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No. 35575-6-III

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN CASTRO,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF

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## **A. INTRODUCTION**

Convicted defendants have a right to a lawful sentence. In his first direct appeal, this Court reversed John Castro's life sentence, holding that an invalid conviction had been used to justify this sentence. At resentencing, the trial court sentenced Mr. Castro to a standard range sentence that was increased due to a firearm enhancement. But numerous errors require a new sentencing hearing. Without the necessary jury finding, the sentence on the firearm enhancement was doubled from five years to 10 years. The State failed to prove Mr. Castro's criminal history. The court failed to properly calculate Mr. Castro's offender score. Despite this Court's holding, the invalid conviction was used as part of Mr. Castro's criminal history. The court mistakenly increased the amount Mr. Castro must pay each month on legal financial obligations. And a scrivener's error in the judgment and sentence indicates that Mr. Castro is a persistent offender. Because Mr. Castro is entitled to a lawful sentence, this Court should reverse and remand for a new sentencing hearing.

## **B. ASSIGNMENTS OF ERROR**

1. In violation of the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution, the sentencing court doubled the sentence for the firearm

enhancement from five years to 10 years without a jury finding that Mr. Castro had previously been sentenced for a deadly weapon enhancement.

2. The State failed to prove Mr. Castro's criminal history.

3. The trial court failed to calculate Mr. Castro's offender score.

4. In violation of the law of case and this Court's holding that a prior conviction for conspiracy to deliver a controlled substance was invalid and cannot be used at sentencing, the court used this conviction in sentencing Mr. Castro.

5. The court failed to fulfill its duty to determine if any of the prior convictions should score the same as the same criminal conduct.

6. Mistakenly believing that it was imposing the same legal financial obligations and contrary to the court's expressed intent, the court increased monthly payments on these obligations from \$5 a month to \$10 a month.

7. Failing to consider whether Mr. Castro had the ability to make monthly payments of \$10 while imprisoned, the court erred in imposing a repayment plan on legal financial obligations at \$10 a month.

8. The judgment and sentence contains a scrivener's error indicating that Mr. Castro was sentenced as a persistent offender.

### **C. ISSUES**

1. The jury must find every fact that increases the punishment for a crime. A sentence for a firearm enhancement is twice its ordinary length if the defendant has previously been sentenced for a deadly weapon enhancement. The jury found that Mr. Castro used a firearm, but did not find that he had been previously sentenced for a deadly weapon enhancement. Did the court unlawfully double the term of the firearm enhancement from five years to 10 years?

2. The State has the burden of proving a defendant's criminal history. A summary is inadequate to meet this burden. At resentencing, the only evidence before the court was a summary by the State. Did the State fail to prove Mr. Castro's criminal history?

3. When sentencing a defendant for an offense, the court must calculate the person's offender score. This is the sum of points accrued as a result of prior convictions rounded down to the nearest whole number. Rather than calculate a sum or a whole number, the court estimated Mr. Castro's offender score as a "plus 9." Did the court fail to calculate Mr. Castro's offender score?

4. When the appellate court issues a decision, the decision is the law of the case. Unless overruled, the law of the case binds the parties and later courts. In the first appeal, this Court held the prior conviction for

conspiracy to deliver a controlled substance was invalid and could not be used at sentencing. Did the trial court violate the law of the case by considering this invalid conviction as part of Mr. Castro's criminal history?

5. In calculating a defendant's offender score, the trial court must determine if any of the previous convictions score together as the same criminal conduct. On remand for resentencing, should the trial court fulfill its duty and conduct this mandatory analysis?

6. The trial court expressed its intent to impose the same legal financial obligations as was imposed on Mr. Castro previously. Previously, Mr. Castro was ordered to pay \$5 per month towards his legal financial obligations. In resentencing Mr. Castro, the court mistakenly believed it had been \$10 per month. Should this Court remand to fix the trial court's mistake so that its intent can be fulfilled?

7. A repayment order must consider the defendant's financial resources and only impose payments that the defendant will be able to make. Mr. Castro faces a lengthy imprisonment and lacks the ability to make payments. Should the repayment provision be stricken because the court lacked a sound basis to impose monthly payments of \$5 to \$10?

8. The appellate court has a duty to ensure that a judgment and sentence is free of errors. The judgment and sentence contains language

indicating that Mr. Castro is a persistent offender. Mr. Castro was not resentenced as a persistent offender. Should the “persistent offender” language be stricken from the judgment and sentence?

#### **D. STATEMENT OF THE CASE**

The underlying facts are recounted in this Court’s unpublished opinion and order amending the opinion. State v. Castro, 195 Wn. App. 1056 (2016) (unpublished), as amended on denial of reconsideration (Jan. 24, 2017).<sup>1</sup>

To summarize, on November 27, 2011, a fight broke out between a large group of men at a hotel. Slip. op. at 2; RP 16. John Castro, a musician and a father, was among the men present during the confrontation. RP 16, 20-21. During the confrontation, a man was shot and died as a result. Slip. op. at 2. Believing Mr. Castro to be the shooter, the prosecution charged Mr. Castro with second degree murder, riot, and unlawful possession of a firearm. CP 1-11. The prosecution alleged a firearm enhancement on the murder charge. CP 10. Mr. Castro contested the charges, but was convicted of these offenses and was found to have been armed with a firearm. CP 12-13. Based on a prior conviction for

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<sup>1</sup> A copy is included in the Appendix. Available at: [https://www.courts.wa.gov/opinions/pdf/317013\\_ord.pdf](https://www.courts.wa.gov/opinions/pdf/317013_ord.pdf).

conspiracy to deliver a controlled substance, which purported to have a deadly weapon enhancement, the trial court sentenced Mr. Castro to life in prison. Slip. op. at 1-2, 5; CP 16.

On appeal, this Court rejected Mr. Castro's challenges to the convictions, but agreed with him that he should not have been sentenced to life in prison. Slip. op. at 5-15. The Court held that the conviction for conspiracy to deliver a controlled substance with a deadly weapon enhancement was an invalid conviction. Slip. op. at 11-12; Order amending opinion at 2 ("Order"). Therefore, it could not serve as a predicate to justify the life sentence. Slip. op. at 11-12; Order at 2.

This Court denied the State's motion to reconsider. Order at 1. The Court amended the opinion, replacing language in the opinion with language further supporting the court's holding that the conspiracy to deliver a controlled substance conviction was invalid. Order at 2. The opinion was also amended to indicate that Judge Korsmo dissented in part. Order at 2.

This Court issued the mandate on February 28, 2017. This Court mistakenly attached a copy of the opinion without the order amending the opinion. CP 23-38.

The parties appeared for resentencing on August 18, 2017. RP 2. The State provided a summary purporting to represent Mr. Castro's

criminal history and calculated his offender score “in excess of 9 for each offense.” CP 40-41. This summary included the conviction for conspiracy to deliver a controlled substance, which this Court had held invalid. CP 40. The State represented that the mandatory sentence of five additional years for the firearm enhancement had to be doubled to 10 years because Mr. Castro had been previously found to have a “prior deadly weapon finding.” CP 41. Based on the foregoing, the State asked the court to impose a high end standard range sentence of 397 months with 120 additional months for the firearm enhancement on the murder conviction. CP 42; RP 9. The State asked that the two other convictions run concurrently. RP 9.

Mr. Castro asked for an exceptional sentence downward, or in the alternative, a sentence at the low end of the standard range. RP 18; CP 45. The request for an exceptional sentence downward was based on recently discovered exculpatory evidence that supported Mr. Castro’s claim of innocence. RP 18; CP 46.

The Court accepted the State’s representations and recommendations, sentencing Mr. Castro to 517 months of confinement. RP 27; CP 94.

## **E. ARGUMENT**

### **1. Violating Mr. Castro's jury trial rights, Mr. Castro's enhanced sentence for using a firearm was doubled without the jury finding the necessary facts beyond a reasonable doubt.**

#### **a. Any fact that increases the punishment for a crime is an element that must be found by the jury.**

The state and federal constitutions guarantee the right to trial by jury. U.S. Const. amend. VI; Const. art. I, § 21, 22. “The constitutional right to jury trial requires that a sentence must be authorized by a jury’s verdict.” State v. Clark-El, 196 Wn. App. 614, 624, 384 P.3d 627 (2016) (quoting State v. Morales, 196 Wn. App. 106, 109, 383 P.3d 539 (2016)). Under the jury trial right, “[a]ny fact that, by law, increases the penalty for a crime is an ‘element’ that must be submitted to the jury and found beyond a reasonable doubt.” Alleyne v. United States, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); accord Hurst v. Florida, \_\_\_ U.S. \_\_\_, 136 S. Ct. 616, 621, 193 L. Ed. 2d 504 (2016). For example, a fact that requires a judge to impose a mandatory minimum sentence must be found by the jury. Alleyne, 570 U.S. at 108.

**b. Mr. Castro's sentence was increased by five years based on the sentencing judge's finding that he had committed a prior offense with a deadly weapon. This violated Mr. Castro's jury trial right.**

The jury found that Mr. Castro was armed with a firearm at the time of the commission of the homicide. CP 91; Supp. CP \_ (sub. 173). Based on this finding, the sentencing court was required to impose a firearm enhancement, increasing Mr. Castro's sentence. RCW 9.94A.533(3). For class A felonies, which includes second degree murder, the increased sentence for a firearm enhancement is five years. RCW 9.94A.533(3)(a); 9A.32.050(2). However, if "the offender has previously been sentenced for any deadly weapon enhancements," the length is doubled. RCW 9.94A.533(3)(d). In other words, the punishment is increased from five years to 10 years.

The State represented that Mr. Castro had previously been sentenced for a deadly weapon enhancement. CP 41. And therefore the firearm enhancement term had to be doubled from five years to 10 years. CP 41. The court accepted the State's representation and 10 years was added to Mr. Castro's sentence. CP 94.

Setting aside the lack of proof (which is addressed in issue two below), increasing the punishment from five years to 10 years violated Mr. Castro's jury trial rights. Although the jury found that Mr. Castro was

armed with a firearm, the jury did not find that Mr. Castro had been previously sentenced for a deadly weapon enhancement. Supp. CP \_\_\_ (sub. nos. 168-175). Therefore, the sentencing court unlawfully doubled the punishment on the firearm enhancement in violation of Mr. Castro's jury trial rights. Alleyne, 570 U.S. at 103, 108.

Our Supreme Court rejected a different, albeit similar, argument. State v. Simms, 171 Wn.2d 244, 248-253, 250 P.3d 107 (2011). In Simms, the defendant argued that doubling the sentence on firearm enhancements violated his jury trial rights because *the information* had not alleged that he had previously been sentenced to a firearm enhancement. Id. at 248-49. In rejecting this argument, the court reasoned there was "no constitutional concern" because a "firearm enhancement does not increase the penalty for a crime beyond the prescribed statutory maximum; it requires the penalty imposed by the court." Id. at 252; see id. at 250-51 ("application of RCW 9.94A.533 does not result in a sentence beyond the maximum authorized statutory sentence. Application of RCW 9.94A.533 results in the required statutory sentence.").

This reasoning is dubious. And it is inconsistent with subsequent precedent from the United States Supreme Court. Alleyne, 570 U.S. at 103, 108 (mandatory minimum sentences implicate jury trial right); Hurst, 136 S. Ct. at 622 (to impose punishment of death, jury was required to

find each necessary fact). The fact that a defendant has been previously sentenced for a deadly weapon enhancement is a fact that increases the punishment for the crime. It doubles the mandatory enhanced sentence. RCW 9.94A.533(3)(d). That a jury finds a defendant is armed with a firearm is not the same as finding a defendant has been previously sentenced for a deadly weapon enhancement. These are two different facts. The maximum Mr. Castro faced for the firearm enhancement without the judge-made finding was five years. This judicial fact-finding violated Mr. Castro's right to have the jury find every fact necessary to justify the punishment imposed by the court.

This Court is ultimately bound by the United State Supreme Court on federal constitutional issues. Cooper v. Aaron, 358 U.S. 1, 18-19, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958). Accordingly, because it is contrary to United States Supreme Court precedent, Simms should not be followed.

Additionally, the issue in Simms concerned an allegation about a lack of notice *in the information*, not whether the jury's verdict authorized the punishment imposed by the court. Simms, 171 Wn.2d at 248-52. These are different issues. See State v. McEnroe, 181 Wn.2d 375, 385, 333 P.3d 402 (2014) (notice of essential elements need not be in the charging document); State v. Williams-Walker, 167 Wn.2d 889, 899, 225 P.3d 913 (2010) (that notice was provided for firearm enhancement did not mean

that jury’s deadly weapon finding authorized firearm enhancement rather than deadly weapon enhancement). Thus, Simms is not controlling.

Arguably, that a person has been previously sentenced for a deadly weapon enhancement falls within the prior conviction exception to the rule that the jury must find every fact necessary to authorize the punishment. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”). This exception is traced to Almendarez–Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). It is a “narrow exception.”<sup>2</sup> Alleyne, 570 U.S. at 112 n.1; but see State v. Jones, 159 Wn.2d 231, 241, 149 P.3d 636 (2006) (sentencing courts permitted to determine facts intimately related to the prior conviction).

Being sentenced for a deadly weapon enhancement is not a prior conviction. Therefore, this fact does not fall within the “narrow exception” for prior convictions.

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<sup>2</sup> Ultimately, the United States Supreme Court will likely reconsider and overrule this exception. See Sessions v. Dimaya, \_\_ U.S. \_\_, 138 S. Ct. 1204, 1253, \_\_L. Ed. 2d. \_\_ (2018) (Thomas, J., dissenting). (“The exception recognized in Almendarez–Torres for prior convictions is an aberration, has been seriously undermined by subsequent precedents, and should be reconsidered.”).

This Court should conclude that because the jury did not find that Mr. Castro had been previously sentenced for a deadly weapon enhancement, the 10-year sentence for the firearm enhancement is unlawful.

**c. An unauthorized sentence is never harmless, requiring resentencing.**

Under the Washington Constitution, the violation of the right to have the jury determine all the facts necessary for the punishment is never harmless. Williams-Walker, 167 Wn.2d at 900-01; Clark-El, 196 Wn. App. at 624. Mr. Castro must be resentenced with a five-year term for the firearm enhancement.

**2. The State failed to prove Mr. Castro's criminal history, requiring remand for a new sentencing hearing.**

**a. The State must produce evidence to prove a person's criminal history.**

The State has the burden of proving a defendant's criminal history by a preponderance of the evidence. RCW 9.94A.500(1); State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999); State v. Mendoza, 165 Wn.2d 913, 928-29, 205 P.3d 113 (2009) (disapproved of on other grounds by State v. Jones, 182 Wn.2d 1, 338 P.3d 278 (2014)). The best evidence of a prior conviction is a certified copy of the judgment. Mendoza, 165 Wn.2d at 920.

“Bare assertions, unsupported by evidence do not satisfy the State’s burden to prove the existence of a prior conviction.” State v. Hunley, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). A prosecutor’s summary is just that and is thus inadequate to meet this burden. Id. at 913-15; Jones, 182 Wn.2d at 10. The lack of an objection at sentencing does not preclude appellate review. Hunley, 175 Wn.2d at 915; Jones, 182 Wn.2d at 10.

**b. The State failed to produce evidence to meet its burden to prove Mr. Castro’s criminal history. A new sentencing hearing is required.**

In this case, the State did not submit evidence at the resentencing hearing to substantiate Mr. Castro’s criminal history. Rather, the State submitted a summary recounting its “understanding” of Mr. Castro’s criminal history. CP 40. Based on its understanding and summary, the State calculated Mr. Castro’s offender score for each offense “in excess of 9.” CP 41. The State further represented that at least one of Mr. Castro’s prior convictions had a deadly weapon finding, which doubled the sentence on the firearm enhancement on the conviction for second degree murder from 60 months to 120 months. CP 41; RP 9.

The State asserted that it had certified copies of court documents substantiating its understanding. CP 40. The State recounted that these documents, certified judgments and sentences for prior convictions of Mr.

Castro, had been admitted as court exhibits at the first sentencing hearing. CP 40; RP 10. The State moved to remove these exhibits from the “evidence vault” and have them produced at resentencing. CP 39-40; RP 10. The defense did not contest the State’s understanding and did not object to having these documents filed. RP 11.

At the resentencing hearing, however, these documents were not produced. The prosecutor did not have certified copies of the documents with him. RP 12. Although the parties and the court discussed supplementing the record with these documents, this did not happen (and would not remedy the error anyway). RP 12-13. Despite the absence of evidence, the court accepted the State’s account of Mr. Castro’s criminal history and used that account in sentencing Mr. Castro. RP 23, 26-27.

Because the evidence at the sentencing hearing did not substantiate Mr. Castro’s criminal history, the State did not meet its burden of proof. Hunley, 175 Wn.2d at 915. Accordingly, this Court should remand for a new sentencing hearing, where the State must produce evidence to substantiate Mr. Castro’s criminal history. For the reasons explained below, resentencing is required for additional reasons.

**3. The trial court failed to calculate Mr. Castro's offender score. Remand for resentencing is required.**

**a. Sentencing courts must calculate a convicted person's offender score.**

Under the Sentencing Reform Act, the standard range sentence is determined by the offender score and offense seriousness level. RCW 9.94A.510, 530(1). A sentencing court acts without authority when it imposes a sentence based upon a miscalculated offender score. State v. Johnson, 180 Wn. App. 92, 99-100, 320 P.3d 197 (2014). In general, defendants may challenge the calculation of an offender score even if the claimed error was not raised in the trial court. State v. Wilson, 170 Wn.2d 682, 690, 244 P.3d 950 (2010); In re Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). The remedy is resentencing using the correct offender score. Wilson, 170 Wn.2d at 691. A trial court's calculation of an offender score is reviewed de novo. State v. Shelley, \_\_\_ Wn. App. 2d \_\_\_, 414 P.3d 1153, 1155 (2018).

**b. The court failed to calculate Mr. Castro's offender score. A "plus 9" is not a proper score.**

"The offender score is *the sum of points* accrued [as a result of prior convictions] rounded down to the nearest whole number." RCW 9.94A.525 (emphasis added); accord State v. Olsen, 180 Wn.2d 468, 472, 325 P.3d 187 (2014).

In this case, the court failed to calculate “the sum of points” Mr. Castro accrued as a result of his prior convictions. Instead, the court estimated it was a “9 plus” for each offense. CP 15; RP 23. This was error. The plain language of the RCW 9.94A.525 requires a sum that is a whole number. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (“If the plain language of the statute is unambiguous, then this court’s inquiry is at an end.”). The Court should remand for a proper calculation of Mr. Castro’s offender score and resentencing.

Even if the State is able to substantiate Mr. Castro’s criminal history, this will not be a fruitless exercise. As explained below, one of the convictions in Mr. Castro’s criminal history should not be considered because it is invalid. This will lead to a decrease in Mr. Castro’s offender score. It is also possible that some of the prior convictions will be scored together as the same criminal conduct.

**4. 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.**

Resentencing is further required because the prior conviction for conspiracy to deliver a controlled substance is invalid and should not have been counted as a prior conviction. This result is compelled by the law of the case doctrine and this Court’s earlier decision declaring this conviction invalid.

**a. In the previous appeal, this Court held that the conviction for conspiracy to deliver a controlled substance was invalid.**

In the first appeal, Mr. Castro successfully challenged the trial court's determination that he was a "persistent offender" and the life sentence. Slip. op. at 11-12. A persistent offender is a person who is currently being sentenced for a "most serious offense" and has two prior convictions most serious offenses. RCW 9.94A.030(37). The trial court had concluded that Mr. Castro's 2008 conviction for conspiracy to deliver a controlled substance with a deadly weapon enhancement was a most serious offense. Slip. op. at 11. This Court reasoned this was improper because a deadly weapon enhancement cannot apply to an unranked offense and conspiracy to deliver a controlled substance is an unranked offense. Slip. op. at 12-13.

The Court went on to hold the conviction for conspiracy to deliver a controlled substance was "facially invalid." Slip. op. at 13. And, 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.

**b. The court’s holding that the prior conviction was invalid and cannot be used at sentencing is binding as “the law of the case.”**

All the foregoing is the “law of the case.” Bank of Am., N.A. v. Owens, 177 Wn. App. 181, 189, 311 P.3d 594 (2013). Under the law of the case doctrine, “once there is an appellate holding enunciating a principle of law, that holding will be followed in later stages of the same litigation.” Id. at 189-90. It “binds the parties, the trial court, and subsequent appellate courts to the holdings of an appellate court in a prior appeal until such holdings are authoritatively overruled.” Id. at 190.

Under this Court’s decision, the conviction for conspiracy to deliver a controlled substance is invalid. As this Court held in the previous appeal, a prior conviction that is invalid on its face cannot be used at sentencing. Order at 2; accord State v. Webb, 183 Wn. App. 242, 250, 333 P.3d 470 (2014). Thus, it was error for the trial court to use that offense as part of Mr. Castro’s criminal history.

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.

**c. Without the invalid conviction, many of the prior class C felony convictions may “wash” and not count in an offender score calculation.**

Additionally, the exclusion of the conviction for conspiracy to deliver a controlled substance may result in the class C prior convictions washing out. Class C prior felony convictions may wash out after five years spent in the community crime free:

[C]lass C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c).

The criminal history summary indicates that Mr. Castro has five to seven class C felony convictions. CP 92-93.<sup>3</sup> Excluding the invalid conviction for conspiracy to deliver a controlled substance, the sentencing date for the most recent of these offenses is March 4, 2004. CP 92. The crimes for which Mr. Castro was convicted in this case occurred on November 27, 2011. CP 90-91. Thus, when the invalid conviction for

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<sup>3</sup> These consist of convictions for attempting to elude a pursuing police vehicle, malicious mischief in the second degree, delivery of a controlled substance, riot, and third degree assault. CP 92-93. Because the judgements and sentences were not before the trial court and are not part of the record, it is unclear if the convictions for delivery of a controlled substance are class B or class C convictions. That depends on the substance. RCW 69.50.401(2).

conspiracy to deliver a controlled substance is excluded, it is possible that Mr. Castro may have spent five consecutive years in the community with committing any crime, resulting in the class C convictions washing.

**5. On remand, the trial court must determine whether any prior convictions count as one offense under the same criminal conduct analysis.**

Calculation of prior offenses is provided for by statute. If the original sentencing court found multiple offenses “encompass the same criminal conduct,” the current sentencing court must count those prior convictions as one offense. RCW 9.94A.525(5)(a)(i). If the original sentencing court did not so find and the prior offenses were served concurrently, the current sentencing court “shall determine” whether to score the offenses as one using the same criminal conduct analysis. RCW 9.94A.525(5)(a)(i); State v. Williams, 176 Wn. App. 138, 141, 307 P.3d 819 (2013), aff’d, 181 Wn.2d 795, 336 P.3d 1152 (2014); see Matter of K.J.B., 187 Wn.2d 592, 601, 387 P.3d 1072 (2017) (the word “shall” “is presumptively imperative and operates to create a duty, rather to confer discretion.”).

Mr. Castro’s criminal history, as found by the trial court, indicates that some of his convictions may qualify as the same criminal conduct. CP 92-93. Some of the convictions have the same offense date and the same sentencing date. CP 92-93. Therefore, some of these offenses may count

as one offense. RCW 9.94A.525(5)(a)(i).

This Court should instruct the trial court on remand to comply with RCW 9.94A.525(5)(a)(i). On remand, the sentencing court must determine if the original sentencing court found any of the prior convictions to encompass the same criminal conduct. If not, the sentencing court on remand must determine whether to score the offenses as one using the same criminal conduct analysis. See Williams, 176 Wn. App. at 142-144; State v. Vasquez, No. 75738-5-I, 2018 WL 1152015, at \*4-5 (Wash. Ct. App. Mar. 5, 2018) (unpublished).<sup>4</sup>

**6. Following a correct calculation, the trial court may decide a lower sentence is appropriate.**

Once the trial court correctly calculates Mr. Castro's offender score, the court should resentence Mr. Castro. As explained earlier, Mr. Castro's offender score may be lower. Even if Mr. Castro's offender score is calculated at 9 or greater, the trial court could reasonably decide that a lower sentence is warranted. State v. Graciano, 176 Wn.2d 531, 551 n.8, 295 P.3d 219 (2013). The trial court sentenced Mr. Castro to the high end of the standard range on all three convictions. CP 94. The trial court made this decision based in part on Mr. Castro's criminal history. RP 26-27.

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<sup>4</sup> GR. 14.1. The decision is cited only for persuasive value and is not precedential or binding. Crosswhite v. Washington State Dep't of Soc. & Health Servs., 197 Wn. App. 539, 544, 389 P.3d 731 (2017).

That history included an invalid conviction. With a correct determination of Mr. Castro's criminal history and offender score, the court may have decided differently. Graciano, 176 Wn.2d at 551 n.8.

**7. The court mistakenly ordered that legal financial obligations be repaid at \$10 per month rather than \$5 a month. In imposing this obligation, the court failed to consider whether Mr. Castro could make these payments. Remand is necessary to either strike the repayment plan or fix the mistake.**

At Mr. Castro's resentencing, the trial court imposed mandatory legal financial obligations (LFOs) of \$500. CP 95. This was consistent with what the court had ordered at the first sentencing. CP 17. The court, however, ordered at the resentencing that Mr. Castro make payment of \$10 a month toward these LFOs. CP 96. This was inconsistent with what was ordered before. The court had ordered that Mr. Castro make payments of \$5 per month. CP 18.

The record shows the change was a mistake. The judge who presided over Mr. Castro's resentencing was not the judge who presided at trial and at the first sentencing hearing. RP 4-5, 23. The resentencing judge incorrectly stated the first judgment and sentence had imposed repayment at \$10 a month. RP 28; CP 18. The judge expressed her intent was to do what the previous judge had done on LFOs. CP 30. But the

judge increased repayment of LFOs from \$5 to \$10. Remand is necessary to remedy the error.

However, because there is not a sound basis to impose repayment at \$5 per month, this court should simply order that it be stricken. Our Supreme Court has indicated that courts should be hesitant to impose low payment terms when there is an inability to pay and little likelihood of this changing in the future. City of Richland v. Wakefield, 186 Wn.2d 596, 607, 380 P.3d 459 (2016); State v. Blazina, 182 Wn.2d 827, 836, 839, 344 P.3d 680 (2015). A repayment order must consider the defendant's financial resources and only impose payments that the defendant will be able to make. State v. Duncan, 185 Wn.2d 430, 437, 374 P.3d 83 (2016); State v. Campbell, No. 35318-4 (Wash. Ct. App. May 15, 2018) (unpublished) (striking repayment order because court lacked sufficient basis to impose repayment schedule).<sup>5</sup>

Here, defense counsel represented that Mr. Castro would be unable to make any payments. RP 30. The State did not disagree. Mr. Castro's sentence will remain lengthy. Given Mr. Castro's inability to pay and his lengthy sentence, the repayment order (whether \$5 or \$10) lacked a sufficient basis. It should be stricken. This will permit the Department of

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<sup>5</sup> GR. 14.1. The decision is cited only for persuasive value and is not precedential or binding. Crosswhite, 197 Wn. App. at 544.

Corrections to set an appropriate payment schedule based on Mr. Castro's circumstances. RCW 9.94A.760(1), (7). At the least, the trial court should reconsider the issue on remand.

Also on remand, the court should also instruct that interest not accrue on Mr. Castro's LFOs beginning June 7, 2018. Effective that date, "no interest shall accrue on nonrestitution legal financial obligations." Laws of 2018, Ch. 269, § 1 (S.S.H.B. 1783).

In sum, Mr. Castro asks that this Court order the repayment plan be stricken. Alternatively, the trial court should reconsider the issue on remand.

**8. The judgment and sentence incorrectly contains language indicating that Mr. Castro is a persistent offender. The language should be stricken.**

This Court "has the authority, as well as the duty, to correct errors on the face of a judgment and sentence." State v. Hibdon, 140 Wn. App. 534, 537, 166 P.3d 826 (2007).

The judgment and sentence has language indicating that Mr. Castro was sentenced as persistent offender. At the bottom of each page, it states "Felony Judgment and Sentence (FJS)(Persistent Offender) CP 90-99. This is error. The Court should instruct that the error not occur at resentencing. Alternatively, the language should be ordered stricken.

## **F. CONCLUSION**

Mr. Castro's sentence is riddled with errors. His sentence was unlawfully increased by five years based on judicial fact finding. The State failed to prove Mr. Castro's criminal history. The trial court failed to calculate his offender score. An invalid conviction was used as part of Mr. Castro's criminal history. The amount of repayment for LFOs was mistakenly increased. And the judgment and sentence erroneously indicates that Mr. Castro is a persistent offender. To remedy these errors, this Court should reverse and remand for a new sentencing hearing.

DATED this 17th day of May 2018.

Respectfully submitted,

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# Appendix

**FILED**  
**JANUARY 24, 2017**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 31701-3-III
	)	
Respondent,	)	
	)	
v.	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION,
	)	GRANTING MOTION TO
JOHN ANTHONY CASTRO,	)	SUPPLEMENT THE RECORD,
	)	AND AMENDING OPINION
Appellant.	)	

THE COURT has considered respondent's motion for reconsideration and the answer thereto, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of August 30, 2016 is hereby denied.

THE COURT has considered respondent's motion to supplement the record and the answer thereto, and is of the opinion the motion should be granted. Therefore,

IT IS FURTHER ORDERED the motion to supplement the record is granted.

IT IS FURTHER ORDERED the opinion filed August 30, 2016, is amended as follows: In the first full paragraph on page 13, the last sentence:

This argument fails, however, because neither the judge nor a jury entered a deadly weapon finding in the earlier prosecution. Neither the amended information, nor the statement of the facts by the prosecutor at the plea hearing, mentioned a deadly weapon.

Is replaced with:

This argument fails. A judgment and sentence is facially invalid if the trial court lacked authority to impose the challenged sentence. *In re Snively*, 180 Wn.2d 28, 32, 320 P.3d 1107 (2014). A sentencing court may not base its sentence on a prior conviction that is facially invalid. *State v. Webb*, 183 Wn. App. 242, 250, 333 P.3d 470 (2014). A conviction for a nonexistent crime is facially invalid. *In re Coats*, 173 Wn.2d 123, 135, 267 P.3d 324 (2011). An unranked felony with a firearm sentence enhancement is a nonexistent crime, rendering the judgment and sentence facially invalid. *State v. Soto*, 177 Wn. App. 706, 716, 309 P.3d 596 (2013), *as amended* (Jan. 14, 2014). The trial court erred in relying on John Castro's 2008 conviction to find him a persistent offender.

On page 15 after Judge Korsmo's signature add "dissents in part".

PANEL: Judges Fearing, Korsmo, Lawrence-Berrey

FOR THE COURT:

  
\_\_\_\_\_  
GEORGE B. FEARING, Chief Judge

**FILED**  
**AUGUST 30, 2016**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 31701-3-III
Respondent,	)	
	)	
v.	)	
	)	
JOHN ANTHONY CASTRO,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

FEARING, C.J. — The trial court, after a jury trial, convicted John Castro of second degree murder, among other charges. Castro assigns three errors on appeal. First, the trial court erred by denying his motion for a mistrial after Detective Kip Hollenbeck violated the trial court’s order to exclude testimony of gangs. Second, the trial court erred by barring his wife from the courtroom during trial when the State never called her to testify. Third, the trial court erred when imposing a life sentence on the assumption that he was a persistent offender. We reject Castro’s first two assignments of error, but agree that the evidence did not support a life sentence. We remand for resentencing.

FACTS

Defendant John Castro pled guilty, in 2008, to conspiracy to deliver a controlled

substance with a deadly weapon enhancement. The felony judgment did not classify the crime as a particular class of felony.

Defendant John Castro performs rap music. On the evening of Friday, November 26, 2011, Castro attended a rap concert at the Ichiban restaurant in Spokane. A group from Moses Lake, including members of a rap band intending to perform that evening, also attended the concert. The Moses Lake entourage included the murder victim, Jose Solis.

During the course of the rap music concert, John Castro and Stafone Fuentes fought in the entrance to Ichiban. Restaurant security quickly ended the fisticuffs, and the restaurant terminated the rap concert.

Upon the closing of the rap concert, many concertgoers, including John Castro and Jose Solis, went to the Quality Inn, a nearby hotel. A fight among a dozen men broke out on the fourth floor of the hotel. The men included John Castro and Jose Solis. Tera Quarles observed the fight. A handful of men came downstairs from an upper floor and joined the chaos. Objects flew through the air. Quarles saw Castro with a gun, saw him lift and point the gun, and saw him shoot Solis. Shamela Freeman saw Castro with a gun, although she saw no shot. After the shot, Tera Quarles grabbed Castro and asked him why he shot Solis. Jose Solis died from a gunshot wound.

PROCEDURE

The State of Washington charged John Castro with murder in the second degree, two counts of second degree assault, riot, and first degree unlawful possession of a firearm. The State brought an ER 404(b) motion to submit evidence of Castro's gang affiliation and criminal history to the jury. The State argued Castro's gang association served as his motive to participate in the hotel melee. The trial court rejected the argument and ordered that "all gang evidence is excluded from the trial." Clerk's Papers (CP) at 265. The court also directed the State to "instruct the witnesses not to mention gang membership or evidence." CP at 265.

At the request of the State, the trial court excluded all potential witnesses from inside the courtroom during trial. The ruling barred John Castro's wife, Dyneshia Sleep, from the courtroom during testimony. John Castro complained to the court about the exclusion of his wife. The State responded that it would prefer to avoid calling Sleep as a witness. The State, nonetheless, argued that it subpoenaed Sleep as a witness because she was at the Quality Inn when the shooting occurred and she might testify to facts essential to the State proving its case. The trial court maintained its ruling that prevented Sleep from viewing the trial. Sleep was not called to testify during trial.

During trial, Detective Kip Hollenbeck testified for the State. During cross-examination, Hollenbeck testified, in part:

Q. No. No. Detective Hollenbeck, you've heard some testimony

about showing people photo montages. When you showed all these people photo montages, did you ever once say to them that the person may not be in the photograph?

A. Yes. There's a warning at the bottom of the form, and each time I show the lineup I read that warning [to] them. That warning explains that this person may or may not be included in this photo lineup.

Q. Okay. And then you heard Mr. Powell testify, and I asked him some questions about this. Mr. Powell actually identified Jason St. Mark in a photograph.

A. Yes.

Q. You've just shown [ ] us all sorts of video. Where was Mr. St. Mark?

A. The first day, the day of this incident, I was reviewing videos with gang experts.

MS. REARDON: Objection.

THE COURT: Ladies and gentlemen, you will disregard the witness's last answer. If you would answer the question, detective.

THE WITNESS: Yes. We were viewing the video and Anthony Fuentes was seen on the video.

Report of Proceedings (RP) at 1382-83.

Based on Detective Hollenbeck's violation of the pretrial ruling to exclude gang evidence, John Castro made a half-time motion to dismiss. The trial court denied the motion.

The State initially requested a jury instruction for the lesser included offense of manslaughter, but withdrew the request. John Castro, preferring an "all or nothing" defense," opposed a manslaughter instruction. CP at 397.

At the conclusion of the trial, the trial court dismissed the two assault charges for insufficient evidence. The jury found John Castro guilty of second degree intentional murder, second degree felony murder, felony riot, and first degree unlawful possession of

a firearm.

After the jury verdict, John Castro again sought a new trial because of Detective Kip Hollenbeck's violation of the trial court's order excluding testimonial references to gangs. As part of the motion, defense counsel filed a declaration that repeated a posting on a Spokane news station's website. The post read:

I was a juror on this trial, and yes, they were all a bunch of gang bangers. I saw it first hand. I was blown away by their cocky attitudes, and pure lack of respect towards the attorneys and the judge. He is exactly where he should be.

CP at 629. The trial court denied the motion for a new trial.

The State of Washington requested the trial court sentence John Castro, as a persistent offender, to a sentence of life without the possibility of parole. The State contended that Castro incurred two previous strikes, one from his 2004 conviction, and the other from a 2008 conviction for conspiracy to deliver a controlled substance with a deadly weapon enhancement. The trial court sentenced Castro to life imprisonment as a persistent offender because of his 2004 and 2008 convictions.

## LAW AND ANALYSIS

### Hollenbeck Testimony

John Castro contends the trial court erred by denying the defense motion for mistrial after Detective Kip Hollenbeck intentionally violated the court's order prohibiting any mention of gangs and so tainted the proceedings that Castro could not get

a fair trial. We do not know if Hollenbeck intentionally violated the order. The State responds that Detective Hollenbeck's reference to gang experts was harmless because it was ambiguous, lacked sufficient detail for the jury to infer Castro had gang affiliations, the court ordered the jury to disregard the comment, and Castro never requested a curative instruction.

We deny the request for a new trial. Detective Hollenbeck should have been instructed to not mention the word "gangs," and he should have obeyed that instruction. Nevertheless, under case law, the trial court did not abuse its discretion in denying the motion for a mistrial.

Denial of a motion for a mistrial is reviewed under an abuse of discretion standard. *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). An abuse of discretion occurs only when no reasonable judge would have reached the same conclusion. *State v. Johnson*, 124 Wn.2d at 75; *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). A mistrial is required only when a defendant has been so prejudiced by a trial irregularity that only a new trial can ensure that the defendant will be tried fairly. *Johnson*, 124 Wn.2d at 76.

One former United States Supreme Court Associate Justice observed that all practicing lawyers recognize as unmitigated fiction the naïve assumption that prejudicial effects can be overcome by instructions to the jury. *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S. Ct. 716, 93 L. Ed. 790 (1949) (Justice Jackson, concurring opinion).

Nevertheless, under Washington law, we presume in all cases that the jury obeyed the instructions of the court, and this presumption must prevail until it is overcome by some showing otherwise. *In re Municipality of Metropolitan Seattle*, 67 Wn.2d 923, 930-31, 410 P.2d 790 (1966).

In considering whether a trial irregularity warrants a new trial, the court must consider (1) the seriousness of the irregularity, (2) whether the statement was cumulative of evidence properly admitted, and (3) whether the irregularity could be cured by an instruction. *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992); *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). The appropriate inquiry is whether the testimony, when viewed against the backdrop of all the evidence, so tainted the trial that the defendant did not receive a fair trial. *State v. Post*, 118 Wn.2d at 620.

John Castro's trial court immediately instructed the jury to disregard Detective Kip Hollenbeck's reference to a gang expert. The jury heard no other references to gangs. The trial court gave thorough consideration to the seriousness of Detective Kip Hollenbeck's testimony, but determined it was not prejudicial because it "simply indicated he had used the task force . . . when he was trying to identify individuals." RP at 1425.

John Castro emphasizes a juror's posting of a message on a news station's website. We have no confirmation that a juror wrote the message. Nevertheless, the message does not suggest that the juror concluded that Castro was a gang member

because of Kip Hollenbeck's statement. The juror wrote that he or she concluded Castro and others were gang members because of the cocky attitudes and lack of respect for others.

John Castro claims that gang evidence cannot be cured by instructing the jury to disregard it, but he does not provide any authority for this contention. The two cases Castro cites, *State v. Wade*, 98 Wn. App. 328, 989 P.2d 576 (1999) and *State v. Holmes*, 122 Wn. App. 438, 93 P.3d 212 (2004), are inapposite. Neither case involves gang evidence, nor a curative instruction to the jury.

#### Exclusion of Dyneshia Sleep

John Castro contends that the prosecutor committed misconduct by requesting that the trial court exclude Castro's wife from the courtroom as a potential witness when the State had no intention to call her to testify. Castro also briefly suggests that the exclusion of Sleep violated his public trial right. The State responds that the exclusion of witnesses is a matter within the discretion of the trial court and Castro forwards no evidence that the prosecutor surreptitiously requested Sleep's exclusion or that the State subpoenaed her for a nefarious purpose. Also, the State argues that the trial court did not violate Castro's public trial right because the exclusion of a witness is a matter of courtroom governance within the discretion of the trial court. We agree with the State.

In order to establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record

and the circumstances at trial. *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). The burden to establish prejudice requires the defendant to prove a substantial likelihood that the instances of misconduct affected the jury's verdict. *State v. Thorgerson*, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011).

John Castro misconstrues the record to raise the specter of malfeasance where none existed. When Castro questioned the State's motivation for excluding Dyneshia Sleep from the proceedings, the State provided a sound explanation. Although the State preferred to avoid calling Sleep as a witness, the State kept her under subpoena because she possessed percipient knowledge of facts the State needed to prove. Castro also fails to show how Sleep's presence in the audience during the trial would have altered the jury's determination of guilt.

John Castro, in a short passage in his brief, claims the exclusion of Dyneshia Sleep violated his public trial right. He cites *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), *In re Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012), and *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012). In *Strode*, *Wise*, and *Paumier*, the Supreme Court found a public trial right violation because the trial court performed juror interviews in the judges' chambers. *In re Personal Restraint of Orange* involved a public trial right violation when the trial court excluded the family of the victim and the defendant during voir dire because of limited space in the courtroom with a ninety-eight-person venire. None of the decisions

entail the exclusion of witnesses during an ongoing trial. Castro forwards no decision that holds that exclusion of a witness constitutes a violation of an accused's right to a public trial.

To successfully raise a public trial right violation, the defendant bears the initial burden of showing a closure occurred. *State v. Gomez*, 183 Wn.2d 29, 34, 347 P.3d 876 (2015). The appellant must show that the judge acted to close the courtroom to the public as opposed to acting to manage the in-court proceedings. *State v. Gomez*, 183 Wn.2d at 36. The exclusion of only one or a few individuals is a matter of courtroom operations, in which the trial judge possesses broad discretion to preserve and enforce order in the courtroom and to provide for the orderly conduct of its proceedings. *State v. Lormor*, 172 Wn.2d 85, 93-94, 257 P.3d 624 (2011); *State v. Gomez*, 183 Wn.2d at 36. The Supreme Court declared in *State v. Johnson*, 77 Wn.2d 423, 428, 462 P.2d 933 (1969):

The power to exclude witnesses from the courtroom, we think, falls within the general discretionary powers of the court to be exercised during trial in aid of eliciting the truth, promoting the orderly presentation of evidence, and to assure that all parties, in the exercise of reasonable diligence, are afforded fair opportunity to offer all relevant evidence.

We hold that the trial court did not close the courtroom when it excluded a potential witness from the courtroom during trial testimony. In turn, the trial court did not breach John Castro's right to a public trial.

### Life Sentence

John Castro contends the trial court erred by finding him a persistent offender. He argues that the trial court mistakenly classified one of his prior offenses, conspiracy to deliver a controlled substance with a deadly weapon enhancement, as a most serious offense. The State responds that the conspiracy to deliver a controlled substance with a deadly weapon enhancement was a most serious offense because the offense was a felony with a deadly weapon finding, even if the deadly weapon enhancement is not valid. This court must remand for resentencing because the conspiracy to deliver a controlled substance conviction is facially invalid and cannot count as a most serious offense.

Under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570, a trial court must impose a life sentence for a persistent offender. A persistent offender is someone who is currently being sentenced for a most serious offense and also has two prior convictions for most serious offenses. RCW 9.94A.030 reads in relevant part:

(37) “Persistent offender” is an offender who:

(a)(i) Has been convicted in this state of any felony considered a most serious offense; and

(ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted.

In turn, RCW 9.94A.030 defines, in relevant part, as a “most serious offense”

(32) “Most serious offense” means any of the following felonies or a felony attempt to commit any of the following felonies:

(a) Any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;

....

(s) Any other class B felony offense with a finding of sexual motivation;

(t) Any other felony with a deadly weapon verdict under RCW 9.94A.825.

Under the POAA, the State bears the burden of proving, by a preponderance of the evidence, the existence of prior convictions that constitute predicate offenses for application of the POAA. *State v. Knippling*, 166 Wn.2d 93, 100, 206 P.3d 332 (2009).

John Castro contends the conspiracy to deliver a controlled substance with a deadly weapon enhancement does not qualify as a most serious offense under the POAA. He argues that a deadly weapon enhancement does not create either a Class A or Class B felony and thus does not fall under RCW 9.94A.030(32)(a) or (s). In other words, his 2008 conviction was for an unranked felony. We agree.

Under *State v. Soto*, 177 Wn. App. 706, 716, 309 P.3d 596 (2013), the deadly weapon enhancement cannot apply to an unranked felony. Conspiracy to deliver a controlled substance is an unranked felony. *State v. Hebert*, 67 Wn. App. 836, 837, 841 P.2d 54 (1992).

John Castro may challenge the 2008 deadly weapon enhancement in the pending prosecution. When a defendant is convicted of a nonexistent crime, the judgment and

sentence is invalid on its face. *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 857, 100 P.3d 801 (2004). Although Castro pled guilty to the challenged offense, exceptions to the foreclosure of collateral attack on a guilty plea exist when, on the face of the record, the court had no power to enter the conviction or impose the sentence. *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 720, 10 P.3d 380 (2000).

The State claims the conspiracy to deliver a controlled substance with a deadly weapon enhancement is a serious offense under RCW 9.94A.030(32)(t), which provides: “[a]ny other felony with a deadly weapon verdict under RCW 9.94A.825” is a serious offense. The State argues that, even if the enhancement is not valid, the crime is a serious offense because of a deadly weapon finding. This argument fails, however, because neither the judge nor a jury entered a deadly weapon finding in the earlier prosecution. Neither the amended information, nor the statement of the facts by the prosecutor at the plea hearing, mentioned a deadly weapon.

John Castro’s second strike, a 2008 conviction for conspiracy to deliver a controlled substance with a weapon enhancement, is a facially invalid conviction. Therefore, he suffered no deadly weapon verdict to raise the conviction to a most serious offense.

#### Statement of Additional Grounds

John Castro asserts five additional grounds for reversal in his statement of additional grounds:

1. Prosecutor and police misconduct committed by introducing gang evidence in violation of the court's order.

2. Introduction of gang evidence violated John Castro's constitutional right to a fair trial by an impartial jury.

3. The trial court abused its discretion in excluding Dyneshia Sleep from the courtroom when she was not obligated to testify against her husband, pursuant to RCW 5.60.060(1).

4. John Castro was entitled to a lesser included instruction on manslaughter because the evidence at trial only proved an accidental death.

5. It was fundamentally unfair to use the conspiracy to deliver a controlled substance conviction as a strike for establishing a sentence of life without parole.

Statements of additional grounds 1, 2, 3, and 5 mirror contentions raised by appellant's counsel. We will not repeat our analysis.

John Castro contends that the trial court erred because he was entitled to receive a jury instruction on the lesser included offense of manslaughter. A defendant who is entitled to a lesser included instruction may choose to forgo such instruction. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). Even if Castro was entitled to a lesser included instruction, he intentionally waived his right to the instruction. Castro opposed any manslaughter instruction because of a preference for an "all or nothing" defense. CP at 397.

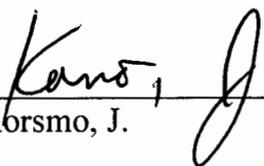
CONCLUSION

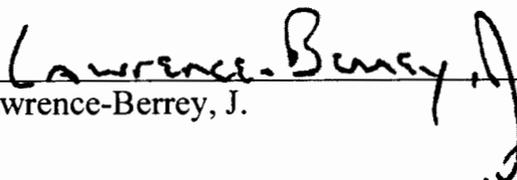
We affirm John Castro's convictions. We vacate his life sentence under the POAA. We remand the case to the trial court to exclude Castro's 2008 conviction for conspiracy to deliver a controlled substance with a deadly weapon enhancement from a POAA calculation and to resentence Castro.

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

  
\_\_\_\_\_  
Fearing, C.J.

WE CONCUR:

  
\_\_\_\_\_  
Korsmo, J.

  
\_\_\_\_\_  
Lawrence-Berrey, J.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 35575-6-III
	)	
JOHN CASTRO,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF MAY, 2018, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] BRIAN O'BRIEN [SCPAappeals@spokanecounty.org] SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X] JOHN CASTRO 849936 WASHINGTON STATE PENITENTIARY 1313 N 13 <sup>TH</sup> AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 17<sup>TH</sup> DAY OF MAY, 2018.

X \_\_\_\_\_ 

**Washington Appellate Project**  
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# WASHINGTON APPELLATE PROJECT

May 17, 2018 - 4:06 PM

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**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35575-6  
**Appellate Court Case Title:** State of Washington v. John Anthony Castro  
**Superior Court Case Number:** 11-1-03698-8

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