NO. 45651-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SOPHEAP CHITH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Katherine M. Stolz, Judge

BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports the appellant's conviction for witness intimidation.

2. Counsel was ineffective for failing to argue witness intimidation and second degree assault were the same criminal conduct.

3. The court violated the appellant's right to a unanimous jury verdict on the charge of drive-by shooting.

4. The trial court erroneously ordered the appellant to participate in a substance abuse evaluation and recommended treatment as a condition of community custody.

Issues Pertaining to Assignments of Error

1. The appellant shot toward another motorist who was following him. The State charged the appellant with intimidating a witness based on the prong that prohibits an attempt, by use of threat, to influence the testimony of a current or prospective witness. Does insufficient evidence support the appellant's conviction under that prong of the statute?

2. Was defense counsel was ineffective for failing to argue witness intimidation and second degree assault of the same person, based on the same shooting, were the same criminal conduct?

3. The appellant engaged in multiple acts of shooting from his car with different motivations and in different locations. The State did not elect which act constituted the single charged drive-by shooting, and the trial court did not give a unanimity instruction, violating the appellant's right to a unanimous jury verdict. Where the State cannot show the resulting error was harmless, should the appellant's conviction be reversed?

4. Did the trial court err when it ordered appellant to complete a substance abuse evaluation and participate in recommended treatment as a condition of community custody, where the court did not make a statutorily required finding that chemical dependency contributed to the offense and otherwise indicated that such treatment should be left up to the Department of Corrections (DOC)?

B. STATEMENT OF THE CASE

1. Charges, verdicts, and sentences

The State charged Sopheap Chith with (1) second degree assault (assault with a deadly weapon), (2) drive-by shooting, (3) unlawful possession of a stolen vehicle, (4) second degree unlawful possession of a firearm, (5) reckless driving, (6) hit and run, (7) third degree driving with a suspended license, (8) felony violation of a no-contact order, (9) first degree taking of a motor vehicle without owner's permission, and (10)

witness intimidation. CP 7-12. The State also alleged firearm enhancements as to counts 1, 3, 8, 9, and 10. CP 7-12.

A jury convicted Chith as charged, although the court later ruled count 3 merged with count 9 and dismissed the former. CP 322-36, 348.

The court sentenced Chith to concurrent standard range sentences on the remaining felonies (counts 1, 2, 4, 8-10) plus four firearm enhancements totaling 126 months, for a total sentence of 228 months of incarceration. CP 350. The court ordered the sentences on the misdemeanors (counts 5-7) to run concurrently with each other and with the felony sentences. CP 358-59.

Chith timely appeals. CP 362-80.

2. Trial testimony

a. Motorists' account of events

Matthew Rapozo's silver Honda Civic was stolen from the parking lot outside his Puyallup apartment some time after noon on February 5, 2013. RP 167-70.

Anna Monroe got off work in Puyallup between 3:00 and 3:15 that afternoon. She drove southbound on 98th Avenue East. RP 204. As she approached a stop sign at the intersection of 98th and 118th Street East, a car passed and nearly hit the front of her car as it swung back into Monroe's lane. RP 204-05. The car stopped at the stop sign, then

continued on. RP 204-05. As it drove, an arm extended from the driver's side window and twice fired a black gun. RP 205, 214. As Monroe described it, "The arm was outstretched up to the . . . sky. It wasn't directed at any houses or buildings or people or anything like that." RP 215.

The car turned right onto westbound 128th Street East. RP 205. It then entered the left turn lane at the intersection of 128th and 94th Avenue East. RP 205. Monroe went straight through the intersection and did not see the car again. RP 205. She called the police the following day. RP 216.

Like Monroe, Gabriel Colbern had just gotten off work and was driving home. RP 283-84. Driving through Puyallup on westbound 128th, he stopped at the intersection of 128th and Meridian Avenue East and waited to turn left onto southbound Meridian. RP 284.

Across the intersection, he saw a man, whom he identified at trial as Chith, standing outside a silver Honda Civic stopped at the light. RP 284-85, 310, 323. The man appeared to be yelling at the occupant of car behind the Honda. When the light turned, Chith got back into the Honda and turned right onto Meridian just in front of Colbern's car. Chith appeared upset and was gesturing angrily at his passenger. RP 285.

The Honda stopped at red light and, once the light turned green, continued south on Meridian. RP 286. Shortly thereafter, as Colbern described it, "the next thing I saw were two poof, poof out the side window [of the Honda]; and then the driver's side window flew out of the car and landed in the middle of the road." RP 286. Police later found glass and attached tinting material in the 13500 block of Meridian. RP 371-72.

The Honda continued to the intersection of Meridian and 136th Street East, where it made a right turn onto westbound 136th, fishtailing in the process. RP 286-87. The Honda passed Ballou Junior High School and stopped in the center turn lane on 136th. RP 287. Colbern stopped in the same lane 25 yards behind the Honda. RP 288-89.

Chith leaned out and waved his arm as if to indicate Colbern should drive past. RP 288. Colbern remained where he was. RP 288. After a moment, an arm reached out of the Honda and fired a small caliber black pistol in Colbern's direction. RP 288-92.

Chith appeared to shoot in Colbern's general direction rather than "at him." RP 330. Colbern believed Chith was primarily trying to scare him off. RP 330-31. Although the shots went in the direction of the junior high school, there were no other cars or pedestrians in the area. RP 289, 332.

Although Colbern was somewhat fearful, the shots did not deter him because he was experiencing an adrenaline rush. RP 300. Colbern also noted that he too was armed and would have shot back if necessary. RP 331.

Chith resumed driving westbound and fired two more shots straight out the window "randomly just toward the neighborhood that was there." RP 293-94. The Honda then entered the intersection of 136th and 94th Avenue East on a red light. RP 294. A school bus struck the Honda, spinning it into the middle of the road and loosening the rear bumper, which was soon deposited in the road. RP 294-95, 368. After stopping briefly, the Honda continued south on 94th, where Colbern eventually lost sight of it. RP 295, 296.

Colbern called 9-1-1 when he first saw the "poofs" out the car window and remained on the phone throughout the incident. RP 289, 296. The 9-1-1 call was played for the jury. RP 296-97.

b. Chith's friends' account of events

Chith's former girlfriend Tiffany LaPlante testified at trial. LaPlante and Chith were dating on February 5, although a no-contact order prohibited Chith from contacting her. RP 238-39. LaPlante called Chith that day for a ride to a hearing at the Fife Municipal Court, where she planned to ask that the no-contact order be lifted. RP 241. Chith told

LaPlante he would call his friend "Korrupt" to give her a ride. RP 342. "Korrupt" picked up LaPlante and then went to get his girlfriend. RP 243. LaPlante testified that on the way she fell asleep in the back of Korrupt's car. RP 244. The next thing she knew, police were pulling LaPlante out of Korrupt's car. RP 244, 258. She denied riding in a car with Chith that day. RP 258.

LaPlante also testified she did not recall being interviewed by a police officer or writing a statement. RP 247-49. The court nonetheless admitted LaPlante's February 5 statements on a variety of legal grounds. RP 405-07. LaPlante's statements and other related testimony revealed the following additional details:

Around 4:15 that afternoon, police stopped an Acura Integra in the parking lot of a shopping center near 160th Street East and Pacific Avenue South in Spanaway. Sothea Chum, also known as "Korrupt," was the driver. RP 386-88, 508, 533-38, 573. LaPlante and another woman, Nicole Shoemaker, were passengers. RP 391, 503, 657.

Deputy James Oetting interviewed LaPlante after the traffic stop. LaPlante said she spent the previous night at a friend's house. Chith was supposed to pick her up in the morning to go to court. RP 413. He did not show up until later, and instead of going to court, they went to the Puyallup mall where they "picked up" a silver Honda. RP 413.

LaPlante said she and Chith got into an argument about the missed court appearance while driving southbound on Meridian. RP 413. The argument became heated and LaPlante got out of the car. When she got back in, Chith grabbed her by the coat and head-butted her. RP 413.

LaPlante had been up for two days smoking methamphetamine and told Oetting she did not remember much about what happened next. RP 413-14. However, she recalled tires being removed from the Honda at an apartment complex parking lot off of Pacific Avenue South. She recalled later throwing the tires out of the Acura. RP 414. The Acura was soon pulled over, although by that time Chith had gotten out of the car. RP 414. Chith later walked by the scene of the traffic stop, however, and LaPlante identified him to police. RP 414.

At trial, Sothea Chum provided additional details and was permitted to relay additional statements by LaPlante. Chum was with Chith and LaPlante the morning of February 5 when Shoemaker, his girlfriend, called and asked for a ride to see her probation officer. RP 487. Chum left Chith and LaPlante near the Puyallup mall. RP 485.

Chith called later and wanted Chum's help removing the wheels from a car. RP 486. They met in Spanaway, and Chum and Chith removed the wheels from the Honda in the apartment complex lot. RP 491. Chith eventually separated from the others after a disagreement

about whether to finish removing the tires or leave the area to avoid detection.[1] RP 499-501.

LaPlante told Chum she and Chith got into an argument and Chith shot off his gun on Meridian. RP 515. She also told Chum they were almost hit by a bus. RP 515. The court overruled Chith's hearsay objection but limited the jury's consideration of the evidence to the evaluation of LaPlante's credibility. RP 516.

C. ARGUMENT

1. INSUFFICIENT EVIDENCE SUPPORTS CHITH'S WITNESS INTIMIDATION CONVICTION.

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Evidence is sufficient to support a conviction only if, when viewed in the light most favorable to the State, a rational trier of fact could find each element of the crime beyond a reasonable doubt. State v. Brown, 162 Wn.2d 422, 428, 173 P.3d 245 (2007); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

RCW 9A.72.110 provides in part that:

[1] A maintenance man from the apartment complex noticed the group's activities and asked a colleague to call the police. RP 676-81.

> (1) A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:
>
> (a) *Influence the testimony of that person*;
>
> (b) Induce that person to elude legal process summoning him or her to testify;
>
> (c) Induce that person to absent himself or herself from such proceedings; or
>
> (d) Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the abuse or neglect of a minor child.

(Emphasis added.)

"Current or prospective witness" means a person endorsed as a witness in an official proceeding or a person whom the actor believes may be called as a witness in any official proceeding. RCW 9A.72.110(2)(b). Subsections (a) through (d) describe alternative means of committing the crime. State v. Boiko, 131 Wn. App. 595, 599, 128 P.3d 143 (2006); State v. Chino, 117 Wn. App. 531, 539, 72 P.3d 256 (2003).

Here, Chith was charged with, and the jury instructed, under only the (a) prong. CP 12, 317. Insufficient evidence supports this prong.

The Supreme Court's Brown decision is on point. 162 Wn.2d 422. There, Brown committed a burglary. He informed a woman who overheard him discussing the burglary that she would "pay" if she spoke to police; she believed it to be a credible threat. Id. at 426. Brown was

then convicted of intimidating a witness under the theory that his threat was made to a person he believed would be called as a witness against him. Id. at 427. On review, the Supreme Court concluded that insufficient evidence supported Brown's conviction because the State only proved he intended to prevent the witness from providing information to police; it did not show that he intended to influence her testimony. Id. at 430.

Although Chith's threat involved an act, not words, the facts here are nevertheless analogous. Chith shot at Colbern, who was following him. One could infer from this evidence that that Chith wanted to prevent Colbern from reporting Chith's activities to the police. This would, arguably, be prohibited under prong (d).

But it strains the imagination to conclude Chith's act was an attempt to change Colbern's testimony. Did Chith want Colbern to testify he followed Chith, but deny that he saw Chith shoot out his window? Did he want Colbern to say he saw someone else shooting? Rather, in the light most favorable to the State, Chith's acts could be interpreted as geared toward avoiding detection, obviating the need for any future testimony. See RP 801 (State's closing argument articulating theory that goal of shooting was to prevent detection by police). As in Brown, the connection

between the acts and any later court proceeding is simply too tenuous to support a conviction under the (a) prong of the statute.

Because insufficient evidence supports the conviction under the only prong charged and instructed upon, the conviction should be reversed and dismissed with prejudice. Brown, 162 Wn.2d at 430.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE WITNESS INTIMIDATION AND SECOND DEGREE ASSAULT WERE THE SAME CRIMINAL CONDUCT.

In any event, the second degree assault and witness intimidation offenses, based on the same act of shooting at Colbern, should be counted as the same criminal conduct in determining Chith's offender score. Chith's attorney rendered ineffective assistance in failing to make this argument. Remand for resentencing is required.

a. The crimes constituted same criminal conduct

RCW 9.94A.589(1)(a) provides:

> [W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

"Same criminal conduct" is defined as two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a).

There is no dispute the offenses occurred at the same time and place. Indeed, they were based on the same act of shooting at Colbern. RP 752, 754 (State's argument in response to defense half-time motion); RP 800 (State's closing argument).

The next question is whether they shared the same intent. Multiple factors inform the objective intent determination, including: (1) how intimately related the crimes are; (2) whether the criminal objective substantially changed between the crimes; (3) whether one crime furthered another; and (4) whether both crimes were part of the same scheme or plan. State v. Burns, 114 Wn.2d 314, 318-19, 788 P.2d 531 (1990); State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005 (1996). Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998).

In this context, intent does not mean the particular mens rea required for the crime. State v. Davis, 174 Wn. App. 623, 642, 300 P.3d 465, review denied, 178 Wn.2d 1012 (2013). Rather, it means the

defendant's "'objective criminal purpose in committing the crime.'" Davis, 174 Wn. App. at 642 (quoting State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030 (1990)); see State v. Dunaway, 109 Wn.2d 207, 217, 743 P.2d 1237, 749 P.2d 160 (1987) (kidnapping and robbery convictions shared same criminal intent); Davis, 174 Wn. App. at 642 (assault and attempted murder convictions shared same criminal intent); State v. Phuong, 174 Wn. App. 494, 548, 299 P.3d 37 (2013) (finding ineffective assistance where counsel did not argue that attempted rape and unlawful imprisonment offenses shared same criminal intent); State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004) (finding ineffective assistance where counsel did not argue that rape and kidnapping convictions shared same criminal intent); State v. Davis, 90 Wn. App. 776, 782, 954 P.2d 325 (1998) (assault and burglary convictions shared same criminal intent).

Here, under the State's theory of assault, the purpose of shooting in Colbern's direction was to create "apprehension and fear of bodily injury." CP 283 (Instruction 13); RP 800 (State's closing argument). Under the State's theory of witness intimidation, the purpose was no different – to strike fear into the mind of Colbert. RP 801. Because the relevant inquiry in this context is not whether the crimes share a particular mens rea element, but whether the offender's objective purpose in committing both

crimes is the same, the offenses involved the same criminal intent. Adame, 56 Wn. App. at 811

The next question is whether the offense involved the same victim. In determining who is a crime victim, this Court looks to the Sentencing Reform Act (SRA).[2] State v. Haddock, 141 Wn.2d 103, 111, 3 P.3d 733 (2000). Under the SRA, a "victim" is "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged." RCW 9.94A.030(53).

In the analogous context of witness tampering under RCW 9A.72.120, the target of witness tampering is properly considered a victim of that crime. State v. Victoria, 150 Wn. App. 63, 67-69, 206 P.3d 694 (2009). Because both crimes shared a victim, Colbert, the third requirement is also satisfied. RCW 9.94A.589(1)(a).

b. Defense counsel was ineffective in failing to raise a same criminal conduct argument.

Consideration of whether two crimes constitute the same criminal conduct involves both determinations of fact and the exercise of trial court discretion. State v. Nitsch, 100 Wn. App. 512, 519-20, 997 P.2d 1000, review denied, 141 Wn.2d 1030 (2000). Defense counsel waived a direct

[2] The Washington Criminal Code, Title 9A RCW, does not specifically define the term "victim." City of Auburn v. Hedlund, 165 Wn.2d 645, 651, 201 P.3d 315 (2009).

challenge to the same criminal conduct determination by not raising the argument below. Id. at 519-20.

A claim of ineffective assistance of counsel, however, is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and Article I, Section 22. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to effective assistance. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. A failure to argue same criminal conduct when such an argument is warranted constitutes ineffective assistance. Saunders, 120 Wn. App. at 824-25.

Only legitimate trial strategy or tactics constitute reasonable performance. Kyllo, 166 Wn.2d at 869. Defense counsel's performance fell below an objective standard of reasonableness because, under the circumstances, there was no legitimate reason not to have requested the

trial court to find the assault and the witness tampering to be same criminal conduct. Chith would only have benefited from such a request, and could not have suffered adverse consequences.

Chith's offender score would have been one or two points lower for each offense, including drive-by shooting, the conviction with the longest sentence, and second degree assault, the conviction with the second longest sentence. CP 343-57. See RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (seriousness level of current offenses); RCW 9.94A.589(1)(a) (sentence range for each current offense determined by using other current convictions as if they were prior convictions for offender score). No legitimate strategy or tactical decision justified counsel's acquiescence to an implicit separate criminal conduct determination that increased his client's term of confinement.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. Applying the facts to the law, Chith's ineffective assistance claim prevails because he shows a reasonable probability that the sentencing court would have exercised its discretion to find that the two offenses constituted the same criminal conduct. Chith need not show counsel's deficient performance more likely than not altered the outcome. Strickland, 466 U.S. at 693. He need only show lack of confidence in the

outcome. Thomas, 109 Wn.2d at 226. Here, the trial court did not address the same criminal conduct issue at sentencing because Chith's attorney failed to ask the trial court to exercise its discretion. This Court cannot be confident the trial court would not have found the offenses were same criminal conduct had it been asked to do so. Remand for resentencing is required. Saunders, 120 Wn. App. at 824-25 (setting forth remedy).

3. CHITH'S RIGHT TO A UNANIMOUS JURY WAS VIOLATED BECAUSE THE STATE DID NOT ELECT WHICH ACT CONSTITUTED THE CHARGED DRIVE-BY SHOOTING, AND THE TRIAL COURT FAILED TO GIVE A UNANIMITY INSTRUCTION.

The court violated Chith's right to a unanimous jury verdict as to the drive-by shooting charge because the evidence described several distinct acts of shooting, the State did not elect which act on which it relied, and the court did not instruct the jury it must unanimously agree on the act constituting the charged crime.

A person is guilty of drive-by shooting if "he . . . recklessly discharges a firearm . . . in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is . . . from a motor vehicle." RCW 9A.36.045(1); CP 292 (Instruction 22, to-convict instruction). A person who unlawfully discharges a firearm from a moving motor vehicle may be inferred to have engaged in reckless conduct. RCW 9A.36.045(2). The inference, however, is not binding

upon the jury and it is for the jury to determine what weight, if any, to give such inference. 11 Wash. Prac., Pattern Jury Instr. Crim. (WPIC) 35.30.01 (3d Ed. 1998); CP 291 (Instruction 21).

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. I, § 21. When the State presents evidence of multiple acts that could constitute a charged crime, "the State must tell the jury which act to rely on in its deliberations or the [trial] court must instruct the jury to agree on a specific criminal act." State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), overruled on other grounds by Kitchen, 110 Wn.2d 403. The State's failure to elect the act, coupled with the court's failure to instruct the jury on unanimity, is constitutional error. Kitchen, 110 Wn.2d at 411. "The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." Id. The error may be raised for the first time on appeal, moreover, because a trial court's failure to give a unanimity instruction is a manifest error affecting a constitutional right. State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

The State need not elect, and the court need not give a unanimity instruction, however, if the evidence shows the accused was engaged in a "continuing course of conduct." State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). Courts have considered various factors in determining whether a continuing course of conduct exists in a particular case. Generally, evidence that the charged conduct occurred at different times and places tends to show that several distinct acts occurred rather than a continuing course of conduct. Id. In contrast, evidence that an offense involves a single victim, or that a defendant engages in a series of actions intended to secure the same objective, supports the characterization of those actions as a continuing course of conduct. Id.

In Handran, two arguably assaultive acts did not require a unanimity instruction because they were part of a course of conduct intended to secure sex with a single victim. Handran entered his ex-wife's apartment through the window one night. Id. at 12. He began kissing her, and then hit her in the face. Id. The trial court refused to give a unanimity instruction. The Supreme Court agreed such an instruction was unnecessary because the two acts were part of a continuing course of conduct. Id. at 17. According to the Court, "[the] alleged criminal conduct occurred in one place during a short period of time between the same aggressor and victim. Under a commonsense evaluation of these

facts, the actions evidence a continuing course of conduct . . . rather than several distinct acts." Id.

In State v. Fiallo-Lopez, the defendant argued for the first time on appeal that the trial should have given a unanimity instruction on the charge of delivery of cocaine. 78 Wn. App. 717, 723, 899 P.2d 1294 (1995). He argued that evidence showed two discrete acts of delivering cocaine, delivery of a "sample" to a restaurant and, later, baggies of cocaine at Safeway. Id. at 725. The Court disagreed that an instruction was needed because the two deliveries of cocaine were a continuing course of conduct: The court found the conduct to be part of one continuous delivery of drugs by the defendant to Cooper. Id. at 725-26; cf. State v. King, 75 Wn. App. 899, 903-04, 878 P.2d 466 (1994) (failure to give unanimity instruction reversible error where State's evidence tended to show two distinct instances of cocaine possession occurring at different times, in different places, and involving two different containers), review denied, 125 Wn.2d 1021 (1995).

In State v. Crane, the Supreme Court reversed a Court of Appeals determination that a unanimity instruction was required in a case involving the fatal assault of a child. 116 Wn.2d 315, 330, 804 P.2d 10 (1991). Although the charging period was much longer, the evidence showed the fatal act or acts likely occurred some time during a two-hour period. As

the Court stated, "[T]he evidence supports only a small time frame in which the fatal assault could have occurred." Id.

In Petrich, however, Petrich was charged with one count of indecent liberties and one count of second degree statutory rape. 101 Wn.2d 566. The victim, Petrich's granddaughter, testified to at least four episodes of sexual contact during a 22-month period. The State did not elect the acts it was relying on for each charge. The Supreme Court held the trial court therefore erred by not instructing the jury that to convict on each charge, all 12 jurors must agree that the same underlying criminal was proven beyond a reasonable doubt. Id. at 572.

The Court rejected the State's contention the acts constituted a continuing course of conduct. Each incident occurred at a separate time and place. The only connection between the incidents was the victim. Id. at 571. Moreover, because the Court could not find the error harmless, it reversed. Id. at 573.

This case is more like Petrich and King than Handran, Fiallo-Lopez, or Crane. Although relatively close in time, the shootings were separable by geographical location and underlying motivation. The evidence showed, and the State argued in closing, that at some point Chith fired shots into the air, arguably motivated by his anger at LaPlante. RP 215 (Monroe testimony); RP 802 (State's closing argument describing

each series of shots and arguing that even though some shots were fired into the air, they still produced necessary risk); RP 805 (closing argument espousing theory that Chith assaulted LaPlante by not only head-butting her but also firing out window and driving recklessly).

During another episode, Chith shot in Colbern's direction. According to the State, this was motivated by his desire that Colbern stop following him. RP 801. After shooting at Colbern, Chith simply fired into a neighborhood. RP 293-94. One could infer this was generalized anger related to LaPlante, the belated product of "road rage," or a further threat to Colbern. The State then argued in closing that any one of the shooting incidents described by the witnesses, including shooting in Colbern's direction, could have supported the charges. RP 802. Given the evidence and the State's theory of the evidence, this Court should reject any argument that the separate shooting incidents were a continuing course of conduct.

The failure to give a unanimity instruction in a multiple acts case is of constitutional magnitude and will be deemed harmless only if no rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. State v. Hanson, 59 Wn. App. 651, 659, 800 P.2d 1124 (1990) (citing Kitchen, 110 Wn.2d at 411).

The error here was not harmless. Monroe described shots fired upward into the air, and the State relied on this description in closing argument in arguing the requisite level of risk was satisfied. But there was no testimony regarding the character of the area where these shots were fired. There was no testimony, expert or otherwise, about the danger posed by bullets fired into the air by a small-caliber weapon. Cf. RP 802 (State's closing argument that such action is dangerous). The danger from the shots fired near the junior high school was more apparent, however, as Colbern testified Chith shot in his general direction and then toward a neighborhood. RP 332.

The State told the jury it could convict Chith based on the shots fired into the air. But a rational trier of fact could have had a reasonable doubt as to whether they met the risk threshold necessary for a drive-by shooting conviction. RCW 9A.36.045(1). Because the State cannot meet the test for harmless error, the drive-by shooting conviction should be reversed. Hanson, 59 Wn. App. at 660.

4. THE TRIAL COURT WRONGLY ORDERED CHITH TO ENGAGE IN SUBSTANCE ABUSE EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

As a condition of community custody, the court ordered Chith to engage in treatment "per DOC." CP 349. This was consistent with the

Court's oral ruling. RP 862. But the judgment and sentence also includes a checked box ordering Chith to "undergo an evaluation for treatment for . . . substance abuse . . . and fully comply with all recommended treatment." CP 352. Because the court failed to make any finding in support of this second requirement, however, the condition should be stricken.

RCW 9.94A.703(3)(c) allows a sentencing court to impose "crime-related treatment or counseling services" only if the problem in need of treatment contributed to the offense. State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003) (addressing alcohol treatment).

Before rehabilitative chemical dependency treatment may be imposed, however, RCW 9.94A.607(1) requires the court to find a chemical dependency contributed to the offense:

> *Where the court finds that the offender has a chemical dependency that has contributed to his or her offense*, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

(Emphasis added).

The goal of statutory construction is to carry out legislative intent. Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). When the meaning of a criminal statute is clear on its face, the appellate court assumes

the Legislature means exactly what it says. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

The court did not find Chith was chemically dependant. Under the plain terms of RCW 9.94A.607(1), the court was required to make such a finding before it could impose the condition regarding substance abuse evaluation and treatment.

The State may argue that the condition may nonetheless be affirmed based State v. Powell, 139 Wn. App. 808, 162 P.3d 1180 (2007), reversed on other grounds, 166 Wn2d 73 (2009). There, this Court remarked the trial court correctly imposed substance abuse treatment as a community custody condition, despite the lack of a finding as required by RCW 9.94A.607(1), because the trial evidence showed the defendant consumed methamphetamine before committing the offense and the defense asked the court to impose substance abuse treatment. Id. at 819-20.

Any such argument should be rejected. First, the remarks in Powell are dicta because the Court had already decided to reverse conviction on a separate issue when it addressed the community custody condition. See State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003) (where court of appeals reversed on separate issue, its discussion of another issue likely to arise on remand was dicta); In re Marriage of Roth,

72 Wn. App. 566, 570, 865 P.2d 43 (1994) ("Dicta is language not necessary to the decision in a particular case."). Dicta have no precedential value. Bauer v. State Employment Sec. Dept., 126 Wn. App. 468, 475 n.3, 108 P.3d 1240 (2005). The opinion also arguably conflicts with this Court's decision in Jones, 118 Wn. App. at 209-10 (failure to make statutorily required finding before ordering mental health treatment and counseling was reversible error even though record contained substantial evidence supporting such a finding).

Second, the Court's reasoning in Powell does not stand up to a plain reading of the statute. Under RCW 9.94A.607(1), the court may impose substance abuse treatment only "[w]here the court finds that the offender has a chemical dependency that has contributed" to the offense." Powell ignored this requirement in holding such a condition is valid even if the court makes no finding so long as the trial record could support such a finding. 139 Wn. App. at 819-20. The Powell Court's approach renders the statutory language referring to the need for a finding superfluous. But "[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citation and internal quotation marks omitted).

Any such argument should also be rejected because "[a]ppellate courts are not fact-finders." State v. E.A.J., 116 Wn. App. 777, 785, 67 P.3d 518 (2003). "[I]t is not the function of an appellate court to substitute its judgment for that of the trial court or to weigh the evidence or the credibility of witnesses." Davis v. Department of Labor and Industries, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980). The court in Powell violated these principles when it independently reviewed the record and, in effect, made a finding the sentencing court never made.

Finally, the Court's other written ruling on the subject, as well as its oral ruling, establish that the court was not willing to make such a finding but rather preferred to defer to Chith's community corrections officer. The following exchange occurred:

> [THE STATE]: And then in terms of conditions of supervision and drug-related conditions?
>
> THE COURT: The standard conditions, no use or possession . . . of alcohol or drugs. Obviously, he's going to be on community supervision; so they can certainly order him to do what they feel may be necessary.

RP 862. Because the record indicates the court was unwilling to make such a finding and preferred to defer to DOC, the outcome in Powell should not control the result in this case.

Sentencing errors may be raised for the first time on appeal. Jones, 118 Wn. App. at 204; State v. Anderson, 58 Wn. App. 107, 110, 791 P.2d

547 (1990). Under the plain language of RCW 9.94A.607(1), this Court should order the sentencing court to strike the condition pertaining to substance abuse treatment and counseling on remand. See State v. Lopez, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007) (striking community custody condition where court did not make statutorily required finding that mental illness contributed to crime), review denied, 164 Wn.2d 1012 (2008).

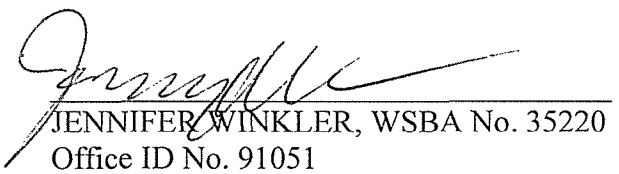
D. CONCLUSION

This Court should reverse Chith's witness intimidation conviction and the accompanying firearm enhancement. Should this Court find to the contrary, this Court should find defense counsel was ineffective in failing to argue that the witness intimidation and second degree assault convictions were the same criminal conduct. Moreover, this Court should reverse Chith's drive-by shooting conviction, as the conviction violates his right to jury unanimity. Finally, this Court should remand for removal of the court-ordered substance abuse and treatment condition.

DATED this 9TH day of June, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER, WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 45651-6-II
	)	
SOPHEAP CHITH,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF JUNE 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SOPHEAP CHITH
NO. 2013036077
PIERCE COUNTY JAIL
910 TACOMA AVENUE S.
TACOMA, WA 98402

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF JUNE 2014.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

June 09, 2014 - 2:23 PM

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Court of Appeals Case Number: 45651-6

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