

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

THURMAN FINLEY SHERRILL,

Appellant.

No. 41441-4-II

UNPUBLISHED OPINION

Johanson, J. — Thurman Sherrill appeals the trial court’s resentencing on a 2003 first degree assault conviction, specifically the firearm sentencing enhancement. He asserts that the trial court improperly refused to consider his argument that the sentencing enhancement should be vacated under *State v. Bashaw*¹ and that the trial court erred in imposing the sentencing enhancement. We affirm.

FACTS

In 2002, the State charged Thurman Sherrill with first degree assault,² with a firearm sentencing enhancement,³ and first degree unlawful possession of a firearm

¹ 169 Wn.2d 133, 234 P.3d 195 (2010).

² RCW 9A.36.011(1)(a).

³ Former RCW 9.94A.510(3)(a) (Supp. 2001).

⁴ for shooting a man four times.

A jury convicted Sherrill on both counts and found by special verdict that he had committed the assault while armed with a firearm. In 2003, the trial court sentenced Sherrill within the standard range, and it imposed the mandatory 60-month sentencing enhancement on the assault conviction.

In 2009, we granted Sherrill's personal restraint petition (PRP) challenging a 1996 drug conviction. We remanded the 1996 case for Sherrill to withdraw his guilty plea; and, on remand, the State dismissed the case. Sherrill then appealed his 2003 sentence for his 2002 case, arguing that the judgment and sentence was facially invalid because it was based on a now-incorrect offender score that had included the now-dismissed 1996 drug conviction. The State agreed that the 2003 judgment and sentence was invalid and that Sherrill was entitled to resentencing with his corrected offender score. We again remanded to the trial court for resentencing.

At resentencing in 2010, Sherrill argued that he was entitled, not only to a corrected offender score, but also to the withdrawal of the firearm enhancement because under *Bashaw* the sentencing enhancement jury instruction improperly suggested a unanimity requirement. The trial court heard arguments regarding whether imposition of the mandatory sentencing enhancement could be addressed at resentencing. Ultimately, the trial court determined that the only issue on remand was to correct Sherrill's offender score and impose a sentence within the standard range. The trial court recalculated the offender score, sentenced Sherrill within the standard range, and added the mandatory 60-month sentencing enhancement to the first degree assault sentence.

⁴ Former RCW 9.41.040(1)(a) (1996).

Sherrill appeals.

ANALYSIS

I. Refusal to Consider Appellant's Arguments

Sherrill asserts that the trial court erred and violated RAP 12.2 and our remand order by applying the firearm sentencing enhancement on remand. We disagree.

Appellate court actions govern all subsequent proceedings in any trial court. RAP 12.2. Following a remand for resentencing, a trial court's discretion is limited by the scope of the appellate court's mandate. *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). And, trial courts must strictly comply with directives from appellate courts that leave no discretion to the trial court. *State v. Schwab*, 134 Wn. App. 635, 645, 141 P.3d 658 (2006), *aff'd*, 163 Wn.2d 664, 185 P.3d 1151 (2008). Appellate courts apply an abuse of discretion standard in reviewing a trial court's resentencing decision on remand. *See Kilgore*, 167 Wn.2d at 42-43.

Where a trial court exercises no independent judgment on remand, there is no issue to review on appeal because the original judgment and sentence remains final and intact. *Kilgore*, 167 Wn.2d at 40. Where one portion of a sentence is found to be erroneous, that erroneous portion does not undermine the otherwise valid part of the sentence. *State v. Rowland*, 160 Wn. App. 316, 328, 249 P.3d 635, *review granted*, 172 Wn.2d 1014 (2011). And, we may remand for resentencing due to an erroneous offender score but leave otherwise valid sentences intact. *Rowland*, 160 Wn. App. at 328; *see Kilgore*, 167 Wn.2d at 37 (“[T]he finality of that portion of the judgment and sentence that was correct and valid at the time it was pronounced’ is unaffected by the reversal of one or more counts.” (quoting *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 34,

604 P.2d 1293 (1980)). This was the case here.

The trial court properly refused to hear Sherrill's arguments for invalidating his special firearm sentencing enhancement because (1) reconsideration of the mandatory sentencing enhancement would have exceeded the scope of our resentencing mandate; and, (2) the imposition of the special enhancement was statutorily mandated rather than imposed at the trial court's discretion.

First, we remanded to the trial court for resentencing because the trial court had applied an inaccurate offender score in sentencing Sherrill.⁵ We, however, did not remand for reconsideration of the 60-month sentencing enhancement—part of his sentence not influenced by his offender score. Therefore, the trial court would have improperly exceeded the scope of our mandate on remand had it altered the sentencing enhancement. *See Rowland*, 160 Wn. App. at 328. On remand, we limited the trial court's review to correcting sentencing errors resulting from the original offender score miscalculation.

Second, Sherrill argues, for the first time on appeal, that the trial court's jury instructions about the sentencing enhancement special verdict were improper. But, he supports his argument with cases involving challenges to a trial court exercising its discretion during sentencing. *See State v. White*, 123 Wn. App. 106, 97 P.3d 34 (2004) (affirming the trial court's discretion to decline imposing a Drug Offender Sentencing Alternative sentence on remand, after having

⁵ Specifically, we explained in the order:

The State concedes that the judgment and sentence in the 2002 case is facially invalid and that Sherrill is entitled to be resentenced without inclusion of the conviction in the now-dismissed 1996 case in his criminal history. We accept the State's concession and remand to the trial court for resentencing.

Clerk's Papers at 153.

previously imposed it); *State v. Harrison*, 148 Wn.2d 550, 61 P.3d 1104 (2003) (reversing a discretionary exceptional sentence imposed by the trial court). These cases demonstrate that a trial court may, on a remand for resentencing, reevaluate discretionary sentences; but, Sherrill's case differs.

Here, the trial court could not exercise independent discretion in applying the sentencing enhancement, as state law mandated its imposition. RCW 9.94A.533(3). Therefore, the trial court did not abuse its discretion in refusing to consider Sherrill's arguments regarding whether or not the new sentence should include the sentencing enhancement. *See Kilgore*, 167 Wn.2d at 40.

II. Validity of the Sentencing Enhancement

Sherrill argues that the trial court erred by imposing a special 60-month sentence enhancement because the enhancement was invalid and improper under *Bashaw*, 169 Wn.2d 133. The State responds that Sherrill failed to preserve this issue for appeal; and, even if he did preserve the issue—and the instructions were improper—any error was harmless. The State is correct.

Generally, a party cannot raise an issue for the first time on appeal unless it is a “manifest error affecting a constitutional right.” RAP 2.5(a). The appellant has the initial 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). An appellant cannot simply assert that

an error occurred at trial and label the error “constitutional”; instead, he must identify an error of constitutional magnitude and show how the alleged error actually affected his rights at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). If an appellant successfully shows that a claim raises a manifest constitutional error, then the burden shifts to the State to prove that the error was harmless beyond a reasonable doubt under the *Chapman*⁶ standard. *Gordon*, 172 Wn.2d at 676.

To determine whether an error is truly of a constitutional dimension, appellate courts first look to the asserted claim and assess whether, if the claim is correct, it implicates a constitutional interest, as compared to another form of trial error. *O’Hara*, 167 Wn.2d at 98. Jury instruction errors, however, are not automatically constitutional in magnitude. *See O’Hara*, 167 Wn.2d at 106. We recently held that jury instruction errors requiring jury unanimity to answer “no” on the special sentencing-enhancement verdict form are not constitutional in nature. *State v. Grimes*, 165 Wn. App. 172, 189, 267 P.3d 454 (2011).

When we conclude that an error is of a constitutional magnitude, we must then determine whether the error was manifest. *O’Hara*, 167 Wn.2d at 99. For an error to be “manifest,” the appellant must show that the asserted error had practical and identifiable consequences at trial. *Gordon*, 172 Wn.2d at 676. To ascertain whether, given what the trial court knew at that time, the trial court could have corrected the alleged error, the appellate court must place itself in the shoes of the trial court when determining if an alleged error had an identifiable consequence.

⁶ *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (noting that the State bears the burden to show harmless error beyond a reasonable doubt).

O'Hara, 167 Wn.2d at 100.

If an alleged error is both “manifest” and of “constitutional magnitude,” the reviewing court usually will address the merits of the claim and determine whether, in the context of the entire record, the error is harmless beyond a reasonable doubt. *O'Hara*, 167 Wn.2d at 98. To find an error harmless beyond a reasonable doubt, from the record, an appellate court must find that the alleged instructional error did not contribute to the verdict obtained. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002).

Sherrill failed to object to the jury instructions at trial. Now on appeal, he fails to identify a specific constitutional interest affected by the alleged jury instruction error. Therefore, he failed to preserve this issue for appeal. RAP 2.5(a). *See Grimes*, 165 Wn. App. at 189.

Sherrill simply cites *Bashaw*, 169 Wn.2d 133; yet, the Supreme Court noted in *Bashaw* that jury instruction errors like those involved in Sherrill’s case do not constitute an error of constitutional magnitude, but are instead the product of Washington common law.⁷ *Bashaw*, 169 Wn.2d at 146, n.7; *See Grimes*, 165 Wn. App. at 189. And, because the allegedly erroneous jury instruction does not rise to a level of constitutional magnitude, we do not need to inquire whether the alleged error was “manifest” or “harmless.” For this reason, we deny Sherrill’s request to vacate his firearm sentencing enhancement.⁸

⁷ The Supreme Court in *Bashaw* applied a constitutional harmless error analysis *after* determining the instruction was erroneous (*see Bashaw*, 169 Wn.2d at 147). The court neither expressly addressed nor held that the error was constitutional in nature for purposes of the RAP 2.5(a) exception.

⁸ Even if the jury instruction error requiring unanimity were of constitutional magnitude, Sherrill must show practical and identifiable consequences at trial. *See Gordon*, 172 Wn.2d at 676. He cannot demonstrate any actual manifest prejudice resulting from this error. Finally, the error was

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We affirm.

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:

Armstrong, P.J.

Hunt, J.

harmless. The jury convicted Sherrill of first degree assault—a crime in which the victim suffered multiple gunshot wounds. Clearly the jury unanimously believed Sherrill to be armed. Absent an error in the jury instruction on the special verdict form, Sherrill fails to demonstrate how the jury would have unanimously convicted him of shooting another man—without possessing a firearm. Therefore, any error in the instruction was harmless.