

NO. 44572-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN DUNN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Michael H. Evans, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY¹

THE STATE FAILED TO PROVE DUNN WAS ARMED WITH A FIREARM.

In the Brief of Appellant (BOA), Jonathan Dunn argued the State failed to prove he was armed with a firearm during his offenses. Citing State v. Pierce² as support, Dunn maintained the State failed to prove the gun was operable as required.

The State attempts to distinguish Pierce on the ground that in that case, this Court reversed the firearm enhancement where the jury was not instructed on the definition of "firearm" and the jury returned special verdicts for deadly weapon enhancements instead of firearm enhancements. Brief of Respondent (BOR) at 7. This is true, but is a distinction without a difference.

The operable language of this Court's holding follows:

Here, 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. 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

¹ The State's arguments regarding the public trial right have been anticipated and sufficiently addressed in the Brief of Appellant and need not be challenged further on reply.

² State v. Pierce 155 Wn. App. 701, 714, 230 P.3d 237 (2010).

sentencing court exceeded its authority by entering a sentence that does not reflect the jury's findings. See Recuenco, 163 Wash.2d at 439, 180 P.3d 1276; accord State v. Williams-Walker, 167 Wash.2d 889, 225 P.3d 913 (2010); In re Pers. Restraint of Delgado, 149 Wash.App. 223, 237, 204 P.3d 936 (2009). We further hold that there is insufficient evidence in the record to support Pierce's firearm enhancements. RCW 9.41.010; see Recuenco, 163 Wash.2d at 437, 180 P.3d 1276; Pam, 98 Wash.2d at 754-55, 659 P.2d 454. 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 XL Pam, 98 Wash.2d at 754-55, 659 P.2d 454.

Pierce, 155 Wn. App. at 714-15 (emphasis added, footnotes omitted).

Under this analysis, it did not matter whether the jury received a correct instruction or not. The fact remains the evidence failed to establish operability. Return of special firearm verdicts would therefore be unlawful.

The State further contends that because "the enhancements in Pierce were already reversed on other grounds, the court's further holding that there was insufficient evidence for the firearm enhancements is non-binding dicta." BOR at 7.

Dunn disagrees. The quoted language above makes clear this Court gave two reasons for its holding. Courts often provide two or more reasons to support their conclusions. "The fact that a court has multiple holdings does not render any of them dicta." Washington State Farm Bureau Fed'n v. Gregoire, 162 Wn.2d 284, 319 n.2, 174 P.3d 1142 (2007)

(Chambers, J. concurring) (citing Savage v. Ash, 86 Wash. 43, 46, 149 P. 325 (1915)).

The State next asserts operability of a firearm need not be proven. This claim ignores the Supreme Court's pronouncement in State v. Recuenco, that "to prove a firearm enhancement, the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of a 'firearm[.]'" Recuenco, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008).

For these reasons, this Court should reject the State's arguments and reverse the firearm enhancements.

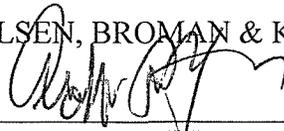
B. CONCLUSION

For the reasons set forth above and in the Brief of Appellant, this Court should remand to the trial court with directions to vacate the firearm enhancement and resentence Dunn.

DATED this 13 day of March, 2013.

Respectfully submitted,

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v.)	COA NO. 44572-7-II
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JONATHAN DUNN,)	
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF MARCH, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JONATHAN DUNN
DOC NO. 876623
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF MARCH, 2013.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

March 13, 2014 - 3:27 PM

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