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Court of Appeals
Division III
State of Washington
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No. 35575-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOHN CASTRO,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The State did not meet its burden to prove Mr. Castro's criminal history. This Court should reverse and remand for a new sentencing hearing.

a. The State has not proved that Mr. Castro invited the error.

The State appears to agree that it did not meet its burden of proving Mr. Castro's criminal history by a preponderance of the evidence. See Br. of App. at 13; Br. of Resp't at 10-20. The State further agrees remand for resentencing is the appropriate remedy for when the State fails to prove a defendant's criminal history. Br. of Resp't at 20.

Nevertheless, the State contends Mr. Castro has forfeited review of his claimed error under the invited error doctrine. Br. of Resp't at 14-15. This "doctrine prohibits a party from setting up an error at trial and them complaining of it on appeal." State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984) (overruled on other grounds by State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995)). For example, the "invited-error doctrine as applied to jury instructions precludes a defendant from arguing that an instruction he proposed was erroneous." State v. Schaler, 169 Wn.2d 274, 292, 236 P.3d 858 (2010); see, e.g., State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999). There must be evidence that the party "intentionally or knowingly set up the error." In re Det. of W.C.C., 185 Wn.2d 260, 265

n.3, 370 P.3d 1289 (2016). The government bears the burden of proving invited error. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

The State has not shown that the invited error doctrine applies. The State claims that the doctrine applies because defense counsel acknowledged there was evidence of Mr. Castro's criminal history at the first sentencing hearing and did not lodge an objection at the resentencing hearing. Br. of Resp't at 14-15. But a lack of an objection or acknowledgment by a defendant is inadequate to establish invited error. See, e.g., State v. Hood, 196 Wn. App. 127, 133-35, 382 P.3d 710 (2016) (although court remarked that the defendant had "stipulated" to instructions proposed by the State, the invited error doctrine did not apply because defendant did not propose the challenged instruction). Moreover, defense counsel below warned the court and prosecution that "to be safe," the court needed to have the missing certified judgments and sentences in the record because it was a new sentencing hearing. RP 12. The prosecution, however, failed to adhere to the warning. Mr. Castro did not invite the error.

b. Because Mr. Castro is appealing from a resentencing hearing and not from a limited remand, his sentencing issues are properly before this Court.

Next, the State argues that because Mr. Castro did not challenge the accuracy of his criminal history and offender score in the first appeal,

he is barred from doing so now. Br. of Resp't at 16-20. The State is incorrect.

The State relies on the general rule that in a subsequent appeal, an appellant cannot raise issues that could have been raised in the previous appeal. Br. at Resp't at 17; RAP 2.5(c); State v. Fort, 190 Wn. App. 202, 233, 360 P.3d 820 (2015). The problem for the State is that this case is an appeal from a resentencing hearing. The appeal is not from a limited remand. It is not an appeal from a simple correction of a judgment and sentence. These facts distinguish this case from the precedents cited by the State and takes it out of the general rule restricting what issues can be raised in a second appeal. As stated by this Court:

> the defendant may raise sentencing issues on a second appeal if, on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding, but not when the appellate court remands for the trial court to enter only a ministerial correction of the original sentence.

State v. Toney, 149 Wn. App. 787, 792, 205 P.3d 944 (2009). Accordingly, Mr. Castro is entitled to raise sentencing issues in this second appeal because he is appealing from a new sentencing hearing. Id. at 792-93.

c. Remand for a new sentencing hearing is required.

Setting aside the State's procedural arguments, the State concedes that remand for resentencing is the appropriate remedy where there has been a failure in proof as to criminal history. Br. of Resp't at 20. The Court should accept the concession and remand for a new sentencing hearing.

2. Under the law of the case, the conviction for conspiracy to deliver a controlled substance is invalid and cannot be counted in calculating Mr. Castro's offender score.

As explained in Mr. Castro's opening brief, this Court previously held that the conviction for conspiracy to deliver a controlled substance was "facially invalid." Slip. op. at 18. As stated in the order amending the opinion, "A sentencing court may not base its sentence on a prior conviction that is facially invalid." Order at 2. This Court reasoned that a "conviction for a nonexistent crime is facially invalid" and that conspiracy to deliver a controlled substance with a deadly weapon enhancement is "a nonexistent crime." Order at 2.

This Court's holding that the prior conviction was invalid and cannot be used at sentencing is binding as "the law of the case." Bank of Am., N.A. v. Owens, 177 Wn. App. 181, 189, 311 P.3d 594 (2013). As this holding has not been overruled, it was binding on the trial court and is also binding on this Court. Id. 189-90. Consequently, the trial court erred

in using the invalid conviction as part of Mr. Castro's criminal history. Br. of App. at 19. On remand, the invalid conviction should not factor into Mr. Castro's criminal history.

The State fails to address Mr. Castro's law of the case argument. The State essentially attempts to relitigate what was decided in Mr. Castro's previous appeal. Now, the State argues this "Court should instruct the trial court to strike the deadly weapon enhancement from the judgment and sentence for defendant's conspiracy to deliver a controlled substance conviction." Br. of Resp't at 24-25. But the law of the case doctrine precludes this Court from rewriting its opinion. Applying the law of the case doctrine, the Court should reject the State's argument. See Humphrey Indus., Ltd. v. Clay St. Associates, LLC, 176 Wn.2d 662, 671, 295 P.3d 231 (2013) (Supreme Court's finding on issue was law of the case and trial court was not free to make ruling contrary to the law of the case).

Under the law of the case doctrine and this Court's opinion declaring that prior conviction facially invalid, Mr. Castro is entitled to resentencing. This Court should instruct that the invalid conviction for conspiracy to deliver a controlled substance not be counted as part of Mr. Castro's criminal history. This will also require a recalculation of Mr. Castro's offender score and an analysis of whether any prior convictions wash out. Br. of App. at 20-21.

3. Mr. Castro reiterates his other arguments made in his Opening Brief.

Mr. Castro reiterates his other arguments and issues as set out in his Opening Brief. The Opening Brief adequately answers the State's arguments on the remaining issues.

To summarize, the firearm enhancement was inappropriately doubled from five years to 10 years without the necessary finding of fact by a jury. Br. of App. at 8-13. The trial court failed to calculate Mr. Castro's offender score because a "plus 9" is not a sum of points accrued as a result of prior convictions rounded down to the nearest whole number. Br. of App. at 16-17. On remand, the trial court should determine whether any prior convictions count as one offense under the same criminal conduct analysis. Br. of App. at 21-22. Mr. Castro is entitled to consideration of a lower sentence even if his offender score is 9 or greater. Br. of App. at 22-23. This Court should strike the repayment plan for legal financial obligations or order that the trial court reconsider the payment terms. Br. of App. at 23-25. And the judgment and sentence should not contain any reference to Mr. Castro being a persistent offender. Br. of App. at 25.

B. CONCLUSION

To remedy the many sentencing errors, this Court should reverse and remand for a new sentencing hearing.

DATED this 8th day of October 2018.

Respectfully submitted,

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	)	
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