

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DONSHAE EUGENE COLEMAN,

Appellant.

No. 42338-3-II

UNPUBLISHED OPINION

Johanson, J. — Donshae Eugene Coleman appeals the trial court’s imposition of a sentence enhancement, arguing that the jury instructions improperly required jurors to deliberate to unanimity before finding that the State had not proved the sentencing enhancement applied. Concluding that he fails to raise an appealable issue, we dismiss Coleman’s appeal.¹

FACTS

On March 18, 2009, the State charged Coleman by third amended information with first degree robbery while armed with a deadly weapon, assault in the second degree, possession of a stolen motor vehicle, and bail jumping. A jury convicted him as charged. It also found by special verdict that Coleman was armed with a firearm during commission of the robbery. The trial court imposed a standard range sentence and then added 60 months incarceration for the sentencing enhancement. His total sentence was 111 months.

¹ A commissioner of this court initially considered Coleman’s appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

Coleman appealed, and Division One of this court reversed his conviction for bail jumping and remanded to the superior court for resentencing. *State v. Coleman*, 155 Wn. App. 951, 231 P.3d 212 (2010), *review denied*, 170 Wn.2d 1016 (2011). He did not challenge the sentence enhancement in that appeal.

At resentencing, the trial court again imposed a standard range sentence based on the lower offender score resulting from the dismissal of the bail jumping conviction. The court again imposed the 60-month firearm sentencing enhancement, for a total of 106 months of confinement.

ANALYSIS

Coleman argues for the first time in this appeal that the trial court erred when it instructed the jury that it must be unanimous in order to find that the sentencing enhancement did not apply. *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010).² The State responds that, as Coleman failed to raise this issue at his original trial, his first appeal, or on remand, the issue is not appealable. Alternatively, the State argues that Coleman waived the *Bashaw* error by not raising it at trial.

When we remand for resentencing, the trial court's discretion is limited by the scope of the mandate. *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009); *see also* RAP 12.2. If a trial

² The jury instructions Coleman claims were in error read, in part:

If any one of you has a reasonable doubt as to the question, you must answer "no." If you unanimously have a reasonable doubt as to this question, you must answer "no."

. . . .

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision.

Supp. Clerk's Papers at 61-63 (Jury Instructions 32 and 33).

court does not exercise independent judgment on remand, there is no issue to review in an appeal following the remand because the original judgment and sentence remains final and intact. *Kilgore*, 167 Wn.2d at 40. The question is not whether independent judgment was exercised at all on remand, but rather whether independent judgment was exercised with respect to the error claimed on appeal. *State v. Barberio*, 121 Wn.2d 48, 50, 846 P.2d 519 (1993). “Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.” *Barberio*, 121 Wn.2d at 50.

Here, Division One remanded to the trial court for resentencing because it had reversed Coleman’s bail jumping conviction. Although the trial court may have exercised discretion when reducing his sentence based on Coleman’s lower standard range, it was not free to exercise discretion with respect to the firearm sentencing enhancement because state law mandated its imposition. RCW 9.94A.533(3). Because the trial court did not and, indeed, could not exercise discretion regarding the firearm enhancement, Coleman cannot now appeal from that enhancement. *Kilgore*, 167 Wn.2d at 43. Because Coleman has not raised an appealable issue, dismissal of his appeal is appropriate. *State v. Kilgore*, 141 Wn. App. 817, 827, 172 P.3d 373 (2007), *aff’d*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009).

And even if Coleman’s appeal was properly before this court, he waived his assignment of error to the jury instructions. Where an appellant raises an issue for the first time on appeal, he bears the burden of showing that (1) the error is “truly of constitutional dimension” and (2) the error was “manifest.” *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); *see also* RAP 2.5(a). Jury instruction errors requiring unanimity to answer “no” on a special sentencing-enhancement verdict form are not constitutional in nature. *State v. Grimes*, 165 Wn. App. 172,

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267 P.3d 454 (2011); *see also State v. Guzman Nunez*, 160 Wn. App. 150, 248 P.3d 103, *review granted*, 172 Wn.2d 1004, 258 P.3d 676 (2011); *State v. Ryan*, 160 Wn. App. 944, 252 P.3d 895, *review granted*, 172 Wn.2d 1004 (2011). *But see State v. Morgan*, 163 Wn. App. 341, 261 P.3d 167 (2011).

We dismiss Coleman’s appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Hunt, J.

Worswick, C.J.