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ASSIGNMENTS OF ERROR

1. The sentencing court erred by imposing deadly weapon enhancements on Counts I, VIII, IX, and X.
2. The sentencing court erred by imposing a firearm enhancement on Count XIII.
3. The imposition of deadly weapon enhancements on Counts VIII, IX, and X infringed Mr. Pierce's Fourteenth Amendment right to due process because the evidence was insufficient to prove the presence of an actual deadly weapon or an operable firearm.
4. The sentencing court was bound by the Court of Appeals' finding that the evidence was insufficient to prove the presence of an actual deadly weapon or an operable firearm.
5. The sentencing court lacked jurisdiction to enter deadly weapon enhancements on Counts I, VIII, IX and X.
6. By imposing deadly weapon enhancements, the sentencing court exceeded the authority granted by the Court of Appeals in its mandate.
7. The firearm and deadly weapon enhancements were imposed in violation of Mr. Pierce's right to due process and his right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22.
8. The firearm and deadly weapon enhancements were not authorized by the jury's verdicts.
9. The firearm and deadly weapon enhancements were improper because of errors in the court's instructions to the jury.
10. The court's instructions failed to make manifestly clear the jury's duty in answering the special verdict on each sentencing enhancement.
11. The court's instructions unconstitutionally required jurors to deliberate to unanimity before answering "no" on each special verdict form.

12. The court's instructions and special verdict forms erroneously allowed imposition of a firearm or deadly weapon enhancement if Mr. Pierce "was armed with, or in possession of a firearm."
13. The jury's special verdicts—finding Mr. Pierce "armed with, or in possession of a firearm"—did not justify imposition of firearm and deadly weapon enhancements.
14. The trial court erred by giving Instruction No. 7.
15. The trial court erred by giving Instruction No. 18.
16. The trial court erred by giving Instruction No. 19.
17. The trial court erred by giving Instruction No. 21.
18. The trial court erred by giving Instruction No. 22.
19. The trial court erred by giving Instruction No. 25.
20. The trial court erred by giving Instruction No. 28.
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28. The trial court miscalculated Mr. Pierce's offender score.
29. The evidence was insufficient to prove that Counts VIII, IX, and XII should be scored separately rather than as the same criminal conduct.
30. The trial court erred by failing to find that Counts VIII, IX, and XII were the same criminal conduct.

31. The trial court erred by adopting Finding of Fact No. 2.1 of the Judgment and Sentence.
32. The trial court erred by adopting Finding of Fact No. 2.3 of the Judgment and Sentence.
33. The trial court erred by sentencing Mr. Pierce with offender scores of five, six, and nine.
34. Mr. Pierce was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
35. Defense counsel was ineffective for failing to argue that Counts VIII, IX, and XII comprised the same criminal conduct.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A deadly weapon enhancement may not be imposed unless the state presents sufficient evidence that the offender was armed with an actual deadly weapon. In this case, the Court of Appeals held that the evidence was insufficient to prove Mr. Pierce was armed with an operable firearm during the commission of Counts VIII, IX, and X. Did the imposition of deadly weapon enhancements violate Mr. Pierce's Fourteenth Amendment right to due process?
2. Upon remand, a sentencing court is bound by the mandate issued by the Court of Appeals. In this case, the sentencing exceeded the authority set forth in the mandate. Did the sentencing court lack jurisdiction to impose deadly weapon enhancements in this case?
3. A jury need not deliberate to unanimity to reject a sentencing enhancement. In this case, the court's instructions erroneously instructed jurors that "all twelve of you must agree on the answer to the special verdict." Did the erroneous instructions violate Mr. Pierce's Fourteenth Amendment right to due process?

4. A firearm or deadly weapon enhancement may not be imposed unless the offender was “armed” with a firearm or deadly weapon. In this case, the court’s instructions and special verdict forms permitted the jury to return a “yes” verdict even if the prosecution failed to prove that Mr. Pierce was armed during the commission of each charged crime. Did the imposition of firearm and deadly weapon enhancements violate Mr. Pierce’s Fourteenth Amendment right to due process in light of the error in the court’s instructions and special verdict forms?
5. An accused person is guaranteed a jury determination of any fact necessary to increase punishment above the statutory maximum. In this case, the jury found that Mr. Pierce was “armed with, or in possession of a firearm at the time of the commission of the [charged] crime,” and thus did not necessarily find that Mr. Pierce was “armed,” as required for imposition of an enhancement. Did the imposition of firearm and deadly weapon enhancements violate Mr. Pierce’s right to due process and to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22?
6. When the jury is directed to determine whether or not an offender was armed with a deadly weapon during the commission of a crime, the sentencing court may not impose a firearm enhancement. In Count XIII, the court’s instructions asked the jury to consider whether or not Mr. Pierce was armed with a deadly weapon. Did the imposition of a firearm enhancement in Count XIII violate Mr. Pierce’s right to due process and to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22?
7. Multiple current offenses comprise the same criminal conduct for purposes of calculating the offender score if they occurred at the same time and place and if they were committed for the same overall criminal purpose. Here, the court failed to analyze Counts VIII, IX, X, and XII to determine whether or not they were the same criminal conduct. Did the trial judge

abuse his discretion by failing to determine whether or not Counts VIII, IX, X, and XII should score separately?

8. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Mr. Pierce's defense counsel unreasonably failed to argue that Counts VIII, IX, X, and XII comprised the same criminal conduct. Was Mr. Pierce denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Wade Pierce was charged by Information with thirteen offenses stemming from three different incidents. Counts I-VI charged first-degree burglary and five counts of firearm theft, alleging that Mr. Pierce unlawfully entered a building and stole guns.¹ CP 1-3; *see also State v Pierce*, 155 Wash.App. 701, 704-707, 230 P.3d 237 (2010).² The Information also alleged that Mr. Pierce was armed with a deadly weapon during the commission of the burglary. CP 1.

Counts VIII-XII charged first degree robbery, first-degree burglary, second-degree assault (two counts), and first-degree theft. The prosecution alleged that Mr. Pierce unlawfully entered a residence, pointed what may have been a gun at the residents, and stole property. CP 4-6; *Pierce*, at 704-707. Neither resident was sure that a gun was present. One occupant who claimed to have seen a gun-like object testified that it may have been made of cardboard. RP (9/15/10) 4; RP (4/29/11) 8-10; State's Memorandum Re: Resentencing, Supp. CP; *see Pierce*, at 714-715.

¹ Count VII was dismissed without prejudice because of deficiencies in the information

² Mr. Pierce has sought permission to supplement the VRP with a copy of the trial transcript, for the sake of providing a complete record on review. However, the part-published opinion from the last appeal provides an adequate outline of the facts

Based on this information, the state alleged that Mr. Pierce was armed with a deadly weapon during the commission of Counts VIII-XII. CP 4-6.

Count XIII charged Possession of Methamphetamine with Intent to Deliver. The charge stemmed from the discovery of contraband in Mr. Pierce's car at the time of his arrest on the other charges. CP 6; *Pierce, at* 704-707. A .22 caliber handgun was also found in the car, and the Information alleged that Mr. Pierce was armed with a firearm during the commission of Count XIII. CP 6; *Pierce, at* 707.

At Mr. Pierce's jury trial, the court included the following language in the "to convict" instruction for each charge:

If you find the defendant guilty of [the charged crime], you will complete the Special Verdict Form... provided to you for this purpose. Since this is a criminal case, all twelve of you must agree on the answer to the special verdict

If you find that the State has proved beyond a reasonable doubt that the defendant was armed with a deadly weapon, it will be your duty to answer the special verdict "Yes."
Instructions Nos. 7, 18, 19, 21, 22, 25, 28, Supp. CP.³

The court provided jurors with pre-printed special verdict forms. The special verdict forms were designated A, I, J, K, L, and M,⁴ and included the following language:

³ Even Instruction No. 28, which related to Count XIII, used the phrase "deadly weapon" instead of the word "firearm," despite the fact that a firearm enhancement was charged CP 7, Instruction No. 28, Supp. CP

We, the jury, return a special verdict by answering as follows:

Was the defendant, WADE WILLIAM PIERCE, armed with, or in possession of a firearm at the time of the commission of the crime as charged in [the specified count]?

Answer: _____

Special Verdict Forms A, I, J, K, L, and M, Supp. CP.⁵

Mr. Pierce was convicted as charged, and the jury answered “yes” on each of the special verdict forms. Special Verdict Forms A, I, J, K, L, and M, Supp. CP; *see also Pierce, at 708.*

Mr. Pierce appealed, and all but one of his convictions were affirmed.⁶ The case was remanded for resentencing. Mr. Pierce filed a motion for a new trial, based (in part) on newly discovered evidence. The motion was denied, and Mr. Pierce was resentenced.⁷ *Pierce, at 708-710.*

⁴ Special Verdict Form N applied to a lesser included offense, and was not used by the jury

⁵ All of the special verdict forms used the word “firearm,” instead of the phrase “deadly weapon,” even though Count XIII was the only charge actually carrying a firearm enhancement

⁶ The Court of Appeals dismissed Count VII, Possession of a Stolen Firearm, because of a deficiency in the charging document *Pierce, at 708.* The state did not refile the charge, and it is not at issue in this appeal

⁷ The sentencing court determined that one of the assault charges (Count XI) merged with other charges. Count XI is not at issue in this appeal.

His second appeal was consolidated with a Personal Restraint Petition.

Pierce, at 711.

In the second appeal, the Court of Appeals vacated Mr. Pierce's firearm enhancements on Counts I, VIII, IX, X, and XI.⁸ In a part-published opinion, the Court held as follows:

[T]he State failed to present sufficient evidence from which a reasonable jury could find that the firearm Pierce allegedly used during the commission of the crimes was operable. There is no evidence that the firearm with which Pierce was armed was capable of firing a projectile. Moreover, the trial court instructed the jury on deadly weapon enhancements and not firearm enhancements. Thus, the jury was not required to find that the alleged firearm was operable. Accordingly, we hold that the sentencing court exceeded its authority by entering a sentence that does not reflect the jury's findings... We further hold that there is insufficient evidence in the record to support Pierce's firearm enhancements.. Therefore, we grant Pierce's PRP on this ground, and we remand to the sentencing court with directions that it dismiss Pierce's firearm enhancements and resentence Pierce without the firearm enhancements on counts I, VIII, IX, X, and XI.

Pierce, at 715 (citations and footnotes omitted).

On remand, the prosecution conceded that it could not ask for deadly weapon enhancements because of deficiencies in the evidence, problems with the court's instructions, and the Court of Appeals' opinion in *Pierce, supra* RP (9/15/10) 2-4. The prosecutor pointed out "that the only testimony as to the weapon was when the victim said, 'I don't know if

⁸ Presumably, the Court meant to vacate the firearm enhancements on Counts XII and XIII as well

it was a real gun or not. It could have been a piece of cardboard for all I know.” RP (9/15/10) 4. This information was repeated for the sentencing judge at a second hearing: “[witnesses said Mr. Pierce was armed with] [w]hat they thought was a firearm, and it could have been a piece of cardboard.” RP (4/29/11) 8.⁹

Despite the Court of Appeals’ Opinion, the lack of proof that Mr. Pierce was armed with an actual gun as opposed to a toy gun or gun-like object (in Counts VIII-XII), the problems with the court’s instructions, and the state’s concessions, the sentencing judge imposed deadly weapon enhancements on Counts I, VIII, IX, and X, and a firearm enhancement on Count XIII. CP 11-12, 14-15.

During the sentencing hearing, Mr. Pierce tried to tell the judge that his offender score was incorrect. RP (4/29/11) 25. The sentencing judge refused to hear legal argument from Mr. Pierce. RP (4/29/11) 24-25, 29. The trial judge did not determine Mr. Pierce’s offender score on the record. RP (4/29/11) 2-34. The Judgment and Sentence reflects the following finding:

[x] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589): Counts I-VI, IX and XII.

⁹ Although the prosecutor did not distinguish between Count I and the other charges, the testimony about the cardboard gun did not relate to Count I

CP 10.

Mr. Pierce was sentenced with offender scores of five (for Count V), six (for Counts II, III, IV, VI, XII, and XIII), and nine (for Counts I, VIII, IX, and X). CP 11-12.

Mr. Pierce again appealed. CP 19.

ARGUMENT

I. THE DEADLY WEAPON ENHANCEMENTS IN COUNTS VIII, IX, AND X VIOLATED MR. PIERCE’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MR. PIERCE WAS ARMED WITH A DEADLY WEAPON.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *State v Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010).

B. The Court of Appeals found the evidence insufficient to prove that Mr. Pierce was armed with an actual deadly weapon during the commission of the crimes charged in Counts VIII, IX, and X.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt.

U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct.

1068, 25 L.Ed.2d 368 (1970). The same is true for sentencing

enhancements. *State v Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008).

A deadly weapon enhancement may only be imposed if the prosecution proves that the offender was armed with an actual deadly weapon. *State v Fowler*, 114 Wash.2d 59, 62, 785 P.2d 808 (1990), (addressing RCW 9.95.040), *overruled on other grounds by State v Blair*, 117 Wash.2d 479, 487, 816 P.2d 718 (1991); *see also State v Pam*, 98 Wash.2d 748, 753, 659 P.2d 454 (1983), (same), *overruled on other grounds State v Brown*, 111 Wash.2d 124, 761 P.2d 588 (1988), *aff'd on rehearing*, 113 Wash.2d 520, 782 P.2d 1013 (1989) (*Brown I*). A deadly weapon enhancement may not be imposed if the evidence establishes only the presence of an inoperable firearm, or a gun-like but non-deadly object. *Pam*, at 753; *Fowler*, at 62.

In this case, the Court of Appeals has already found that “the State failed to present sufficient evidence from which a reasonable jury could find that the firearm Pierce allegedly used during the commission of the crimes was operable,” because there was “no evidence” that it was “capable of firing a projectile.” *Pierce*, at 715.¹⁰ At the resentencing hearing, the prosecutor twice reaffirmed that the state had not established the presence of a real gun (on Counts VIII-XII), as opposed to a toy or a

¹⁰ The Court did not distinguish between the three incidents in its opinion. In fact, the guns from Counts I-VII and Count XIII were operable firearms.

gun-like object, and pointed out testimony that the object could have been a piece of cardboard. RP (9/15/10) 4; RP (4/29/11) 8.

Nothing in the record established that the presence of a real gun (as opposed to a toy gun, or a gun-like object) for the burglary, robbery, and assaults that resulted in conviction on Counts VIII-XII. Because of this, the sentencing court should not have imposed deadly weapon enhancements. *Fowler*, at 62. The enhancements on Counts VIII, IX, and X¹¹ must be vacated, and the case remanded for correction of the Judgment and Sentence. *Id.*

II. IN LIGHT OF THE MANDATE ISSUED BY THE COURT OF APPEALS, THE SENTENCING COURT LACKED JURISDICTION TO IMPOSE DEADLY WEAPON ENHANCEMENTS ON COUNTS I, VIII, IX, AND X.

A mandate issued by the Court of Appeals is binding on the superior court, and must be strictly followed. *McCausland v McCausland*, 129 Wash.App. 390, 399, 118 P.3d 944 (2005), *reversed on other grounds*, 159 Wash.2d 607, 152 P.3d 1013 (2007). The superior court lacks jurisdiction to address issues beyond those for which the case has been remanded. *In re Wilson's Estate*, 53 Wash.2d 762, 337 P.2d 56 (1959).

¹¹ Mr. Pierce was not sentenced on Count XI, and the sentencing court did not impose an enhancement on Count XII. CP 11-12, 14-15

Here, the Court of Appeals granted Mr. Pierce's PRP, and "remand[ed] to the sentencing court with directions that it dismiss Pierce's firearm enhancements and resentence Pierce without the firearm enhancements on counts I, VIII, IX, X, and XI." *Pierce*, at 715.¹² Both parties understood this to mean that the sentencing judge could not impose deadly weapon enhancements on those counts. RP (9/15/10) 2-4; *see also* State's Memorandum (filed 4/28/2011), Defendant's Memorandum (filed 4/29/2011), Supp. CP; RP (9/15/10) 2-7; RP (4/29/11) 2-17.

The sentencing court exceeded the authority granted by the Court of Appeals' mandate. Following remand, the superior lacked jurisdiction to impose deadly weapon enhancements on Counts I, VIII, IX, and X.¹³ *Wilson's Estate, supra* Accordingly, the deadly weapon enhancements must be vacated, and the case remanded for correction of the judgment and sentence. *Id*

¹² It is not clear why the Court of Appeals' decision failed to specifically mention Counts XII and XIII. On remand, the sentencing court did not impose an enhancement related to Count XII, accordingly, no enhancement relating to that charge is at issue in this appeal. Count XIII is addressed elsewhere in this brief.

¹³ The trial court determined that Count XI merged with Count VIII. Thus, even though the Court of Appeals ordered the enhancement dismissed on Count XI, that charge is not at issue in this appeal. CP 8-9

III. THE FIREARM AND DEADLY WEAPON ENHANCEMENTS WERE IMPOSED IN VIOLATION OF MR. PIERCE'S RIGHT TO DUE PROCESS AND HIS RIGHT TO A JURY DETERMINATION OF ANY FACT USED TO INCREASE THE PENALTY BEYOND THE STANDARD RANGE.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *Schaler*, at 282. Jury instructions are reviewed *de novo*. *State v Bashaw*, 169 Wash.2d 133, 140, 234 P.3d 195 (2010). Instructions must be manifestly clear because juries lack tools of statutory construction. *See, e.g., State v Kyllo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009); *State v Harris*, 122 Wash.App. 547, 554, 90 P.3d 1133 (2004).

B. In light of the court's instructions and the special verdicts returned by the jury, the sentencing court was not authorized to impose firearm or deadly weapon enhancements.

Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. U.S. Const. Amend. VI and XIV; Wash. Const. Article I, Sections 21 and 22.; *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Imposition of an enhanced sentence without a proper jury finding on the underlying facts violates an accused person's right to due process and to a jury trial. *Id., Recuenco, supra*

1. The court's instructions and special verdict forms relieved the prosecution of its burden to prove that Mr. Pierce was "armed" with a firearm or deadly weapon at the time of each crime.

Before imposing a sentencing enhancement, the trial court must instruct the jury on the state's burden to prove the "elements" required in order for the jury to return a "yes" verdict relating to the enhancement. *See, e.g., Recuenco, supra.* Firearm and deadly weapon enhancements may be imposed only if a person is "armed" with a firearm or deadly weapon. *See* RCW 9.94A.533; RCW 9.94A.825. A person is "armed" if the weapon is easily available, readily accessible, and has some nexus with the person and the crime. *State v. Brown*, 162 Wash.2d 422, 431, 173 P.3d 245 (2007) (*Brown II*). Proof of mere possession is insufficient, by itself, to establish that a person is "armed" within the meaning of the statutes, and cannot support imposition of firearm or deadly weapon enhancements. *State v. Gurske*, 155 Wash.2d 134, 138, 118 P.3d 333 (2005).

In this case, the trial court's erroneous special verdict forms undermined the instructions outlining the state's burden on the firearm and deadly weapon enhancements. The instructions did not require proof that Mr. Pierce was "armed." Instead, the special verdict forms allowed a "yes" verdict if the jury found that Mr. Pierce was "armed with, *or in possession of* a firearm at the time of the commission of the [charged]

crime...” Special Verdict Forms A, I, J, K, L, M, Supp. CP (emphasis added).¹⁴

This relieved the prosecution of its burden to establish beyond a reasonable doubt that Mr. Pierce was armed at the time of each crime. Instead, jurors could have answered “yes” even if Mr. Pierce were only in constructive possession of a firearm or other deadly weapon. *See* Instruction No. 15, Supp. CP (defining possession to include constructive possession).

Because the jury may have answered “yes” on each special verdict form without proof that Mr. Pierce was actually “armed,” the instructions and special verdict forms relieved the prosecution of its burden of proof. *Gurske, at 138*. This violated Mr. Pierce’s Fourteenth Amendment right to due process. *Blakely, supra, Recuenco, supra* Accordingly, the firearm and deadly weapon enhancements must be vacated and the case remanded to the trial court for correction of the judgment and sentence.

Id

2. The jury’s verdicts do not support imposition of firearm or deadly weapon enhancements because they do not necessarily reflect a finding that Mr. Pierce was “armed” with a firearm or deadly weapon during the commission of each crime.

¹⁴ The special verdict forms differed from those approved for use in firearm and deadly weapon cases. *See* WPIC 190 01, WPIC 190 02

The erroneous special verdict forms cannot support imposition of firearm or deadly weapon enhancements for another reason as well. Because the jury was permitted to return “yes” verdicts upon proof of mere possession, the special verdict forms do not necessarily reflect a finding that Mr. Pierce was “armed” at the time of each offense. Imposition of an enhancement without a jury determination of the underlying facts violates *Blakely* and *Recuenco*.

Since jurors did not necessarily find that Mr. Pierce was “armed” with the firearm or deadly weapon as to each count, the sentencing court should not have imposed the enhancements. *Blakely, supra, Recuenco, supra* Accordingly, the enhancements must be vacated, and the case remanded for correction of the Judgment and Sentence. *Id*

3. The imposition of a firearm enhancement on Count XIII violated Mr. Pierce’s right to due process and to a jury trial because the jury was instructed to determine whether or not he was armed with a deadly weapon.

As noted above, a sentencing enhancement may not be imposed absent proper instructions on the state’s burden to prove the “elements” required in order for an affirmative finding on a special verdict. *See, e g , Recuenco, supra*. Here, the court specifically directed jurors to determine whether or not Mr. Pierce was armed with a deadly weapon on Count

XIII. The directive came from the “to convict” instruction itself, which included the following language:

If you find the defendant guilty of Possession with Intent to Deliver a Controlled Substance, you will complete the Special Verdict Form M provided to you for this purpose. Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.

If you find that the State has proved beyond a reasonable doubt that the defendant was armed with a deadly weapon, it will be your duty to answer the special verdict “Yes.”

Instruction No. 28, Supp. CP.

The directive also stemmed from Instruction No. 36, which reads as follows:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in [Count XIII]... A pistol, revolver, or any other firearm, is a deadly weapon whether loaded or unloaded.

Instruction No. 36, Supp. CP.

Neither instruction required the jury to specifically find that Mr. Pierce was armed with a firearm. Instructions Nos. 28 and 36. Nor did the instructions make clear that a firearm enhancement could only be imposed upon proof that Mr. Pierce was armed with an *operational* firearm. *Recuenco, at 437.*

Because the jury was instructed to determine whether or not Mr. Pierce was armed with a deadly weapon, the sentencing court erred by imposing a firearm enhancement on Count XIII. *Recuenco, supra* The

enhancement must be vacated and the case remanded for correction of the judgment and sentence.¹⁵ *Id*

IV. THE FIREARM AND DEADLY WEAPON ENHANCEMENTS VIOLATED MR. PIERCE’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT’S INSTRUCTIONS IMPROPERLY REQUIRED THE JURY TO DELIBERATE TO UNANIMITY IN ORDER TO REJECT EACH SENTENCING ENHANCEMENT.

A. Standard of Review

Constitutional errors are reviewed *de novo*. *Schaler*, 282. Jury instructions are reviewed *de novo*. *Bashaw*, at 140. Instructions must be manifestly clear. *Kyllo*, at 864.

B. The court’s instructions violated Mr. Pierce’s Fourteenth Amendment right to due process by requiring the jury to deliberate to unanimity in order to reject each enhancement.

The Supreme Court has recently reaffirmed that “a nonunanimous special finding by a jury is a final decision by the jury that the State has not proved its case beyond a reasonable doubt.” *Bashaw*, at 148.

Accordingly, jurors may not be instructed that unanimity is required in order to return a special verdict on an enhancement. *Id* Such an instruction “leave[s] the jury without a way to express a reasonable doubt

¹⁵ Division I has applied a harmless error analysis under similar circumstances to uphold a firearm enhancement imposed after the jury was instructed regarding a deadly weapon enhancement. *See In re Personal Restraint of Rivera*, 152 Wash App 794, 218 P 3d 638 (2009). The *Rivera* decision appears to conflict with *Recuenco*, and should not be followed here

on the part of some jurors.” *State v Ryan*, ___ Wash.App. ___, ___, 252 P.3d 895 (2011).

Here, as in *Bashaw*, the jury was erroneously instructed that “all twelve of you must agree on the answer to the special verdict.” Instructions Nos. 7, 18, 19, 21, 22, 25, 28, Supp. CP. The “yes” verdict was therefore “[t]he result of [a] flawed deliberative process.” *Id.* at 147. Furthermore, the incorrect instruction created a manifest error affecting Mr. Pierce’s Fourteenth Amendment right to due process. Accordingly, the issue can be raised for the first time on review pursuant to RAP 2.5 (a)(3).¹⁶ *Ryan*, at ____.¹⁷

Because of the faulty instructions, it is impossible to “say with any confidence what might have occurred had the jury been properly instructed.” *Bashaw*, at 148. The deadly weapon and firearm enhancements must therefore be vacated. *Id.*

¹⁶ Even if the error were not manifest, or did not affect a constitutional right, the court should exercise its discretion and review the argument on its merits. RAP 2.5 (a), *Russell*, at 122

¹⁷ Division III has recently decided that *Bashaw* errors cannot be raised for the first time on review *State v Nunez*, 160 Wash App 150, 248 P 3d 103 (2011), *State v Bea*, ___ Wash App ___, ___ P 3d ___ (2011) This is curious, since the defendant in *Bashaw* did not object in the trial court and raised the error for the first time on review, as noted in the Court of Appeals’ opinion in that case *See State v Bashaw* 144 Wash App 196, 199, 182 P 3d 451 (2008) *reversed by Bashaw, supra* (“There was no objection to the instruction”)

V. THE TRIAL COURT ABUSED ITS DISCRETION BY SCORING COUNTS VIII, IX, AND XII SEPARATELY INSTEAD OF FINDING THAT THEY COMPRISED THE SAME CRIMINAL CONDUCT.

A. Standard of Review

A sentencing court's "same criminal conduct" determination will be reversed based on a clear abuse of discretion or misapplication of the law. *State v. Haddock*, 141 Wash.2d 103, 110, 3 P.3d 733 (2000). Failure to exercise discretion requires reversal. *State v. Grayson*, 154 Wash.2d 333, 342, 111 P.3d 1183 (2005).

B. Multiple offenses comprise the same criminal conduct if committed at the same time and place, against the same victim, with the same overall criminal purpose.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. When calculating the offender score, a sentencing judge must determine how multiple current offenses are to be scored. Under RCW 9.94A.589(1)(a),

[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime... "Same criminal conduct," as used in this subsection, 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).

The burden is on the state to establish that multiple convictions do not stem from the same criminal conduct. *State v Dolen*, 83 Wash.App. 361, 365, 921 P.2d 590 (1996), *review denied at* 131 Wash.2d 1006, 932 P.2d 644 (1997), *citing* RCW 9.94A.110; *State v Jones*, 110 Wash.2d 74, 750 P.2d 620 (1988); *State v Gurrola*, 69 Wash.App. 152, 848 P.2d 199, *review denied*, 121 Wash.2d 1032, 856 P.2d 383 (1993).

In determining whether multiple offenses require the same criminal intent, the sentencing court “should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next...” *State v Garza-Villarreal*, 123 Wash.2d 42, 46-47, 864 P.2d 1378 (1993) (quoting *State v Dunaway*, 109 Wash.2d 207, 215, 743 P.2d 1237 (1987), 749 P.2d 160 (1988)). A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. *State v Williams*, 135 Wash.2d 365, 368, 957 P.2d 216 (1998); *State v Porter*, 133 Wash.2d 177, 183, 942 P.2d 974 (1997).

- C. The sentencing court should have scored Counts VIII, IX, and XII as one offense under the “same criminal conduct” test.

Counts VIII, IX, and XII all stemmed from a single incident, in which Mr. Pierce burglarized a house and robbed its occupants, possibly at gunpoint. All three offenses took place at the same time and place. All three involved the same victims, and all three were committed with the

overall purpose of stealing property. CP 1-6; *Pierce*, at 704-707; *Garza-Villarreal*, at 47.

The evidence was therefore insufficient to establish that these three charges scored separately under RCW 9.94A.589. The court should have found Counts VIII, IX, and XII to be the same criminal conduct and scored them as a single offense.¹⁸ RCW 9.94A.589(1)(a); *Garza-Villarreal*. Had the court done so, it would have sentenced Mr. Pierce with offender scores of five (Counts II-VI, XII, and XIII) and seven (Counts I, VIII, IX, and X).¹⁹

Mr. Pierce's sentence must be vacated and the case remanded for a new sentencing hearing. *Id*

¹⁸ Counts X and XI, which each involved assault against a single victim, cannot be scored as the same criminal conduct. Although committed at the same time and place with the same overall criminal purpose, Counts X and XI did not involve the same victim as each other, nor did they involve the same victim as Counts VIII, IX, and XII. *See, e.g., State v Davis*, 90 Wn App 776, 954 P 2d 325 (1998)

¹⁹ The court would then have had the option of treating some of the crimes separately under the burglary anti-merger statute. *See* RCW 9A 52.050. This is not what the court did, its finding reflects that Counts IX (burglary) and XII (theft) were the same criminal conduct. Furthermore, the court made no mention of the anti-merger statute at sentencing. *See* RP (9/15/10) and RP (4/29/11)

VI. MR. PIERCE WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash.App. 29, 146 P.3d 1227 (2006).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); see also *State v Pittman*, 134 Wash.App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance, though it is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, at 130. Any strategy "must be based on reasoned decision-making..." *In re Hubert*, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, "[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law." *Kyllo*, at 862. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

- C. Defense counsel provided ineffective assistance by failing to argue that Counts VIII, IX, and XII comprised the same criminal conduct.

As noted above, Counts VIII, IX, and XII occurred at the same time and place, with the same overall criminal purpose, and involved the same victims. Despite this, defense counsel did not ask the sentencing court to find that they comprised the same criminal conduct. Had the trial court scored the three offenses as one, Mr. Pierce would have had a lower offender score and a lower standard range on each offense.

Counsel's unreasonable failure to request a "same criminal conduct" finding prejudiced Mr. Pierce. Accordingly, the sentence must be vacated and the case remanded for a new sentencing hearing.

Reichenbach, supra

CONCLUSION

For the foregoing reasons, the firearm and deadly weapon enhancements must be vacated and the case remanded for correction of the judgment and sentence. In addition, the base sentence for the underlying offenses must be vacated and the case remanded for resentencing with offender scores of five (Counts II-VI, XII, and XIII) and seven (Counts I, VIII, IX, and X).

Respectfully submitted on July 27, 2011.

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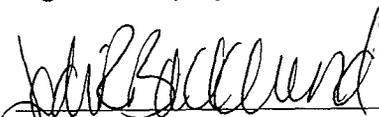
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 27, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 27, 2011.



Jodi R. Backlund, WSBA No. 22917
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