

NO. 39219-4-II

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

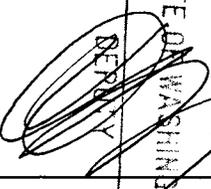
STATE OF WASHINGTON,

Respondent,

v.

RENATA ABRAMSON,

Appellant.

09 NOV 10 PM 12:21
STATE OF WASHINGTON
BY  DEPUTY

FILED
COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-01786-2

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL AVERY SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

ORIGINAL

SERVICE

Michelle Bacon-Adams
623 Dwight St.
Port Orchard, WA 98366

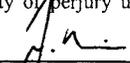
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED November 6, 2009, Port Orchard, WA 
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
I. COUNTERSTATEMENT OF THE ISSUES.....	1
II. STATEMENT OF THE CASE.....	2
III. ARGUMENT.....	5
THE TRIAL COURT PROPERLY “CORRECTED” THE JUDGMENT AND SENTENCE IN ACCORDANCE WITH THIS COURT’S MANDATE FROM HER FIRST APPEAL.	5
1. Abramson’s argument, based on counsel’s performance in her prior appeal, is beyond the scope of the current appeal from the trial court’s compliance with this Court’s mandate to “correct her judgment and sentence.”	5
a. Abramson’s standard-range sentence is not appealable.	5
b. The trial court acted within the limited scope of this Court’s mandate.....	7
c. Appointed counsel has only raised issues properly presented in a personal restraint petition, and Abramson has not demonstrated entitlement to appointed counsel for that purpose.....	8
d. Abramson did not present any issue at resentencing for the trial court to decide with regard to the firearm enhancement.....	9
2. Abramson fails to show that counsel’s performance was constitutionally ineffective.	12
3. The remedy would not be an entire new trial.....	17
IV. CONCLUSION.....	18

TABLE OF AUTHORITIES
CASES

Anders v. California,
386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967).....9

In re Dalluge,
152 Wn. 2d 772, 100 P.3d 279 (2004).....12, 13

State v. Abramson,
165 Wn. 2d 1025, 203 P.3d 381 (2009).....4

State v. Abramson,
No. 35481-1-II ("*Abramson I*").....2

State v. Ammons,
105 Wn. 2d 175, 713 P.2d 719, 718 P.2d 796 (1986).....5

State v. Barberio,
121 Wn. 2d 48, 846 P.2d 519 (1993).....8

State v. Crane,
116 Wn. 2d 315, 804 P.2d 10 (1991).....12

State v. Ford,
151 Wn. App. 530, 213 P.3d 54 (2009).....18

State v. Guloy,
104 Wn. 2d 412, 705 P.2d 1182 (1985).....10

State v. Hendrickson,
129 Wn. 2d 61, 917 P.2d 563 (1996).....12

State v. Kilgore,
___ Wn. 2d ___, 216 P.3d 393 (2009).....8

State v. Kinneman,
155 Wn. 2d 272, 119 P.3d 350 (2005).....5, 8

<i>State v. Laramie,</i> 141 Wn. App. 332, 169 P.3d 859 (2007).....	18
<i>State v. Lord,</i> 117 Wn. 2d 829, 822 P.2d 177 (1991).....	12
<i>State v. Mail,</i> 121 Wn. 2d 707, 854 P.2d 1042 (1993).....	5, 6, 7
<i>State v. McFarland,</i> 127 Wn. 2d 322, 899 P.2d 1251 (1995).....	12
<i>State v. Pirtle,</i> 127 Wn. 2d 628, 904 P.2d 245 (1995).....	3
<i>State v. Riley,</i> 137 Wn. 2d 904, 976 P.2d 624 (1999).....	3
<i>State v. Theobald,</i> 78 Wn. 2d 184, 470 P.2d 188 (1970).....	9
<i>State v. Thompson,</i> 93 Wn. App. 364, 967 P.2d 1282 (1998).....	9
<i>State v. Tilton,</i> 149 Wn. 2d 775, 72 P.3d 735 (2003).....	15
<i>Strickland v. Washington,</i> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	12

STATUTES

RCW 9.94A.110 (recodified as RCW 9.94A.500(1)).....	6
RCW 9.94A.210(1).....	6
RCW 9.94A.370(2).....	6
RCW 9.94A.500(1).....	7

RCW 9.94A.585(1).....	7
RCW 10.73.150(1) & (4).....	9

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Abramson's argument, based on counsel's performance in her prior appeal, is beyond the scope of the current appeal from the trial court's compliance with this Court's mandate to "correct her judgment and sentence," particularly where:

- a. Abramson's standard-range sentence is not appealable;
- b. The trial court acted within the limited scope of this Court's mandate;
- c. Appointed counsel has only raised issues properly presented in a personal restraint petition, and Abramson has not demonstrated entitlement to appointed counsel for that purpose; and
- d. Abramson did not present any issue at resentencing for the trial court to decide with regard to the firearm enhancement?

2. Whether, assuming the issue were properly before the Court, Abramson fails to show that counsel's performance in her first appeal was constitutionally ineffective for failing to adequately reconstruct the record where she fails to show any meritorious issue that was not presented in that appeal, or how she was prejudiced as a result?

II. STATEMENT OF THE CASE

A. NOTE ON RECORD REFERENCES

The Court has transferred the record from Abramson's 2006 appeal, *State v. Abramson*, No. 35481-1-II ("*Abramson I*"), to the present proceeding. "CP(06)" and "nRP(06)" will refer to the Clerk's Papers and the Reports of Proceedings from that appeal.

"CP" will refer to the Clerk Papers prepared for the current appeal. "RP" will refer to the report of the resentencing hearing held on April 17, 2009.¹

B. PROCEDURAL HISTORY

Renata Abramson was charged by first amended information filed in Kitsap County Superior Court with (1) delivery of methamphetamine, (2) possession of methamphetamine, (3) possession of methamphetamine with intent to manufacture or deliver, and (4) second-degree unlawful possession of a firearm. CP 1. Counts II and III included firearms allegations, and Count III additionally bore a school-zone enhancement allegation. *Id.* The case proceeded to trial and the jury convicted her as charged on all counts. CP 234-38.

Abramson appealed. This Court rejected most of the issues raised.

¹ Nothing of consequence to the current appeal occurred on April 3, 2009, the other date for which a report of proceedings was prepared.

Abramson I, Op. at 10-17, 18-28.

Among the issues raised was the contention that the jury instructions were incomplete. The Court concluded, however that Abramson failed to show error:

IV. JURY INSTRUCTIONS

Abramson argues that the trial court failed to instruct the jury adequately because it did not give the jury instructions for special verdict enhancements, did not give an accomplice instruction, and did not give “an instruction for one of the crimes for which the jury found Ms. Abramson guilty.” Br. of Appellant at 34. Abramson’s arguments fail; furthermore, she mischaracterizes the record.

A. Standard of Review

We review jury instruction challenges *de novo*, examining the effect of a particular phrase in an instruction by considering the instructions as a whole. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). Jury instructions are sufficient if they allow the parties to argue their theories of the case and, when read as a whole, properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

B. Adequate Instructions

Abramson’s counsel asserts, “[T]he instructions in the Clerk’s Papers may not be an accurate reflection of what the jury actually possessed.” Br. of Appellant 34, n. 2. The State agrees that the record on appeal is not complete, but it argues that the jury did receive a complete set of all necessary instructions. Nothing in the record indicates to the contrary.

The State explains that “for reasons not known, the copy of the instructions placed in the court file after trial was incomplete,” but the record is clear that “the jury was fully instructed.” Br. of Resp’t at 31. The record contains a complete set of the State’s proposed jury instructions, which includes the instructions that Abramson alleges the jury did

not receive. The record also contains an extensive discussion between the trial court and counsel about the jury instructions. From the record, it is clear that, contrary to Abramson's assertions, the trial court gave the jury instructions on the sentence enhancements, accomplice liability, and "to convict" instructions for the crimes charged. Having carefully reviewed the record, we hold that the trial court adequately instructed the jury.

Abramson I, Op. at 22-23 (footnote omitted).

The State conceded that the trial court erred in imposing a school-zone sentencing enhancement. *Abramson I*, Op. at 17. The Court accepted the concession, and remanded Abramson's case "to correct her judgment and sentence." *Abramson I*, Op. at 28.

The Supreme Court denied review. *State v. Abramson*, 165 Wn.2d 1025, 203 P.3d 381 (2009). The mandate issued on February 20, 2009. CP 7.

The resentencing hearing was held on April 17, 2009. Abramson purported to object to the firearms enhancement, but failed to specify any grounds for the objection. RP 5-6. The trial court struck the school-zone enhancement and imposed a sentence within the standard range. RP 6, CP 37.

III. ARGUMENT

THE TRIAL COURT PROPERLY “CORRECTED” THE JUDGMENT AND SENTENCE IN ACCORDANCE WITH THIS COURT’S MANDATE FROM HER FIRST APPEAL.

Abramson argues primarily that prior appellate counsel was ineffective with regard to his preparation of the record in her prior appeal, and that the resentencing court erred in failing to rule on her objection to the firearms enhancement. These claims are not properly raised in this appeal, and are without merit.

1. Abramson’s argument, based on counsel’s performance in her prior appeal, is beyond the scope of the current appeal from the trial court’s compliance with this Court’s mandate to “correct her judgment and sentence.”

a. Abramson’s standard-range sentence is not appealable.

A trial court’s decision regarding a sentence within the standard range is not appealable because “as a matter of law there can be no abuse of discretion.” *State v. Kinneman*, 155 Wn.2d 272, ¶ 21, 119 P.3d 350 (2005) (quoting *State v. Mail*, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993) and *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986)). That said, a defendant nevertheless “is not precluded from challenging on appeal the procedure by which a sentence within the standard range was imposed.” *Ammons*, 105 Wn.2d at 183.

In *Mail*, the Court rejected the defense argument that the *Ammons* “dicta” should be read broadly. *Mail*, 121 Wn.2d at 711. Instead, it explained that review was circumscribed by the terms of the Sentencing Reform Act. *Mail*, 121 Wn.2d at 711. It found that RCW 9.94A.110 (recodified as RCW 9.94A.500(1)) was the “baseline.” *Mail*, 121 Wn.2d at 711. That provision sets forth the minimum factors that the court *must* consider at sentencing:

[T]he presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

The Court went on to explain that RCW 9.94A.370(2) (recodified as 9.94A.530(2)) identifies the information that the court “may rely on.” *Mail*, 121 Wn.2d at 711.

In this context, the Court concluded that in order for a “in order for a ‘procedural’ appeal to be allowed under *Ammons*, it must be shown that the sentencing court had a duty to follow some specific procedure required by the SRA, and that the court failed to do so.” *Mail*, 121 Wn.2d at 712. Unless there is a “clear showing” that the trial court failed to follow a mandated procedure, RCW 9.94A.210(1) (recodified as 9.94A.585(1)) applies, and no appeal should be permitted. *Mail*, 121 Wn.2d at 712. The Court summarized

its holding thus:

Since the only applicable procedures mandated by the SRA in this case are those dictated by RCW 9.94A.[500(1)] and RCW 9.94A.[530](2), these are the only statutory bases for an appeal under *Ammons*. In order to bypass the prohibition on appeals found at RCW 9.94A.[585](1), this petitioner must show either that the trial court refused to consider information mandated by RCW 9.94A.[500(1)], or that the petitioner timely and specifically objected to the consideration of certain information and that no evidentiary hearing was held.

Mail, 121 Wn.2d at 713. The Court observed that this rule would prevent the *Ammons* exception from swallowing the appeal prohibition of RCW 9.94A.585(1) in its entirety. *Mail*, 121 Wn.2d at 713-14.

Here, the trial court considered all the information mandated by RCW 9.94A.500(1). It likewise did not consider any factual information to which Abramson interposed a timely and valid objection.² As such, Abramson fails to show she has any statutory basis for appeal.

b. The trial court acted within the limited scope of this Court's mandate.

Moreover, in this case, this Court's mandate was very narrow: it called for the trial court to "correct" the judgment and sentence after the Court struck the school-zone sentencing enhancement. *Abramson I, Op.*, at 28. A mandate issued by this Court becomes the law of the case that binds

² As will be discussed, *infra*, contrary to Abramson's contention, the trial court did not fail to consider any timely and valid objection made by Abramson.

the trial court on remand. RAP 12.2. As the Supreme Court explained in *State v. Kilgore*, ___ Wn.2d ___, 216 P.3d 393 (2009), the trial court's discretion on remand is thus limited by the scope of the appellate mandate.

Thus in *State v. Barberio*, 121 Wn.2d 48, 51, 846 P.2d 519 (1993), the trial court properly declined to consider on remand an issue that was not within the scope of the appellate mandate. Here the mandate was for the trial court to "correct" the judgment by deleting the school-zone enhancement. The trial court did this and its labor was thus complete.

Moreover as the Supreme Court has explained, even if the trial court had had discretion to re-examine the firearm enhancements, Abramson could only appeal if the court actually exercised that discretion:

The fact that the trial court had discretion to reexamine Kilgore's sentence on remand is not sufficient to revive his right to appeal. Our rules of appellate procedure require that the trial court exercise its discretion in order to give rise to an appealable issue. We will not waive this rule to make exceptions for defendants where a mere possibility of direct review exists.

Kilgore, 216 P.3d at ¶ 21. Here the trial court did not reconsider the firearms enhancements. As such there is no discretionary ruling to appeal.

c. Appointed counsel has only raised issues properly presented in a personal restraint petition, and Abramson has not demonstrated entitlement to appointed counsel for that purpose.

Even were Abramson arguably entitled to appeal, the scope of that appeal would be whether the trial court complied with the mandate of this

Court and whether the court followed the procedures mandated by the SRA. Counsel was appointed for that purpose. Appointed counsel apparently has determined that the trial court properly imposed sentence and complied with the mandate. When she made that determination, the purposes for which she was appointed at public expense were at an end. At that juncture she should have moved to withdraw. *See State v. Theobald*, 78 Wn.2d 184, 470 P.2d 188 (1970), and *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967).

Abramson was neither entitled to nor granted the appointment of counsel for the purposes of researching, preparing the record for, and filing a personal restraint petition. *See State v. Thompson*, 93 Wn. App. 364, 369 n.9, 967 P.2d 1282(1998); RCW 10.73.150(1) & (4). Yet that is effectively what she has received. Abraham's issues primarily deal with the effectiveness of prior appellate counsel and resentencing counsel's alleged failure to correct prior appellate counsel's allegedly deficient performance. Neither of these issues is within the proper scope of the present appeal. Appellate counsel's attempt to essentially file a PRP in lieu of the appeal for which she was hired to prosecute should not be countenanced.

d. Abramson did not present any issue at resentencing for the trial court to decide with regard to the firearm enhancement.

Even were the issues raised properly before the Court, and even if the

trial court had authority to go beyond this Court's mandate, the record fails to support Abramson's contentions that the firearm enhancement issue was "preserved for review," Brief of Appellant, at 23, and that the trial court erred in not ruling on her objection.

An objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). A review of the record shows no adequate objection was presented to the trial court. Counsel began by essentially conceding that the mandate merely called for removal of the school-zone enhancement from the sentence: "I guess I would defer to the court to what was originally imposed, minus the 24 months in this case." RP 4.

Subsequently, counsel raised the supposed objection, which resulted in the following colloquy:

MR. ARBENZ [defense counsel]: ... And for the record, Your Honor, we also are objecting to any firearm enhancements. Mr. Hester has asked me to make sure that is on the record in this case, the imposition of firearms enhancements –

THE COURT: Currently under Count 3, prior to the Court of Appeals review, it indicates 100 plus 36 for firearm, then an additional 24. So if we just looked at the 100 plus the 36, equals 136. So that is what you are proposing?

MR. ARBENZ: That's what we are proposing in this case.

THE COURT: But you're still objecting to the firearm.

MR. ARBENZ: We are, for purposes of the record, Your Honor, objecting to firearm enhancements.

MR. ANDERSON [prosecutor]: I guess the state would ask just for some guidance, as that went up on appeal and the court has affirmed it. For the purposes of what record?

THE COURT: That's what I'm confused about, actually.

MR. ARBENZ: Your Honor, the issue is – this is from what I've been told by Mr. Hester, who had unfortunately a conflict today.

THE COURT: You are representing your client today.

MR. ARBENZ: I am absolutely, Your Honor.

Our understanding was that during Mr. Hester's attempt to appeal this case, that the court either had misplaced the jury instructions, or that the jury instructions were not recorded on the record, and made it impossible for Mr. Hester to effectively appeal certain issues pertaining to firearm enhancements. He's asked me, for purposes of this sentencing, simply to make an on-the-record objection to the sentencing enhancement, for the possibility of future appeals. And that's all I'm doing. With the rest of the resentencing, we defer to the court."

RP 5-6.

Abramson's counsel stated only that was objecting for the record. However, since he provided no explanation of the basis for his objection he essentially raised no objection at all. Likewise, even though the trial court sought an explanation, no grounds for the objection were forthcoming. To the contrary, counsel expressed agreement with the proposed sentence. In

these circumstances, the court cannot be faulted for failing to rule on the supposed objection.

2. *Abramson fails to show that counsel's performance was constitutionally ineffective.*

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result ... would have been different." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996); *Strickland*, 466 U.S. at 687. Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991). Additionally, a petitioner claiming ineffective assistance of appellate counsel must show that he was actually and substantially prejudiced by the error and that the legal issue in the prior appeal had merit. *In re*

Dalluge, 152 Wn.2d 772, 777, 100 P.3d 279 (2004).

The State does not challenge the assertion that counsel did not properly prepare a reconstructed record. As the Court noted, he failed to take the steps required by the Rules of Appellate Procedure to reconstruct the missing portions of the record. *Abramson I*, Op. at 23, n.7. The State can conceive of no tactically valid reason for his failure to do so.

Nevertheless, in the context of ineffective assistance of *appellate* counsel, to establish deficient performance, the defendant must show that appellate counsel “failed to raise an issue with underlying merit” *Dalluge*, 152 Wn.2d at 786. As discussed, *infra*, Abramson fails to show counsel missed any meritorious issue. As such, while counsel’s practice was clearly sloppy, Abramson fails to show deficient performance in any constitutional sense.

Abramson also fails to meet her burden of showing prejudice. As the State argued on direct appeal, and this Court found, it was quite clear from the record that the jury was given a full set of instructions, despite the incomplete copy in the clerk’s file.

In her first appeal, Abramson claimed that the trial court failed to instruct the jury on the sentencing enhancements, accomplice liability, or

“one of the crimes”³ with which she was charged. The copy of the written instructions filed with the clerk after trial was clearly incomplete: Abramson was charged and convicted of four crimes plus enhancements, yet the packet in the court file contains only the introductory instructions and complete instructions for Counts I & II. *See* CP(06) 210-29.⁴

Nevertheless, the record does not support the notion that the jury was not completely instructed. The State filed a full set of proposed instructions and two supplemental instructions that corrected typographical errors in its original submission. CP(06) 79-121, 134, 175-77. Abramson also filed proposed instructions pertaining to the defense theories. CP(06) 172-74. Before the jury was instructed, the court and the parties spent a significant amount of time going over each proposed instruction and the verdict forms. 5RP(06) 436-56. Included in the instructions the court agreed to give were all the instructions that Abramson alleged the jury did not receive: complete instructions for Counts III and IV, 5RP(06) 439-44, 452, 456, the definition of “accomplice,” 5RP(06) 445-47, and complete definitional instructions for the sentencing enhancements. 5RP(06) 447-53, 456. After recesses to prepare some alterations ordered or agreed to, the parties then assembled the

³ Abramson failed to identify the charge to which she referred. As will be discussed, it actually appears that the instructions given for both Counts III *and* IV were missing from the court file.

⁴ The clerk’s papers accurately reflect the document as it appears in the superior court file.

packet in an agreed order. 5RP(06) 456-57. The trial court then recessed to make copies of the final packet to give to the jurors (minus the verdict forms). 5RP(06) 458. The copies were distributed to the jury and the court read the instructions to the jurors. 5RP(06) 458. Neither the State nor Abramson objected to the court's reading of the instructions.

It is simply not credible that after having spent a considerable period of time discussing the instructions, arguing objections to them and finally assembling them in an agreeable fashion, that *neither* party would have mentioned it if the court had given only half the instructions to the jurors. Moreover, the final instruction in the agreed ordering was that for the sentencing enhancement. 5RP(06) 456. The prosecutor specifically referred to this instruction in his closing argument. 5RP(06) 467.

Plainly, the jury was fully instructed, but for reasons not known, the copy of the instructions placed in the court file after trial was incomplete. Abramson cites no authority that requires reversal under these circumstances. The precedent is to the contrary.

A criminal defendant is "constitutionally entitled to a 'record of sufficient completeness' to permit effective appellate review of his or her claims." *State v. Tilton*, 149 Wn.2d 775, 781, 72 P.3d 735 (2003). That does

not necessarily mean a verbatim transcript. *Tilton*, 149 Wn.2d at 781. Alternative methods allowing effective review are permissible. As discussed above, the record here is sufficient to determine that the jury was instructed, and indeed to determine *how* they were instructed.⁵

While Abramson correctly notes that this Court criticized counsel for failing to take the proper steps to complete the record, *Abramson*, Op., at 23 n.7, the Court also found that “[f]rom the record, it is clear that, contrary to Abramson’s assertions, the trial court gave the jury instructions on the sentencing enhancements, accomplice liability, and “to convict” instructions for the crimes charged.” *Abramson*, Op., at 23. Abramson fails to explain why that conclusion is incorrect.

Instead, Abramson merely argues that she “respectfully disagrees” with this Court’s resolution of the previous appeal. She utterly fails to back her disagreement with any facts or law, however.⁶ She argues only that the record was inadequate for appellate counsel to divine what issues should have been brought regarding the jury instructions. As discussed above and in the original appeal, however, the entire, lengthy, discussion of what instructions

⁵ Abramson did not in the prior appeal, nor now, suggest that any of the trial court’s rulings on the instructions to be given were improper.

⁶ The State notes that like her predecessor, present appellate counsel has also taken no steps to reconstruct the trial record. *But see supra* (any issue beyond “correction” of the judgment and sentence to remove the school-zone enhancement beyond the proper scope of this appeal).

should or should not have been given was fully reported and in appellate counsel's possession. In two proceedings before this Court Abramson has never identified any error in those rulings. As this Court found, the record clearly indicates that jury was instructed in accordance with the trial court's rulings. Abramson fails to demonstrate prejudice. This claim should be rejected.

3. *The remedy would not be an entire new trial.*

Abramson's final assertion is that the alleged deficiency in the record entitles her to a new trial. Abramson fails, however to show that the record was inadequate. Nor does she identify any basis for conducting an entire new trial.

As discussed previously, this Court found in the previous appeal that the record was adequate to address the issues on appeal. As also discussed previously, the record completely reflects the lengthy discussion between counsel and the trial court regarding what instruction should or should not have been given. Neither first nor present appellate counsel have ever pointed to any ruling the trial court made with regard to the instructions that was even potential error.

Further, even now Abramson only claims that there was potential error with regard to the firearm enhancement. She makes no claim, however,

that there was any infirmity with regard to the remaining instructions or findings of guilt. The State thus fails to see what basis there would be to overturn the substantive verdicts of the jury, particularly since those verdicts have already once been affirmed by this Court. *See, e.g., State v. Ford*, 151 Wn. App. 530, ¶ 35, 213 P.3d 54 (2009) (instructional error only results in reversal of affected count, remaining counts affirmed); *State v. Laramie*, 141 Wn. App. 332, ¶ 25, 169 P.3d 859 (2007) (same).

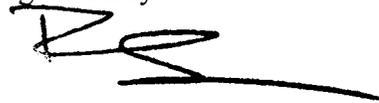
IV. CONCLUSION

For the foregoing reasons, Abramson's sentence should be affirmed.

DATED November 6, 2009.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney