

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

WADE WILLIAM PIERCE,

Appellant.

No. 42108-9-II

UNPUBLISHED OPINION

Quinn-Brintnall, P.J. — Wade William Pierce appeals the sentence enhancements imposed following his second resentencing as well as the calculation of his offender scores. He contends that (1) the sentence imposed exceeded the scope of this court’s mandate, (2) the evidence was insufficient to support the deadly weapon enhancements, (3) the imposition of the deadly weapon and firearm enhancements violated his right to due process and his right to have a jury determine the facts used to increase his sentence beyond the standard range, (4) the special verdict instruction erroneously required the jury to deliberate to unanimity to reject each enhancement, (5) the trial court abused its discretion by failing to count some of his convictions as the same criminal conduct in calculating his offender scores, and (6) defense counsel provided ineffective assistance by failing to argue same criminal conduct. This is Pierce’s third appeal of his sentences. We accept the State’s concession of error concerning the firearm enhancement

imposed on count XIII, reject its concession concerning the trial court's refusal to consider Pierce's same criminal conduct argument, and reverse and remand for resentencing solely for the purpose of vacating all of the enhancements; i.e., the firearm and deadly weapon enhancements imposed on counts I, VIII, IX, X, and XIII. The current offender score and underlying sentence on each count shall remain unchanged.

FACTS

By amended information, the State charged Pierce in 2004 with first degree burglary (count I), theft of a firearm (counts II-VI), possession of a stolen firearm (count VII), first degree robbery (count VIII), first degree burglary (count IX), second degree assault (counts X, XI), first degree theft (count XII), and unlawful possession of methamphetamine with intent to deliver (count XIII). Counts I-VII alleged that Pierce entered the Jack Cartwright residence, stole firearms, and possessed a stolen firearm. *State v. Pierce*, 155 Wn. App. 701, 707, 230 P.3d 237 (2010). Counts VIII-XII alleged that he entered the Jerry and Rosita Coble residence, pointed a gun at its residents, and stole property. *Pierce*, 155 Wn. App. at 707. Count XIII stemmed from the discovery of drugs in Pierce's car following his arrest on other charges. *Pierce*, 155 Wn. App. at 707. The State alleged that Pierce committed count I while armed "with a deadly weapon, to wit: rifle," that he committed counts VIII and IX while "armed with a deadly weapon, to wit: pistol," that he committed assault "with a deadly weapon to wit: pistol" (counts X and XI), and that he committed counts XII and XIII while armed with a firearm. Clerk's Papers (CP) at 1, 4-5.

The trial court instructed the jury that for the purposes of a special verdict, the State had to prove that Pierce was armed with a deadly weapon during his commission of counts I and VIII-XIII. The special verdict forms on each of these counts asked the jury to determine whether

Pierce was “armed with, or in possession of a firearm” at the time of each offense, and the jury answered “yes” on each form. CP at 66, 74, 76, 78, 80, 82, 84. The trial court imposed corresponding firearm enhancements and standard range sentences for a total sentence of 495 months.

On appeal, we affirmed all of Pierce’s convictions except possession of a stolen firearm (count VII). *State v. Pierce*, noted at 135 Wn. App. 1014 (2006), *review denied*, 161 Wn.2d 1016 (2007). We found sufficient evidence to support the firearm enhancements and rejected Pierce’s same criminal conduct argument, concluding that the trial court did not abuse its discretion in counting the burglary and theft in counts IX and XII separately from the robbery and assault in counts VIII and X. *Pierce*, 2006 WL 2924475, at *11. We also rejected Pierce’s argument that the trial court’s deadly weapon instructions precluded the imposition of firearm enhancements. *Pierce*, 2006 WL 2924475, at *12.

Pierce then filed a motion for post-trial relief based on newly discovered evidence, which the trial court denied. *Pierce*, 155 Wn. App. at 708-09. During his subsequent resentencing, the trial court merged one of his second degree assault convictions (count XI) into his first degree robbery conviction (count VIII) and excluded the possession of a firearm conviction. *Pierce*, 155 Wn. App. at 709. Pierce’s first resentencing resulted in 150 months confinement plus 252 months for the firearm enhancements, for a total of 402 months. *Pierce*, 155 Wn. App. at 709.

Pierce appealed and again challenged each of the firearm enhancements in his consolidated personal restraint petition. *Pierce*, 155 Wn. App. at 713. We reconsidered the issue and held that insufficient evidence supported the firearm enhancements on counts I, VIII, IX, X, and XI because there was no evidence that Pierce had been armed with an operable firearm during these

offenses. *Pierce*, 155 Wn. App. at 714. We remanded and instructed the sentencing court to “dismiss Pierce’s firearm enhancements and resentence Pierce without the firearm enhancements on counts I, VIII, IX, X, and XI.” *Pierce*, 155 Wn. App. at 715.

During Pierce’s second resentencing, the trial court disagreed with both parties and decided that it could impose deadly weapon enhancements in place of the vacated firearm enhancements. The trial court did not impose any enhancement on count XII and retained the firearm enhancement on count XIII, agreeing with the State that this enhancement had not been addressed on appeal and should stand.¹

The trial court refused to consider Pierce’s argument, made during his allocution statement, that the same criminal conduct rule required recalculation of his offender scores: “We’re not relitigating issues that could have, should have, and maybe were raised in previous sentences.” Report of Proceedings (Apr. 29, 2011) at 28. The court imposed a standard range sentence of 150 months, plus 120 months of enhancements, for a total sentence of 270 months.

ANALYSIS

Scope of Prior Mandate

Pierce argues that our mandate following his second appeal permitted the trial court to strike the firearm enhancements but not to substitute deadly weapon enhancements. As stated above, we instructed the trial court on remand to “resentence Pierce without the firearm enhancements on counts I, VIII, IX, X, and XI.” *Pierce*, 155 Wn. App. at 715. The accompanying mandate instructed the trial court to proceed in accordance with our opinion.

The trial court’s discretion to resentence on remand is limited by the scope of the appellate

¹ The trial court did not impose sentence on count XI because it had merged with count VIII.

court's mandate. *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009); *see also In re Wilson's Estate*, 53 Wn.2d 762, 764, 337 P.2d 56 (1959) (trial court may consider no issue other than the one for the determination of which the case was remanded). Our mandate is binding on the superior court and must be strictly followed. *In re Marriage of McCausland*, 129 Wn. App. 390, 399, 118 P.3d 944 (2005), *rev'd on other grounds*, 159 Wn.2d 607, 152 P.3d 1013 (2007).

The State argues that our remand allowed the trial court to exercise its discretion to impose deadly weapon enhancements that had been pleaded, proven, and handed down at Pierce's trial. We disagree. Our remand language did not give the trial court discretion to substitute deadly weapon enhancements for the vacated firearm enhancements. *Cf. In re Pers. Restraint of Delgado*, 149 Wn. App. 223, 240, 204 P.3d 936 (2009) (vacating firearm enhancements and remanding "to the trial court to impose, in their place, the deadly weapon enhancements that were charged by the State and found by a jury beyond a reasonable doubt"); *State v. Williams*, 147 Wn. App. 479, 485, 195 P.3d 578 (2008) (vacating firearm enhancements and remanding for resentencing using deadly weapon enhancements). We conclude that the trial court's actions exceeded the scope of our earlier mandate and we now remand for resentencing without the deadly weapon enhancements on counts I, VIII, IX, and X.

Firearm Enhancement on Count XIII

Pierce's challenges to this enhancement implicate several jury instructions. We first address whether he can raise such challenges for the first time in his third appeal. The general rule is that a defendant is prohibited from raising issues in a subsequent appeal that were or could have been raised in the first appeal. *State v. Mandanas*, 163 Wn. App. 712, 716, 262 P.3d 522 (2011). But Pierce challenged the enhancement on count XIII in his prior personal restraint petition, and

we neglected to address that challenge in our previous opinion. Consequently, we exercise our discretion under RAP 2.5 to consider his current challenges to the firearm enhancement imposed on count XIII.

Special Verdict Form

The special verdict form on count XIII instructed the jury to answer “yes” if it found that Pierce was “armed with, *or in possession of* a firearm at the time of the commission of the crime as charged.” CP at 84 (emphasis added). Pierce argues that this language erroneously allowed the jury to impose an enhancement based only on the finding that he possessed a firearm, and that it both relieved the State of its burden to prove that he was armed with a firearm and violated his right to due process. *See State v. Bennett*, 161 Wn.2d 303, 306-07, 165 P.3d 1241 (2007) (instructions that diminish State’s burden of proof violate due process). Pierce also contends that the special verdict form’s reference to possession violated his right to have a jury determine that he was armed. *See State v. Williams-Walker*, 167 Wn.2d 889, 898, 225 P.3d 913 (2010) (sentencing court violates defendant’s right to jury trial if it imposes a firearm enhancement without a jury authorizing the enhancement by explicitly finding that, beyond a reasonable doubt, the defendant committed the offense while so armed).

The jury must find that a defendant was “armed” with a firearm or a deadly weapon to impose the corresponding sentence enhancement. RCW 9.94A.533(3), (4). A person is armed if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes, and if 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). Proximity or constructive possession alone is insufficient to establish that a defendant was armed at the time the crime was committed.

State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005). Instead, the weapon must be easily accessible and readily available to use for either offensive or defensive purposes. *Gurske*, 155 Wn.2d at 138.

The definition of possession was pertinent to some of Pierce’s underlying offenses, and the trial court instructed the jury that possession could include constructive possession. Pierce contends that this instruction combined with the special verdict form allowed the jury to impose the enhancement on count XIII if it found that he constructively possessed a weapon.

The State acknowledges that the special verdict form contained a misstatement but argues that the rest of the instructions clarified the State’s burden of proving that Pierce was armed. *See Bennett*, 161 Wn.2d at 307 (reviewing jury instruction that allegedly relieved State of its burden of proof in context of instructions as a whole). In particular, the State points to the instruction that defined “armed” for the jury:

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. . . . A person is armed with a deadly weapon if, at the time of the commission of the crime, the 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.

CP at 63. The State contends that this instruction and the special verdict form together guaranteed that an enhancement was possible only if the jury found that Pierce was “armed.”

The State’s argument overlooks the special verdict form’s reference to possession as well as the instruction that defined possession as being either actual or constructive. *See* CP at 40 (“Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item, and such dominion and control may be immediately

exercised.”). Trial counsel explained during closing argument that constructive possession was not sufficient to uphold the firearm enhancements, but the fact remains that the instructions presented this option to the jury. Whether viewed individually or in the context of the instructions as a whole, the special verdict form relieved the State of its burden of proving that Pierce was armed. We do not consider this error harmless because there was not uncontroverted evidence that Pierce was “armed” with the gun found wrapped in plastic and newspaper and zipped inside the cloth cover of his passenger seat. *See State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (when jury instruction misstates essential element of crime, error is harmless if that element is supported by uncontroverted evidence).

Because the erroneous reference to “possession” undermines either a deadly weapon or firearm enhancement, we reject the State’s request that we remand for imposition of a deadly weapon enhancement instead of the firearm enhancement imposed. The trial court must strike the existing firearm enhancement on count XIII and sentence Pierce on the underlying conviction alone. Given this result, we need not consider the other instructional errors Pierce raises in this appeal.

Same Criminal Conduct

Pierce’s argument here concerns the robbery, burglary, and theft that occurred at the Coble residence. Pierce raised the same challenge in his first appeal after the trial court scored the burglary and theft (counts IX and XII) as one offense but separately from the robbery and assault (counts VIII and X), which it also counted as one offense.² We affirmed:

We hold that the trial court did not abuse its discretion in counting the burglary and the theft as separate from the robbery and the assault. The trial court could have found that Pierce committed the burglary and theft with the intent to

² The trial court chose not to apply the anti-merger rule.

steal property and that the robbery and the assault involved the intent to threaten another person. Because the trial court could have found that the intent in each crime was different, we uphold the offender score for the current convictions.

Pierce, 2006 WL 2924475, at *11.

Pierce did not challenge this ruling in either a motion for reconsideration or a petition for review. As the trial court recognized in refusing to consider his same criminal conduct argument during the most recent resentencing, that issue has already been resolved. Our same criminal conduct ruling is the law of the case and will not be reconsidered here. *See State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008) (law of the case doctrine provides that once there is an appellate court ruling, its holding must be followed in subsequent stages of the same litigation). We reject the State’s concession of error and also hold that counsel was not ineffective in failing to raise this issue again during Pierce’s second resentencing.

We remand for resentencing solely for the purpose of vacating the weapon enhancements imposed on counts I, VIII, IX, X, and XIII. The existing offender scores and underlying sentences should remain unaltered.

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.

QUINN-BRINTNALL, P.J.

We concur:

VAN DEREN, J.

No. 42108-9-II

PENYOYAR, J.