

NO. 45941-8-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

BRETT EVERETTE,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF COWLITZ COUNTY

The Honorable Marilyn Haan, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The evidence was insufficient to convict the appellant of attempted kidnapping in the first degree.

2. The jury instructions did not require the jury to unanimously agree on the acts underlying felony harassment as required by the Sixth and Fourteenth Amendments and Article I, sections 3, 21, and 22 of the Washington Constitution.

3. The trial court erred by convicting the appellant of unlawful possession of a firearm where there is insufficient evidence that he ever owned or possessed a firearm.

4. The trial court erred in denying the appellant an extension of time in which to file a motion for new trial.

5. The appellant assigns error to the following conclusion of law pertaining to the motion for new trial:

Defendant's motion for a new trial is denied for failure to file within the time limits specified by CrR 7.5 (b).

Clerks Papers (CP) 189.

6. The appellant assigns error to the following conclusion of law pertaining to the motion for new trial:

Because the Defendant did not present a sufficient basis to extend the time for filing under CrR 7.5 (b), no additional time for filing is granted.

CP 189.

7. The appellant assigns error to the following conclusion of law pertaining to the motion for new trial:

CrR 7.5 (a)(3) does not apply because no newly discovered evidence has been presented, as the information presented by the Defendant's motion was known at the time of trial.

CP 189.

8. The appellant assigns error to the following conclusion of law pertaining to the motion for new trial:

Had the Defendant's attorney presented the information he now claims should have been presented, it would not have changed the outcome of the trial.

CP 189.

9. The trial court erred when it dismissed appellant's motion for new trial based on a finding that it had no jurisdiction to decide the motion.

10. The appellant assigns error to the following conclusion of law pertaining to the motion for new trial:

Because the Defendant filed his notice of appeal, jurisdiction for the issues he now raises belongs to the Court of Appeals. Any issues the Defendant chooses to raise should be brought before the Court of Appeals.

CP 189.

11. The appellant assigns error to the following conclusion of law petition to the motion for new trial:

Under RAP 7.2 (e), the trial court is not permitted to rule on the issues raised in the Defendant's post-judgment motions without receiving permission from the Court of Appeals. The trial court has not received this permission from the Court of Appeals.

CP 189.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. In order for the State to prove attempted kidnapping in the first degree beyond a reasonable doubt, the State must prove the defendant took an act constituting a substantial step toward abduction of the victim with an intent to inflict bodily injury on her or inflict extreme mental distress.

In the instant case, Brett Everette was charged with attempted first degree kidnapping for restraining Kendra Swanger in a bedroom by threatening her and telling her that he was "gonna put some new holes in her head." Ms. Swanger said that Mr. Everette had a handgun; another witness believed he had a gun but did not actually see a weapon. Did the State present sufficient evidence that Mr. Everette committed attempted kidnapping of Ms. Swanger? Assignment of Error No. 1.



2. The jury trial provisions of the Sixth Amendment to the United States Constitution and Article I, section 21 of the Washington Constitution require jury unanimity beyond a reasonable doubt of every essential element of the crime charged. When evidence indicates two distinct acts, either one of which could form the basis of a crime of felony harassment, the jurors must be instructed they all must agree beyond a reasonable doubt on the same act. Did the trial court abuse its discretion in failing to give a unanimity instruction when the prosecution presented evidence of a multiple events that could be construed as threatening bodily injury? Assignment of Error No. 2.

3. Whether there is sufficient evidence to support a conviction for first degree unlawful possession of a firearm where there is no evidence that the appellant had in his possession or controlled a firearm other than a statement by one witness that she saw a gun, which was contradicted by another witness who said that he did not see a gun, and where the gun allegedly seen by the first witness was not recovered by law enforcement? Assignment of Error No. 3.

4. Did the trial court abuse its discretion in denying a motion for new trial based solely on the fact that the motion was not within 10 days of the

verdict? Assignment of Error Nos. 4 and 5.

5. Did the trial court err when it dismissed appellant's motion for new trial based on the court's ruling that that once a defendant appeals his conviction, the trial court loses all jurisdiction to determine a motion for new trial?

Assignment of Error Nos. 6-11.

### **C. STATEMENT OF THE CASE**

#### **1. Procedural history:**

Brett Everette was charged by amended information in the Cowlitz County Superior Court with attempted kidnapping in the first degree (RCW 9A.40.020(1)(c), (d)); felony harassment (RCW 9A.46.020(1)(a)(i)); and unlawful possession of a firearm in the first degree (RCW 9.91.040(1)(a)). Clerk's Papers (CP) 31-33. The State alleged that Counts 1 and 2 were committed while Mr. Everette was armed with a firearm (RCW 9.94A.533(3)). CP 32.

Jury trial in the matter started December 18, 2013, the Honorable Marilyn Haan presiding. 12/18/13Report of Proceedings (RP) at 42.<sup>1</sup>

The jury instruction listing all essential elements the prosecution must prove for felony harassment did not tell the jury that they must unanimously agree that the prosecution proved a specific threat necessary for a felony harassment conviction. CP 103, 105.

**2. Trial evidence:**

Kendra Swanger, who had used heroin since age 16, was going out with Brad Martin, who was also a heroin user. 12/19/13RP at 10, 11. They broke up in July or August, 2013, and at that time she started seeing Joey Sanchez, who supplied her with heroin. 12/18/13RP RP at 55, 56. Ms. Swanger testified that Nate Hart, the step father of Joey Sanchez, agreed to give his vehicle to Joey Sanchez in exchange for methamphetamine. 12/18/13RP at 57. However, Joey Sanchez did not provide the

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<sup>1</sup>The record of proceedings consists of five volumes:

Report of Proceedings from September 6, 2013, September 10, 2013, September 24, 2013, October 1, 2013, October 8, 2013, October 23, 2013, October 24, 2013, October 31, 2013, November 1, 2013, November 5, 2013, November 7, 2013, November 12, 2013, December 5, 2013, December 9, 2013, December 10, 2013, December 11, 2013, December 12, 2013, December 13, 2013, January 13, 2014, February 3, 2014, February 10, 2014, (sentencing hearing), February 25, 2014, March 5, 2014, March 12, 2014, and March 19, 2014;  
12/18/13RP (jury trial);  
12/19/13RP, (jury trial, morning session);  
12/19/13RP, (jury trial, afternoon session); and  
12/20/13RP, (jury trial).

methamphetamine to Mr. Hart as arranged. 12/18/13RP at 57. Because of her relationship with Mr. Sanchez, Mr. Hart asked Ms. Swanger to retrieve the vehicle from Mr. Sanchez, and she agreed to do so. 12/18/13RP at 57. On or around August 7, 2013, while Mr. Sanchez was high on heroin, she took the vehicle and returned it to Mr. Hart, who was at Maria Johnson's house, which is located in Longview, Washington. 12/18/13RP at 58.

Ms. Swanger stated that several people including Joey Sanchez and his brother David, were angry with her as a result of her actions, and subsequently she was hiding from them. 12/18/13RP at 59,105. On August 12, 2013 she was at Ms. Johnson's house in a bedroom with Brad Martin, with whom she had apparently reconciled. 12/18/13RP at 60.

Mr. Everette came to the front door of the house and said to Ms. Johnson that he knew her and he was checking on her. Ms. Swanger stated that Mr. Everette then came into the bedroom with two other individuals. She stated that Mr. Everette said: "So, what's up with my homey's car," and when she got up from the bed he grabbed her by her hair and neck and threw her back on the bed. 12/18/13RP at 65, 66. She testified that Mr. Everette held her down by her neck and when she got up, he "flashed a gun" that she said resembled a 9 mm handgun owned by Mr. Sanchez. 12/18/13RP at 68. She said that Mr. Everett repeatedly said to Mr. Martin that "You need to get

your bitch to tell me where Joey's car is at." 12/18/13RP at 69. She said that when she tried to leave the room after he threw her on the bed, Mr. Everette said that nobody was allowed to leave. 12/18/13RP at 66.

Ms. Swanger stated that she saw Mr. Everette point a black handgun at her. Mr. Martin did not see Mr. Everette with a handgun and did not see him point a gun, but stated that he believed that he had one in the waistband of his pants based on the movements that he was making when he was confronting Ms. Swanger. 12/19/13RP at 31, 32, 38. Mr. Martin stated that Mr. Everette said his "homies" have a "Mossberg" out in the car, implying that he had access to a shotgun. 12/19/13RP at 18. Mr. Martin said that Mr. Everette told Ms. Swanger that he was "gonna put some new holes in her head." 12/19/13RP at 17.

Maria Johnson identified Mr. Everette as the person who came to her house on August 12, 2013. 12/18/13RP at 155. She testified that he was at her house on for approximately 40 minutes. 12/18/13RP at 157. She stated that she did not see him with a weapon and that she would have called the police if she had seen a weapon. 12/18/13RP at 156.

Ms. Swanger also testified that Mr. Everette made a telephone call from the bedroom in order to find David and Joey Sanchez to have them come to Maria Johnson's house. 12/18/13RP at 70.

She said that Ms. Johnson came into the bedroom and that she then followed Ms. Johnson out of the room. 12/18/13RP at 71. Mr. Everette followed her and then took Ms. Swanger back into the bedroom, then left the room. 12/18/13RP at 71. She said that at that time Mr. Martin wedged a skateboard upside down under the door so that it could not be easily opened, then they both left the house by going out a window. 12/18/13RP at 71. They both ran through a gate in the backyard. 12/18/13RP at 75, 76. While running, Ms. Swanger tripped on gravel in an alley, scraping her leg. 12/18/13RP at 76. Despite this, Mr. Martin continued running. 12/18/13RP at 76.

Ms. Swanger testified that while she was in the alley, she saw David Sanchez driving a Nissan Pathfinder toward her. Marcus Cochran and Joey Sanchez were also in the Pathfinder. 12/18/13RP at 77. The SUV stopped and Joey Sanchez got out and ran after her, grabbed her shoulder and pulled her backwards, causing her to fall. 12/18/13RP at 78. After she was on the ground, Mr. Cochran and Joey Sanchez started to drag her to the SUV. 12/18/13RP at 78, 111. She stated that a shotgun fell from Joey Sanchez' side of the SUV. 12/18/13RP at 79. She said that Mr. Cochran said that someone had called the police, then dropped her, and they got back into the

SUV and left. 12/18/13RP at 79.

Marcus Cochran stated that David Sanchez was driving the Pathfinder in the alley, and that Joey Sanchez pointed an unloaded shotgun out of the window of the SUV at Ms. Swanger and shouted “where the (deleted)’s my car?” 12/19/13RP at 161.

Bob Ross and his wife were showing a washer and dryer they had for sale in their utility room to another couple on August 12. While in the utility room, Mr. Ross heard a car speeding down the alley and the sound of woman screaming just before the vehicle came to a stop. 12/18/13RP at 43, 44. Mr. Ross identified the vehicle as a Nissan Pathfinder. 12/18/13RP at 46. The Pathfinder was occupied by three males, and they had opened the vehicle’s doors. 12/18/13RP at 45, 48. The SUV’s occupants then closed the doors and accelerated away again, leaving the woman in the alley. 12/18/13RP at 45. Mr. Ross described the woman as being frightened. 12/18/13RP at 47. The woman, identified as Kendra Swanger, appeared to have scrapes on her leg. 12/18/13RP RP at 47, 48. Mr. Ross asked if she needed help and she said no, that she had warrants for her arrest, and then ran away. 12/18/13RP at 47.

Ms. Swanger stated that she was stopped by police a block away.

12/18/13RP at 80. She told the police that she was Kayla Swanger, who is actually her sister. 12/18/13RP at 80. The Nissan Pathfinder was located by the Longview Police Department and impounded. 12/19/13RP at 191.

Ms. Swanger was properly identified and arrested for warrants approximately two weeks later. 12/18/13RP at 90. While in the jail she testified that she heard a male voice that she identified as being Mr. Everette, yelling through the wall from the cell next to her that "She's a rat." 12/18/13RP at 91.

The defense rested without calling any witnesses. 12/19/13RP at 121. 869

### **3. Verdicts, enhancements, and sentence:**

The jury found Mr. Everette guilty as charged in Counts 1 through 3. CP 114, 117, 120. The jury also found firearm enhancements in Counts 1 and 2. CP 116, 119. At sentencing the court found that Mr. Everette had two prior offenses that constituted most serious offenses and Mr. Everette to be a persistent offender under RCW 9.94A.030(36)(a)(i),(ii), the Persistent Offender Accountability Act (POAA). 2/10/14RP at 145-46. Mr. Everette was sentenced under RCW 9.94A.570 to life without the possibility of early release in Counts 1 and 2, and a standard range sentence of 116 months in



Count 3. CP 137.

**4. Motion for new trial:**

The jury returned verdicts on December 20, 2013. CP 114, 117, 120. On February 12, 2014, Mr. Everette filed a pro se motion for new trial alleging newly discovered information regarding the allegation that he made telephone calls to Mr. Sanchez from Maria Johnson's house. In his motion, Mr. Everette argued that no phone records support the allegation that he made calls to Joey Sanchez in order to have him come to the house, therefore challenging the State's claim of accomplice liability. CP 142-46.

The sentencing took place was on February 10, 2014, and notice of appeal was filed February 14, 2014. CP 147.

On February 25, 2014, Mr. Everette filed additional pro se motions in support of his request for a new trial pursuant to CrR 7.8. CP 150-63. Mr. Everette was appointed new counsel, who filed a second notice of appeal on March 12, 2014. CP 165.

The motions for new trial were heard March 12, 2014. The State argued that the trial court lost jurisdiction to hearing a motion for new trial. 3/12/14RP at 173. The State also argued that the motions should be transferred to this Court as a Personal Restraint Petition unless the court

determined that a evidentiary hearing is required. 3/12/14RP at 174.

The court found that the motion for new trial was not timely filed under CrR 7.5. 3/12/14RP at 183. The court found that even if timely filed, and that even if the new information regarding the absence of working cell phones in the Pathfinder had been admitted at trial, it would not have changed the outcome of the trial. 3/12/14RP at 184.

The court also found that it lost all jurisdiction to decide the motion because Mr. Everette filed a notice of appeal. 3/12/14RP at 185.

The following findings of fact and conclusions of law were entered regarding the motion for new trial:

#### I. FINDINGS OF FACT

1. On December 20, 2013, after a jury trial, the Defendant's guilty verdicts were entered.
2. On January 31, 2014, the Defendant filed a pro se motion for a new trial.
3. During the time period between the entry of the guilty verdicts and sentencing, the Defendant remained represented by his trial attorney, Bruce Hanify.
4. On February 10, 2014, the Defendant was sentenced.
5. At sentencing, because the Defendant's pro se motion for a new trial included a claim of ineffective assistance of counsel, the Court appointed the Cowlitz County Office of Public Defense to represent the Defendant on his motion. Mr. Hanify remained as the Defendant's attorney of record for all other matters involving his case.

6. On February 14, 2014, the Defendant filed his notice of appeal.
7. In his notice of appeal, the Defendant appeals the entirety of his trial and judgment and sentence.
8. On February 25, 2014, the Defendant filed additional pro se motions in support of his request for a new trial, with additional bases added to the original claims.
9. In his motion for a new trial, the Defendant claims information was not presented at the trial. The information was known to the Defendant at the time of trial, and the decision was made not to present this information at trial.
10. On March 5, 2014, due to a conflict of interest, the Cowlitz County Office of Public Defense was permitted to withdraw as the Defendant's attorney on his pro se motion for a new trial, and attorney James Jeffrey Sowder was appointed to represent the Defendant on this motion.

## II. CONCLUSIONS OF LAW.

1. The Defendant's motion for a new trial is denied for failure to file within the time limits specified by CrR 7.5 (b).
2. Because the Defendant did not present a sufficient basis to extend the time for filing under CrR 7.5 (b), no additional time for filing is granted.
3. CrR 7.5 (a)(3) does not apply because no newly discovered evidence has been presented, as the information presented by the Defendant's motion was known at the time of trial.
4. Had the Defendant's attorney presented the information he now claims should have been presented, it would not have changed the outcome of the trial.
5. Because the Defendant filed his notice of appeal, jurisdiction for the issues he now raises belongs to the Court of Appeals. Any issues the

Defendant chooses to raise should be brought before the Court of Appeals.

6. Under RAP 7.2 (e), the trial court is not permitted to rule on the issues raised in the Defendant's post-judgment motions without receiving permission from the Court of Appeals. The trial court has not received this permission from the Court of Appeals.

CP 188-89.

Timely notice of appeal was filed February 14, 2014 and March 10, 2014. CP 147, 165-66. This appeal follows.

#### D. ARGUMENT

1. **THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT MR. EVERETTE COMMITTED ATTEMPTED KIDNAPPING IN THE FIRST DEGREE**

a. **The state must prove each element of the alleged offense beyond a reasonable doubt**

In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); *State v. Crediford*, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996).

Evidence is sufficient if, viewed in the light most favorable to the State, it would permit any rational trier of fact to find the essential

elements of the crime beyond a reasonable doubt. *State v. Hendrickson*, 129 Wn.2d 61, 81, 917 P.2d 563 (1996) "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992).

**b. Insufficient evidence was presented to find Mr. Everette guilty of attempted first degree kidnapping**

Mr. Everette was charged with attempted first degree kidnapping, contrary to RCW 9A.40.020(c) or (d), requiring the State to prove, beyond a reasonable doubt, that: (1) Everette took a substantial step toward (2) intentionally abducting Ms. Swanger with the intent; (3) to inflict bodily injury on her or to inflict extreme mental distress. RCW 9A.40.020(1)(c), (d); CP 128.

RCW 9A.40.02 defines kidnapping in the first degree in relevant part as:

(1) person is guilty of kidnapping in the first degree if he or she

intentionally abducts another person with intent:

- (a) To hold him or her for ransom or reward, or as a shield or hostage; or
- (b) To facilitate commission of any felony or flight thereafter; or
- (c) To inflict bodily injury on him or her; or
- (d) To inflict extreme mental distress on him, her, or a third person; or
- (e) To interfere with the performance of any governmental function.

(2) Kidnapping in the first degree is a class A felony.

RCW 9A.040(2) provides that "Abduct" means to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force.

RCW 9A.40.010(1) provides that a person commits the crime of attempt when "with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020.

Whether a substantial step towards the crime has been taken is a question of fact. *State v. Workman*, 90 Wn.2d 443, 449, 584 P.2d 382 (1978). Washington courts follow the approach that "conduct is not a substantial step unless it is strongly corroborative of the actor's criminal purpose." *Workman*, 90 Wn.2d at 451.

Mr. Everette concedes that the State established that he restrained Ms. Swanger's movements, as that term is defined by RCW 9A.40.010(1).

Under the statute, "restrain" means:

[t]o restrict another person's movements without consent and without legal authority in a manner which interferes substantially with that person's liberty. Restraint is without consent if it is accomplished by physical force, intimidation or deception . . . .

Nevertheless, restraint, in and of itself, is insufficient to constitute abduction.

In *State v. Green*, 94 Wn.2d 216, 227, 616 P.2d 628 (1980) the Court specifically held that incidental restraint and movement of a victim, standing alone, are not indicative of a true kidnapping. In *Green*, the Supreme Court held that there is insufficient evidence to prove kidnapping as an aggravator of murder beyond a reasonable doubt where the restraint and movement of the victim was merely "incidental" to and not "an integral part of and was independent of the underlying homicide." *Green*, 94 Wn.2d at 227.

[T]he mere incidental restraint and movement of a victim which might occur during the course of a homicide are not, standing alone, indicia of a true kidnapping.

*Green*, 94 Wn.2d at 227. In *Green*, an eyewitness saw a man snatch a child from a public sidewalk and take her behind a nearby apartment building out

of view, where he killed her. *State v. Green*, 94 Wn.2d at 222-23. Another witness also saw the victim being grabbed and taken around the building. *Green*, 94 Wn.2d at 224.

Here, Mr. Everette took no step towards restraining Mr. Swanger in a place she was not likely to be found. On the contrary, Mr. Everette confronted Ms. Swanger in the bedroom of the house with Mr. Martin present. Other people, including the homeowner Maria Johnson, knew that Mr. Everette was there and knew where Ms. Swanger was located.

The testimony shows that Mr. Everette wanted to know where the "missing" vehicle was located. Although Mr. Everette allegedly forced Ms. Swanger onto the bed and said that she could not leave, his actions were not "strongly indicative" of an intent to abduct. The evidence indicates that during the alleged incident, Mr. Everette was simultaneously making telephone calls, apparently requesting other people to come to the house, including his girlfriend, allegedly for the purpose of beating up Ms. Swanger.

At best, the evidence supports a finding of false imprisonment. *State v. Beasley*, 126 Wn.App. 670, 691-92, 109 P.3d 849 (2005). RCW 9A.40.040 provides:

A person is guilty of unlawful imprisonment if he knowingly restrains another person.



In *Beasley*, the Court found sufficient evidence was presented to prove unlawful imprisonment, because

There was evidence that Harrison was held at gunpoint, both on the ground and in her car. There was also the evidence that Beasley told Harrison that he was going to kill her. There was evidence that Beasley circled the car with the rifle, that he was screaming and yelling while pointing the rifle at the car, and that he told Harrison that he intended to kill her. All of the witnesses spoke of their fear that Beasley would in fact kill them. Beasley denied the allegations of the witnesses. But as we previously discussed, determinations of credibility are for the jury to decide. *Myers*, 133 Wn.2d at 38. Taking the evidence in the light most favorable to the State, it supports the conviction for unlawful imprisonment.

*Beasley*, 126 Wn.App. at 692.

The State did not allege unlawful imprisonment and a requested instruction for unlawful imprisonment was not given.

**b. Reversal and dismissal is required.**

In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Everette committed attempted first degree kidnapping, the judgment may not stand. *State v. Spruell*, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). Without sufficient evidence supporting Ms. Swanger's abduction, the conviction must be reversed and dismissed. *Green*, 94 Wn.2d at 227-28.

2. **THE TRIAL COURT ERRONEOUSLY FAILED TO PROVIDE A UNANIMITY INSTRUCTION ON FELONY HARASSMENT, WHEN THE STATE PRESENTED EVIDENCE OF AT LEAST TWO ACTS THAT COULD POTENTIALLY BE THE BASIS OF A CRIMINAL CONVICTION.**

a. **A unanimous verdict on every essential element of the crime is constitutionally required**

The constitutional right to trial by jury and the state constitutional right to conviction only upon a unanimous jury verdict require jury unanimity on all essential elements of the crime charged. *State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990); *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988); U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 21, 22.

When the evidence indicates multiple distinct acts, any one of which could form the basis for a conviction, either the State must elect which act it is relying on as the basis for the charge, or the court must instruct the jury it must unanimously agree that the same act has been proven beyond a reasonable doubt ; *Kitchen*, 110 Wn.2d at 411; *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Where neither alternative is elected, there a constitutional error stemming from the possibility some jurors may have relied on one act while other jurors relied on another. *Kitchen*, 110 Wn.2d at 409; *State v. Badda*, 63 Wn.2d 176, 182, 385 P.2d 859 (1963).

b. The trial court failed to give an instruction requiring juror unanimity as to which threats were proven beyond a reasonable doubt.

The prosecution offered at least three acts describing potentially threatening conduct by Mr. Everette or alleged accomplice Joey Sanchez toward Ms. Swanger. The State alleged that when Mr. Everette was in the bedroom with Ms. Swanger and Mr. Martin, he threatened to kill Ms. Swanger, threatened to “put new holes in her head,” and according to Ms. Swanger, “flashed” or waved a 9mm handgun.

No other witnesses, however, corroborated her claim that he had a gun, although Mr. Martin said that he thought that Mr. Everette had a gun. Later, Mr. Everette’s accomplices allegedly pushed Ms. Swanger to the ground while in the alley and then attempted to drag her the Pathfinder.

Mr. Cochran said that Joey Sanchez pointed a shotgun at Ms. Swanger while he was in the Pathfinder. The prosecution, however, did not unambiguously elect any particular threat that must serve as the basis of felony harassment. The State argued in closing that Mr. Everette threatened to kill Ms. Swanger in the bedroom and that she was placed in fear. 12/20/13RP at 67, 68. Yet the prosecution did not limit the jury's consideration to only a particular act or threat; the prosecutor also referred in closing to the shotgun

allegedly possessed by Mr. Everette's accomplices in the Pathfinder, which Mr. Cochran said was pointed at Ms. Swanger. 12/20/13RP at 71. This latter argument was made in the context of the felony harassment charge.

c. **The proper remedy is reversal.**

The trial court's failure to require a unanimous verdict was an error of constitutional magnitude which necessitates reversal of the conviction for theft in the second degree. *State v. King*, 75 Wn. App. 899, 904, 872 P.2d 1115 (1994). An error of constitutional magnitude is reversible unless it is "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1975); *Guloy*, 105 Wn.2d at 426. In a multiple acts case, the failure to give a unanimity instruction is presumed to be prejudicial error. *State v. Jones*, 71 Wn. App. 798, 822, 863 P.2d 85 (1993). The error is harmless "only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable about." *Kitchen*, 110 Wn.2d at 406. Here, given the array of alleged conduct, the jury may well have not been unanimous as to which act it was relying for the conviction. The error was not harmless beyond a reasonable doubt and the conviction for felony harassment must be reversed.

3. **THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM WHERE**

**THERE IS NO UNCONTRADICTED  
EVIDENCE THAT MR. EVERETTE HAD A  
FIREARM IN HIS POSSESSION.**

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

RCW 9.941.040(1)(a) provides that a person is guilty of unlawful possession of a firearm in the first degree: "if the person owns, has in his or her possession, or has in his or her control any firearm after having previously convicted . . . of any serious offense."

Here, there is no uncontradicted testimony whatsoever to support actual possession of a gun. In this case, the only direct testimony about the gun was that Ms. Swanger testified that Mr. Everette waved a gun that she identified as a 9 mm handgun owned by Joey Sanchez. 12/18/13RP at 68. Her testimony is directly contradicted, however, by Mr. Martin, who said that he *thought* Mr. Everette had a gun during the incident, but did not actually see him with a gun and certainly did not see him wave or brandish a gun. 12/19/13RP at 31, 32,

38. Ms. Johnson also stated that she did not see Mr. Everette with a gun when he came into her house, and that if she had seen him enter her house with a gun, she could have called the police. Because there is insufficient evidence that Mr. Everette possessed the gun, his conviction for unlawful possession must be reversed.

4. **THE COURT ERRED IN DENYING AN  
EXTENSION OF TIME TO FILE A MOTION  
FOR NEW TRIAL.**

The jury returned verdicts on December 20, 2013. CP 114, 117, 120. On January 31, 2014, Mr. Everette filed a pro se motion for new trial. CP 159. Sentencing was not scheduled to take place until February 10, 2014. At sentencing, Mr. Everette was appointed new counsel to represent him on the motion. Previous counsel filed Notice of Appeal, and his new counsel filed an Amended Notice of Appeal on March 10, 2014. CP 165. On February 25, 2014, Mr. Everette filed supplemental pro se motions for new trial and motion for relief from judgment in support of his request for new trial. CP 150-63.

On March 12, 2014, the court found that that motion was untimely and that it did not have jurisdiction to hear the motion because the matter was pending in the Court of Appeals. CP 188-89.

- a. **The court abused its discretion by finding the motion was not timely filed.**

The court abused its discretion in not granting an extension of time to file the motion for new trial. CrR 7.5(b) provides that a motion for new trial must be filed and served within 10 days of the day the verdict is filed. The rule further provides, however, that the "court on application of the defendant or on its own motion may in its discretion extend the time." CrR 7.5(b). In this case, Mr. Everette filed a pro se motion for new trial and then had counsel appointed to address the claim of ineffectiveness of his trial counsel. New counsel took steps to preserve the motion, including filing a supplemental memorandum seeking an extension of time to conduct an investigation of Mr. Everette's claims. CP 169-72. There was no prejudice to the State in granting an extension of time beyond the ten day filing deadline; sentencing was not scheduled until February 10, 2014, approximately a month after the initial motion for new trial was filed.

The court's only reasons for denying the motion was that it was untimely and that it had lost jurisdiction to rule on the motions because Mr. Everette had filed notice of appeal. CP 189. Since these were untenable reasons, the court abused its discretion in doing so.

The court abuses its discretion when that discretion is "exercised on untenable grounds, or for untenable reasons." *State v. Nelson*, 108 Wn.2d 491, 504-05, 740 P.2d 835 (1987); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). CrR 7.5 clearly contemplates that a motion to extend time could, in the court's discretion, be granted. Therefore, the fact that the motion is untimely cannot alone be a sufficient grounds for denying the motion.

A motion for new trial was the best means of resolving Mr. Everette's claims regarding newly discovered evidence, and the trial court's grounds for denying the motion for new trial were untenable. If this Court does not grant Mr. Everette relief on the record on appeal, his case should be remanded because of the denial of the right to bring a motion for new trial.

**b. The trial court abused its discretion by finding that it had lost jurisdiction.**

Another reason cited the trial court when dismissed Mr. Everette's motion was the court's mistaken belief that under the Court Rules, the filing of a notice of appeal waived all rights to litigate a motion for new trial.

The Rules of Appellate Procedure specifically contemplate such post-judgment motions, even after the notice of appeal. RAP 7.2(e) provides:

(e) Postjudgment Motions and Actions To Modify Decision. The trial court has authority to hear and determine (1) postjudgment motions authorized by the civil rules, the criminal rules, or statutes, and (2) actions to change or modify a decision that is subject to modification by the court that initially made the decision. The postjudgment motion or action shall first be heard by the trial court, which shall decide the matter. If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision. A party should seek the required permission by motion.



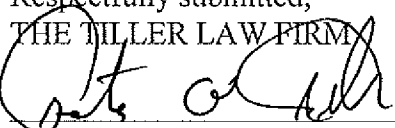
Since a motion under CrR 7.5 and 7.8 are both "post-judgment motion authorized by the criminal rules," an appeal is not a bar to the motion. RAP 7.2(e) specifically contemplates that a post-judgment motion may be filed in the Superior Court while an appeal is pending. The limitation on the superior court's jurisdiction when an appeal is pending is that permission must be sought from the appellate court before formal entry of an order that will change the decision under review. Therefore, the trial court erred by finding that it no longer jurisdiction to rule on the pro se motions.

**F. CONCLUSION**

Based on the above, Mr. Everette respectfully requests this court to reverse and dismiss his convictions in Counts I, II, and III.

In the alternative, the Superior Court had jurisdiction to hear Mr. Everette's motion for new trial. His case should be remanded for a hearing to address his claims on the merits.

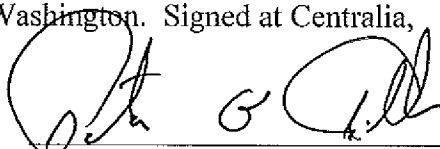
DATED: October 1, 2014.

Respectfully submitted,  
THE TILLER LAW FIRM  
  
PETER B. TILLER-WSBA 20835  
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on October 1, 2014, that this Opening Brief filed by JIS to the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid to Ms. Susan Baur, Cowlitz Co. Prosecutor's Office, 312 SW 1<sup>st</sup> Ave., Kelso, WA 98626 and to Mr. Brett C. Everette, DOC #847512, Clallam Bay Correction Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326, LEGAL MAIL/SPECIAL MAIL, true and correct copies of this Brief.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on October 1, 2014.



PETER B. TILLER

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## TILLER LAW OFFICE

**October 01, 2014 - 4:50 PM**

### Transmittal Letter

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