictions for VUCSA. 2/21/13RP 100-01. But counsel did *not* agree that the two prior VUCSA convictions, which were sentenced on the same date under the same cause number, did not amount to the "same criminal conduct" for purposes of determining the current offender score. The issue of same criminal conduct for the prior convictions was simply not raised or addressed.

The Court of Appeals held Ms. Castillo waived her right to challenge her offender score on appeal by "affirmatively acknowledging her offender score in the trial court." Slip Op. at 14. This reasoning is inconsistent with this Court's case law and with the SRA, warranting review under RAP 13.4(b)(1) and (4).

It is fundamental and well-established that constitutional due process places the burden on the State to prove a defendant's criminal history at sentencing. State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999); RCW 9.94A.530(2); U.S. Const. amend. XIV. Thus, "[i]t

is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination." State v. Mendoza, 165 Wn.2d 913, 926, 205 P.3d 113 (2009) (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).

Despite the general rule that a defendant may not raise issues on appeal that were not raised below, the Court "allow[s] belated challenges to crimin history relied upon by a sentencing court." Mendoza, 165 Wn.2d at 919-20, 929. 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. Id. If the State fails to meet its burden of proof at sentencing, the defendant may challenge the offender score for the first time on appeal. Id. 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 Court has "emphasized the need for an *affirmative* acknowledgment by the defendant of *facts and information* introduced for the purposes of sentencing." Id.

"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.

For instance, a defendant who agrees with the State's assertion of the offender score does not waive the right to challenge whether an out-of-state conviction was comparable to a Washington felony and should have been included in the offender score. State v. Lucero, 168 Wn.2d 785, 789, 230 P.3d 165 (2010). If a defendant's criminal

history includes prior convictions from another jurisdiction, the State bears the burden of proving the facts necessary to establish comparability. Ford, 137 Wn.2d at 482-83; State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999).

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. Lucero, 168 Wn.2d at 787. The Court held he did not thereby "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.

These same principles should logically apply to the same criminal conduct determination in regard to prior offenses. The SRA places a mandatory duty on the trial court to conduct a same criminal conduct determination for certain prior offense and, if the court

concludes they encompass the same criminal conduct, the court is required to count them as a single offense in the offender score:

> (5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:
>
> (i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court *shall* determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, 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).

RCW 9.94A.525(5)(a)(i) (emphasis added).[1]

Because the same criminal conduct determination in regard to prior offenses is a mandatory part of sentencing, the defendant should not be deemed to have waived the right to challenge that determination without having affirmatively agreed to the facts necessary to make a finding of same criminal conduct.

The Court of Appeals reasoned Ms. Castillo did not have a right to raise the issue of same criminal conduct for the first time on appeal by relying on State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000 (2000)

and In re Personal Restraint of Shale, 160 Wn.2d 489, 158 P.3d 588 (2007). The court stated:

> [b]ecause '[a]pplication of the same criminal conduct statute involves both factual determinations and the exercise of discretion,' a defendant's affirmative acknowledgement in the trial court that her offender score was properly calculated prevents her from arguing for the first time on appeal that particular convictions, which were counted in the calculation of that score, amount to the same criminal conduct.

Slip Op. at 14 (quoting Nitsch, 100 Wn. App. at 518-26).

But Nitsch and Shale do not apply because those cases involved multiple *current* offenses and not a defendant's criminal history. Shale, 160 Wn.2d at 495-96; Nitsch, 100 Wn. App. at 517-18. Application of the same criminal conduct inquiry in regard to multiple current offenses "involves both factual determinations and the exercise of discretion." Shale, 160 Wn.2d at 494-95. Thus, a "defendant's 'failure to identify a factual dispute for the court's resolution and . . . failure to request an exercise of the court's discretion' waived the challenge to his offender score." Id. (quoting Nitsch, 100 Wn. App. at 520-23).

These principles apply only to the same criminal conduct determination for multiple *current* offenses. Under the SRA, multiple

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[1] Multiple prior offenses encompass the "same criminal conduct" if they involved the same criminal intent, were committed at the same time and place, and involved the same victim. RCW 9.94A.589(1)(a).

current offenses are presumed to be separate conduct to be counted separately in the offender score unless the court determines they encompass the same criminal conduct:

> Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently.

RCW 9.94A.589(1)(a).

In State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013), this Court explained that, in light of the statutory language, the burden is on the defendant to establish that multiple current offenses encompass the same criminal conduct because "a 'same criminal conduct' finding favors the defendant by lowering the offender score below the *presumed* score." Id. at 539. The State's burden to prove the existence of prior convictions at sentencing does not include establishing that *current* offenses constitute separate conduct. Id. at 539. Thus, in the case of current offenses, the defendant is the moving party and

therefore bears the burden to come forward with sufficient facts to warrant the exercise of discretion in her favor. Id.

These principles do not apply in the case of multiple *prior* offenses. Unlike for current offenses, the SRA imposes a *mandatory* duty to make the same criminal conduct determination for prior offenses that were sentenced concurrently, if the prior sentencing court did not already make a finding regarding same criminal conduct. RCW 9.94A.525(5)(a)(i); State v. Williams, 176 Wn. App. 138, 307 P.3d 819 (2013), aff'd, __ Wn.2d __, 336 P.3d 1152 (2014); 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").

As stated, the State bears the burden to prove criminal history and all necessary facts necessary to include a prior conviction in the

offender score. Mendoza, 165 Wn.2d at 926; Ford, 137 Wn.2d at 480-83. Under the SRA, the criminal conduct determination is a mandatory component of establishing a defendant's criminal history. RCW 9.94A.525(5)(a)(i). The State should bear the burden of proving the facts necessary to make the same criminal conduct determination. If the State fails to meet its burden, under Ford and Mendoza, the defendant should be able to raise the issue for the first time on appeal. Mendoza, 165 Wn.2d at 929; Ford, 137 Wn.2d at 484-85.

3. Whether the trial court had an affirmative duty imposed by the SRA to conduct a same criminal conduct analysis is an issue of substantial public interest warranting review. RAP 13.4(b)(4)

The State alleged Ms. Castillo had two prior convictions for controlled substance violations, both sentenced under the same cause number on December 21, 2009. CP 130. The current sentencing court erred in failing to determine whether the two prior convictions encompassed the "same criminal conduct" before inuding them in the offender score. RCW 9.94A.525(5)(a)(i).

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).

In Torngren, 147 Wn. App. at 563, and Reinhart, 77 Wn. App. at 459, the Court of Appeals similarly held the SRA places a mandatory duty on the trial court to determine whether prior offenses, served concurrently, should count as a single offense in the offender score, if a prior court did not already conclude they amount to the same criminal conduct. The nature of the obligation imposed by the SRA in this context has not been addressed by this Court.

Here, as in Williams, the State alleged Ms. Castillo had two prior offenses that were sentenced on the same date. CP 130. 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.[2] Williams, 176 Wn. App. at 142-44; Torngren, 147 Wn. App. at 563; Reinhart, 77 Wn. App. at 459.

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.

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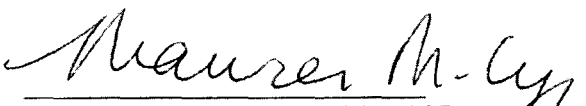
[2] There are many possible scenarios under which two controlled substance violations, occurring at the same time and place, may encompass the same criminal conduct. See, e.g., State v. Vike, 125 Wn.2d 407, 412-13, 885 P.2d 824 (1994) ("concurrent counts involving simultaneous simple possession of more 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).

E. CONCLUSION

Because the Court of Appeals' opinion conflicts with this Court's case law and presents issues regarding application of the SRA that are of substantial public interest, this Court should accept review.

Respectfully submitted this 10th day of December, 2014.



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. AMALIA M. CASTILLO, a.k.a. AMALIA M. CERVANTES, Appellant.	DIVISION ONE No. 70099-5-I (consol. with No. 70697-7-I) UNPUBLISHED OPINION FILED: November 10, 2014

DWYER, J. — Amalia Castillo was charged with and convicted of multiple felonies for her role in an armed kidnapping. After the jury in her first trial failed to reach a unanimous verdict with regard to one of the charges—conspiracy to commit murder in the first degree—she was subsequently retried and convicted. In this consolidated appeal from both judgments, she challenges (1) the constitutional adequacy of the charging document in her second trial, (2) the constitutional sufficiency of the evidence to support her conviction of unlawful possession of a firearm in the second degree in her first trial, and (3) the trial court's calculation of her offender score at sentencing. We find no error and, therefore, affirm.

I

On September 30, 2011, Francisco Mendoza-Gomez[1] told Castillo, who was in his employ,[2] to kill a man named Juan Zuozo-Moreno.[3] Mendoza-Gomez's directive to Castillo came after he discovered Zuozo-Moreno engaged in sexual relations with Mendoza-Gomez's sister-in-law at her SeaTac apartment.

Shortly thereafter, Castillo and a man named Agalega Pua—who was compensated by Mendoza-Gomez to assist Castillo—forced Zuozo-Moreno, at gunpoint, to enter a black Acura sport utility vehicle (SUV). Castillo then drove the SUV to Federal Way to pick up a man named Eric Tharp. Tharp suggested that Fort Lewis would be a suitable place to dispose of Zuozo-Moreno.

While still in Federal Way, however, the SUV began to experience mechanical difficulties. Capitalizing on the resultant distraction, Zuozo-Moreno was able to escape from the SUV and find temporary refuge in a gas station convenience store. However, Tharp and Pua followed Zuozo-Moreno into the store where they repeatedly beat and kicked him before fleeing from the scene in the SUV.

During the ensuing investigation, a King County detective stopped a Jeep Cherokee that was being driven by Tharp.[4] Castillo was seated in the front passenger seat and her infant child was seated directly behind her in the rear

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[1] Mendoza-Gomez's nickname is "Chaparro."

[2] Castillo's duties ranged from running errands for Mendoza-Gomez to assisting him in selling drugs.

[3] Also known as Isais Lozano.

[4] Castillo testified that the Jeep belonged to Mendoza-Gomez. The State offered testimony that the Jeep belonged to someone named "Nicole." No evidence was presented that Castillo was the owner of the Jeep.

passenger seat. A man known to Castillo as "Status" was seated in the rear passenger seat behind Tharp.

Castillo and Tharp were arrested and a search of the vehicle was conducted. A .380 caliber pistol was recovered from the floorboard behind Castillo's seat. Another .380 caliber pistol was found between the driver's seat and the center console. Two rifles were found in the storage area in the rear of the Jeep. Additionally, a .45 caliber pistol was found in a laptop bag in the storage area in the rear of the Jeep. Although Castillo admitted that the laptop bag belonged to her, she testified that someone else had placed the pistol in her laptop bag and that she had no knowledge of the presence of any of the firearms that were found in the Jeep.

Castillo was searched incident to her arrest. Items and substances found either in her purse or on her person included cocaine, methamphetamine, $4,000 in cash, and a loaded .380 caliber pistol. However, the pistol did not have a firing pin.

Thereafter, Castillo was charged by third amended information with (1) conspiracy to commit murder in the first degree, with a firearm enhancement allegation, (2) kidnapping in the first degree, with a firearm enhancement allegation, (3) unlawful possession of a firearm in the second degree, and (4) violation of the Uniform Controlled Substances Act (VUCSA)—specifically, possession of methamphetamine with intent to deliver or manufacture. See, RCW 69.50.401(1), (2)(b).

After being tried alone, Castillo was found guilty by jury verdict of

kidnapping in the first degree, with a firearm enhancement; of unlawful possession of a firearm in the second degree; and, of the lesser charge of simple possession of methamphetamine. However, when the jury was unable to reach a unanimous verdict as to the conspiracy charge, the judge declared a mistrial as to that count.

At the sentencing hearing following her first trial, Castillo, when queried, agreed (through her counsel) that she had an offender score of four.

> THE COURT: All right. Thank you. And, Ms. Cruz, before I hear from you, do you agree that the offender score of 4 is accurate?
>
> MS. CRUZ: That is correct, Your Honor.
>
> THE COURT: All right. Thank you.
>
> MS. CRUZ: We do agree. . . . If you look at her priors, she has one prior with two counts, and those were indeed for prior VUCSAs.

Thereafter, Castillo was charged—this time along with Mendoza-Gomez—by fifth amended information. The fifth amended information included, in pertinent part, a charge of conspiracy to commit murder in the first degree that was identical to the conspiracy charge that was contained within the third amended information—the charging document in Castillo's first trial.

> 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.

On April 26, 2013, Castillo was found guilty by jury verdict of conspiracy to commit murder in the first degree while armed with a firearm.

At the sentencing hearing following her retrial, Castillo, through her counsel, did not repudiate her prior assent when she was asked whether she agreed that her offender score was four.

> THE COURT: . . . As I've said, I think that brings the Offender's Score to a 4 for Ms. Cervantes, and I think if you do the calculations with the Conspiracy for Murder I and multiply it by .75, I think it gets us to a standard range of 211.5 to 280.5 months prior to the application of the firearms enhancements. So I'll just ask counsel to look over those numbers and make sure they're correct.
>
> MS. CRUZ: I was getting 210.75, Your Honor, so you rounded up—you had 211 and a half.
>
> THE COURT: I had 211.5. So I have the standard range at an Offender's Score of 4 on a Murder I at 282 to 374.
>
> MS. CRUZ: Okay.

Thereafter, the trial court imposed a standard-range sentence based on Castillo's offender score of four.

Castillo appealed from the felony judgment and sentence entered following her first trial and the felony judgment and sentence entered following her second trial. The cause numbers corresponding to her two appeals were

then consolidated into a single appeal, which we resolve herein.

II

Castillo contends—for the first time on appeal—that the fifth amended information omitted essential elements of the charged crime of conspiracy to commit murder in the first degree. Absent from the charging document, she avers, were the following two elements of criminal conspiracy: (1) that she agreed with one or more persons to commit a crime, and (2) that any one of those who were in accord took a "substantial step" toward the completion of the agreement. We disagree.

"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).

Given the nature of Castillo's challenge, we must determine whether any of the essential elements of the aforementioned statutory provision were omitted from the fifth amended information.

Familiar principles direct our analysis. In a criminal prosecution, the accused has a constitutional right to be informed of the charge she is to meet at trial. State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). For that reason, the charging document must include all essential elements of a crime in order to apprise the accused of the charges and facilitate the preparation of a defense. State v. Pineda-Pineda, 154 Wn. App. 653, 670, 226 P.3d 164 (2010). However, in order to discourage defendants from the practice of waiting until

document—provided ample notice to Castillo that the State would attempt to prove that she agreed with one or more persons to cause Zuozo-Moreno's death. See State v. Morgan, 163 Wn. App. 341, 347, 261 P.3d 167 (2011) ("'[T]he term "conspiracy" implies the involvement of two or more people.'" (quoting State v. McCarty, 140 Wn.2d 420, 427, 998 P.2d 296 (2000))), review denied, 175 Wn.2d 1013 (2012).[6] Thus, notwithstanding a charging document that, as the State concedes, was "somewhat poorly drafted," it was nonetheless adequate to apprise Castillo of the crime with which she was charged; more specifically, it provided satisfactory notice that the charge involved agreeing with one or more persons to engage in conduct constituting a crime—namely, the killing of another human being.

As to the second element alleged by Castillo to be absent from the charging document, we again conclude that the necessary facts may be found in the charging document, which provided her with adequate notice as to the second challenged element. We have previously held—and do so again here—that a failure to articulate the "substantial step" requirement does not warrant reversal where there are sufficient facts in the information to constitute adequate notice to the defendant. See Pineda-Pineda, 154 Wn. App. at 670-71. In Pineda-Pineda, the defendant was charged both with delivery of a controlled substance and with conspiracy to deliver a controlled substance. 154 Wn. App.

[6] In arguing that the information omitted the essential element of agreement with one or more persons, Castillo alludes to the fact that the information does not make use of the statutory language of RCW 9A.28.040(1). However, "[t]he information need not set forth the exact statutory language defining the crime." Morgan, 163 Wn. App. at 347 (citing Kjorsvik, 117 Wn.2d at 108).

at 671. However, the information did not "articulate the substantial step requirement." Pineda-Pineda, 154 Wn. App. at 670. Nevertheless, we considered the other related charges and held that the defendant was provided with adequate notice vis-à-vis the substantial step requirement because the date range of the conspiracy charge "encompassed" the date of delivery that was specified in the delivery charge, "which support[ed] a reasonable inference that Pineda-Pineda took a substantial step in the conspiracy to deliver." Pineda-Pineda, 154 Wn. App. at 671.

While the particular facts here differ from the facts in Pineda-Pineda, they do not lead to a conclusion that is at variance with our decision in that case. Here, the fifth amended information named two defendants and alleged that "the defendant or [sic] took a substantial step in the pursuance of such agreement." Unquestionably, this language is unartful; yet, two defendants were named in the charging document and it was alleged that the "*defendant*" took a "substantial step." Given that Castillo was one of two named defendants, the facts contained within the fifth amended information provided adequate notice that she could be found guilty of the crime with which she and her co-defendant had been charged if it was found that either one of them had taken a "substantial step" toward the completion of the agreement.

Moreover, because the second part of the two-part test permits us to "look beyond the face of the charging document to determine if the accused actually received notice of the charges he or she must have been prepared to defend

against,"[7] we may examine the trial court record to assess whether Castillo was actually prejudiced. Kjorsvik, 117 Wn.2d at 106. The procedural history is telling. Because Castillo was twice charged with conspiracy to commit murder in the first degree, she had, by the time of the second trial, been apprised of the State's theory of the case and the manner in which it intended to establish her culpability. Given Castillo's acquaintance with the State's theory of the case during her first trial, we decline to conclude that Castillo failed to receive actual notice of the essential elements of the conspiracy charge prior to the second trial.

Our liberal construction of the fifth amended information reveals that, although it left something to be desired, it was not constitutionally inadequate. Moreover, the procedural history of this case discloses that Castillo was not, in actuality, prejudiced by the unartful language contained within the charging document. Therefore, we decline Castillo's request to reverse her conviction and to dismiss the charge without prejudice and, instead, affirm her conviction of conspiracy to commit murder in the first degree.

III

Castillo next contends that, with regard to her conviction of unlawful possession of a firearm in the second degree, the State failed to carry its burden of proof. The evidence adduced by the State was constitutionally insufficient, she asserts, because it failed to show either that (1) the handgun found in her purse was operational, or that (2) she had possession or control over any of the

[7] We note that the second part of this test may only be reached in the event that the first part is satisfied, which is the case here.

other guns found in the Jeep.

The State does not attempt to refute Castillo's first assertion. Instead, it "recognizes that there was scant evidence presented to the jury regarding the steps that would need to be taken to make this pistol functional as a firearm," and that, "[i]n his closing argument, the deputy prosecutor deemphasized the gun found in Castillo's purse, observing that it was not immediately operational." In recognition of the State's apparent concession, we turn our attention to Castillo's second assertion.

When reviewing a challenge to the sufficiency of the evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *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). All reasonable inferences are drawn in favor of the verdict and interpreted most strongly against the defendant. State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995).

As charged, the State was required to prove beyond a reasonable doubt that, on the day that she was arrested, Castillo "knowingly had a firearm in her possession or control." See RCW 9.41.040(2)(a)(i).

"Possession of property may be either actual or constructive." State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Constructive possession is established when the person charged with possession of contraband has dominion and control over either the contraband or the premises upon which the contraband was found. State v. Mathews, 4 Wn. App. 653, 656, 484 P.2d 942

(1971); see also State v. Potts, 1 Wn. App. 614, 617, 464 P.2d 742 (1969) (an automobile may be considered a premises). "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." State v. Chouinard, 169 Wn. App. 895, 899-900, 282 P.3d 117 (2012), review denied, 176 Wn.2d 1003, 297 P.3d 67 (2013). However, it is not necessary—in order to adequately support a finding of constructive possession—that the defendant be either the owner or the operator of the vehicle. Rather, it is well-settled that the proximity of a passenger in a vehicle to contraband, "coupled with the other circumstances linking" the passenger to the contraband, may constitute sufficient evidence to support a jury's finding that the passenger constructively possessed the contraband. See, e.g., Mathews, 4 Wn. App. at 658.

A straightforward application of this well-settled rule disposes of this issue. There is no dispute that Castillo was in close proximity to all of the guns that were located in the Jeep. Moreover, the State adduced evidence that a .45 caliber pistol was discovered in Castillo's laptop bag. This evidence provides the requisite circumstances linking Castillo to one of the guns.[8] While Castillo was neither the owner nor the operator of the Jeep in which the guns were found, she was—admittedly—the owner of the laptop bag in which one of the guns was found. Therefore, notwithstanding her testimony that she was not responsible for

[8] In order to adequately support Castillo's conviction, the State needed only to adduce evidence that she possessed one or more of the guns found in the Jeep.

the presence of the .45 caliber pistol in her bag and that she did not know that it had been placed there—testimony that the jury was not required to credit[9]—the presence of the gun in her bag, coupled with her propinquity to it, constituted sufficient evidence to support a finding that she constructively possessed the gun.

VI

Castillo next contends that the trial court erred in imposing a sentence that was calculated using an offender score of four. This is so, she asserts, because (1) the State did not carry its burden of proving the facts necessary to determine whether two alleged prior VUCSA convictions should be included in calculating her offender score, and (2) the trial court did not independently determine whether the two alleged prior convictions constituted the same criminal conduct. Rather than addressing the merits of her contention, the State argues that Castillo, by affirmatively acknowledging that the offender score calculated by the trial court was correct, waived her ability to bring this challenge on appeal. We agree with the State.

As a general matter, "[i]llegal or erroneous sentences . . . may be challenged for the first time on appeal." State v. Nitsch, 100 Wn. App. 512, 519, 997 P.2d 1000 (2000). However, where an alleged sentencing error "involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion," the error may not be raised for the first time on appeal. In

[9] See, e.g., State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999) ("[T]he finder of fact is the sole and exclusive judge of . . . the credibility of witnesses.").

re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002); State v. Wilson, 170 Wn.2d 682, 689, 244 P.3d 950 (2010). Because "[a]pplication of the same criminal conduct statute involves both factual determinations and the exercise of discretion," a defendant's affirmative acknowledgement in the trial court that her offender score was properly calculated prevents her from arguing for the first time on appeal that particular convictions, which were counted in the calculation of that score, amount to the same criminal conduct. Nitsch, 100 Wn. App. at 518-26; see also In re Pers. Restraint of Shale, 160 Wn.2d 489, 494-96, 158 P.3d 588 (2007) (adopting our reasoning in Nitsch and holding that waiver may apply where a defendant argues for the first time on appeal that two prior convictions constituted the same criminal conduct), overruling on other grounds recognized by In re Newlun, 158 Wn. App. 28, 34, 240 P.3d 795 (2010).

Both parties agree (and the record confirms) that Castillo, through her counsel, agreed that her offender score was four. Therefore, Castillo, by affirmatively acknowledging her offender score in the trial court, waived—insofar as she asserts that her two alleged prior convictions amounted to the same criminal conduct—her opportunity to challenge her offender score on appeal.[10]

[10] It is the defendant's burden to establish that two crimes constitute the same criminal conduct. State v. Aldana Graciano, 176 Wn.2d 531, 540, 295 P.3d 219 (2013). Thus, by failing to raise this issue in the trial court, Castillo—in addition to waiving her ability to challenge her offender score on appeal—failed to meet her burden of proof in the trial court.

Affirmed.

We concur:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70099-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: December 10, 2014