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No. 67203-7-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

JOHN P. CALENE, JR., Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the court's denial of defendant's request for a continuance in order to hire private counsel made a couple days before trial violated defendant's Sixth Amendment right to counsel of his choice where defendant had not hired private counsel yet, the counsel he indicated he would hire would require another 60 days to prepare for trial and where the case had already been continued a number of times.
2. Whether the defendant affirmatively acknowledged the comparability of his Wyoming conspiracy to commit larceny felony conviction, thus allowing the court to include it in his offender score without further proof from the State when he objected to the offender score only based on whether the two Wyoming offenses were the same criminal conduct and stated that those two prior convictions should count only as one point, after the State had presented the Wyoming judgment and argument on comparability of the convictions.
3. Whether two Wyoming convictions were the same criminal conduct for offender score purposes under RCW 9.94A.525(5) where the prior convictions were run consecutively and the only evidence before the court indicated that the offenses had different but overlapping dates of offense.
4. Whether any error in including a prior Wyoming felony conviction for conspiracy to commit larceny in the offender score was harmless where defendant's offender score still would have been a 9 or more on all three counts, he would face the same standard range and he would still face the possibility of an exceptional sentence on at least two of the counts.

C. FACTS

In July 2010, the State charged Appellant John P. Calene with one count of Attempting to Elude a Pursuing Police Vehicle, in violation of RCW 46.61.024, a class C felony, and specifically alleged that other persons were endangered by his actions, in violation of RCW 9.94A.834, for his actions that occurred on July 19, 2009. CP 77-78, 81-82. A bench warrant was issued in August 2010 when Calene failed to appear for arraignment. Supp CP ___, Sub Nom. No. 7. Calene was arraigned on November 12, 2010 and trial was set for January 3, 2011. Supp CP ___, Sub Nom. 20. On Dec. 22nd, 2010 the State moved for a continuance of the trial date due to the unavailability of a witness, which motion was granted, and the trial was continued one week to Jan. 10th. Supp CP ___, Sub Nom. 22, 26.

On Jan. 4th, defense filed a notice of the affirmative defense of alibi. Supp CP ___, Sub Nom. No. 29. On Jan. 10th, the judge heard pretrial motions in the morning and then later that day, upon defense motion, continued the trial one week to allow the defense to investigate jail calls made by Calene that impacted his alibi defense. Supp CP ___, Sub Nom. 35, 36, 38; 1RP 5-40. On Jan. 11th, the State amended the charges to add a count of Unlawful Possession of a Controlled Substance –

Methamphetamine alleged to have occurred on July 19, 2009, in violation of RCW 69.50.4013(1), and one count of Tampering with a Witness, in violation of RCW 9A.72.120(1), for his actions on Jan. 2nd, 2011, both class C felonies. CP 69-71. The trial date was continued again, this time by agreement of the parties, to February 22nd. CP 44, Supp CP ___, Sub Nom. 45. On February 17th, the court granted the defense's motion to continue the trial date, over the State's objection, to March 28th so the defense could interview witnesses. CP 51, Supp CP ___, Sub Nom. 50.

On March 8th, the State filed an amended information which alleged that Calene had multiple current offenses and a high offender score resulting in some current offenses going unpunished, and that he had committed the current offense shortly after release from incarceration, pursuant to RCW 9.94A.535(2)(c), and (t). CP 62-64. On March 10th the court denied a defense motion to continue the trial date to which the State had objected. CP 87. Calene bailed out of jail on March 21st. CP 86. On March 24th the trial date was continued to April 25th by agreement of the parties. CP 85. On April 21st, four days before trial, the public defender's office informed the court that Calene wanted a continuance in order to hire private counsel, to which the State objected. Supp CP ___, Sub Nom. 71; 1RP 53-54. The court denied the motion and trial proceeded on the 25th of April, with Calene's assigned public defender representing him.

The jury found Calene guilty as charged, including the special allegation. CP 29-30; 5RP 391-94. While the State initially sought a jury determination on the recent release from incarceration aggravating factor, the State ultimately withdrew that. 5RP 395, 398. At sentencing the State informed the court that it could not prove up Calene's prior Idaho convictions, but asserted that his prior Wyoming felony convictions were comparable. 5RP 410-11. The prosecutor asserted Calene's offender score therefore was 11 on the first two counts and 10 on the third. 5RP 412. Defense counsel asserted her only issue related to the Wyoming convictions, asserting that the two convictions should only count one point because they were the same course of criminal conduct, thus making the offender score 10 on the first two counts and 9 on the third. 5RP 412-13. The court determined that the two Wyoming offenses were not the same criminal conduct and found Calene's offender score to be 11 regarding counts I and II and 10 on count III.¹ 5RP 413. The State informed the court that the standard range was 34-41 months on count I, including the 12 month enhancement, 12-24 months on count II, and 51-60 months on count III. 5RP 413. Defense counsel agreed that was the correct standard range, assuming the offender score the court found was correct. 5RP 413.

¹ The judgment and sentence erroneously lists the offender score as 9 on all counts. CP 5.

The State then requested imposition of the top of the standard range on all three counts, with all counts to run concurrently. 5RP 415. Defense counsel joined in the State's recommendation for 60 months on count III and did not make a specific recommendation regarding the other counts. 5RP 419. The court imposed the top of the range on all counts. 5RP 424.

D. ARGUMENT

- 1. The trial court's denial of Calene's request for a continuance in order to obtain private counsel did not violate his Sixth Amendment right to counsel of choice where the trial was scheduled to start four days later and private counsel would have required a sixty day continuance.**

Calene asserts that the trial court violated his Sixth Amendment right to counsel of his choice when it denied his request for a continuance to procure private counsel. A defendant's right to counsel of choice is not absolute, cannot unduly delay the proceedings, and must be made in a timely manner. Here, after a number of continuances had already been granted, Calene requested another continuance a couple of days before trial in order to retain private counsel. While he claimed he could afford to hire his own attorney now, the attorney he claimed he would hire would require a sixty day continuance. Given the late request, days before trial, the court did not abuse its discretion in denying the continuance motion.

Calene's Sixth Amendment right was not violated because his request would have unduly delayed the trial.

Under the Sixth Amendment a defendant has a right to the counsel of his choice if s/he can afford it, but that right is not without limitations. Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); State v. Roth, 75 Wn. App. 808, 824, 881 P.2d 268 (1994), *rev. den.* 126 Wn.2d 1016 (1995). A defendant's right to counsel of choice cannot unduly delay the proceedings. Roth, 75 Wn. App. at 824. "[T]he essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant, not to ensure that a defendant will inexorably be represented by his or her counsel of choice." State v. Price, 126 Wn. App. 617, 631, 109 P.3d 27, *rev. den.* 155 Wn.2d 1018 (2005). If a defendant's right to counsel of choice is violated, the defendant need not establish prejudice, and the error is not subject to harmless error review because such error is structural in nature. United States v. Gonzalez-Lopez, 548 U.S. 140, 146-48, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

Trial courts have broad discretion regarding continuance motions sought to obtain private counsel. Price, 126 Wn. App. at 632. "[O]nly an 'unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay' violates the defendant's right." *Id.* (*quoting* Morris v. Slappy, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 75 L.Ed.2d 610

(1983)). A continuance to obtain new counsel made on the day of trial is untimely. State v. Chase, 59 Wn. App. 501, 506, 799 P.2d 272 (1990). “In the absence of substantial reasons a late request should generally be denied, especially if the granting of such a request may result in delay of the trial.” State v. Early, 70 Wn. App. 452, 457, 853 P.2d 964 (1993).

When a defendant seeks a continuance in order to obtain new counsel, the court must balance the defendant’s right to counsel of choice against the public’s right to prompt administration of justice. Roth, 75 Wn. App. at 824. The factors the court considers in balancing those interests include: (1) whether the defendant has previously sought and received continuances; (2) whether the defendant has a legitimate reason for dissatisfaction with current counsel; (3) whether current counsel is prepared to go to trial; (4) whether the denial of the motion is likely to result in identifiable prejudice to the defendant’s case of a material or substantial nature. *Id.* at 825.

Here, while the trial court did not specifically balance the Roth factors on the record when it denied Calene’s request for a continuance, the facts demonstrate that those factors weighed in favor of the public’s right to prompt proceedings. First, Calene had previously sought and received two continuances, one of which had previously been made on the day of trial. The State and defense had agreed to another two

continuances of the trial date, and defense had previously had a continuance request, to which the State had objected, denied.

Second, Calene indicated no dissatisfaction with current counsel, and in fact in his phone calls from jail, he had stated that he thought defense counsel was doing a good job. 1RP 55. It was the prosecutor's understanding, from those jail calls, that Calene's goal had been to get released from jail and then continue the case as long as possible. 1RP 55.

Third, the prosecutor informed the court that defense counsel had indicated she had been ready to go to trial since February, although Calene wanted the case continued. The prosecutor explained that she had agreed to the last continuance on March 24th because defense counsel had indicated it would be the last one. 1RP 53-55.

Finally, Calene presented no evidence or claim of prejudice that would result if the continuance wasn't granted and he didn't hire private counsel. 1RP 54-56. While Calene had indicated that he wanted to hire Mr. Fryer as counsel, the prosecutor informed the court that she had received a phone call from a different attorney the day before wanting to know if she would agree to continue the case if Calene hired him. 1RP 55. Furthermore, there was no guarantee that Calene would have been able to afford private counsel: the public defender indicated that now that Calene wasn't in jail, he could work and his employer could assist Calene in

hiring private counsel. 1RP 54. The public defender did acknowledge to the court that Mr. Fryer would require at least a 60 day continuance. 1RP 53.

On balance, the public's right to prompt administration of justice outweighed Calene's untimely request to hire private counsel. The trial had been continued over four months from its original trial date, defense counsel was prepared to go to trial, Calene did not indicate any dissatisfaction with current counsel, and he had not identified any specific prejudice that would occur from proceeding with the trial scheduled for the next week. *See, Roth*, 75 Wn. App. 808 (denial of continuance so that lead counsel could be present at voir dire did not violate defendant's right to counsel of choice where the court had ordered one continuance already, defendant didn't articulate dissatisfaction with co-counsel, only preference for lead counsel, and where there was no reasonable basis upon which to conclude that voir dire by co-counsel would result in any identifiable prejudice to defendant); *Early*, 70 Wn. App. 452 (where continuances had previously been granted, appointed counsel was prepared to go to trial, and defendant had had six months to retain private counsel, court's denial of motion to continue the trial 30 days in order to substitute newly hired private counsel did not violate defendant's right to counsel of choice).

Calene's right to counsel of his choice was not violated when the trial court denied his motion to continue the trial.

2. **Calene waived the issue of whether his prior Wyoming conviction for conspiracy to commit felony larceny was comparable to a Washington felony offense when he affirmatively acknowledged it by stating that his two Wyoming convictions should only count as one point.**

Calene also asserts that the trial court miscalculated his offender score by including his two prior Wyoming convictions in the offender score. Specifically he alleges that the trial court erred in including his prior conviction for conspiracy to commit larceny because he now asserts it isn't comparable to a felony Washington offense. He also asserts the court erred in finding that the two Wyoming convictions were not the same criminal conduct. First, Calene waived the issue of comparability of the Wyoming conspiracy conviction by affirmatively acknowledging it and limiting his objection regarding his offender score to the issue of whether the Wyoming convictions were the same criminal conduct. Second, the trial court did not err in counting the two Wyoming convictions separately because under the Sentencing Reform Act ("SRA") prior convictions that were run consecutively are counted separately and the court does not engage in a same criminal conduct analysis of such offenses.

Even if Calene did not waive the issue of comparability and the conspiracy to commit larceny conviction was not legally comparable to a Washington felony offense, the Wyoming convictions would still count as one point because Calene does not dispute the comparability of the other Wyoming conviction. Under the facts of this case, where Calene faced the possibility of an exceptional, consecutive sentence, the standard range was the same whether the offender score was 11 or 10 on the first two counts and 10 or 9 on the third count, and defense counsel recommended a top of the standard range sentence, any error in the offender score calculation was harmless. Therefore, remand for resentencing, as Calene has requested, is not necessary.

- a. *Calene waived the comparability of his Wyoming conspiracy offense by affirmatively acknowledging the conviction's inclusion in the offender score.*

It is the State's burden to prove the existence and comparability of defendant's prior convictions by a preponderance of the evidence at sentencing. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). A defendant does not waive the State's obligation to present evidence unless he or she affirmatively acknowledges the facts and information introduced for sentencing purposes. State v. Mendoza, 165 Wn.2d 913, 928, 205 P.3d 113 (2009). Under the SRA, the court may rely upon information that is

admitted or acknowledged at the time of sentencing. RCW 9.94A.530(2) (2009). Prior to the 2008 amendments to the SRA, a defendant's mere failure to object to the alleged criminal history was not sufficient to constitute a waiver. Mendoza, 165 Wn.2d at 928. "[A] defendant's *affirmative acknowledgment* that his prior out-of-state convictions ... are properly included in his offender score," satisfies SRA requirements. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004).

"Acknowledgment" now includes "not objecting to criminal history presented at the time of sentencing" as well as not objecting to information contained in presentence reports. RCW 9.94A.530(2) (2008)².

The defendant's acknowledgment of the existence and comparability of prior convictions permits the sentencing court to rely on unchallenged facts and information introduced at sentencing. Ross, 152 Wn.2d at 233. A defendant's affirmative acknowledgment that a prior out-of-state conviction is properly included in his offender score permits a trial court to include the conviction in the offender score without conducting a comparability analysis. State v. Wilson, 170 Wn.2d 682, 690, 244 P.3d 950 (2010); State v. Birch, 151 Wn. App. 504, 518, 213

² In a split decision Division II of the Court of Appeals determined that this amended statutory provision violated due process under State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999). State v. Hunley, 161 Wn. App. 919, 929, 253 P.3d 448 (2011). The Supreme Court has granted review of that decision. 172 Wn.2d 1014 (2011).

P.3d 63 (2009), *citing*, State v. Ford, 137 Wn.2d 472, 483 n. 5, 973 P.2d 452 (1999); State v. Collins, 144 Wn. App. 547, 182 P.3d 1016 (2008), *rev. den.* 165 Wn.2d 1032 (2009).

Here, at the initial date for sentencing the prosecutor informed the court that it looked like the State and the defense were not going to agree about the offender score because it appeared that the defense was not including any out-of-state convictions in its proposed offender score, therefore the prosecutor requested a continuance to obtain certified judgment and sentences of the out-of-state convictions. SRP 402.

Defense counsel objected to the continuance and stated it hadn't received any information about the out-of-state convictions and that it was the State's burden to prove them unless they stipulated to them. SRP 403.

The continuance was granted and at the continuance of the sentencing hearing³ the prosecutor submitted the judgment for the Wyoming convictions and informed the court that she would not be able to prove up the Idaho convictions. SRP 409-10; PLA. Ex. 1.

When questioned whether defense had any objection to the court considering the proffered documents, defense counsel informed the court

³ The court took testimony from those people who had appeared in order to speak on behalf of Calene at the May 5th hearing, so they wouldn't have to come back. SRP 405-08.

that she did not have any objection to the Wyoming documents but she would object to the court “using *all* of the crimes for which he was convicted out of state.” 5RP 409 (emphasis added). After the prosecutor presented the Wyoming judgment, argued comparability of the convictions contained therein and asserted therefore that the offender score was 11 on the first two counts and 10 on the third, the court inquired whether defense took issue with any of the State’s assertions. 5RP 410-12. Defense counsel responded:

The *only* issue I take is one of what I believe is merger. It’s my understanding that each of the crimes for which he was convicted in Wyoming deal with the same course of conduct and same course of conduct in this state in this case is essentially possession of a vehicle known to be stolen. So essentially, your Honor, while he was convicted of four separate crimes involving that same course of conduct, *I would allege that under our statute, that under our offender score statute it would be counted one* under the merger rules.

5RP 412 (emphasis added). When the court inquired further how the two crimes could be the same criminal conduct, defense counsel responded it was her understanding that the convictions were based on the same set of facts and that she wanted that objection noted for the record. RP 412-13. She then reiterated that the Wyoming convictions should count as one point which then made his offender score 10 on the first two counts and 9 on the third. 5RP 413. The court rejected defense’s same criminal

conduct argument and found that the offender score was an 11 on the first two counts and 10 on the third. RP 413.

Here when the court specifically requested defense counsel to state her position on comparability of the Wyoming convictions, she asserted her *only* objection related to whether the Wyoming convictions were the same criminal conduct and therefore they should only count one point. Her assertion that the offenses should only count as one point in the offender score, given the court's question, was an affirmative acknowledgment regarding the comparability of the Wyoming convictions, thus relieving the trial court from having to make any further determination regarding comparability.

In Ross, the defendant Hunter disputed the State's calculation of his offender score, arguing that two of his five out-of-state convictions were not comparable. Ross, 152 Wn. App. at 226. At a subsequent sentencing hearing, the State conceded it could not prove up one of the convictions, and reduced its calculated offender score by one point. *Id.* Hunter's counsel then conceded that the other challenged out-of-state conviction was comparable. Defense counsel for one of the other defendants on appeal, Legrone, submitted a sentencing memorandum to the trial court which included two prior federal drug convictions, but argued that the two convictions should count as one offense under a same

criminal conduct analysis. Ross, 152 Wn.2d at 227. The Ross court rejected Hunter's and Legrone's assertions that the State's failure to prove the comparability of the convictions constituted legal error and therefore they could not waive such an offender score error. *Id.* at 230-232. The court affirmed the Court of Appeals' conclusion that Hunter had affirmatively acknowledged that the prior out-of-state convictions were properly included in his offender score and that Legrone's prior federal convictions had likewise been properly included in his offender score. Like Hunter and Legrone, defense counsel here conceded that the Wyoming conspiracy conviction was comparable to a Washington felony when she argued that the two Wyoming convictions should only count as one point in the offender score.

Calene's case is distinguishable from that in State v. Lucero, 168 Wn.2d 785, 230 P.3d 165 (2010). In that case, the State did not provide a certified copy of the judgment for the out-of-state conviction for the court's consideration regarding comparability. Defense counsel there argued that the standard range was a certain number of months based on the inclusion of a California burglary conviction in his offender score, arguing that the defendant's offender score was at least a six. *Id.* at 787. The Washington Supreme Court rejected the Court of Appeals' conclusion that the defendant acknowledged the comparability of his California

convictions by acknowledging his offender score. *Id.* at 789. The court found that under Mendoza, the defendant's assertion that "without the challenged California drug possession conviction, his offender score would still include the California burglary conviction" did not affirmatively acknowledge the comparability of his California convictions.

Here, after the certified judgment had been presented to the court, and the issue of comparability was squarely before the court, defense counsel affirmatively stated that the Wyoming convictions should count as one point. She informed the judge that her *only* objection regarding the convictions being included in Calene's offender score was that they should only count as one point since they were the same criminal conduct. In Lucero, there was no discussion of comparability at all, defense only asserted that one of his California convictions washed out and therefore shouldn't be included in the offender score. State v. Lucero, 140 Wn. App. 782, 788, 167 P.3d 1188 (2007). Defense counsel's statement here that the Wyoming convictions should count as one point made specifically in the context of the issue of comparability constitutes affirmative acknowledgment of the comparability of the convictions. Moreover, under the current SRA provisions, defense counsel's lack of an objection to the inclusion of the conspiracy conviction in the offender score, other than on same criminal conduct grounds, was sufficient acknowledgment

for the sentencing court to include it in the offender score without conducting any comparability analysis.

- b. The Wyoming convictions were not the same criminal conduct because the offenses were not run concurrently as required by RCW 9.94A.525(5), but consecutively.*

Under the SRA prior convictions are counted separately for offender score purposes unless they were previously determined to encompass the same criminal conduct. RCW 9.94A.525(5)(a)(i). For those offenses that have not already been found to constitute the same criminal conduct, only those prior convictions that were run concurrently are subject to a same criminal conduct determination by the court:

In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

- (i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense. The current sentencing court shall determine with respect to *other prior adult offenses for which sentences were served concurrently* or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the “same criminal conduct” analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations;

RCW 9.94A.525(5)(a)(i) (emphasis added). “Served concurrently” under this section means:

(i) the latter sentence was imposed with specific reference to the former; (ii) the concurrent relationship of the sentences was judicially imposed; and (iii) the concurrent timing of the sentences was not the result of a probation or parole revocation on the former offense.

RCW 9.94A.525(5)(b); *see, State v. Roberts*, 117 Wn.2d 576, 817 P.2d 855 (1991) (under former RCW 9.94A.360(6)(c) regarding offenses committed prior to July 1, 1986 “served concurrently” means the latter sentence refers to the former and there is a manifestation in the record of a judicial intent to impose a concurrent sentence).

Under RCW 9.94A.589, “same criminal conduct,” means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). “Same criminal conduct” is conduct that involves the same victim, the same objective intent, and occurs at the same time and place. *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The absence of any one of these factors precludes a finding of “same criminal conduct.” *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). The phrase is “construed narrowly to disallow most claims that multiple offenses constitute the same criminal act...” *Id.*

There must be sufficient facts in the record for the court to make the factual determination regarding the same criminal conduct. *See, Mendoza*, 165 Wn. 2d at 929 (“‘Bare assertions’ as to criminal history do not substitute for the facts and information a sentencing court requires.”). An appellate court reviews decisions regarding “same criminal conduct” for abuse of discretion or misapplication of the law. *Tili*, 139 Wn.2d at 122. If the facts can support a finding of either “separate and distinct criminal conduct” or “same criminal conduct,” the trial court’s decision shall be affirmed. *State v. Rodriguez*, 61 Wn. App. 812, 816, 812 P.2d 868, *rev. den.*, 118 Wn. 2d 1006 (1991).

Here, the Wyoming court ran count I, felony receiving property in violation of law, and count II, knowingly possessing an automobile with an altered vehicle identification number, concurrently, and count III, accessory before the fact to the crime of felony larceny, and count IV, conspiracy to commit felony larceny, concurrently. PLA. Ex. 1 at 2. However, it ran counts I and II consecutively to counts III and IV:

IT IS FURTHER ORDERED that the concurrent sentences on Counts I and II shall run consecutive with the concurrent sentences imposed on Counts III and IV.

PLA. Ex. 1 at 2-3. The Wyoming court clearly ran the sentences for the offenses at issue here, the felony receipt of stolen property and the

conspiracy counts, consecutively. Therefore, under the statute as the two convictions were run consecutively, the court was not required, or permitted, to make a same criminal conduct determination. While the trial court's reasoning for concluding that the counts were not the same criminal conduct was different, the trial court did not err in counting the two Wyoming offenses separately under RCW 9.94A.525(5).

Moreover, the only evidence in the record regarding the facts of the offenses is that count I was committed "on or about the 7th through the 18th day of August" while count IV was committed on or about August 18th. There is no evidence in the record to substantiate Calene's assertions on appeal, or below, that the offenses related to the same stolen property. Similarly, there is no evidence in the record that the conspiracy to commit theft of property furthered the receipt of the stolen property. If that were the case one would assume that the conspiracy would have occurred before the receipt of the stolen property, but the conspiracy was alleged to have occurred on the 18th while the receipt occurred between the 7th and the 18th. The trial court did not err in counting the two prior Wyoming convictions separately for offender score purposes.

- c. *Any error in the offender score calculation would be harmless where the standard range was the same and defense counsel recommended imposition of top of the range at sentencing.*

Even if Calene did not waive the issue of comparability of the conspiracy conviction and/or the offenses should have counted as one offense for offender score purposes, Calene does not contest on appeal the comparability of the felony receipt of stolen property conviction. Any error in the offender score calculation was harmless then because Calene faced the same standard range whether he was a 10 or 11 on the first two counts and a 9 or a 10 on the third count.

“Where the standard range is the same regardless of a recalculation of the offender score, any calculation error is harmless.” State v. Priest, 147 Wn. App. 662, 673, 196 P.3d 763 (2008), *rev. den.*, 166 Wn.2d 1007 (2009); *see also*, State v. Fleming, 140 Wn. App. 132, 138, 170 P.3d 50 (2007) (where defendant’s standard range sentence was the same whether the offender score was a 9 or 11, trial court’s failure to address same criminal conduct analysis was harmless), *disapproved of on other grounds* by State v. Mendoza, 165 Wn.2d 913 (2009); *accord*, State v. Argo, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996). The State concedes that the Wyoming conspiracy conviction is not *legally* comparable to a Washington felony because under RCW 9.94A.525(4) only felony

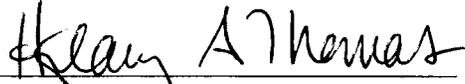
anticipatory offenses are to be included in the offender score, and under Washington law at the time Calene committed the offense, conspiracy to commit second degree theft would have been a gross misdemeanor. RCW 9A.28.040(3)(d) (1989); RCW 9A.56.040 (1989); Wilson, 170 Wn.2d at 687-88. This does not preclude his conspiracy offense, however, from being *factually* comparable to a conspiracy to commit first degree theft, if the item Calene conspired to take had in fact been valued at over \$1500. Calene's offender score was at least a 9 on count III and at least a 10 on the other two current offenses. His standard range does not change, and he would still be looking at the possibility of an exceptional sentence on the first two counts based on the aggravator of current offenses going unpunished due to his high offender score.⁴ Defense counsel at sentencing recommended the top of the standard range, 60 months, on the third count, the one that carried the highest range. The court imposed that amount. Calene has suffered no prejudice from the court's inclusion of the Wyoming conspiracy conviction in his offender score because his standard range on all the offenses is still the same and he was still facing the possibility of an exceptional sentence.

⁴ While Calene faced greater time on the third count than the first two, Calene would still face the possibility of some of the current offenses being run consecutively under an exceptional sentence pursuant to RCW 9.94A.589(1)(a).

E. CONCLUSION

The State requests this court affirm Calene's convictions and the sentence imposed below.

Respectfully submitted this 5th day of January 2012.



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CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, JENNIFER WINKLER, addressed as follows:

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Sydney A. Koss 01/06/2012
LEGAL ASSISTANT DATE