

70099-5

70099-5

NO. 70099-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

AMALIA M. CASTILLO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN GAIN AND BILL BOWMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1) An information, if challenged for the first time on appeal, will be deemed sufficient so long as it contains allegations that express the crime that was meant to be charged, even if the charging document does not contain all of the precise statutory language. Here, the first count of the information, accusing the appellant and a co-defendant of the crime of conspiracy to commit first-degree murder, failed to expressly state that each defendant agreed with “one or more persons” to engage in criminal conduct, or that “any of them” took a substantial step in furtherance of the agreement. However, given that the information did state that the two co-defendants agreed to engage in such conduct, and that the defendant herself took a substantial step toward that end, did the information adequately express the charged offense?

2) Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, and with all reasonable inferences made in the State's favor, it permits a rational trier of fact to find the elements of the charged crime proved beyond a reasonable doubt. Here, on the charge of unlawful possession of a firearm, the State's evidence indicated that the defendant,

an admitted felon and current drug dealer, was stopped while travelling in a vehicle containing an arsenal of handguns and rifles, including a handgun on the floorboard underneath her baby's car seat and another pistol in a suitcase that the defendant acknowledged was hers. Was the jury entitled to conclude that the defendant was aware of and in at least shared control of the gun directly under her child, and to discount her claim that the gun in her handbag was placed there by someone else without her knowledge, and find her guilty of the charged offense?

3) A defendant waives the right to appeal the trial court's inclusion of particular prior convictions in her offender score, and the trial court's obligation to determine whether those prior offenses constituted the same criminal conduct, when she affirmatively and directly identifies as her offender score a score that necessarily includes the prior offenses and treats them as separate crimes. Here, the defendant expressly indicated her offender score as four points, which necessarily included two pre-existing felonies and inescapably scored them as one point each. Is she now barred from challenging their inclusion in her offender score on appeal?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, Amalia Castillo a.k.a. Amalia Cervantes, was charged by third amended information with Conspiracy to Commit Murder in the First Degree (Count I), Kidnapping in the First Degree (Count II), Unlawful Possession of a Firearm in the Second Degree (Count III), and Violation of the Uniform Controlled Substances Act – Possession of Methamphetamine with Intent to Deliver (Count IV). CP 17-19. At her first trial, Castillo was found guilty by jury verdict on Counts II and III, and on a lesser charge of simple possession of methamphetamine as to Count IV. CP 116, 118-19. The jury was unable to reach a unanimous verdict as to Count I. CP 120.

At her retrial on the conspiracy charge, Castillo was co-tried alongside Francisco Mendoza-Gomez. CP 234-36. By jury verdict rendered on April 26, 2013, Castillo was found guilty as charged. CP 218.

2. SUBSTANTIVE FACTS

The conspiracy and kidnapping charges against Castillo originated from an incident that occurred on September 30, 2011, and the firearm and narcotics charges resulted from Castillo's

subsequent arrest, twelve days later, for the earlier crimes. Much of the State's case-in-chief at Castillo's re-trial on the conspiracy count included evidence that was presented at her first trial. In this brief, the State will cite only to the report of proceedings for the first trial when the evidence presented at that trial pertains solely to Counts II, III, and IV, and will cite to the reports of proceedings from both trials where the testimony relates also to the conspiracy conviction (Count I).

On the afternoon of September 30, 2011, Tawney Eckert and her husband, Taylor, arrived at the Shell gas station located at 1520 S. 348th St. in Federal Way after being given a lift there by a stranger following mechanical difficulties with the Eckerts' vehicle. 4/11/2013 RP 98-99. As they entered the station parking lot, the Eckerts noticed a black Acura SUV parked nearby. 4/11/2013 RP 99, 118. The SUV pulled up to the front of the station's convenience store as Taylor Eckert noticed a commotion inside the store. 4/11/2013 RP 118. Suddenly, two men bolted from the store and jumped into the SUV, which sped away. 4/11/2013 RP 100, 118. Taylor noticed that one of the men, a Samoan, was holding a gun. 4/11/2013 RP 122. Another bystander heard the driver of the

SUV, a woman, yell to the two men that they needed to go just as they exited the store. 4/11/2013 RP 62-63.

The Eckerts entered the store, and found Juan Moreno, also known as Isais Lozano, lying on the floor behind the cash register. 4/11/2013 RP 105, 118. Moreno had gashes on his forehead and jaw and was bleeding significantly. 4/11/2013 RP 105-07, 124. Tawney, a trained paramedic, began to treat Moreno's injuries while her husband spoke by phone with a 911 emergency dispatcher. 4/11/2013 RP 105, 108.

Federal Way Police Department officers responded to the Shell station and spoke to the clerk, Hossam Gayed, who was working there that afternoon. 4/11/2013 RP 82. Gayed testified that he had been behind the cash register when a man crashed through the front door of the store and leapt over the counter; the man was followed by a larger, Samoan man in hot pursuit. 4/10/2013 88-90. Gayed, fearing that he was going to be robbed, hid inside an interior office, behind a door he locked. 4/10/2013 RP 91. From inside the office, he heard a man screaming and yelling. 4/10/2013 RP 93. When he came out of the office, he saw the first man who had raced into the store on the ground, bleeding severely and being treated by Tawney Eckert. 4/10/2013 RP 93-94.

Gayed provided the responding officers with video taken by the station's surveillance cameras. 4/10/2013 RP 99. The video, which was played to the jury, showed one man enter the store to obtain paper funnels, used to pour fluids into vehicles. 4/10/2013 RP 101. Shortly after, the in-store camera recorded Moreno's panicked entry into the store, followed by two men, one a Samoan and the other a male with a shaved head; the two caught Moreno and proceeded to beat, kick, and pistol-whip him before fleeing. 4/11/2013 RP 88-89.

Moreno testified that he had paid a visit to a Seatac apartment in the mid-afternoon of September 30, 2013, to visit a woman named Cheila. 12/13/2012 RP 81, 86. Cheila was the sister-in-law of Francisco Mendoza-Gomez, a man whom Moreno knew socially. 12/13/2012 RP 80. Moreno had met Cheila a few days earlier while visiting Mendoza-Gomez, but did not know what Cheila's relationship to Mendoza-Gomez was. 12/13/2012 RP 84. He returned on the 30th to spend more time with Cheila, whom he found attractive; Moreno had not told Mendoza-Gomez of his plans to visit Cheila, who was married to Mendoza-Gomez's brother. 12/13/2012 RP 86.

While Moreno was speaking to Cheila, Mendoza-Gomez arrived without notice, accompanied by Castillo. 12/13/2012 RP 88-89. Mendoza-Gomez appeared to be angry, and demanded to talk privately with Cheila. 12/13/2012 RP 88. Castillo remained with Moreno, and told him that he was in trouble. 12/13/2012 RP 91; 4/15/2013 RP 50.

About ten minutes later, a Samoan and another man arrived outside the apartment and spoke to Castillo. 12/13/2012 RP 94-95; 4/15/2013 RP 52-53. The two men spoke to Castillo in English, which Moreno does not understand. 12/13/2012 RP 94-95; 4/15/2013 RP 52-54. The Samoan man then walked up to Moreno, pointed a handgun at Moreno's torso, and pushed Moreno toward a waiting vehicle. 12/13/2012 RP 100-01; 4/15/2013 RP 57, 59, 61-62. Moreno was driven at gunpoint to a Tukwila motel, where he was brought by the Samoan into a room. 12/13/2012 RP 101-04; 4/15/2013 RP 63-64, 68-69.

The Samoan man, Agalega Pua, testified that he had been sleeping in the room at the Tukwila motel on the afternoon of September 30th when he was awakened by a phone call from Castillo. 11/29/2012 RP 10; 4/16/2013 RP 77. Castillo, who was the common-law wife of Pua's older brother (then incarcerated at

King County Jail), told Pua that she needed his help, and that a car would be coming to the motel to collect him. 11/29/2012 RP 8, 10-11; 4/16/2013 RP 76. When the car arrived, Pua was driven to Castillo's location, at the Seatac apartment. 11/29/2012 RP 12; 4/16/2013 RP 81.

Castillo told Pua that Moreno had been caught in a compromising situation with the wife of Mendoza-Gomez's brother. 4/16/2013 RP 85. She gave Pua a handgun and told him to keep watch on Moreno. 11/29/2012 RP 15, 18; 4/16/2013 RP 84. Castillo talked to Mendoza-Gomez, and then returned to Pua; she told Pua that Mendoza-Gomez had directed her to kill Moreno. 11/29/2012 RP 22; 4/16/2013 RP 90.

At Castillo's direction, Pua took Moreno at gunpoint to a car that transported them back to Pua's Tukwila motel room. 11/29/2012 RP 25, 28; 4/16/2013 RP 92-93. A few minutes later, Castillo and Mendoza-Gomez arrived, along with Mendoza-Gomez's brother. 11/29/2012 RP 29-30; 4/16/2013 RP 100, 103. They spoke angrily to Moreno in Spanish, and Mendoza-Gomez was armed with a .45 caliber handgun and a baseball bat. 11/29/2012 RP 32-33, 38; 4/16/2013 RP 104-06. Mendoza-Gomez swung the bat at Moreno's head; Moreno was struck in his hand

when he raised it to block the impact to his skull. 11/29/2012 RP 35; 4/16/2013 RP 106-07.

Mendoza-Gomez spoke to Castillo, and then gave his .45 caliber pistol to Pua. 4/16/2013 RP 109-11. Castillo told Pua to take Moreno to a waiting black Acura SUV with her. 11/29/2012 RP 37; 4/16/2013 RP 110-11. Once inside the vehicle, Castillo told Pua that they were going to kill Moreno. 11/29/2012 RP 40; 4/15/2013 RP 119. She also informed Moreno, in Spanish, that he would be killed. 11/29/2012 RP 45.

Castillo then drove the SUV to pick up a friend, Eric Tharp, in Federal Way. 11/29/2012 RP 47; 4/16/2013 RP 119-20. When Tharp got in, he suggested that Fort Lewis, in Tacoma, would be a suitable place to dispose of Moreno. 11/29/2012 RP 49; 4/16/2013 RP 121.

The SUV began to experience mechanical trouble, and Tharp suggested that they stop at a nearby Walmart for "oil." 11/29/2012 RP 50; 4/16/2013 RP 123. (In actuality, the vehicle required transmission fluid, which Tharp purchased at the Walmart. 11/28/2012 RP 25.) Upon returning to the SUV, Tharp realized he did not have a funnel to pour the fluid into the vehicle's receptacle,

and directed Castillo to drive to the Shell station across the street.
4/16/2013 RP 126.

At the gas station, Tharp obtained a funnel and poured the "oil" into the SUV. 11/29/2012 RP 57; 4/16/2013 RP 127. Castillo, who had kept the vehicle's doors locked throughout this time, unlocked the doors so Tharp could enter. 11/29/2012 RP 53; 4/16/2013 RP 125, 128. Castillo began to drive away, neglecting to lock the doors again, and Moreno seized the opportunity to escape. 11/29/2012 RP 57; 4/16/2013 RP 128.

Moreno ran into the station's store, and Pua and Tharp chased after him. 11/29/2012 RP 57; 4/16/2013 RP 129. According to Pua, he and Tharp beat and kicked Moreno, and then returned to the SUV to flee the scene. 11/29/2012 RP 58-59; 4/16/2013 RP 129.

Pua testified that he received a few hundred dollars and a small amount of methamphetamine from Mendoza-Gomez for his efforts. 11/29/2012 RP 61; 4/16/2013 RP 132. Pua explained that Mendoza-Gomez was upset with him, however, because Moreno had survived. 4/17/2013 RP 42-43.

Through information developed in their investigation in the days following the incident at the Shell station, Federal Way Police

Department detectives distributed a bulletin for area law enforcement officers, requesting that they look out for Tharp and Castillo. 12/4/2012 RP 76; 4/22/2013 RP 13-14. King County Sheriff's Office Detective Benjamin Wheeler spotted Tharp driving a Jeep Cherokee on the evening of October 12, 2011, in Federal Way, and stopped him; inside the car, in the front passenger seat, was Castillo. 12/4/2012 RP 77-78. In the rear passenger seat behind Castillo was her infant child; an adult male was in the seat behind Tharp. 12/4/2012 RP 79.

Castillo and Tharp were arrested and a search of the vehicle was conducted. 12/4/2012 RP 80; 12/5/2012 RP 10-12. A .380 caliber pistol was recovered from the floorboard behind Castillo's seat, directly under her baby's car seat. 12/5/2012 RP 12. Another .380 caliber handgun was found between the driver's seat and the center console. 12/5/2012 RP 78. A .45 caliber pistol was found in a laptop bag in the storage area in the rear of the Jeep, as were two rifles. 11/28/2012 RP 76; 12/5/2012 RP 72.

In a search incident to Castillo's arrest, a loaded .380 pistol was found in Castillo's purse; however, the gun lacked a firing pin. 11/28/2012 RP 75; 12/5/2012 RP 62-63. In addition, two baggies of methamphetamine, along with a small amount of cocaine

powder, were recovered from Castillo's purse. 12/10/2012 RP 10-12, 92-97. Arresting officers also seized \$4,000 in cash from Castillo's person. 11/28/2012 RP 75.

In the Jeep's front passenger seat area, investigators found a notebook entitled "Maty's little book." 4/18/2013 RP 152. "Maty" is Castillo's nickname. 4/22/2013 RP 37. On one page, dated September 30, 2011, the following entry was made: "Today I start a new beginning with Chaparro." 4/22/2013 RP 152. "Chaparro" is Mendoza-Gomez's nickname. 4/15/2013 RP 34.

The trial court informed the jury at Castillo's first trial, pursuant to the parties' stipulation, that she had previously been convicted of a felony offense. 12/10/2012 RP 82-83.

Castillo testified in her case-in-chief. She testified that she originally met Mendoza-Gomez when she started buying cocaine and methamphetamine from him, and eventually ended up assisting him in his drug-dealing business, performing tasks like depositing checks, translating, and managing his fleet of more than two dozen cars. 12/17/2012 RP 37-41; 4/24/2013 RP 16-17.

Castillo claimed that Mendoza-Gomez called her on September 30, 2011, and asked for her help because he had caught Moreno with his brother's wife, and that Moreno had

threatened to beat Mendoza-Gomez up or kill him. 12/17/2012 RP 46-48; 4/24/2013 RP 22. Castillo testified that when she arrived at Mendoza-Gomez's Seatac apartment, she separated Mendoza-Gomez and Moreno and then left with Mendoza; she denied giving any orders to Moreno or providing him with a gun. 12/17/2012 50-51; 4/24/13 RP 30.

Castillo testified that she and Mendoza-Gomez, after completing some errands, went to their motel in Tukwila and were surprised to find Moreno there. 12/17/2012 RP 52-53; 4/24/2013 RP 31. Moreno and Mendoza-Gomez began to argue again, and Mendoza-Gomez swung a bat at Moreno. 12/17/2012 RP 54-55; 4/24/13 RP 32-36. Castillo testified that she interceded and offered to give Moreno a ride in order to end the confrontation, and that Moreno accepted. 12/17/2012 RP 56-57; 4/24/13 RP 36-37. Castillo claimed that Pua joined them for the trip. 12/17/2012 RP 60; 4/24/13 RP 37.

Castillo testified that all parties were in the Acura SUV consensually as they drove to the Tacoma home of a relative of Moreno, and that they stopped to pick up Eric Tharp only so he could diagnose the vehicle's mechanical difficulties. 12/17/2012 RP 63; 4/24/2013 RP 41-45.

Castillo claimed that Tharp suggested that the vehicle needed transmission fluid, so they stopped first at a Walmart for the fluid and then at the gas station for a funnel. 4/24/13 RP 45-46, 53. She testified that Moreno still appeared angry to her, and that he was “venting.” 12/17/2012 RP 67; 4/24/13 RP 47. She told the jury that Moreno got out of the SUV and ran toward the gas station convenience store. 12/17/2012 RP 72; 4/24/13 RP 56.

Castillo stated that Pua ran after Moreno, and that she told Tharp to bring Pua back, which he did. 12/17/2012 RP 72; 4/24/13 RP 56, 58.

Castillo testified that Mendoza-Gomez never told her to kill Moreno, and denied that she ever formed a plan with Tharp and Pua to carry out Mendoza-Gomez’s orders. 12/17/2012 90-91; 4/24/13 RP 61. She denied being the author of the entry in “Maty’s little book” referring to a new relationship with Mendoza-Gomez, and contended that someone else had put the pistol in her laptop bag that was seized by police from the Jeep following her arrest; she also testified that she had no knowledge of any of the other firearms found in the Jeep. 12/17/2012 RP 85; 4/24/12 RP 65-66.

C. ARGUMENT

1. THE AMENDED INFORMATION WAS CONSTITUTIONALLY SUFFICIENT

On appeal, Castillo claims for the first time that reversal of her conviction for conspiracy to commit murder is warranted because the final amended information that included that charge omitted essential elements of the crime. The State recognizes that the relevant charging document was, indeed, somewhat poorly drafted. Nevertheless, Castillo's claim should be rejected, because a common-sense reading of the amended information enables the reader to identify all of the elements that the State was obligated to prove, and Castillo cannot plausibly demonstrate that she lacked adequate notice to prepare her defense.

The purpose of an information is to provide the defendant with the requisite notice of the accusation against her and so enable her to prepare an appropriate defense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). When a defendant challenges the charging document for the first time on appeal, the appellate court must liberally construe all of the information in the charging document in favor of validity. Kjorsvik, 117 Wn.2d at 102. The test to determine the sufficiency of a charging document under Kjorsvik has two prongs: "(1) do the necessary facts appear in any

form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" Kjorsvik, 117 Wn.2d at 105-06.

Applying the first prong of the Kjorsvik test, the reviewing court looks at the face of the document only. The information must be written in such a manner as to enable persons of common understanding to know what is intended. State v. Simon, 120 Wn.2d 196, 199, 840 P.2d 172 (1992). As the state supreme court has noted, if "the information contains allegations that express the crime which was meant to be charged, it is sufficient even though it does not contain the [precise] statutory language." State v. Hopper, 118 Wn.2d 151, 156, 822 P.2d 775 (1992). A reviewing court should be "guided by common sense and practicality in construing the language," and even missing elements "may be implied if the language supports such a result." Id.

Here, Castillo contends that reversal is required because the amended information contained two omissions that, she asserts, rendered her unable to mount a suitable defense to the conspiracy charge. The first count of the charging document accused both

Castillo and Francisco Mendoza-Gomez of the crime of Conspiracy to Commit Murder in the First Degree, "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, 3011, 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 [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.

CP 234.

As the "[sic]" notations added here by the undersigned acknowledge, Castillo is correct in noting that the charging document lacked language found in the relevant conspiracy statute, RCW 9A.28.040(1). Specifically, the information does not expressly state that the accused agreed "with one or more persons" to engage in the performance of the criminal conduct, nor does it state that "any one of them" (i.e., any one of multiple conspirators) took a substantial step in pursuance of the agreement. Compare RCW 9A.28.040(1) and CP 234.

Nevertheless, it is incorrect to suggest, as Castillo does, that the omissions were so egregious as to justify reversal in light of her

untimely challenge to the sufficiency of the charging document. The fact that Castillo was alleged to have formed a compact with other individuals is readily apparent from a common-sense reading of the charge. It was alleged that Castillo, as well as a specific co-defendant, and “together with others,” “agreed” to engage in particular illegal conduct against a single individual on a precise date. CP 234. One cannot “agree” with oneself; the term necessarily suggests a meeting of minds.

It is equally difficult to find prejudice from absence of the term “or any one of [the conspirators].” It must again be noted that Castillo was charged in this count as a defendant along with another person, and the count specifically states that “the defendant” took a substantial step in furtherance of the ill-intentioned agreement. The term “the defendant” can apply either to Castillo or Mendoza-Gomez, i.e., to any one of multiple conspirators.

Indeed, the presence of a co-defendant in the charging document can reasonably lead one to conclude that there was, for practical purposes, surplusage in this count. That is, if the words “with” and “or” had not been used, the information would contain virtually no defect:

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 to engage in or cause the performance of such conduct, and the defendant took a substantial step in the pursuance of such agreement.

If the first prong of the Kjorsvik test is satisfied, the reviewing court, in applying the second prong of the test “may 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.” Kjorsvik, 117 Wn.2d at 106. With regard to this second prong, it must be emphasized that Castillo’s conviction for conspiracy to commit murder resulted from her second trial, after the jury at her first trial was unable to reach a verdict on this charge. Castillo had, by the time of her retrial, already been made abundantly aware what the State’s case amounted to, and how it intended to prove her culpability for conspiracy. It is, accordingly, hard to accept Castillo’s proposition that she was unable, due to a lack of adequate notice via the amended information, to mount a suitable defense to this count.

2. THE EVIDENCE WAS SUFFICIENT TO SUPPORT CASTILLO'S CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM

Next, Castillo argues that her conviction, at her first trial, for second-degree unlawful possession of a firearm must be reversed and dismissed with prejudice. She asserts that the State did not present sufficient evidence to prove that she possessed any of the firearms found by arresting officers when they stopped the Jeep she was riding in on October 12, 2011. Her contention is without merit.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits a rational trier of fact to find the elements of the charged offense proved beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of evidentiary insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. Salinas, 119 Wn.2d at 201.

A number of firearms were recovered in the Jeep that was stopped by officers on October 12, 2011. A .380 semiautomatic pistol was found in Castillo's purse although that weapon lacked its

firing pin. 12/5/2012 RP 60, 62. Officers found another .380 handgun – this one immediately operational – on the floorboard under the infant seat on which Castillo’s child sat in the rear of the passenger compartment. 12/5/2012 RP 10-12, 71. A .45 caliber pistol was located inside a rolling briefcase found in the back of the Jeep; this, too, was able to be fired without any difficulty. 12/5/2012 RP 72, 74-75. In addition, an operational .380 was found between the driver’s seat and center console, and two rifles were also found in the rear storage area. 11/28/2012 RP 76; 12/5/2012 RP 75, 77.

In his closing argument, the deputy prosecutor deemphasized the gun found in Castillo’s purse, observing that it was not immediately operational. 12/18/2012 RP 40. The State 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. Cf. State v. Raleigh, 157 Wn. App. 728, 736, 238 P.3d 1211 (2010) (finding that sufficient evidence existed to demonstrate operability of firearm found without firing pin when officer demonstrated to jury how to re-install the firing pin).

This does not, however, absolve Castillo of culpability entirely. Possession may be actual or constructive. State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). To establish

constructive possession, the State must show that the defendant had dominion and control over the item in question. State v. Nyegaard, 154 Wn. App. 641, 647, 226 P.3d 783 (2010). No single factor is dispositive in determining such dominion and control; rather, the totality of the circumstances must be considered. State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000).

The jury's verdict here was abundantly reasonable. First, the jurors heard plentiful testimony, from fellow conspirator Agalega Pua and the victim, about Castillo's exposure to firearms. 11/29/2012 18-23; 12/13/2012 RP 91-96, 113-16. She was surely no neophyte to the handling and use of guns. Furthermore, Castillo herself testified that one of her duties to Mendoza-Gomez was to take care of his vehicles, and that she had keys to all of them, including the Jeep. 12/17/2012 RP 41. The confined area within the Jeep to which Castillo had access at the time leading up to her arrest contained four handguns and two rifles. The jury would have been quite justified in concluding that she was not only in mere proximity to this arsenal, but that she exercised a degree of control over some or all of them.

Moreover, one of the operational pistols was found directly underneath Castillo's child. 12/5/2012 RP 12. The jury could have

understandably rejected Castillo's testimony that another person put her child in the car seat and reasonably inferred that she instead had, and that she either placed the gun on the floorboard at that time or put it there when stopped by officers, or even directed another adult in the car to do so at some point in time. See Turner, 103 Wn. App. at 521 (observing that one can be in constructive possession jointly with another person).

Finally, Castillo testified that the bag in which the .45 caliber pistol was found was her personal laptop carrier. 12/17/2012 RP 85. Castillo's assertions that another person placed both her child and all of her belongings in the Jeep, and was thus responsible for any weapons found near or inside them, were quite dubious in light of the totality of the circumstances. The jury could have, quite easily, rejected Castillo's claims of ignorance and concluded that she put the .45 caliber pistol in her own bag, and thus maintained dominion and control over that weapon.

The jury needed only to conclude that Castillo constructively possessed any of the five operational firearms found inside the Jeep in which she rode with her child, and for which she had the keys. The jury had sufficient evidence on which to conclude that Castillo's relationship to at least one of those weapons was more

than a mere matter of proximity. Her claim should be rejected and her conviction affirmed.

3. CASTILLO WAIVED HER ABILITY TO CHALLENGE HER OFFENDER SCORE ON APPEAL

Finally, Castillo asserts that the trial courts that sentenced her following her convictions at her first and second trials erred because their calculations of her offender score included two pre-existing VUCSA convictions. Castillo now contends that these convictions should not have been considered absent proof by the State of their existence and applicability, and that the trial courts were obligated to determine whether the two convictions amounted to the same criminal conduct. See Brief of Appellant, at 27-35.

Castillo's request for resentencing should be denied. A defendant who knowingly, affirmatively, and voluntarily stipulates to an offender score that necessarily includes prior convictions waives her right to later challenge her offender score on appeal. See In re Goodwin, 146 Wn.2d 861, 874-75, 50 P.3d 618 (2002) (distinguishing between stipulations based on facts and those based on errors of law). Similarly, a defendant's affirmative acknowledgement to an offender score prevents him from afterward arguing that particular convictions counted in the calculation of that

score amount to same criminal conduct. Id. at 875, citing State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000 (2000).

At Castillo's sentencing following her first trial, she expressly acknowledged that she had an offender score of 4, based on her multiple current convictions and her prior VUCSA offenses:

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.

2/21/13 RP 100-01.

At the sentencing following her retrial for conspiracy to commit murder, Castillo again responded affirmatively during a discussion about her score:

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 firearm 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.

7/12/2013 RP 6.

The trial courts were entitled to rely on Castillo's express representations as to her score. The courts did not need to insist upon further proof or engage in discretion that Castillo actively excused them from undertaking. Her reliance on State v. Lucero, 168 Wn.2d 785, 230 P.3d 165 (2010), and State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009), is misplaced. Those decisions stand for the proposition that neither a defendant's mere failure to object to the State's representation of her criminal history, nor her recommendation of a sentence consistent with the range proposed by the prosecution, prevents her from challenging that representation on appeal.

Here, in contrast, Castillo invited the purported error she now identifies. She did far more than stand idly by while the State and the trial court attempted to determine her offender score. Castillo confirmed to each court directly that she had an offender score of four points, which necessarily included both prior VUCSA

convictions and which necessarily treated them as separate offenses to be counted as one point each. To allow a defendant to obtain resentencing under such circumstances would countenance more than simple sandbagging. It would effectively encourage any defendant to actively mislead a sentencing court, secure in the knowledge that she could later obtain resentencing on the basis of trial court inaction that was caused by her own misrepresentations.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Castillo's convictions and the trial courts' judgments and sentences with regard to her offender score. The State agrees with Castillo that her February 21, 2013, judgment and sentence should be remanded for correction of a scrivener's error that wrongly indicates a conviction for possession of methamphetamine with intent to deliver. Castillo was, in fact, convicted of simple possession.

DATED this 16 day of June, 2014.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By:

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right. The signature is positioned above a horizontal line that underlines the text below.

DAVID SEAVER, WSBA# 30390
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. CASTILLO, Cause No. 70099-5 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 16 day of June, 2014



Name
Done in Seattle, Washington

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STATE OF WASHINGTON
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