IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WADE WILLIAM PIERCE, Appellant	No. 38377-2-II Consolidated with No. 38373-0-II PART PUBLISHED OPINION
In re Personal Restraint Petition of WADE WILLIAM PIERCE, Petitioner.	

Quinn-Brintnall, J. — Wade William Pierce appeals Lewis County Superior Court's denial of his motion for post-judgment relief under CrR 7.8. In addition, he contends that the trial court violated his constitutional rights against double jeopardy when it imposed firearm enhancements where the use of a weapon is an element of the underlying crime. In a statement of additional grounds (SAG),[1] Pierce contends that he was denied his constitutional right to effective counsel and he was denied a fair trial due to prosecutorial misconduct. In addition, Pierce raises

[1] RAP 10.10.

several issues in his consolidated personal restraint petition (PRP),[2] including a contention that the trial court erred by imposing firearm enhancements rather than deadly weapon enhancements. We hold that the trial court properly denied Pierce's motion for a new trial. But we further hold that the trial court erred when it imposed firearm enhancements on his convictions because there is insufficient evidence to establish that Pierce was armed with an operable firearm during the commission of the crimes. Finally, in the unpublished portion of this opinion, we hold that Pierce's remaining contentions have no merit. Accordingly, we affirm, grant in part, deny in part, and remand to the trial court for resentencing without firearm enhancements findings, which rest on insufficient evidence.

FACTS[3]

On December 31, 2003, an intruder awoke Jerry and Rosita Coble by shining a flashlight on them in their bed. The intruder was holding what appeared to be a handgun. The Cobles covered their heads as directed while the intruder ransacked and robbed their home. Both Jerry and Rosita[4] believed they saw a second person in the living room during the invasion.

Once the intruders left, Rosita looked outside and saw what she believed to be a small, black, two-door car leaving the driveway. She later saw a similar car at the police evidence garage and learned that it belonged to Pierce.

Police investigators photographed shoe prints found in snow outside the Cobles' home.

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[2] RAP 16.4.

[3] Unless otherwise noted, the facts are from this court's decision in Pierce's first appeal, *State v. Pierce*, noted at 135 Wn. App. 1014 (2006), *review denied*, 171 P.3d 1056 (2007).

[4] We use the Cobles' first names for clarity.

The investigators noted that the tire tracks in the driveway appeared to have been made by "mud-and-snow type tire[s]." Clerk's Papers (CP) (No. 38377-2-II) at 308. They were unable to recover any usable fingerprints from the Coble home. Later, the Cobles reported that the bandits stole cash, electronics, jewelry, a jewelry box, luggage, a videocassette recorder (VCR) and satellite receiver, and other personal items from their home.

On February 7, 2004, Jack Cartwright saw Pierce briefly at a local tavern. Pierce left shortly after a brief interaction with Cartwright's companion, Norma Woodard. When Cartwright returned home that evening, he discovered that someone had broken into his house and stolen six guns, along with items belonging to his daughter. Police investigators were unable to recover any usable fingerprints from Cartwright's home, but they did find two very distinct sets of footprints. They also photographed tire tracks in Cartwright's driveway.

Lewis County Sheriff's Detective Bruce Kimsey began investigating Pierce as a suspect in the Coble and Cartwright break-ins after receiving a Crime Stoppers' tip. He contacted Pierce at his residence on March 25, and asked some questions about the burglaries. Pierce's mother, Wanita Hidalgo, overheard part of the questioning.

Hidalgo testified that Pierce lived next to her until his ex-wife evicted him in April 2004. Pierce's ex-wife then informed Hidalgo that all of Pierce's things must be removed from the house. Hidalgo, her husband, and a few other people removed things from the house and brought them over to Hidalgo's residence. Hidalgo said it was "[e]verbody's stuff. He had people renting rooms there. There was all kinds of stuff." CP (No. 38377-2-II) at 309.

Pierce always had access to Hidalgo's garage, and he stored some things there. Hidalgo came to suspect that some of the items in her house were stolen. On April 19, Hidalgo called the

sheriff. With Hidalgo's written consent, Detective Kimsey searched her property. In Hidalgo's spare bedroom and in the garage, Kimsey found items taken from Cartwright and the Cobles, including Cartwright's shotgun. The police recovered other guns from Hidalgo's house, but other than the shotgun, they were not able to identify them as Cartwright's.

The following day, Hidalgo called 911 because she believed Pierce was on her property. She thought she saw him drive his car behind her house. Detective Kimsey and Inspector Smith went to Hidalgo's property. Smith contacted Pierce and interviewed him. When Kimsey arrived, he interviewed Pierce in the back of his police car. The officers arrested Pierce. The officers were unable to locate Hidalgo on the property that day. Kimsey secured the property, including the back of the house. He spotted Pierce's black Ford Probe and, through the window, he saw a suitcase that appeared to be luggage stolen in one of the burglaries. Kimsey impounded the car and later obtained a warrant to search it and the containers found therein.

Inside the car, they found more items stolen from the Cobles. Zipped inside the passenger seat, they found a .22 Ruger pistol and a magazine with multiple bullets. They also found about 90 grams of methamphetamine, a scale, a syringe, and about a dozen small plastic bindles. They found a set of work boots with tread matching the tread pattern of one of the sets of footprints outside the Coble house. When Detective Kimsey went to Pierce's house, he saw a set of tires with tread that appeared to match the tracks in the Cobles' driveway.

In a later interview, Pierce told Detective Kimsey that he had seen the shotgun under Cartwright's bed when Woodard had previously given him a tour of Cartwright's house. Pierce also said that he had seen Cartwright's firearms during this tour and that was why his fingerprints would be on Cartwright's guns. The police never recovered fingerprints from the guns. The guns

they found at Hidalgo’s house turned out not to belong to Cartwright.

Procedure

The State charged Pierce with first degree burglary of the Cartwright residence (count I), theft of five firearms taken from Cartwright (counts II-VI), and possession of a stolen firearm (count VII). For the Cobles incident, the State charged Pierce with first degree robbery (count VIII), first degree burglary (count IX), two counts of second degree assault (counts X and XI), and first degree theft (count XII). Finally, the State charged Pierce with unlawful possession of a controlled substance with intent to deliver (count XIII).

In a pretrial motion, Pierce moved to suppress all evidence discovered on April 21, 2004. Following briefing and argument by both parties, the trial court denied Pierce's motion. It ruled that the officers were legally on Hidalgo's property under the "community safety exception." CP (No. 38373-0-II) at 15-16.

After trial, the jury convicted Pierce on all counts. The special verdict forms asked the jury whether Pierce was "armed with, or in possession of a firearm at the time of the commission of the crime." CP (No. 38373-0-II) at 19, 21, 23, 25, 27, 29, 37. By these special verdicts, the jury found that Pierce was armed with a firearm during the burglaries (counts I and VIII), during the possession of a controlled substance (count XIII), and during the first degree robbery (count IX), two counts of second degree assault (counts X and XI), and first degree theft (count XII).

Pierce appealed. We considered Pierce's contentions that (1) the information was deficient, (2) the evidence was insufficient for many of the counts,[5] (3) he was denied the right to

[5] Pierce did not challenge the sufficiency of the evidence supporting his theft conviction in his initial appeal. *See Pierce*, 135 Wn. App. 1014. He alleged that there was insufficient evidence showing that (1) he was armed with a deadly weapon, (2) he participated in the first degree burglary, (3) he committed theft of firearms at the Cartwright residence (five convictions for theft of a firearm), (4) he assaulted the Cobles, and (5) he possessed methamphetamine with intent to deliver.

a unanimous jury verdict on the burglary and assault charges because the evidence was insufficient to support one or more of the alternative means of committing those offenses, (4) the jury instruction defining knowledge was improper, (5) the trial court improperly calculated his offender score, and (6) the firearm enhancement was improper. In an unpublished opinion filed on October 10, 2006, we affirmed all of Pierce's convictions except the stolen firearm conviction, which we reversed because the information on that charge was deficient. We remanded Pierce's case for resentencing with instructions to vacate and dismiss without prejudice the possession of a stolen firearm charge. We issued our mandate terminating review on October 11, 2007.

On May 14, 2008, Pierce filed a motion for post-trial relief under CrR 7.5, contending that newly discovered 911 call evidence warranted a new trial. In a later reply brief filed on June 11, 2008, Pierce amended his motion for new trial and argued that he was entitled to post-trial relief under CrR 7.8 based on the same newly discovered 911 call evidence. On August 8, 2008, after briefing and argument, the trial court denied his motion for a new trial.

The trial court resentenced Pierce on September 12, 2008. At the sentencing hearing, Pierce raised various issues regarding the firearm enhancements and merger of his two second degree assault convictions into the first degree robbery conviction. Specifically, his counsel stated:

> For the Coble matter, our request is that under the *Taylor*[6] and *Freeman*[7] cases to merge into two offenses rather than three. We believe we can do nothing about there being two assaults and it cannot therefore get merged down to one, believe me, I've tried to find any authority possible there. . . . Robbery in this case is by being armed with a firearm. And the Assault II, both the Assault II's in this case, were assaulted another with a deadly weapon. So because we're talking about a

[6] *State v. Taylor*, 90 Wn. App. 312, 950 P.2d 526 (1998).

[7] *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005).

> deadly weapon, firearm in both those matters, it just seems to fit the facts of the case, your Honor, that the assault was committed in furtherance of the robbery.

Report of Proceedings (RP) (Sept. 12, 2008) at 3-4.

The trial court granted Pierce's motion to merge one conviction for second degree assault into his first degree robbery conviction. It then resentenced Pierce, excluding the possession of a stolen firearm charge (count VII) and one of the second degree assault charges (count XI). Pierce's resentencing resulted in 150 months confinement for the standard range plus 252 months confinement for the firearm enhancements, for a total of 402 months confinement.

Pierce appeals. In his direct appeal, he argues that the trial court erred when it denied his motion for a new trial based on newly discovered evidence under CrR 7.8. He further argues that his firearm enhancements violate his constitutional right against double jeopardy where the use of a weapon is an element of the underlying crimes. Pierce also raises several issues in a SAG, including ineffective assistance of counsel and prosecutorial misconduct. Finally, in addition to his direct appeal, Pierce filed a PRP, in which he raises a multitude of issues. We consolidated Pierce's direct appeal and PRP for review.

ANALYSIS[8]

Motion for New Trial

In his direct appeal, Pierce contends that the trial court erred when it denied his motion for relief from judgment under CrR 7.8.[9] We disagree.

We review a CrR 7.8 ruling for an abuse of discretion, and we will not reverse a denial

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[8] Pierce assigns no error to the trial court's findings of fact or conclusions of law in his direct appeal.

[9] Pierce does not challenge the trial court's denial of his motion for a new trial under CrR 7.5.

absent an abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 642, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991). A trial court abuses its discretion when it bases its decisions on untenable or unreasonable grounds. *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007).

A trial court will not grant a new trial on the basis of newly discovered evidence unless the moving party demonstrates that the evidence "(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; *and* (5) is not merely cumulative or impeaching." *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981) (alteration in original). The absence of any one of these factors is grounds to deny a new trial. *Williams*, 96 Wn.2d at 223. Here, Pierce fails to meet his burden.

Relying on *State v. Slanaker*, 58 Wn. App. 161, 791 P.2d 575, *review denied*, 115 Wn.2d 1031 (1990), Pierce argues that the 911 call documents qualify as newly discovered evidence which by due diligence could not have been discovered before trial. But *Slanaker* is easily distinguished.

In *Slanaker*, the defendant and his roommate testified to the defendant's alibi at trial. 58 Wn. App. at 162-63. The State impeached their testimony by arguing from evidence that both men had motive to lie. *Slanaker*, 58 Wn. App. at 163. The defendant knew that two other witnesses could corroborate his alibi, but he could not locate those two witnesses before trial. *Slanaker*, 58 Wn. App. at 163. He was, however, able to locate the two witnesses after trial and moved for a new trial on newly discovered evidence grounds. *Slanaker*, 58 Wn. App. at 163. The trial court granted Slanaker's motion. *Slanaker*, 58 Wn. App. at 163.

Division One of this court affirmed. *Slanaker*, 58 Wn. App. at 162. It determined that,

based on the record, there was no likelihood that the two newly discovered witnesses could have been found before trial with due diligence. *Slanaker*, 58 Wn. App. at 165. Further, it determined that the newly discovered witnesses' alleged impartial alibi testimony could be extremely significant in light of the State's impeachment of Slanaker's and his roommate's testimony. *Slanaker*, 58 Wn. App. at 168. Accordingly, Division One held that the trial court did not abuse its discretion when it granted Slanaker's motion for a new trial. *Slanaker*, 58 Wn. App. at 168-69.

Contrary to the facts of *Slanaker*, the record here suggests that Pierce could have reasonably discovered the 911 call documentation before trial had he exercised due diligence. But even if Pierce could establish that he could not have reasonably discovered the 911 call documentation by due diligence before trial, he has not established that the evidence would likely change the trial result, is material, and is not merely cumulative or impeaching. *See Williams*, 96 Wn.2d at 223.

First, it is unlikely that admission of the 911 call documentation would have changed the outcome of the trial. *See Williams*, 96 Wn.2d at 223. Pierce argues that the 911 call documentation would prove that the police officers were not acting under the community caretaking exception to the warrant requirement. But the 911 call documentation does not establish that the detectives were informed of or knew that Hidalgo was at some other place during the events in question. As the trial court stated, "[t]here is no showing that the whereabouts of Ms. Hidalgo were relayed to the detectives, and without that, it is irrelevant whether the dispatch center knew where she was or that it was a different location or that it was a markedly different location or that she hadn't returned to that particular spot." RP (Aug. 8,

2008) at 34-35.

Likewise, we question whether the 911 documentation is material or admissible. *See Williams*, 96 Wn.2d at 223. The only purpose for admitting the 911 call documentation would be to impeach Inspector Smith's and Detective Kimsey's credibility. But newly discovered evidence that is merely cumulative or impeaching is not sufficient grounds to grant a new trial. CrR 7.8; *Williams*, 96 Wn.2d at 223.

Pierce's self-serving declarations do not support his contention that the 911 call documentation could not have been discovered before trial, would have likely changed the trial outcome, was material and admissible, and was not merely cumulative or impeaching evidence. *See Williams*, 96 Wn.2d at 223.[10] The trial court did not abuse its discretion when it denied his motion for a new trial.

Personal Restraint Petition

We now turn to Pierce's consolidated PRP. As a personal restraint petitioner, Pierce may not renew an issue that he raised and we rejected on direct appeal unless the interests of justice require relitigation of that issue. *In re Pers. Restraint of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). He may raise new issues, however, including both errors of constitutional magnitude and nonconstitutional errors. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990); *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 87, 660 P.2d 263 (1983).

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[10] Because the evidence was merely impeaching, we do not address Pierce's SAG contention that he was denied the effective assistance of counsel because his defense counsel failed to subpoena law enforcement officers for the CrR 7.8 hearing. *See State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (To establish ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient and (2) the deficient performance resulted in prejudice.).

In the PRP context, to prevail on a claim of constitutional error, Pierce must demonstrate actual and substantial prejudice. *In re Pers. Restraint of Mercer*, 108 Wn.2d 714, 721, 741 P.2d 559 (1987). And to prevail on a nonconstitutional claim, he must show "a fundamental defect which inherently results in a complete miscarriage of justice." *In re Cook*, 114 Wn.2d at 812. Regardless of whether he bases his challenges on constitutional or nonconstitutional error, Pierce must support his petition with facts or evidence supporting his claims of unlawful restraint and not rely solely on conclusory allegations. *In re Cook*, 114 Wn.2d at 813-14.

A. Firearm Enhancements

Pierce raises an issue that he previously raised in his initial appeal. *See State v. Pierce*, noted at 135 Wn. App. 1014, 2006 WL 2924475 at *11-12, *review denied*, 171 P.3d 1056 (2007). He contends that the trial court erred by imposing a sentence for a firearm enhancement rather than a deadly weapon enhancement. Pierce maintains that the State charged him by information with being "armed with a deadly weapon" as to counts I, VIII, IX, X, and XI, and the jury was instructed on deadly weapon enhancements as to counts I, VIII, IX, X, and XI; however, the trial court sentenced him to firearm enhancements. Thus, he concludes that under *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008), the sentencing court erroneously imposed firearm enhancements instead of deadly weapon enhancements on counts I, VIII, IX, X, and XI. In arriving at this conclusion, Pierce implies that the interest of justice requires relitigation of this issue. *See In re Taylor*, 105 Wn.2d at 688.

We agree, although on slightly different grounds, that the interest of justice requires reconsideration of this issue. "[I]n order 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': 'a weapon or device from which a projectile may be fired by an explosive such as gunpowder.'" *Recuenco*, 163 Wn.2d at 437 (quoting 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.10.01 (Suppl. 2005)). To uphold a firearm enhancement, the State must present the jury with sufficient evidence to find a firearm operable under this definition. *Recuenco*, 163 Wn.2d at 437 (citing *State v. Pam*, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988)).

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.[11] 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. *See Recuenco*, 163 Wn.2d at 439; *accord State v. Williams-Walker*, 167 Wn.2d 889, ___ P.3d ___ (2010); *In re Pers. Restraint of Delgado*, 149 Wn. App. 223, 237, 204 P.3d 936 (2009). We further hold that there is insufficient evidence in

[11] During oral argument, the State did not contend that it presented any evidence that Pierce had used an operable firearm during the commission of his offenses but instead argued that it was not required to have the weapon in order to support a firearm enhancement. This may be true when there is other evidence of operability, such as bullets found, gunshots heard, or muzzle flashes. Although the evidence is sufficient to prove an element of the offense of robbery or burglary or a deadly weapon enhancement, where proof of operability is not required, the evidence here is insufficient to support the imposition of a firearm sentencing enhancement where proof of operability is required. *See Recuenco*, 163 Wn.2d at 437; *Pam*, 98 Wn.2d at 754-55.

the record to support Pierce's firearm enhancements.[12] RCW 9.41.010; *see Recuenco*, 163 Wn.2d at 437; *Pam*, 98 Wn.2d at 754-55. 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. *Pam*, 98 Wn.2d at 754-55.[13]

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Additional PRP Issues

Pierce raises several additional issues in his PRP. We briefly address each issue in turn.

A. Motion to Suppress

Pierce contends that the trial court violated his constitutional rights under the Fourth Amendment of the U.S. Constitution and article I, section 7 of the Washington Constitution when

[12] Although the record on appeal does not contain the full trial transcript, because the State does not assert that it presented any evidence that the firearm was operable and asserts that it was not required to do so, it cannot meet its burden to prove that failing to instruct the jury on this element was harmless beyond a reasonable doubt. *See State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988) (a jury instruction that omits an element of the offense is subject to constitutional harmless error analysis); *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997) (State bears the burden of proving constitutional errors harmless beyond a reasonable doubt).

[13] Because we vacate Pierce's firearm enhancements, we do not address his contention that his firearm enhancements violate double jeopardy. *But see State v. Kelley*, 168 Wn.2d 72, ___ P.3d ___ (2010) (holding that the imposition of a firearm enhancement does not violate double jeopardy when an element of the underlying offense is use of a firearm). Moreover, we do not address his argument that he was denied the effective assistance of counsel on appeal because his appellate counsel failed to challenge the firearm enhancements. *In re Matter of Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983) ("A case is moot if a court can no longer provide effective relief.").

it denied his suppression motion. He argues that the trial court erroneously justified the officers' initial search under the community caretaking function.

Warrantless searches and seizures may be permitted within the confines of "'a few specifically established and well-delineated exceptions'" to the warrant requirement. *State v. Evans*, 159 Wn.2d 402, 407, 150 P.3d 105 (2007) (quoting *State v. Chrisman*, 100 Wn.2d 814, 817, 676 P.2d 419 (1984)). The community caretaking function is one such exception. It arises when police are serving in their role as community caretakers. *State v. Kinzy*, 141 Wn.2d 373, 394, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104 (2001). Under the community caretaking function exception, a warrantless search may be permissible when necessary for the purpose of rendering aid or performing routine checks on health and safety. *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004). This exception applies when "'(1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched.'" *State v. Menz*, 75 Wn. App. 351, 354, 880 P.2d 48 (1994) (quoting *State v. Gocken*, 71 Wn. App. 267, 276-77, 857 P.2d 1074 (1993), *review denied*, 123 Wn.2d 1024 (1994)), *review denied*, 125 Wn.2d 1021 (1995).

Here, the record supports the trial court's conclusion that the officers entered Hidalgo's property under the community caretaking exception. They were responding to Hidalgo's 911 call that Pierce was on her property; there is no indication in the record that the officers knew Hidalgo was not on the property at the time. When they entered her yard and subsequently noticed Pierce's car, they were responding to her 911 call in their capacity as community caretakers. The

trial court did not err when it denied Pierce's motion to suppress. *In re Cook*, 114 Wn.2d at 810, 813-14. We deny relief on this ground.

B. Double Jeopardy

Pierce also asserts that the trial court put him twice in jeopardy for the same offense, thereby violating the Fifth Amendment of the U.S. Constitution and article 1, section 9 of the Washington Constitution. He argues that his second degree assault (count X) must merge into his first degree robbery (count VIII) because the assault was incidental to the robbery. The State disagrees, arguing that because the trial court already merged one of the second degree assaults (count XI) into the first degree robbery (count VIII), it is inappropriate to also merge the second degree assault (count X) into the first degree robbery (count VIII). The charges at issue stem from the Coble incident.

We review double jeopardy questions de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). The State may bring multiple charges arising from the same criminal conduct in a single proceeding.[14] *State v. Michielli*, 132 Wn.2d 229, 238, 937 P.2d 587 (1997). But trial courts may not enter multiple convictions for the same offense without offending double jeopardy. *State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983). At issue in any double jeopardy analysis is whether the legislature intended to impose multiple punishments on two or more convictions. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815-16, 100 P.3d 291

[14] We note that Pierce makes no contention that his first degree robbery conviction and his remaining second degree assault conviction constitute the same criminal conduct. Same criminal conduct requires an analysis that is separate and distinct from the double jeopardy analysis. *State v. French*, 157 Wn.2d 593, 611, 141 P.3d 54 (2006). The sole inquiry in the vast majority of same criminal conduct cases is whether the trial court clearly abused its discretion or misapplied the law. *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440, *cert. denied*, 498 U.S. 838 (1990); *see* RCW 9.94A.589(1)(a) (same criminal conduct clause).

(2004).

Pierce contends that we must apply the merger doctrine to his first degree robbery conviction and his remaining second degree assault conviction. The merger doctrine is a rule of statutory construction used to determine whether the legislature intended to authorize multiple punishments for a single act. *Freeman*, 153 Wn.2d at 771-72. Under the merger doctrine, when a particular degree of crime requires proof of another crime, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime. *See Freeman*, 153 Wn.2d at 772-73; *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). A separate conviction for the included crime will not stand unless it involved an injury to the victim that is separate and distinct from the greater crime. *Johnson*, 92 Wn.2d at 680. Further, multiple punishments for crimes that appear to merge will not violate the prohibition on double jeopardy if the legislature expressed its intent to punish each crime separately. *Freeman*, 153 Wn.2d at 778.

Here, neither Pierce nor the State contends that the trial court erred when it merged one second degree assault conviction with Pierce's first degree robbery conviction. Instead, Pierce argues that the trial court should have merged both second degree assault convictions with the first degree robbery conviction.[15] We disagree.

The jury convicted Pierce on two charges of second degree assault under RCW 9A.36.021(1)(c) for the incidents at the Coble residence that occurred on December 31, 2003. A person is guilty of second degree assault if he "[a]ssaults *another* with a deadly weapon." RCW 9A.36.021(1)(c) (emphasis added). This plain language indicates that the legislature intended to

[15] During the 2008 resentencing hearing, Pierce argued only that one of the second degree assault charges merged into the first degree robbery charge. The trial court agreed and ultimately merged one second degree assault charge (count XI) into the first degree robbery charge (count VIII).

measure punishment by the number of individuals who were victims. *See State v. Smith*, 124 Wn. App. 417, 434, 102 P.3d 158 (2004) (holding that the defendant's convictions of three second degree assaults based on her single act of firing a gun at a car containing three passengers did not violate constitutional principles of double jeopardy), *aff'd*, 159 Wn.2d 778, 154 P.3d 873 (2007); *State v. Clark*, 117 Wn. App. 281, 285, 71 P.3d 224 (2003) (construing "another" to indicate that the legislature intended to measure units of prosecution by number of victims and not each accident under the vehicular assault statute, RCW 46.61.522(1)(a)), *aff'd by State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005).

Here, there were two victims of second degree assault—Jerry and Rosita Coble. Both Jerry and Rosita testified at trial and there was sufficient evidence supporting both second degree assaults. Because the plain language of RCW 9A.36.021(1)(c) indicates that the legislature intended to punish an assault on each victim separately and because the State does not challenge the trial court's decision to merge one of Pierce's second degree assault convictions with his first degree robbery conviction, we see no basis for requiring that Pierce's remaining second degree assault conviction merge with his first degree robbery conviction to avoid offending double jeopardy principles.

Our conclusion complies with our Supreme Court's recent decision in *State v. Kier*, 164 Wn.2d 798, 194 P.3d 212 (2008). There, the State charged the defendant with first degree robbery and second degree assault arising from a carjacking incident wherein the defendant pointed a gun at both the driver and passenger and then stole the car. *Kier*, 164 Wn.2d at 802-03. The Supreme Court framed the issue as "whether Kier's second degree assault conviction merges into his first degree robbery conviction, where the carjacking incident giving rise to both charges

involved two victims, and where the prosecutor in closing argument identified the driver as the victim of the robbery and the passenger as the victim of the assault." *Kier*, 164 Wn.2d at 805. The court concluded that the convictions merged "in light of the way [the] case was charged and presented to the jury." *Kier*, 164 Wn.2d at 805.

The State charged Kier with first degree robbery of the passenger and the driver and second degree assault of the passenger. *Kier*, 164 Wn.2d at 808. The evidence at trial demonstrated that the passenger was a victim of the assault and the robbery; the instructions did not specify that the jury was to consider only the driver a victim of the robbery; and the jury was "properly instructed to base its verdict on the evidence and instructions and not on the arguments of counsel." *Kier*, 164 Wn.2d at 813. The State failed to clearly identify the passenger as the victim of the assault until closing argument. *Kier*, 164 Wn.2d at 813. The Supreme Court concluded that because no clear election had been made outside of closing argument, the verdict was ambiguous and the rule of lenity[16] required merger of the convictions. *Kier*, 164 Wn.2d at 813.

Here, however, the State provided evidence that both Jerry and Rosita Coble were victims of the robbery. It was not required to elect a specific victim of the robbery because "[p]roof of robbery does not require the specific identity of the victim or victims." *Kier*, 164 Wn.2d at 812 (citing *State v. Levy*, 156 Wn.2d 709, 722, 132 P.3d 1076 (2006)). Furthermore, the State provided evidence that both Rosita and Jerry were victims of independent second degree assaults. In other words, here, the State did not charge Pierce with the assault of only one victim. There

[16] Under the rule of lenity, any ambiguity in the jury's verdict must be resolved in the defendant's favor. *Kier*, 164 Wn.2d at 811-12.

were two victims and two second degree assaults. There is no ambiguity in the jury's verdict. Furthermore, the trial court merged one of the second degree assault convictions with the first degree robbery conviction. The State does not challenge the trial court's merger decision.[17] We see no legitimate constitutional requirement that the remaining second degree assault merge with the first degree robbery conviction. We deny relief on these grounds.[18]

C. Unanimity Instruction - Theft and Robbery

Pierce next complains that his first degree theft (count XII) and first degree robbery (count VII) convictions are unsupported by evidence sufficient to identify the property that was the subject of those crimes. Additionally, he contends that the trial court should have supplied a unanimity instruction for those charges.

Contrary to Pierce's contention, a unanimity instruction was not required in this case. A unanimity instruction is not necessary where evidence demonstrates a continuing course of conduct. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (citing *State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173 (1984)). To determine whether a continuing course of conduct constitutes a single charged count, a court evaluates the facts in a commonsense manner considering (1) the time elapsed between the criminal acts and (2) whether the different acts involved the same parties, the same location, and the same ultimate purpose. *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395, *review denied*, 129 Wn.2d 1016 (1996). This case presents

[17] The first degree robbery (count VIII) was charged by assault and by deadly weapon. The State cited RCW 9A.56.200(1)(a) generally.

[18] In light of our holding, we do not address Pierce's contention in his PRP that he was denied effective assistance of counsel because his appellate counsel failed to raise this issue on appeal. *See In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 329, 823 P.2d 492 (1992) (to obtain relief, a petitioner must show that he was actually and substantially prejudiced by an error).

neither situation. A unanimity instruction was neither required nor was the State required to make an election. *See Handran*, 113 Wn.2d at 17; *Love*, 80 Wn. App. at 361.

The crux of Pierce's challenge to his first degree theft conviction seems to be that the State failed to sufficiently prove that the value of the property was $1,500 or more, as required for a first degree theft. *See* former RCW 9A.56.030(1)(a) (1995).

The evidence sufficiency test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. And we "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

A defendant is guilty of first degree theft if he commits theft of property exceeding $1,500 in value. Former RCW 9A.56.030(1)(a). Theft is defined as "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him of such property or services." Former RCW 9A.56.020(1)(a) (1975).

Here, Pierce has failed to provide the trial transcripts to support his contention that the State failed to establish that the property was worth $1,500 or more. Accordingly, we decline to reach the merits of his contention. RAP 16.7(a)(2)(i); *In re Cook*, 114 Wn.2d at 813-14.

As to the first degree robbery[19] charge, Pierce alleges, in a sweeping conclusory statement,

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[19] The jury convicted Pierce of first degree robbery in violation of RCW 9A.56.200(1). That section defines the offense by reference to the underlying crime of robbery. RCW 9A.56.190 defines robbery:

> A person commits robbery when he unlawfully takes personal property from the

that the State failed to identify the personal property it relied on for its conviction. But as we discussed above, viewing the evidence in the light most favorable to the State, a reasonable trier of fact could have found that Pierce took personal property from the Cobles; the fact of the taking, not the value of the items, is sufficient to convict him of first degree robbery. *See Salinas*, 119 Wn.2d at 201; *see also In re Cook*, 114 Wn.2d at 813-14. Accordingly, we deny relief on this ground.[20]

D. Sufficiency of Evidence

Pierce additionally contends that there is insufficient evidence to support *all* of his convictions. To support this contention, he argues that the footprint evidence and the tire track evidence found outside of the Cobles' residence and the Cartwright residence were insufficient to convince a reasonable trier of fact that he was present on those properties on the incident dates.

Pierce relied on this same argument during his original appeal when he argued that there was insufficient evidence to support the firearm enhancements. *Pierce*, 2006 WL 2924475 at *4.

> person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone.

[20] Because we hold there was no error, we do not address Pierce's contention that he was denied effective assistance of counsel because his defense counsel failed to request a unanimity instruction at trial. *See In re St. Pierre*, 118 Wn.2d at 329.

We rejected this argument and held that when the challenged evidence is viewed in the light most favorable to the State, a jury could reasonably conclude that Pierce participated. *Pierce*, 2006 WL 2924475 at *4. Although he again challenges the evidence in his PRP, he has not attempted to establish that the interests of justice require us to relitigate the sufficiency of the footprint and tire track evidence. *See In re Taylor*, 105 Wn.2d at 688. Therefore, we refuse to analyze the merits of Pierce's contention that insufficient evidence supports his convictions. *See In re Taylor*, 105 Wn.2d at 688.

E. Ineffective Assistance of Counsel

Finally, Pierce makes various ineffective assistance of counsel claims, in addition to the ones noted above. He fails to support his remaining ineffective assistance of counsel claim with persuasive reasoning or anything beyond bare and conclusory allegations. He cannot meet his burden of proving actual and substantial prejudice from these alleged errors based on conclusory allegations, bare allegations, and unpersuasive reasoning. *See In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992). Accordingly, we hold that Pierce has not shown he was denied the effective assistance of counsel at trial or during his initial appeal. We deny relief on these grounds.

Lastly, in his SAG, Pierce contends that he was denied his constitutional right to a fair trial because the prosecutor engaged in misconduct. He maintains that the prosecutor (1) solicited false testimony from law enforcement officers during the CrR 3.5 hearing and at trial; and (2) called Pierce a liar, commented on his failure to testify, and relied on prejudicial facts not in evidence during closing arguments. These arguments are meritless.

A defendant claiming prosecutorial misconduct must establish the impropriety of the prosecutor's comments and their prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Comments are prejudicial only where "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). A defendant who fails to object to an improper comment waives any error unless the comment is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice" that a curative instruction could not have neutralized the prejudice. *Brown*, 132 Wn.2d at 561. In closing argument, the State has wide latitude in drawing reasonable inferences from the evidence, including commenting on the credibility of witnesses based on evidence in the record. *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995), *review denied*, 129 Wn.2d 1012 (1996).

Here, Pierce fails to show prejudice. Significantly, the record contains only an excerpt of Detective Kimsey's testimony from the CrR 3.5 hearing. It does not include transcripts from the parties' closing arguments. Accordingly, the record on appeal is insufficient for us to analyze Pierce's prosecutorial misconduct claims. *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

In conclusion, we hold that the trial court properly denied Pierce's motion for a new trial. But we further hold that the trial court erred when it imposed firearm enhancements on his convictions because there is insufficient evidence establishing that Pierce was armed with an operable firearm during the commission of the crimes. Finally, we hold that Pierce's remaining

contentions have no merit. Accordingly, we affirm, grant in part, deny in part, and remand to the trial court for dismissal of Pierce's firearm enhancements and resentencing.

QUINN-BRINTNALL, J.

We concur:

HOUGHTON, J.

VAN DEREN, C.J.