Supreme Court No. 91601-0
COA No. 45509-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAYLIN JEROME IRISH,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Jaylin Jerome Irish requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Irish, No. 45509-9-II, filed March 31, 2015. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. A charging document is constitutionally deficient if it does not contain all of the essential elements of the crime. An essential element of the crime of rendering criminal assistance is that the accused acted with knowledge of the specific crime committed by the person he assisted. Here, the information alleged that Mr. Irish "unlawfully and feloniously" rendered criminal assistance to another person, but did not allege that Mr. Irish acted with knowledge of the specific crime committed by that person. Should this Court grant review and hold that the information is constitutionally deficient because it omitted this essential element? RAP 13.4(b)(1), (2), (3), (4).

2. A guilty plea is involuntary in violation of constitutional due process if the defendant is not apprised of the elements of the crime the State would have to prove if the case went to trial. Here, Mr. Irish pled guilty to rendering criminal assistance but was never informed that in

order to prove the charge, the State would have to prove he acted with knowledge of the crime committed by the person he allegedly assisted. Should this Court grant review and hold that Mr. Irish's guilty plea is involuntary in violation of due process? RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

Mr. Irish was charged with one count of first degree assault, RCW 9A.36.011(1)(a), and one count of first degree rendering criminal assistance, RCW 9A.76.050(3) and 9A.76.070(2)(a). CP 12-13. The charges arose out of an altercation that occurred in Tacoma involving several young men. CP 4. The State alleged that a man named Demarcus Pate attempted to punch two men and then fired a handgun at them as he chased them through an alley. CP 4. The State alleged that Mr. Pate then jumped into a car driven by Mr. Irish. CP 4. A witness reported hearing two additional gunshots as the car drove away from the scene. CP 4.

After extended negotiations, Mr. Irish pled guilty to the charges pursuant to a plea agreement with the State. CP 14-23; RP 70-75, 84.

About one month later, the court and the parties convened for sentencing. At the outset of the hearing, defense counsel informed the court that shortly after Mr. Irish pled guilty, he had contacted counsel

and stated that he wanted to withdraw his plea because "he had been pressured into entering the plea." RP 84. Counsel told the court that if Mr. Irish moved to withdraw the plea, counsel would become a witness based on Mr. Irish's allegations that counsel had pressured him into pleading guilty. RP 84. Therefore, counsel urged the court to appoint new counsel because he had a conflict of interest. RP 85.

The court denied counsel's motion to withdraw and immediately proceeded to sentencing. RP 85-86; CP 26-37.

Mr. Irish appealed, arguing (1) the information was constitutionally deficient because it omitted an essential element of the charged crime of rendering criminal assistance, *i.e.*, that Mr. Irish acted with knowledge of the specific crime committed by the principal; (2) his plea was involuntary in violation of due process because it was not based on a full understanding of the elements of the crime of rendering criminal assistance; and (3) his constitutional right to counsel was violated because his attorney had a conflict of interest.

The Court of Appeals agreed with Mr. Irish that the trial court violated his constitutional right to counsel because it required him to proceed with an attorney who had a conflict of interest. Slip Op. at 1, 8. The court therefore vacated Mr. Irish's sentence and remanded to

the trial court to allow him to move to withdraw his guilty plea with the assistance of a different attorney. Slip Op. at 1.

But the court disagreed with Mr. Irish's argument that the information omitted an essential element of the crime of rendering criminal assistance. Slip Op. at 1. The court concluded that the allegation in the information that Mr. Irish "unlawfully and feloniously" rendered criminal assistance to another person was sufficient to apprise Mr. Irish that he supposedly acted with knowledge of *the specific crime* committed by the principal. Slip Op. at 5.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review in order to make clear that an information charging the crime of rendering criminal assistance which states that the accused "unlawfully and feloniously" rendered criminal assistance to another person is not sufficient to allege the essential element that the accused acted with knowledge of the specific crime committed by the principal

It is well-established that a charging document in a criminal case must contain all of the essential elements of the crime so as to apprise the accused of the charge and allow him to prepare a defense. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); U.S. Const. amend. VI; Const. art. I, § 22.

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

a. An essential element of the crime of rendering criminal assistance is that the accused acted with knowledge of the specific crime committed by the principal

Mr. Irish was charged with one count of first degree rendering criminal assistance. CP 12-13. "A person is guilty of rendering criminal assistance in the first degree if he or she renders criminal assistance to a person who has committed or is being sought for murder in the first degree or any class A felony or equivalent juvenile offense." RCW 9A.76.070(1). A person "renders criminal assistance" if

> with intent to prevent, hinder, or delay the apprehension or prosecution of another person *who he or she knows has committed a crime or juvenile offense or is being sought by law enforcement officials for the commission of a crime or juvenile offense or has escaped from a detention facility*, he or she:
>
> (1) Harbors or conceals such person; or
>
> (2) Warns such person of impending discovery or apprehension; or
>
> (3) Provides such person with money, transportation, disguise, or other means of avoiding discovery or apprehension; or
>
> (4) Prevents or obstructs, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of such person; or
>
> (5) Conceals, alters, or destroys any physical evidence that might aid in the discovery or apprehension of such person; or
>
> (6) Provides such person with a weapon.

RCW 9A.76.050 (emphasis added).

To prove the crime of rendering criminal assistance, the State must prove the accused "ha[d] knowledge of the principal's crime," even if it cannot prove he had knowledge "of facts disclosing the degree of that crime." State v. Anderson, 63 Wn. App. 257, 260, 818 P.2d 40 (1991). As with accomplice liability, the State must prove not only that the accused knew the principal committed *a* crime, it must also prove he had knowledge of *the specific crime* committed by the

principal.[1] Id.; see State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000) (to prove accomplice liability, the State must prove beyond a reasonable doubt the accused "acted with knowledge that his or her conduct would promote or facilitate *the* crime for which he or she is eventually charged").

b. The information omitted the essential element that Mr. Irish acted with knowledge of the specific crime allegedly committed by the principal

The information alleged:

> That JAYLIN JEROME IRISH, in the State of Washington, on or about the 24th day of March, 2012, did unlawfully and feloniously render criminal assistance to Demarcus Pate, a person who committed or was being sought for First Degree Assault, a Class A felony, by providing such person with money, transportation, disguise, or other means of avoiding discovery or apprehension, contrary to RCW 9A.76.050(3) and 9A.7.070(2)(a), and against the peace and dignity of the State of Washington.

CP 12-13. The information contains the essential element that the principal, Demarcus Pate, "committed or was being sought for First Degree Assault, a Class A felony." Id. But the information is

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[1] The crime of rendering criminal assistance, which was created by the Legislature in 1975 as part of the criminal code, replaced the concept of accessory after the fact. State v. Budik, 173 Wn.2d 727, 736, 272 P.3d 816 (2012). The crime embodies many of the same principles as did its predecessor. Id.

constitutionally deficient because it does not allege that Mr. Irish *knew* the specific crime allegedly committed by Mr. Pate. Id.

When knowledge is an element of the crime, it must be alleged in the information. Kjorsvik,117 Wn.2d at 100. In cases similar to this one, this Court has held the charging language was inadequate to allege the element of knowledge under the liberal construction standard. In Moavenzadeh, 135 Wn.2d at 361, the information alleged that the defendant "did possess stolen property," but it did not allege that he *knowingly* possessed stolen property. The Court held the information was defective because it failed to allege that the defendant knew the property was stolen. Id. at 363-64.

Similarly, in State v. Simon, 120 Wn.2d 196, 197-98, 840 P.2d 172 (1992), the information alleged that the defendant "did knowingly advance and profit by compelling Bobbie J. Bartol by threat and force to engage in prostitution; and did advance and profit from the prostitution of Bobbie Bartol, a person who was less than 18 years old." One element of the crime, which was not alleged, was knowledge that Bartol was under the age of 18. The Court reversed the conviction, reasoning that "[n]o one of common understanding reading the

information would know that knowledge of age is an element of the charge of promoting prostitution of a person under 18." Id. at 199.

The Court of Appeals has also found charging documents deficient where they did not allege the element of knowledge. In State v. Sutherland, 104 Wn. App. 122, 126, 15 P.3d 1051 (2001), the information alleged Sutherland "did commit FELONY HIT AND RUN, in that being the driver of a vehicle involved in an accident resulting in the death of Matthew Saeger, a human being, did fail to remain at the scene of the accident." Relying on Simon, the court held the information was deficient because it did not allege that Sutherland knew he was in an accident. Id. at 132; see also State v. Courneya, 132 Wn. App. 347, 352-53, 131 P.3d 343 (2006) (holding information charging hit and run was constitutionally deficient because it did not allege that the accused knew he was in an accident).

As in those cases, the information charging Mr. Irish with first degree rendering criminal assistance is constitutionally deficient because it does not contain the essential element that he acted with knowledge of the specific crime committed by the principal. CP 12-13; RCW 9A.76.050; Anderson, 63 Wn. App. at 260.

In some cases, the words "unlawfully" or "feloniously" may be sufficient to allege the element of "knowingly." In State v. Cuble, 109 Wn. App. 362, 367, 35 P.3d 404 (2001), for instance, the information alleged that Cuble "did unlawfully and feloniously own, have in his possession, or under his control a firearm." The Court of Appeals held this language was sufficient to allege that Cuble knew he possessed the firearm. Id. Similarly, in State v. Snapp, 119 Wn. App. 614, 618, 82 P.3d 252 (2004), the information alleged that Snapp "did feloniously violate a No Contact Order." Again, the court held this language was sufficient to allege that Snapp "knowingly" violated the order. Id.

But unlike in Cuble and Snapp, the words "unlawfully and feloniously" contained in the information in this case were insufficient to allege the knowledge element. The information alleged that Mr. Irish "did unlawfully and feloniously render criminal assistance to Demarcus Pate, a person who committed or was being sought for First Degree Assault." CP 12-13. Even if this language was sufficient to allege that Mr. Irish knew Mr. Pate had committed a crime, it was not sufficient to allege he knew Mr. Pate had committed *an assault*.

The term "feloniously" contained in a charging document means "with intent to commit a crime." State v. Nieblas-Duarte, 55 Wn. App.

376, 380-81, 777 P.2d 583 (1989) (quoting State v. Smith, 31 Wash. 245, 248, 71 P. 767 (1903)). But it does not mean "intent to commit a specific crime." Thus, the phrase "unlawfully and feloniously" in the information may have been sufficient to allege that Mr. Irish acted with knowledge he was assisting a person who had committed a crime, but it was not sufficient to allege he knew he was assisting a person who had committed *an assault.*

This Court should grant review and hold that the information does not contain the essential knowledge element of the crime of rendering criminal assistance and is therefore constitutionally deficient.

2. Mr. Irish's guilty plea was involuntary in violation of constitutional due process because it was not based on a full understanding of the nature of the crime of rendering criminal assistance

a. A guilty plea is not knowing, intelligent and voluntary unless it is based on an understanding of the elements of the crime

It is a violation of constitutional due process to accept a guilty plea without an affirmative showing that the plea was made knowingly, intelligently and voluntarily. State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980); Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); U.S. Const. amend. XIV; Const. art. I, §

3. Not only must the record disclose that the defendant understood the rights he was giving up, it must also show he possessed an understanding of the law in relation to the facts. Boykin, 395 U.S. at 244. A defendant who does not understand how the law applies to the behavior he admits committing, cannot be said to be entering the plea voluntarily. Id.

"A guilty plea cannot be voluntary in the sense that it constitutes an intelligent admission unless the defendant is apprised of the nature of the charge." In re Pers. Restraint of Keene, 95 Wn.2d 203, 207, 622 P.2d 350 (1981); see also CrR 4.2(d) ("The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea."). This is "'the first and most universally recognized requirement of due process.'" Keene, 95 Wn.2d at 207 (quoting Henderson v. Morgan, 426 U.S. 637, 645, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976)).

To be made sufficiently aware of the nature of the offense, the defendant must be given "notice of what he is being asked to admit." State v. Holsworth, 93 Wn.2d 148, 153, 607 P.2d 845 (1980). At a minimum, the defendant must be informed of "the acts and the requisite

state of mind in which they must be performed to constitute a crime." Id. at 153 n.3.

This requirement of due process is satisfied only if the record demonstrates the defendant was notified of all the "critical elements" of the crime to which he pled guilty. In re Pers. Restraint of Hews, 108 Wn.2d 579, 593, 741 P.2d 983 (1987). In Hews, the defendant was charged with and pled guilty to second degree murder. Id. at 580-81. Because intent is a "critical element" of that crime, the plea could not be considered voluntary unless Hews was advised of that element. Id. at 593.

As in Hews, Washington courts have consistently held that a defendant pleading guilty must be fully apprised of any element that encompasses the *mens rea* of the charged offense. See, e.g., Keene, 95 Wn.2d at 208 ("intent to injure or defraud" is "critical element" of crime of forgery); State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984) (defendant pleading guilty to second degree felony murder based on underlying felony of assault must be informed that "knowledge" is element of crime).

Thus, due process requires more than a showing that the defendant was made aware of the factual assumptions on which the

court and the State were proceeding. Osborne, 102 Wn.2d at 94. The record must also show the defendant was informed of the "critical" *mens rea* elements the State would be required to prove if the case went to trial. Id.

b. Mr. Irish's plea was involuntary because it was based on a misunderstanding of the critical elements of the crime of first degree rendering criminal assistance

"[T]he record of the plea hearing must affirmatively disclose a guilty plea was made intelligently and voluntarily, with an understanding of the full consequences of such a plea." Wood v. Morris, 87 Wn.2d 501, 503, 554 P.2d 1032 (1976). The trial judge has an obligation to "make direct inquiries of the defendant as to whether he understands the nature of the charge and the full consequences of a guilty plea." Id. at 511. Thus, the record at the time the plea was entered must demonstrate the defendant's understanding of the nature of the charge against him. Id.

If the critical element is contained in the information, the defendant pled guilty as charged in the information, and the record shows the defendant was informed of the contents of the information, this creates a presumption that the plea was knowing, intelligent and voluntary. Hews, 108 Wn.2d at 596; Osborne, 102 Wn.2d at 94;

Keene, 95 Wn.2d at 208-09. The presumption does not apply in this case, however, as the critical elements are not contained in the information. As discussed in the previous section, the information omitted the critical "knowing" element of first degree rendering criminal assistance.

Moreover, the record of the plea hearing does not disclose that Mr. Irish was otherwise made aware of that critical element. Counsel asserted that he went over the guilty plea statement with Mr. Irish and "he understands the document." RP 71. But the guilty plea statement does not set forth the "knowledge" element of rendering criminal assistance. The guilty plea statement set forth the elements of first degree rendering criminal assistance as follows:

> In the State of Washington, the defendant did unlawfully and feloniously render criminal assistance to Demarcus Pate, a person who committed or was being sought for First Degree Assault, a Class A felony, by providing such person with money, transportation, disguise, or other means of avoiding discovery or apprehension.

CP 14. As with the charging document, the guilty plea statement does not contain the element that Mr. Irish had knowledge of the specific crime committed by the principal.

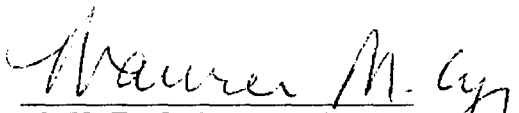
The court affirmed that Mr. Irish was aware he was charged with "rendering criminal assistance in the first degree." RP 72. The

court asked him if he understood the elements of the offense and he said, "yes." RP 72. But the record does not affirmatively disclose that he was ever informed of the critical knowledge element of the crime. Thus, his guilty plea was involuntary in violation of constitutional due process. Keene, 95 Wn.2d at 207; Wood, 87 Wn.2d at 503, 511. Boykin, 395 U.S. at 244.

E. CONCLUSION

This Court should grant review and hold that the information alleging that Mr. Irish "unlawfully and feloniously" rendered criminal assistance to another person was not sufficient to allege the essential element that Mr. Irish acted with knowledge that the person he was assisting had committed an assault. The Court should further hold that, because the guilty plea was not based on a full understanding of the elements of the crime, it was not knowing and voluntary.

Respectfully submitted this 28th day of April, 2015.



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAYLIN JEROME IRISH, Appellant.	No. 45509-9-II UNPUBLISHED OPINION

SUTTON, J. — Jaylin Jerome Irish appeals his convictions following guilty pleas for first degree assault and first degree rendering criminal assistance. Irish argues that (1) the information failed to include all the essential elements of first degree rendering criminal assistance and (2) the trial court violated his right to counsel when it denied his trial counsel's motion to withdraw.[1] Holding that the information contained all the essential elements of first degree rendering criminal assistance but that the trial court violated Irish's right to counsel, we vacate Irish's sentence, remand to allow him to move to withdraw his guilty plea, and order the trial court to appoint Irish new counsel.

[1] Irish also argues that he pled guilty involuntarily. Because we vacate Irish's sentence and order the trial court to appoint Irish new counsel, giving him the opportunity to move to withdraw the plea, we do not consider this argument.

FACTS

I. THE STATE'S CHARGING DOCUMENT AND IRISH'S GUILTY PLEAS

The State charged Irish with three counts of first degree assault and one count of drive-by shooting, all while acting as an accomplice. The State later amended its information to add one count of first degree rendering criminal assistance. In his statement of defendant on plea of guilty, Irish explained why he was guilty of these charges:

> On March 24, 2012, in the City of Tacoma, I drove my car, a white Honda Accord with license plate 368XKL to the area of South 45th Street bordered by South Lawrence Street and South Alder Street[.] I went there because I heard there was going to be a fight in that location. When I arrived I saw several people fighting. I then saw one person pull out a gun and fire one shot towards some of the people he had been fighting with. The shooter got into my car and I drove him north on South Alder Street to get him away from the scene so he could avoid apprehension by law enforcement. As we reached the intersection of South Alder Street and South 43rd Street, the shooter told me to stop and let him out of the car so that he could fire another round at the people he had previously shot at. I agreed and let him out. When I drove off I heard a gunshot.

Clerk's Papers (CP) at 22.

On the day that trial was to begin, the State and Irish reached a plea agreement that reduced Irish's charges to one count of first degree assault and one count of first degree rendering criminal assistance. Both the amended information and the guilty plea statement included the same language for first degree rendering criminal assistance: Irish "did unlawfully and feloniously render criminal assistance to [another], a person who committed or was being sought for First Degree Assault, a Class A felony, by providing such person with . . . means of avoiding discovery or apprehension." CP at 12-13.

At the hearing to enter Irish's guilty plea, Irish's trial counsel, Zenon Olbertz, told the trial court that he and Irish discussed the guilty plea, which had been reached after "protracted

discussions and negotiations [with the State]." Verbatim Report of Proceedings (VRP) at 71. During his colloquy with the trial court, Irish answered in the affirmative that he understood the elements of first degree assault and first degree rendering criminal assistance. The trial court accepted Irish's guilty plea and found that Irish made it knowingly, intelligently, and voluntarily.

II. SENTENCING: TRIAL COURT FINDS NO CONFLICT OF INTEREST

Olbertz opened Irish's sentencing hearing by asking the trial court to appoint Irish new counsel. Olbertz explained that shortly after the entry of Irish's guilty plea, Irish expressed desire to withdraw it because "[Irish] had been pressured into entering the plea." VRP at 84. Irish's request prompted Olbertz to ask the Department of Assigned Counsel (DAC) to assign new counsel for Irish because Olbertz felt he had become a witness to Irish's allegation of pressure. Olbertz understood that DAC had appointed a new attorney but he was unaware whether a notice of substitution had been filed by the time of the sentencing hearing. Olbertz told the trial court that he thought he had a conflict of interest because he would be a witness at any potential hearing or proceeding on Irish's motion to withdraw the plea. The trial court denied Olbertz's request because it did not have anything "firm" to make a conflict finding that would prevent proceeding with sentencing. VRP at 85. The trial court then sentenced Irish. Irish appeals.

ANALYSIS

I. INFORMATION CONTAINED ALL ESSENTIAL ELEMENTS OF FIRST DEGREE RENDERING CRIMINAL ASSISTANCE

For the first time on appeal, Irish argues that the State's information failed to give him notice of all the essential elements of first degree rendering criminal assistance. We disagree.

Under the Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington State Constitution, the State's information must contain all the essential elements of each charged crime and allege facts supporting those elements so that the accused may prepare a defense. *State v. Zillyette*, 178 Wn.2d 153, 158-59, 307 P.3d 712 (2013); *State v. Lindsey*, 177 Wn. App. 233, 245, 311 P.3d 61 (2013), *review denied*, 180 Wn.2d 1022 (2014). An "essential element" is an element that is necessary to establish the illegality of the behavior charged by the State. *Zillyette*, 178 Wn.2d at 158.

We review challenges to the sufficiency of a charging document de novo.[2] *Lindsey*, 177 Wn. App. at 244. But, when reviewing such a challenge for the first time on appeal, we will liberally construe the information in favor of its validity. *Zillyette*, 178 Wn.2d at 161. We will uphold a charging document if it satisfies the two-prong *Kjorsvik*[3] test: "(1) [D]o the necessary elements appear in any form, or by fair construction, on the face of the document and, if so, (2) can the defendant show he or she was actually prejudiced by the unartful language." *Zillyette*, 178 Wn.2d at 162. The State's information contains all the necessary elements and Irish cannot demonstrate actual prejudice.

A. Necessary Elements of First Degree Rendering Criminal Assistance

Irish argues that the State's information was insufficient because it alleged that he acted "unlawfully and feloniously," which is insufficient to allege knowledge as required to prove first degree rendering criminal assistance. CP at 12. We disagree.

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[2] A guilty plea does not waive the defendant's right to appeal the sufficiency of the State's charging document. *State v. Peltier*, 181 Wn.2d 290, 294-95, 332 P.3d 457 (2014).

[3] *State v. Kjorsvik*, 117 Wn.2d 93, 105-106, 812 P.2d 86 (1991).

> A person renders criminal assistance if,
>
> with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he or she *knows has committed a crime* . . . or is being sought by law enforcement officials for the commission of a crime . . . he or she [p]rovides such person with . . . means of avoiding discovery or apprehension.

RCW 9A.76.050(3) (emphasis added). To commit first degree rendering criminal assistance, the defendant must provide assistance to a person who has committed a class A felony. RCW 9A.76.070(1).[4] A person can be convicted of rendering criminal assistance only if he or she had knowledge of the principal's crime, but need not know the facts pertaining to the degree of crime. *State v. Anderson*, 63 Wn. App. 257, 260, 818 P.2d 40 (1991).

We determine whether the defendant satisfies the first prong of the *Kjorsvik* test by reading the information in a commonsense manner. *Zillyette*, 178 Wn.2d at 162. The information need not use the exact words of the applicable statute as long as it uses words that convey the same meaning. *Kjorsvik*, 117 Wn.2d at 108. We have held that the phrase "'unlawfully and feloniously'" is equivalent to the term "'knowingly.'" *State v. Snapp*, 119 Wn. App. 614, 621, 82 P.3d 252 (2004) (quoting *State v. Krajeski*, 104 Wn. App. 377, 386, 16 P.3d 69 (2001)). The State may thus use the phrase "'unlawfully and feloniously'" to allege knowledge as a necessary element of the charged crime. *Krajeski*, 104 Wn. App. at 386 (quoting *State v. Nieblas-Duarte*, 55 Wn. App. 376, 380, 777 P.2d 583 (1989)).

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[4] RCW 9A.76.070(1) provides:

> A person is guilty of rendering criminal assistance in the first degree if he or she renders criminal assistance to a person who has committed or is being sought for murder in the first degree or any class A felony or equivalent juvenile offense.

The State's amended information charged Irish with first degree rendering criminal assistance, alleging

> [t]hat [Irish] . . . did unlawfully and feloniously render criminal assistance to [Irish's co-defendant], a person who committed or was being sought for First Degree Assault, a Class A felony, by providing such person with . . .means of avoiding discovery or apprehension, contrary to RCW 9A.76.050(3) and 9A.76.070(2)(a).

CP at 12-13. The information describes the actions Irish took to render criminal assistance and that his co-defendant was being sought for first degree assault, a class A felony. The information alleges that Irish did so "unlawfully and feloniously." CP at 12. The State's allegation that Irish acted "unlawfully and feloniously" is equivalent to alleging that Irish acted with knowledge. *Krajeski*, 104 Wn. App. at 386. Viewed in context and construed liberally, the State's information sufficiently alleged the knowledge element of rendering criminal assistance.

B. Actual Prejudice

Even if all necessary elements of the charged crime appear in the information, it may still be constitutionally insufficient under the second prong of the *Kjorsvik* test if the defendant was actually prejudiced by the "unartful language." *Zillyette*, 178 Wn.2d at 162. Irish argues that we must presume prejudice when the information does not contain all the necessary elements of the charged crime. Irish cannot prove that he was prejudiced.

Irish's statements demonstrate that he understood the elements of first degree rendering criminal assistance. Irish answered in the affirmative when the trial court asked him whether he understood the charges against him. In his guilty plea statement, Irish explained why he was guilty:

> I then saw one person pull out a gun and fire one shot towards some of the people he had been fighting with. The shooter got into my car and I drove him north on South Alder Street *to get him away from the scene* so he could avoid apprehension by law enforcement.

CP at 22 (emphasis added). Irish understood that his co-defendant had fired shots toward people and then drove his co-defendant away from the scene to avoid apprehension. Irish cannot be prejudiced by the language in the information when his own words show that he understood what the shooter had done and what his own role had been. Further, Irish told the trial court that he understood the elements of the crimes to which he pled guilty. Irish cannot demonstrate actual prejudice.

II. OLBERTZ COULD NOT REPRESENT IRISH WHEN HE HAD A CONFLICT OF INTEREST

Irish argues that the trial court violated his right to counsel when it denied Olbertz's motion to withdraw due to a conflict of interest between himself and Olbertz because Irish alleged that Olbertz pressured him to plead guilty. We agree.

The Sixth Amendment guarantees the right to effective assistance of counsel. U.S. CONST. amend. VI; *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 348, 325 P.3d 142 (2014). This right includes the right to conflict-free counsel at all critical stages of prosecution. *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005).[5] We review de novo whether a conflict of interest precludes continued representation. *State v. Pierce*, 169 Wn. App. 533, 559, 280 P.3d 1158 (2012); *Gomez*, 180 Wn.2d at 347.

[5] A conflict of interest exists where a defendant's interests are adverse to his or her attorney's interests. *State v. Fualaau*, 155 Wn. App. 347, 362, 228 P.3d 771 (2010), *cert. denied*, 131 S. Ct. 1786 (2011).

The trial court has a duty to investigate potential conflicts of interest when it knows or reasonably should know that a potential conflict of interest exists between counsel and his or her client. *State v. Regan*, 143 Wn. App. 419, 425-26, 177 P.3d 783 (2008). When a defendant or an attorney alerts the trial court to a conflict of interest, the trial court must appoint substitute counsel or take "adequate steps" to determine whether the risk of a conflict of interest is too remote to require substitute counsel. *Holloway v. Arkansas*, 435 U.S. 475, 484, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). On appeal, a defendant must demonstrate that an actual conflict of interest adversely affected trial counsel's performance. *State v. Dhaliwal*, 150 Wn.2d 559, 570, 79 P.3d 432 (2003).

The trial court violated Irish's right to counsel. Olbertz alerted the trial court that he had a conflict of interest with Irish because he had been a witness to Irish's allegation that counsel pressured him to plead guilty. This was an actual conflict of interest and not theoretical; after Irish told Olbertz that he wanted to withdraw his guilty plea because of that pressure, Olbertz could not have filed a motion to withdraw the guilty plea because of the conflict of interest. *Regan*, 143 Wn. App. at 428. This caused a lapse in representation and affected Olbertz's ability to advocate on Irish's behalf. *Regan*, 143 Wn. App. at 428. Further, the trial court could not have gathered more information to make a conflict finding because Olbertz's conflict prevented him from giving the trial court a more complete explanation. By denying Olbertz's motion to withdraw, the trial court required Olbertz to continue to represent Irish at the sentencing hearing despite a demonstrated conflict of interest.

We hold that the State's information sufficiently alleged the essential elements of first degree rendering criminal assistance, but that the trial court violated Irish's right to counsel by denying his trial counsel's motion to withdraw. Therefore, we vacate Irish's sentence, remand to

allow Irish to move to withdraw his guilty plea, and order the trial court to appoint new counsel for Irish.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

We concur:

Worswick, J.

Bjorgen, A.C.J.

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 45509-9-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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[PCpatcecf@co.pierce.wa.us]
Pierce County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 28, 2015

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