

No. 42108-9-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

WADE WILLIAM PIERCE,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Was there insufficient evidence to sustain the deadly weapon enhancement on counts VIII, IX and X?
- B. Did the trial court exceed its jurisdiction by imposing a deadly weapon enhancement during the resentencing hearing?
- C. Was Pierce's constitutional right to a jury determination of the deadly weapon enhancement violated by the trial court?
- D. Did Pierce waive raising an objection to the special verdict jury instruction by failing to object in the trial court?
- E. Did the special verdict jury instruction improperly require unanimity for the jury to answer no to the deadly weapon enhancement?
- F. Do counts VIII, IX and XII constitute same criminal conduct?
- G. Was Pierce's trial counsel ineffective in his representation of Pierce during the resentencing hearing?

II. STATEMENT OF THE CASE

The State will briefly lay out the history of the case. The facts are to be supplemented throughout the States brief.¹ The State charged Pierce with two counts of burglary in the first degree, one count of robbery in the first degree, two counts of assault in the second degree, one count of possession of methamphetamine with the intent to deliver, five counts of theft of a firearm, one count of possession of a stolen firearm and one count of theft in the first

¹ The State would also note the facts can be found at 135 Wn. App. 1014, COA No. 32788-1-II (2006) and 155 Wn. App. 701, 230 P.3d 237 (2010) (published in part).

degree. CP 1-6. There were three different incidents which led to the charges in this case. See *State v. Pierce*, 155 Wn. App. 701, 230 P.3d 237 (2010); *State v. Pierce*, 135 Wn. App. 1014 (2006)²; CP 1-6. Counts I, VIII, IX, X, XI, XII and XIII were all alleged to have been committed while armed with a deadly weapon, a firearm. CP 1-6. Pierce elected to have a jury hear his case and was found guilty on all counts. CP 65-84. Pierce was sentenced on January 7, 2005 and the trial court imposed firearm enhancements on counts I, VII, IX, X, XI, XII and XIII. Supp. CP. 2005 JS.³

Pierce appealed and all but count VII was affirmed. *State v. Pierce*, 135 Wn. App. 1014. Pierce filed a motion for post-trial relief, which was granted in part and denied in part and Pierce was resentenced in 2008. *State v. Pierce*, 155 Wn. App. at 708-09. Pierce timely filed an appeal, which was consolidated with a personal restraint petition. The result of the second appeal and the personal restraint petition ultimately found Pierce being resentenced a second time on April 29, 2011. CP 8-18. The Court

² The State acknowledges the rule prohibiting citing unpublished opinions, but due to the fact that this case has been re-litigated on appeal, there are at least two prior opinions containing the facts of the case. At the time of writing this, the State just received appellate counsel's request that the original report of proceedings be transferred to this appeal, therefore at this time the State will be relying on the prior appellate decisions for establishing the facts.

³ The State will be filing a supplemental designation of Clerk's papers to include the original judgment and sentence entered in this case in January 2005

of Appeals directed the trial court to vacate the firearm enhancements on counts I, VIII, IX, X and XI and resentence Pierce. *State v. Pierce*, 155 Wn. App. at 715. At the second resentencing hearing the trial court imposed a deadly weapon enhancement on counts I, VIII, IX, X. CP 8-18. Pierce timely appeals.

III. ARGUMENT

A. **PIERCE'S DUE PROCESS RIGHT WAS NOT VIOLATED BECAUSE THERE WAS SUFFICIENT EVIDENCE PRESENTED TO SUPPORT THE DEADLY WEAPON ENHANCEMENTS ON COUNTS VIII, IX AND X.**

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const., amend. XIV; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If “any rational jury could find the essential elements of the crime beyond a reasonable doubt”, the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence

presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State.

State v. Goodman, 150 Wn.2d 774, 781, 83 P.2d 410 (2004).

When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury’s by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Further, “the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d at 638.

The Cobles’s testified that they believed the intruder who robbed their home had a firearm. *See State v. Pierce*, 135 Wn. App. 1014 (2006). According to Jerry⁴ after the intruder shined the flashlight on Jerry and Rosita the intruder shined the flashlight at

⁴ Jerry Coble and Rosita Coble will be referred to by their first names to avoid confusion, no disrespect intended.

what Jerry believed was a gun the intruder was holding. *Id.* Jerry did admit he was not positive the person was armed with a gun, but he believed it was a gun and was not going to bet his life that it was something else. *Id.* Rosita testified that the man who came into her bedroom was armed with a gun. *Id.* When asked on cross-examination how sure she was that the man had a gun, Rosita replied, "I'm not certain, but it looked like a gun, and I reacted as if it was a gun. It looked like a gun. He pointed it at me. He pointed it, the flashlight, to the gun ... to me it was a gun and it could kill us." *Id.* Later, when Pierce was apprehended by law enforcement a handgun was discovered in his vehicle. *Id.*

The reviewing court does not substitute its judgment for that of the jury's when determining credibility. While Pierce was not immediately apprehended and the firearm found on his person after he robbed the Cobles, there was ample circumstantial evidence that Pierce was armed with gun, which is per se a deadly weapon, when he robbed the Cobles. RCW 9A.04.110(6). The evidence is viewed in the light most reasonable to the state and all inferences must be interpreted in favor of the state. *State v. Salinas*, 119 Wn.2d at 201. Therefore, there was sufficient evidence for the jury to find that Pierce was armed with a deadly weapon, a gun, beyond

a reasonable doubt. Pierce's due process rights were not violated and the deadly weapon enhancements should be affirmed.

B. THE TRIAL COURT HAD JURISIDICION TO IMPOSE THE DEADLY WEAPON ENHANCEMENTS ON COUNTS I, VIII, IX AND X.

A superior court is bound by a mandate issued by the Court of Appeals. *Harp v. American Surety Company of New York*, 50 Wn.2d 365, 368, 311 P.2d 988 (1957) (citations omitted). The superior court must strictly follow the mandate. *Id.* It is recognized by the reviewing court that there is a difference between when a mandate obligates the trial court to act without discretion and when the trial court may exercise its discretion. *Id.* at 369. When the trial court is directed, upon remand, and authorized to use its discretion it must be within the confines of the reviewing court's decision and instructions. *McCausland v. McCausland*, 129 Wn. App. 390, 399, 118 P.3d 944 (2005), *reversed on other grounds*, 159 Wn.2d 607 (2007).

In the present case the Court of Appeals, in its decision, remanded Pierce's case back to the trial court "with directions that it dismiss Pierce's firearm enhancements and resentence without the firearm enhancements on counts I, VIII, IX, X and XI." *State v. Pierce*, 155 Wn. App. at 715. The reasoning behind the decision

was that the State did not prove that the firearm was operable, a requirement for the jury to find a firearm enhancement. *Id.* at 714. The trial court followed the mandate of the Court of Appeals and dismissed the firearm enhancement. RP (4/29/11) 19-21 and 30-31; CP 8-18. The trial court, in using the discretion vested in it when resentencing, imposed the deadly weapon enhancement that was pled, proved and handed down by the jury at Pierce's trial. See, *State v. Pierce*, 155 Wn. App. at 715, footnote 11; CP 62, 63, 65, 66, 73-84. The trial court was within its jurisdiction to impose such a sentence, therefore the deadly weapon enhancement should be affirmed.

C. THE DEADLY WEAPON ENANCEMENT WAS PLED AND PROVED TO THE JURY, THEREFORE THE TRIAL COURT DID NOT VIOLATE PIERCE'S RIGHT FOR A JURY DETERMINATION OF A FACT USED TO INCREASE THE PENALTY BEYOND THE STANDARD RANGE.

1. The Deadly Weapon Enhancements On Counts I, VIII, IX and X Was Properly Pled And Proved To The Jury.

When seeking an exceptional sentence above the statutory maximum sentence, the State must plead and prove any facts necessary to impose such a sentence to a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). A sentencing enhancement,

which increases the penalty of a conviction beyond the statutory maximum must be alleged in the information and proved to a jury beyond a reasonable doubt. *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). If the trial court imposes a sentence on a defendant that is greater than authorized by the jury or statute the error is never harmless. *In re Cruze*, 169 Wn.2d 422, 432, 237 P.3d 274 (2010).

An essential element of a deadly weapon or firearm enhancement is that the person was armed with the deadly weapon or firearm. See RCW 9.94A.533. “A person is armed if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes and there is a connection between the defendant, the weapon, and the crime.” *State v. Easterlin*, 159 Wn.2d 203, 208-09, 149 P.3d 366 (2006) (citations omitted).

In the present case the State charged Pierce in the second amended information on counts I, VIII, IX and X with the enhancement of being armed with a deadly weapon. CP 1-5. In each count the information states: and in commission thereof the defendant was armed with a deadly weapon” and states a to wit with the appropriate firearm, either pistol or rifle. CP 1-7. Pierce argues that the jury instructions are flawed because the special

verdict forms do not require Pierce to be armed with a deadly weapon thereby relieving the State of its burden to prove the enhancement beyond a reasonable doubt. Brief of Appellant 16-17. Pierce further argues that the jury's verdicts do not support a deadly weapon enhancement because the verdicts do not necessarily reflect that Pierce was armed with a deadly weapon while in commission of the crimes. Brief of Appellant 17-18. The State respectfully disagrees with Pierces assertions, the deadly weapon enhancement was charged in the information, properly instructed in the jury instructions and proved to the jury.

Jury instructions are reviewed de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). A challenged jury instruction is reviewed in the context of the jury instructions as a whole. *Id.* Juries are presumed to follow the jury instructions provided to them by the trial court. *State v. Ervin*, 158 Wn.2d 746, 756, 147 P.3d 567 (2006). Jury instructions are considered inadequate if they prevent a party from arguing their theory of the case, misstate the applicable law or mislead the jury. *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002).

The jury instructions, taken as a whole, are clear that Pierce must be armed with a deadly weapon for the jury to answer yes on

the special verdict forms. The special verdict forms do state, "Was the defendant, WADE WILLIAM PIERCE, armed with, or in possession of a firearm at the time of the commission of the charge in count"... CP 66, 76, 78, 80, 82, 84. Instruction number 36 states the burden of proof and elements required to find Pierce was armed with a deadly weapon. CP 63.

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 Counts I, VIII, IX, X, XI, XII, and XIII. A person is armed with a deadly weapon if, at the time of the commission of the crime, the deadly weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there is a connection among the defendant, the crime, and the deadly weapon.

A pistol, revolver, or any other firearm, is a deadly weapon, whether loaded or unloaded.

CP 63. Taken as a whole, it is clear that the jury was properly instructed on what it must find in order to answer yes on the special verdict forms. See CP 63. The jury was properly instructed that it must find, beyond a reasonable doubt, that Pierce was **armed** with a deadly weapon. CP 63. Therefore, the jurors did find that Pierce was armed with a deadly weapon during the commission of each of the crimes and the deadly weapon enhancement should be affirmed.

2. Any Error In The Jury Instructions Were Harmless Beyond a Reasonable Doubt.

While the State is not admitting there was any error in the jury instructions, assuming arguendo that an error did occur, any error was harmless beyond a reasonable doubt. Jury instructions that omit an essential element of a crime are subject to harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002), citing *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999). The harmless error test, “[w]hen applied to an element, omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence.” *State v. Brown*, 147 Wn.2d at 341 (citation omitted).

In the present case, the uncontroverted evidence was that Pierce was armed with a deadly weapon in the commission of the burglary, robbery, assaults and theft at the Coble residence. *State v. Pierce*, 155 Wn. App. at 705; *State v. Pierce*, 135 Wn. App. 1014. The evidence is also uncontroverted that when Pierce burgled Mr. Cartwright’s house he was armed with a deadly weapon and when Pierce possessed methamphetamine with the intent to deliver he was armed with a deadly weapon. See *State v. Pierce*, 135 Wn. App. 1014. Therefore, any error in the jury instructions relieving the State of its burden of proving beyond a

reasonable doubt that Pierce was armed with a deadly weapon while in the commission of the crimes is harmless beyond a reasonable doubt.

3. Count XIII Was Pled And Proved As A Deadly Weapon Enhancement And Therefore The Sentencing Of A Firearm Enhancement Was Improper.

The State agrees with Pierce's assertion that the trial court originally improperly sentenced Pierce to a firearm enhancement on Count XIII. The State argues, as it does in the proceeding section, that the State pled and proved to the jury that Pierce was armed with a deadly weapon during the commission of each of crimes as alleged in Counts I, VIII, IX, X and XIII. See CP 1-6, 60-61, 63, 66, 76, 78, 80, 82, 84, 86. Therefore, in adopting the argument set forth above for Counts I, VIII, IX and X, the State submits that Pierce should be remanded for resentencing on Count XIII with the instruction to vacate the firearm enhancement and impose the deadly weapon enhancement as found by the jury.

D. PIERCE FAILED TO OBJECT TO THE SPECIAL VERDICT JURY INSTRUCTION GIVEN BY THE TRIAL COURT AND IS THEREFORE BARRED FROM RAISING IT FOR THE FIRST TIME ON APPEAL.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v.*

O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *State v. O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id.*, citing RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* (citations omitted). The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *State v. McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *State v. O'Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged

error. *Id.* (citations omitted). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *State v. McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

Pierce asserts in his brief that his case is analogous to *State v. Bashaw*⁵ because the instruction in this case required all 12 jurors to agree to answer to the special verdict. Brief of Appellant 21. Pierce argues the instructions created a manifest error affecting his due process right and therefore can be raised for the first time on appeal. Brief of Appellant 21. The court in *Bashaw* held that the trial court erred in giving a special verdict jury instruction that required the jury to be unanimous. *State v. Bashaw*, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). The Supreme Court did not conduct an analysis to determine whether the error was one affecting a constitutional right although it did conduct a constitutional harmless error analysis. See *State v. Bashaw*, 169 Wn.2d 133.

In *State v. Nunez* the court held that Nunez could not for the first time on appeal assign error to trial court's jury instruction requiring unanimity to acquit him of the aggravating factor. *State v.*

⁵ *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010).

Nunez, 160 Wn. App. 150, 162-64, 248 P.3d 103 (2011) (published in part). The court held that, “[b]ecause we are satisfied that the claimed instructional error was not manifest constitutional error, we will not review it for the first time on appeal.” *State v. Nunez*, 160 Wn. App. at 164. Nunez was convicted of delivery of a controlled substance. *Id.* The jury also found that Nunez had delivered the controlled substance within 1,000 feet of a school bus zone or school. *Id.* Nunez did not object to the jury instruction that required jury unanimity in regards to the special verdict for the aggravating factor. *Id.* The court stated:

[T]he aggravating factors in Mr. Nunez’s case were imposed following a deliberative procedure to which he did not object; which no court, state or federal, has found to be unconstitutional or unfair; which has been acknowledged to have procedural advantages; and which, in the lesser included crime context, is preferred by a number of jurist and courts. This is not constitutional error.

Id. It further held that if such an error in instruction was of constitutional magnitude, any such error was harmless. *Id.*

In Pierce’s case, like *Nunez*, there is no showing by Pierce that the alleged error is a manifest constitutional error. Therefore, he is precluded from raising it for the first time on appeal. The court should affirm the jury’s special verdict and the sentence enhancement.

E. THE JURY INSTRUCTIONS ONLY REQUIRED THE JURY TO BE UNANIMOUS IN FINDING THAT PIERCE HAD BEEN ARMED WITH A DEADLY WEAPON. THE JURY INSTRUCTIONS DID NOT REQUIRE UNANIMITY FOR THE JURY TO FIND THE DEADLY WEAPON ENHANCMENT WAS NOT COMMITTED.

While the State is not agreeing that Pierce can raise the issue of the unanimity required in the jury instructions for the first time on appeal, *arguendo*, the instructions in Pierce's case are distinctly different from the instructions in *Bashaw*.

Challenged jury instructions are reviewed *de novo*. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). In *Bashaw* the challenged instruction read: "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." *Sate v. Bashaw*, 169 Wn.2d at 139. The requirement for the jury to be unanimous in its decision was the fatal flaw in the jury instruction, as the jury only must be unanimous if they are to answer yes for the special verdict. *Id.* at 145-48.

In the present case the special verdict jury instruction read as follows:

You will also be furnished with special verdict forms. If you find the defendant not guilty do not use the special verdict form. If you find the defendant guilty, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied

beyond a reasonable doubt that “yes” is the correct answer. **If you have a reasonable doubt as to the question, you must answer no.**

CP 62 (emphasis added). The special verdict jury instruction used in Pierce’s case is markedly different from the one used in *Bashaw*. There is no requirement of unanimity of the jury in order to produce a “no” answer. The jury was correctly instructed if you have a reasonable doubt then you must answer no. Therefore the deadly weapon enhancements should stand.

F. THE STATE CONCEDES THAT UNDER THESE CIRCUMSTANCES COUNTS VIII, IX AND XII CONSTITUTE SAME CRIMINAL CONDUCT.

When an appellate court reviews the trial court determination whether two offenses count as same criminal conduct it will reverse the trial court’s decision only for “a clear abuse of discretion or misapplication of the law.” *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000) (citation omitted). Offenses considered same criminal conduct will not be used in a defendant’s offender score against each other and will be counted as one crime for sentencing purposes. RCW 9.94A.589(1). Same criminal conduct as used in RCW 9.94A.589(1) “means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” If one of the elements outlined in

RCW 9.9A.589(1) is missing, the offenses are not considered same criminal conduct. *State v. Haddock*, 141 Wn.2d at 110 (citation omitted). While the court will analyze whether one crime furthered the next, the court must look at the specific facts of the case. *State v. Longuskie*, 59 Wn. App. 838, 847, 807 P.2d 1004 (1990).

In the present case, Pierce was convicted of robbery in the first degree, count VIII, burglary in the first degree, count IX, and theft in the first degree, count XII. CP 8-18. All three counts stem from the incident at the Coble's residence. See *State v. Pierce*, 155 Wn. App. 701; CP 4-6. The State agrees that under these circumstances counts VIII, IX and XII constitute same criminal conduct.⁶ Therefore, due to the change in offender score, the court must remand this case back to the trial court for resentencing with instructions to correct the offender score to reflect same criminal conduct in counts VIII, IX and X.

⁶ The State would not normally concede that the burglary count would be same criminal conduct because RCW 9A.52.050 allows for other crimes committed while in the commission of a burglary may be sentenced separately. In this case, the court has already found that counts IX and X are same criminal conduct and the State did not appeal that finding. See CP 10. Therefore the State unfortunately feels that in this case, it has no choice but to concede the issue.

G. PIERCE RECEIVED EFFECTIVE ASSISTANCE FROM HIS TRIAL COUNSEL THROUGHOUT THE PROCEEDINGS, INCLUDING HIS SENTENCING HEARING.

To prevail on an ineffective assistance of counsel claim Pierce must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *State v. Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. If counsel's performance is found to be deficient, than the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

In the present case, Pierce's trial counsel's actions were reasonable. The prior appellate decisions in this case do not address same criminal conduct of Counts VIII, IX and X. Pierce's case was sent back for resentencing for the narrow purpose of vacating the firearm enhancements and resentencing due to the dismissal of the firearm enhancements. See *State v. Pierce*, 155 Wn. App. 701. Further, in the previous judgment and sentence it found that Counts IX and XII were same criminal conduct but did not include Count VIII. Supp. CP 2005 JS. For the resentencing hearing, trial counsel clearly did research, wrote a sentencing memorandum and argued to the trial court that it could not impose a deadly weapon enhancement upon Pierce. RP (4/29/11) 11-17; CP 117-121. Trial counsel's conduct and representation of Pierce, as taken as a whole when reviewing the resentencing hearing, was competent and reasonable, therefore, Pierce has not made the requisite showing that his trial counsel was ineffective.

IV. CONCLUSION

For the reasons argued above this court should remand this case for resentencing, but only to address the correction in the offender score and imposition of the deadly weapon enhancement on count XIII.

RESPECTFULLY submitted this 19th day of September, 2011.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
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Attorney for Plaintiff

LEWIS COUNTY PROSECUTOR

September 19, 2011 - 1:46 PM

Transmittal Letter

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Statement of Arrangements

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■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

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