Supreme Court No. 100549-1
No. 82103-2-I

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

IRA DECHANT,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Ira Dechant asks this Court to grant review of the Court of Appeals' decision terminating review. The Court of Appeals issued its opinion on November 1, 2021. The Court denied Mr. Dechant's motion to reconsider on December 8, 2021. These rulings are attached in the appendix.

B. ISSUE FOR WHICH REVIEW SHOULD BE GRANTED

If two crimes, as charged and proved, are the same in law and fact, double jeopardy forbids punishing the crimes separately absent clear legislative intent to the contrary. Attempted murder requires intent to kill and a substantial step toward this goal. Conspiracy to commit murder requires an agreement to kill and a substantial step in furtherance of the agreement. Conspiracy is a continuing offense that ends with the last substantial step. In this case, the last substantial step for the murder conspiracy was the same as the substantial step for the attempted murder—one person involved in the conspiracy

gave a gun to another person. Is double jeopardy violated where, as charged and proved, the attempt to commit murder is the same in fact and law as the conspiracy?

C. STATEMENT OF THE CASE

This case arises from a resentencing. The underlying facts can be found in two previous decisions by the Court of Appeals: State v. Dechant, No. 72055-4-I, noted at 192 Wn. App. 1072, 2016 WL 1032365 (2016) (unpublished); In re Pers. Restraint of Dechant, No. 77541-3-I, noted at 10 Wn. App. 2d 1040, 2019 WL 5110549 (2019) (unpublished).

To summarize, Ira Dechant was prosecuted on five charges: solicitation to commit first degree murder, conspiracy to commit first degree murder; attempted first degree murder; unlawful possession of a firearm in the second degree; and possession of a controlled substance, heroin. CP 14-16. The two possession charges related to Mr. Dechant's arrest on January 7, 2013. CP 3, 18-19. The three other charges were premised on the allegation that, while in jail and with the help of others, Mr.

Dechant planned to murder the man responsible for his arrest. CP 3-9. The prosecution alleged these offenses were committed between January 13 and 29, 2013. CP 17-18.

The prosecution alleged Mr. Dechant solicited and conspired with Michael Rogers, his cellmate, to commit the murder. RP 275-76, 315.[1] But as the State acknowledged, Mr. Rogers had an extensive criminal record. RP 274-75. Mr. Rogers was attempting to curry favor with law enforcement so he might be treated with leniency and brought the supposed plan to the attention of the police. RP 278, 835. Working as an informant and following his release from jail, Mr. Rogers met with Charles Scheulke on January 29, 2013. RP 775, 1002-03. Wearing a wire, Mr. Rogers elicited statements from Mr. Scheulke, who was supposedly in on the plan, and got Mr.

[1] "RP" refers to the transcripts from appeal No. 72055-4-I.

Scheulke to hand him a gun. RP 775, 1001, 1003, 1010, 1014. The police then arrested Mr. Scheulke. RP 1048.

At trial, the court dismissed the firearm allegation on the solicitation charge for insufficient evidence. RP 1445. With Mr. Dechant's agreement, the trial court adjudicated the charges of unlawful possession of a firearm and possession of a controlled substance, finding Mr. Dechant guilty on the two charges. RP 1542-44. The jury adjudicated the solicitation, conspiracy, and attempt charges, along with the two special firearm allegations on the conspiracy and attempt charges. RP 1552-53.

During deliberations, the jury asked the court, "does the commission of conspiracy to commit murder end at the point that the commission of the attempted murder begins?" CP 216). The court told the jury to reread its instructions. CP 217; RP 1551-52. The instructions contained no guidance on this question, providing only that the jury must find these two offenses were committed between January 13 and January 29, 2013. CP 184-210.

The jury found Mr. Dechant guilty of the three charges and found the two firearm allegations proved. CP 211-15.

The trial court found that the solicitation, conspiracy, and attempt convictions all constituted the "same criminal conduct," meaning they counted as one offense for purposes of calculating Mr. Dechant's offender scores on the five convictions. 6/12/14 RP 47. The same criminal conduct finding, however, did not affect the two firearm enhancements, which at five years each added a total of 10 years to Mr. Dechant's sentence. CP 23. With the firearm enhancements, Mr. Dechant's total sentence was 420 months. CP 23. Defense counsel unsuccessfully argued that the convictions for conspiracy and attempt should "merge," and that only one firearm enhancement of five years should apply. 6/12/14 RP 54-57.

Mr. Dechant and his sister retained attorney Mitch Harrison to represent Mr. Dechant in his appeal. No. 77541-3-I,

Br. of Pet. ("PRP"), App. E, p. 2.[2] After failing to meet the deadlines and threats of sanctions, Mr. Harrison filed an incomplete brief. PRP, App. E, p. 3-4. The Court of Appeals rejected it for filing. Id. at 4. Mr. Harrison filed an amended brief that was accepted. Id. at 5. Mr. Harrison made a very short argument that the conspiracy and attempt convictions violated the prohibition against double jeopardy. Br. of App. at 55-57.[3] Mr. Harrison did not file a reply brief.

In an unpublished opinion, the Court of Appeals affirmed Mr. Dechant's convictions along with the sentence. State v. Dechant, No. 72055-4-I, noted at 192 Wn. App. 1072, 2016 WL 1032365 (2016) (unpublished).

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[2] Available at: https://www.courts.wa.gov/content/Briefs/A01/775413%20Appellant%20's%20.PDF

[3] Available at: https://www.courts.wa.gov/content/Briefs/A01/720554%20Appellant%20Ira%20DeChant's.pdf

Although Mr. Harrison was retained to prepare and file a petition for review, he failed to do so. PRP, App. E, p. 5-7. Mr. Dechant himself petitioned for review by the Washington Supreme Court, but it was denied as untimely. PRP, App. E, p. 7.

Mr. Dechant's sister and others filed grievances against Mr. Harrison for taking money to do legal work and failing to complete the promised work. PRP, App. E, p. 8-10. As attorney David Zuckerman summarized, "Mr. Harrison's standard operating procedure appears to be taking as much money as he can get from the client, promising great results, and then abandoning the client." PRP, App. E, sub. App. K, p. 8. Due to Mr. Harrison's unethical behavior, he resigned his license to practice law in lieu of discipline.[4] PRP, App. G.

[4] https://www.mywsba.org/WebFiles/CusDocs/000000043040-0/0131.pdf

Mr. Dechant's sister retained attorneys Jason Saunders and Kimberly Gordon. PRP, App. E, p. 1. They moved to recall the mandate and restore Mr. Dechant's right to a direct appeal. Id. The State agreed that this relief was warranted. PRP App. G, p. 2. Still, the Court of Appeals refused to grant this relief.

Mr. Dechant, through attorneys Saunders and Gordon, filed a personal restraint petition. Mr. Dechant argued he was deprived of his right to effective assistance of counsel on appeal because Mr. Harrison failed to argue a privacy act violation on appeal. PRP at 13-37. He also argued that his offender score was miscalculated because a prior conviction was improperly scored as two points rather than one. PRP at 43-49.

This Court rejected Mr. Dechant's primary argument, but agreed on the offender score issue and remanded for resentencing. CP 54; In re Pers. Restraint of Dechant, No. 77541-3-I, noted at 10 Wn. App. 2d 1040, 2019 WL 5110549 (2019).

At the resentencing, the parties agreed that Mr. Dechant's offender score on the offenses of solicitation, conspiracy, and attempt were each reduced by one point. CP 55-56, 164-66. Defense counsel noted that he had argued at the first sentencing hearing that the conspiracy and attempt convictions should merge and that only one firearm enhancement should apply. 11/19/20 RP 7-8. He informed the trial court, "Mr. Dechant wishes the Court had, back in 2014, only applied one 60-month-gun enhancement." 11/19/20 RP 8. After noting this objection, Mr. Dechant himself briefly argued that he got "ten extra years instead of five on – on something that – that should only have been applied to a charge." RP 9.

On counts one to three, the court imposed concurrent sentences of 280 months. CP 177; 11/19/20 RP 11. The court also imposed concurrent sentences on counts 4 and 5. CP 177. Rejecting any contention that only one firearm enhancement should apply, the court ordered two consecutive five-year

sentences on the firearm enhancements, for a total sentence of 400 months. CP 177; 11/19/20 RP 11-12.

Appealing from this resentencing, Mr. Dechant argued that his convictions for attempted murder and conspiracy to commit murder, both with firearm enhancements, violate the prohibition against double jeopardy because they are the same in fact and law. In the earlier appeal, the Court of Appeals had overlooked both that conspiracy is a continuing offense that ends with the last substantial step and that the special jury verdicts on the firearm enhancements conclusively showed the two offenses were same. Br. of App. at 12-18.

The Court of Appeals refused to engage Mr. Dechant's argument, instead ruling that the double jeopardy issue was not properly before the Court. Slip op. at 3-8. Nonetheless, the Court of Appeals, however, remanded for resentencing again because Mr. Dechant's conviction for possession of a controlled substance was void under State v. Blake, 197 Wn.2d 170, 173, 481 P.3d 521 (2021). Slip op. at 8.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Based on the same act, Mr. Dechant was convicted of conspiracy to commit murder while armed with a firearm and attempted murder while armed with a firearm. Because these convictions are the "same offense," they violate double jeopardy.

a. Double jeopardy forbids punishment for the same offense.

The constitutional prohibition against double jeopardy forbids imposition of multiple punishments for the same offense. U.S. Const. amends. V, XIV; Const. art. I, § 9; Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2005). A double jeopardy issue is an issue of law reviewed de novo. State v. Mutch, 171 Wn.2d 646, 662, 254 P.3d 803 (2011).

Under double jeopardy, "if the crimes, as charged and proved, are the same in law and in fact, they may not be punished separately absent clear legislative intent to the contrary." State v. Freeman, 153 Wn.2d 765, 776, 108 P.3d 753

(2005) (citing Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). This is known as the "same elements" test, the "same evidence" test, or the Blockburger test. Orange, 152 Wn.2d at 301. The analysis considers "the elements of the crimes as charged and proved, not merely as the level of an abstract articulation of the elements." Freeman, 153 Wn.2d at 776. Thus, even if the elements of a crime are different on an abstract level, they may still constitute the "same offense." "Double jeopardy will be violated where *the evidence required* to support a conviction upon one of the charged crimes would have been sufficient to warrant a conviction upon the other." Orange, 152 Wn.2d at 820 (cleaned up).

Orange illustrates these principles. Based on shooting a person, the defendant was convicted of first degree attempted murder and first degree assault. The Court held these convictions violated double jeopardy. Key to this determination was that the "substantial step" element for attempt is a

"placeholder" element that must be given a "factual definition." Orange, 152 Wn.2d at 818. The facts, as set out in the charging document, showed that the substantial step for the attempted murder charge was the shooting of the victim. Id. at 814-15, 820. This was the same act that the assault with a firearm conviction was based on. Id. Accordingly, the two crimes were the same in fact and in law, violating the constitutional protection against double jeopardy. Id. at 820; see also State v. Hughes, 166 Wn.2d 675, 683-86, 212 P.3d 558 (2009) (convictions for rape and rape of child violated double jeopardy; both convictions based on single act of sexual intercourse); State v. Martin, 149 Wn. App. 689, 700, 205 P.3d 931 (2009) (second degree assault and attempted third degree rape convictions violated double jeopardy as they were both predicated on same conduct); State v. Potter, 31 Wn. App. 883, 887-88, 645 P.2d 60 (1982) (convictions for reckless endangerment and reckless driving, both based on driving of car, violated double jeopardy).

b. The convictions for conspiracy to commit murder while armed with a firearm and attempted murder while armed with a firearm violate double jeopardy because they are the same offense.

Mr. Dechant was charged with conspiracy to commit murder in the first degree and attempted murder in the first degree. CP 18. Both charges concerned the same period and the same named victim. CP 18. Both charges also contained special firearm allegations, alleging Mr. Dechant was armed with a handgun at the time of the offenses. CP 18.

Conspiracy and attempt are related, inchoate crimes. State v. Dent, 123 Wn.2d 467, 476, 869 P.2d 392 (1994); State v. Roby, 67 Wn. App. 741, 746, 840 P.2d 218 (1992). "A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement." RCW 9A.28.040(1). "A person is guilty of an attempt to commit a crime if, with intent to

commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1).

Although conspiracy requires an agreement, both crimes require intent that a specific crime be committed or performed. State v. Stein, 144 Wn.2d 236, 246, 248, 27 P.3d 184 (2001). Both crimes also require proof of a substantial step. The substantial step requirements are not identical in all situations. Dent, 123 Wn.2d at 477. A substantial step for purposes of conspiracy may be a lesser act than a substantial step for purposes of an attempt. Id. This is because conspiracy requires a substantial step in pursuance of the agreement to commit the crime while attempt requires a substantial step toward the commission of the crime. Id.

But the two may overlap. Conspiracy is a continuing offense that ends with the last substantial step committed in pursuance of the agreement. State v. Carroll, 81 Wn.2d 95, 110, 500 P.2d 115 (1972); State v. Williams, 131 Wn. App. 488,

497, 128 P.3d 98 (2006), review granted, cause remanded (on other grounds), 158 Wn.2d 1006, 143 P.3d 596 (2006). As a continuing offense, it "may not be arbitrarily divided up to support separate charges such that a defendant is, for all intents and purposes, punished twice for the same offense." State v. Farnworth, 192 Wn.2d 468, 475-76, 430 P.3d 1127 (2018) (citing Brown, 432 U.S. at 169; In re Snow, 120 U.S. 274, 282, 7 S. Ct. 556, 30 L. Ed. 658 (1887)). For example, because assault is a continuing offense, it violates double jeopardy to convict a person of second degree assault and fourth degree assault for the same assaultive conduct. State v. Villanueva-Gonzalez, 180 Wn.2d 975, 978, 985-86, 329 P.3d 78 (2014).

Thus, the act constituting a substantial step in pursuance of a conspiracy—a continuing act that may encompass multiple substantial steps, can also be the act constituting a substantial step toward the commission of the crime, i.e., an attempt. It will necessarily be *the same* substantial step in many instances

because conspiracy ends with the last substantial step committed in pursuance of the agreement.

This was true in this case. For the attempt charge, the prosecution identified Mr. Scheulke's transfer of a handgun to Mr. Rogers as the substantial step toward the commission of the planned murder. RP 315, 1471, 1493, 1495. The prosecution identified multiple acts as constituting a substantial step in pursuance of the conspiracy to commit the planned murder, including this same transfer of a gun. RP 1471. Because conspiracy is a continuing offense that ends with the last substantial step, transferring the gun was a substantial step for both the purpose of the conspiracy and the attempt.

Further, the jury's special verdicts on the two firearm allegations proves that the jury found the act of transferring the gun to be the substantial step for purposes of both crimes. The prosecution argued, "both the conspiracy and the attempt were done with Mr. Rogers and Mr. Scheulke in full possession of a loaded weapon fully operable firearm." RP 1495. The jury

agreed, finding not merely that the attempt was committed with a firearm, but that the conspiracy was committed with a firearm. In other words, the jury found the firearm allegation on the conspiracy proved based on the transfer of the gun, which was the substantial step. See State v. Houston-Sconiers, 188 Wn.2d 1, 16, 391 P.3d 409 (2017) (holding that firearm enhancement on conspiracy charge was appropriate because obtaining or brandishing a gun can be a substantial step in pursuance of the agreement). No other evidence proved the firearm allegation on the conspiracy. In fact, the court dismissed the firearm allegation on the solicitation charge in count one (which concerned an earlier period from that of Mr. Scheulke's transfer of the gun to Mr. Rogers) due to a lack of evidence. RP 1445. If the jury had relied on a different substantial step for the conspiracy, it should not have found the firearm allegation on that charge proved.

This analysis is supported by State v. Nysta, 168 Wn. App. 30, 275 P.3d 1162 (2012), which indicates special verdict

findings can establish a double jeopardy violation. In Nysta, the defendant argued that his convictions for second degree rape and felony harassment by means of a death threat violated double jeopardy. He theorized that the forcible compulsion element of rape could have been based on a threat to kill rather than physical violence. If true, this arguably violated double jeopardy because "the evidence required to support the conviction for second degree rape was also sufficient to convict Nysta of felony harassment." Id. at 49-50. But no special verdict or anything else established that the jury relied on the threat to kill in finding the forcible compulsion element of rape satisfied. Id. Thus, the double jeopardy claim failed. Id.; see also In re Pers. Restraint of Borrero, 161 Wn.2d 532, 538-39, 167 P.3d 1106 (2007) (because charging document alleging attempted murder did not identify the substantial step and jury did not necessarily rely on kidnapping to prove substantial step, convictions for kidnapping and attempted murder did not violate double jeopardy).

In contrast, the special verdicts on the firearm enhancements establish that the jury *necessarily* relied on the transfer of the gun from Mr. Scheulke to Mr. Rogers for the substantial step components of conspiracy and attempted murder. And the intent elements, an intent to commit murder, were the same. In other words, the evidence required to support the conviction for conspiracy to commit murder while armed with a firearm was also sufficient to support the conviction for attempted murder while armed with a firearm. Orange, 152 Wn.2d at 820; Nysta, 168 Wn. App. at 50. Thus, the two convictions violate double jeopardy.

After the Court of Appeals decided Mr. Dechant's first appeal, this Court has recognized that aggravating circumstances or special allegations are "elements" of an offense for purposes of a double jeopardy analysis. State v. Allen, 192 Wn.2d 526, 529, 431 P.3d 117 (2018). Under the constitutional right to a jury trial, "'any fact that increases the mandatory minimum is an 'element' that must be submitted to

the jury.'" Id. (quoting Alleyne v. United States, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013)). A double jeopardy analysis must consider these facts. Id. Thus, when comparing the elements of conspiracy to commit murder and attempted murder, the analysis must treat the allegation of being armed with a firearm as an "element" for both offenses because these two offenses had firearm allegations which were found by the jury.

As explained, that the jury found the firearm element satisfied for conspiracy establishes that the jury found the transferring of the firearm to be the act constituting the attempted murder. Consequently, the two convictions violate double jeopardy because under the Blockburger test the attempt conviction is a subset of the facts making up the conspiracy conviction.

2. Double jeopardy issues are properly raised on appeal following a resentencing. This Court's opinion in Allen was a significant change in the law warranting a fresh look at whether the duplicitous convictions for attempt and conspiracy violated double jeopardy. The Court of Appeals should have reviewed the double jeopardy issue.

The Court of Appeals refused to review Mr. Dechant's double jeopardy claim, ruling it had already decisively disposed of the matter in its 2016 opinion. But a defendant is entitled to raise sentencing issues in the later appeal if the appellate court in the earlier proceeding "vacates the original sentence or remands for an entirely new sentencing proceeding." State v. Toney, 149 Wn. App. 787, 792, 205 P.3d 944 (2009). As in Toney, Mr. Dechant raised sentencing issues; and sentencing issues include double jeopardy claims. Id. at 792-93, 797.

The Court of Appeals reasoned Toney did not apply on the theory that Mr. Dechant was not actually appealing from a resentencing, as in Toney. Slip op. at 7. Although acknowledging that it had "remand[ed] for resentencing" when it granted Mr. Dechant's personal restraint petition, and that

Mr. Dechant appealed from that resentencing, the Court reasoned this was so because, "We did not vacate the original sentence, or remand for an entirely new sentencing proceeding, as was the case in Toney." Slip op. at 7. This is a distinction without a difference. The Court of Appeals cited no authority in support of this distinction. And the remand was not a ministerial correction of the judgment and sentence. It was a resentencing. And contrary to the Court's reasoning, Mr. Dechant was appealing from an illegal conviction, not a standard range sentence. Slip op. at 7-8. Contradicting itself, the Court of Appeals properly vacated the possession conviction because it was unconstitutional under Blake. If the Court of Appeals were right, it should not have granted that relief. But it correctly did. It should have also reached the double jeopardy issue.

As for the earlier decision on the double jeopardy issue, an appellate decision may be revisited in a subsequent appeal if there has been a change in the precedent. Roberson v. Perez,

156 Wn.2d 33, 42-43, 123 P.3d 844 (2005). As outlined earlier, our Supreme Court recently held that aggravators or sentencing enhancements are "elements" for purposes of a double jeopardy analysis. Allen, 192 Wn.2d at 529. This broke new ground. This Court in the first appeal did not consider the two firearm enhancements as being "elements" in analyzing whether there was a double jeopardy violation. Before Allen, they were not considered "elements" in a double jeopardy analysis.

Consistent with Allen, this Court very recently recognized that the doctrine requiring the prosecution to prove all the requirements in the jury instructions, including requirements that impose a higher burden than the law requires, "applies with equal force to jury instructions pertaining to sentence enhancements and aggravating circumstances because they are the functional equivalent of elements of a crime." State v. Anderson, __ Wn.2d __, 498 P.3d 903, 907 n.5 (2021) (emphasis added).

Consequently, a double jeopardy analysis of the conspiracy and attempt offenses must consider the firearm enhancements. This clarification in the law warranted a fresh analysis of the double jeopardy issue on the merits.

This Court has also made it clear that appellate courts have authority "to address arguments belatedly raised when necessary to produce a just resolution." State v. McFarland, 189 Wn.2d 47, 57, 399 P.3d 1106 (2017). "Proportionality and consistency in sentencing are central values of the [Sentencing Reform Act], and courts should afford relief when it serves these values." Id.

The Court of Appeals refusal to address the meritorious double jeopardy issue does not serve these values. This is particularly true when Mr. Dechant did not have effective representation in his first appeal by Mitch Harrison, who later resigned due to his unethical appellate practices. It is a manifest injustice to permit the double jeopardy violation to persist,

which results in Mr. Dechant's sentence being five years longer than it should be.

3. That courts engage in the proper double jeopardy analysis is critical in ensuring fair sentences and to check abusive charging practices. Review is warranted.

The prohibition against double jeopardy affords defendants a modest protection. They should not receive punishment based on a conviction that is the same in law and fact as another conviction. Because sentences on firearm enhancements must be served consecutively, it is critical that this guarantee be enforced by the courts so that duplicitous convictions do not result in people being imprisoned for many more additional years. These people include disadvantaged groups and minorities, who endure the brunt of unjust duplicitous convictions and resulting harsher sentences.

Thus, the importance of this issue goes beyond the facts of Mr. Dechant's case. Double jeopardy claims are often brought, partly because there is no time-bar on double jeopardy

claims. RCW 10.73.100(3). It is critical that courts engage in the right analysis and grant relief when warranted. This means considering special verdict forms and other facts found by the jury when conducting a double jeopardy analysis. Thus, review is warranted as a matter of public interest to provide clarity and ensure proper future adjudications. RAP 13.4(b)(4). Review is also warranted because the double jeopardy issue presented is a significant constitutional issue that should be decided by this Court. RAP 13.4(b)(3).

E. CONCLUSION

For the foregoing reasons, Mr. Dechant respectfully asks this Court to grant review.

This document contains 4,302 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 6th day of January, 2022.

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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. IRA DAVID DECHANT, Appellant.	No. 82103-2-I DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — Dechant was convicted of solicitation to commit murder, conspiracy to commit murder, attempted murder, unlawful possession of a firearm, and possession of a controlled substance. His conspiracy and attempt convictions included firearms enhancements. In a prior appeal, this court rejected his argument that the three convictions related to murder violated principles of double jeopardy. He subsequently filed a personal restraint petition that we granted solely for recalculation of his offender score and resentencing. He now appeals from the resentencing, claiming that the firearm enhancements on his convictions for conspiracy to commit murder and attempted murder violate double jeopardy. He also asks that we vacate the conviction for possession of a controlled substance. Resentencing to correct the offender score did not create a right to appeal the judgment and sentence on double jeopardy grounds. We vacate the conviction for possession of a controlled substance and remand for resentencing based on the changed offender score.

FACTS

Ira Dechant was arrested on January 7, 2013 on an outstanding warrant after being turned in by a confidential informant, Louis Didomenici. State v. Dechant, No. 72055-4-I, slip op. at 2, 5 (Wash. Ct. App. March 14, 2016) (unpublished), https://www.courts.wa.gov/opinions/pdf/720554.pdf. Based on evidence found during this arrest, the State charged Dechant with unlawful possession of a firearm in the second degree and possession of heroin. Id. at 5. In jail, Dechant met Michael Rogers, and asked him to kill Didomenici. Id. at 3. Rogers showed interest in the plan at first, but ultimately reported it to jail staff. Id. at 4. Working with a detective, Rogers recorded a conversation where Dechant told him that a man named Charles Scheulke could provide him with a gun outside the jail. Id. at 4. Scheulke visited Dechant in jail, and Dechant told him to provide Rogers with "anything that he needs." Id. at 5.

On January 29, 2013, Rogers was released from jail into the custody of an investigating detective. Id. Rogers met up with Scheulke, and gave police a signal that Scheulke gave Rogers a firearm. Id. Because of this, the State charged Dechant with solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, and attempted murder in the first degree. Id. The jury found Dechant guilty of all three crimes. Id. at 6. The conspiracy to commit murder and attempted murder convictions also both included a firearm enhancement. Dechant waived his right to a jury on the firearm and drug charges and the trial court found Dechant guilty as charged. Id. Dechant has previous felony convictions of bank robbery, burglary in the second degree, and possession of a

stolen vehicle. These convictions were factored into his offender score. The bank robbery conviction specifically raised his offender score by two points. Dechant received a 420 month sentence.

Dechant appealed to this court challenging three of his convictions—conspiracy to commit murder in the first degree, solicitation to commit murder in the first degree, and attempted murder in the first degree—on double jeopardy grounds. Id. at 8. We affirmed the convictions. Id. at 1, 13.

Dechant filed a personal restraint petition (PRP) that was decided in 2019. In re Pers. Restraint of Dechant, No. 77541-3-I, slip op. at 12 (Wash. Ct. App. Oct. 14, 2019) (unpublished), https://www.courts.wa.gov/opinions/pdf/775413.pdf. In the PRP, Dechant argued that his counsel in his first appeal provided ineffective assistance. Id. He alleged that appellate counsel failed to argue issues related to the Washington privacy act, chapter 9.73 RCW, and his offender score. Id. at 14, 21. We found that counsel provided ineffective assistance related to Dechant's offender score and remanded for resentencing. Id. at 23.

At resentencing, the court reduced the offender score of Dechant's previous bank robbery conviction from two points to one point. Because of this lower offender score, the court imposed a standard range sentence of 400 months. He appeals his resentencing.

DISCUSSION

I. RAP 2.5(c)(2)

Dechant argues that his convictions of conspiracy to commit murder and attempted murder violate double jeopardy and that he can raise this issue following

his resentencing. He argues this claim can be heard again on appeal because there has been an intervening change in the law, that not hearing it would result in a manifest injustice, and that he can appeal following a resentencing. The State argues that this claim was already raised and rejected in Dechant's original appeal which precludes him from raising it again.

Generally, a defendant is prohibited from raising issues in a second appeal that were or could have been raised in the first appeal. See State v. Sauve, 100 Wn.2d 84, 87, 666 P.2d 894 (1983). However, some exceptions exist. Under RAP 2.5(c)(2), we can review an earlier decision of the appellate court "where justice would best be served, [and] decide the case on the basis of the appellate court's opinion of the law at the time of the later review." Courts have interpreted this rule to allow a repeat appellate review on certain grounds. Roberson v. Perez, 156 Wn.2d 33, 42-43, 123 P.3d 844 (2005). The appellate court can revisit a previously decided case if there has been an intervening change in the law. State v. Schwab, 163 Wn.2d 664, 672-73, 185 P.3d 1151 (2008). The appellate court can also rehear a case if the prior decision is clearly erroneous and the erroneous decision causes a manifest injustice. State v. Gregory, 192 Wn.2d 1, 29-30, 427 P.3d 621 (2018).

A. Change in Precedent

If there has been a change in precedent, appellate courts have discretion to rehear a case. Roberson, 156 Wn.2d at 42. Dechant alleges that this court should review the double jeopardy claim again because State v. Allen changed the precedent. 192 Wn.2d 526, 528-29, 431 P.3d 117 (2018). He argues that Allen

holds "that aggravating circumstances or special allegations are 'elements' of an offense for purposes of a double jeopardy analysis." He argues that this court did not consider the firearm aggravators as elements in analyzing whether his convictions for conspiracy to commit murder and attempted murder constitute double jeopardy. If we had, he argues, we would have found that Dechant's firearm enhancements created the same substantial step needed for both crimes.

However, Dechant mischaracterizes Allen. Rather than establishing that aggravators are elements of the crime, Allen held that if a jury acquits a defendant of an aggravator, double jeopardy bars retrying the aggravator. Id. at 544. Allen does not provide an avenue to raise the double jeopardy issue again here.

B. Manifest Injustice

An appellate court can reconsider a prior decision in the same case if the decision was clearly erroneous and the erroneous decision caused a manifest injustice. Gregory, 192 Wn.2d at 29-30. Dechant urges this court to revisit the merits of his double jeopardy claim because failure to do so would result in a manifest injustice. Dechant alleges that having to serve an additional five years due to a duplicative firearm enhancement is an injustice. He also argues that we should allow for special treatment due to the constitutional nature of the issue.

In the previous appeal, we agreed with the State that "the crimes at issue include different legal elements and each requires proof of a fact that the others do not." Dechant, No. 72055-4-I, slip op. at 11. Dechant does not argue that the court's prior decision stating that attempted murder and conspiracy to commit murder having different elements is clearly erroneous. Instead, Dechant argues

that having firearm enhancements, on both the attempt and the conspiracy convictions, is double jeopardy causing a manifest injustice. However, having firearm enhancements on different crimes is not an injustice. "Washington courts have repeatedly rejected arguments that weapon enhancements violate double jeopardy." State v. Huested, 118 Wn. App. 92, 95, 74 P.3d 672 (2003). Therefore, if Dechant had made this argument on his prior appeal, the outcome would not have changed.[1] Because the decision in the first appeal was not an erroneous decision, there is no manifest injustice warranting relief under RAP 2.5(c).

Next, raising constitutional issues does not create the opportunity for unlimited appeals. See State v. Mandanas, 163 Wn. App. 711-12, 717, 262 P.3d 522 (2011). "Even though an appeal raises issues of constitutional import, at some point the appellate process must stop." Sauve, 100 Wn.2d at 87. Constitutional or not, an issue that could have been raised in the first appeal cannot be raised in a second appeal. Id. The double jeopardy issue was raised and Dechant's firearm enhancements argument could have been raised in the first appeal. The argument cannot be raised for the first time here. Dechant fails to show the decision in the first appeal was erroneous and a manifest injustice.

[1] While Dechant did not directly allege ineffective assistance of counsel for failure to make this argument at the first appeal, he clearly implies it occurred. He alleges that his counsel for his first appeal resigned due to unethical behavior, and that "[t]he result of this deficient representation was that this Court reached the wrong result." But, the ethics charges did not relate to his appellate representation of Dechant. And, it was not defective performance to fail to advance the firearm enhancement argument in the first appeal given the case law on that issue. See Huested, 118 Wn. App. at 95.

II. Resentencing

Dechant argues that State v. Toney shows that a resentencing can be appealed. 149 Wn. App. 787, 792-93, 205 P.3d 944 (2009). Toney holds that resentencing issues can come up on appeal only if the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding. Id. at 792. Additionally, a sentence imposed in the standard range is generally not appealable. State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003) (citing RCW 9.94A.585(1)).

Here, Dechant's resentencing was focused on lowering the offender score for a past crime committed years before the attempted murder and conspiracy to commit murder convictions for which he is now arguing double jeopardy violations for the firearm enhancements. Dechant, No. 77541-3-I, slip op. at 23. This court concluded that the "appellate attorney provided ineffective assistance of counsel by not challenging the calculation of his offender score, we grant the PRP on this ground and remand for resentencing." Id. We did not vacate the original sentence, or remand for an entirely new sentencing proceeding, as was the case in Toney. See id. When Dechant asked the court to consider the double jeopardy argument relative to the two firearm enhancements at his resentencing, the judge responded, "Nobody brought up that issue at the Court of Appeals. The offender score was the issue at the Court of Appeals." The trial court did not address the merits of the argument. Instead, the trial court amended Dechant's offender score, following the Court of Appeals' instructions, and imposed a standard range sentence. Because the only changes the sentencing court made were a change to the

offender score and a new sentence within the standard range, this resentencing cannot be appealed.

III. Possession of a Controlled Substance

In contrast to Dechant's double jeopardy argument, his challenge to his conviction of one count of unlawful possession of a controlled substance under RCW 69.50.4013 is supported by a change in law and should be reversed. The State properly concedes, that State v. Blake requires this result. 197 Wn.2d 170, 481 P.3d 521 (2021).

We vacate the conviction for possession of a controlled substance and remand for resentencing based on the changed offender score.

Appelwick, J.

WE CONCUR:

Chun, J.

Verellen J

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

THE STATE OF WASHINGTON,

Respondent,

v.

IRA DAVID DECHANT,

Appellant.

No. 82103-2-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Ira Dechant, filed a motion for reconsideration. The court has considered the motion pursuant to RAP 12.4 and a majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Appelwick, J.
Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

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. 82103-2-I**, 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 or residence address as listed on ACORDS:

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Date: January 6, 2022

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