NO. 45651-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SOPHEAP CHITH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine Stoltz

No. 13-1-00554-1

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..........1

1. When viewed in the light most favorable to the State, was there sufficient evidence to support the crime of intimidation of a witness when the verdict is supported by the reasonable inferences from the evidence?..........1

2. Has defendant demonstrated that trial counsel's performance was both objectively unreasonable and that he was prejudiced by counsel's failure to argue intimidation of a witness and second degree assault were the same criminal conduct?..........1

3. When the acts relied upon are one unit of prosecution, did the trial court err in failing to give a unanimity instruction when none was requested?..........1

4. Should this court remand to allow the trial court to enter a Finding that the defendant has a chemical dependency that contributed to the commission of the crimes when the record indicates defendant committed the offenses to fund his drug habit?..........1

B. STATEMENT OF THE CASE..........2

1. Procedure..........2

2. Facts..........4

C. ARGUMENT..........10

1. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CRIME OF INTIMIDATION OF A WITNESS BASED UPON THE REASONABLE INFERENCES FROM THE EVIDENCE..........10

2. DEFENDANT HAS NOT DEMONSTRATED THAT TRIAL COUNSEL'S PERFORMANCE WAS BOTH OBJECTIVELY UNREASONABLE AND THAT HE WAS PREJUDICED BY COUNSEL'S FAILURE TO ARGUE INTIMIDATION OF A WITNESS AND SECOND DEGREE ASSAULT WERE THE SAME CRIMINAL CONDUCT. 15

3. WHEN THE ACTS RELIED UPON ARE ONE UNIT OF PROSECUTION, DID THE TRIAL COURT ERR IN FAILING TO GIVE AN UNREQUESTED UNANIMITY INSTRUCTION? 18

4. THE COURT SHOULD REMAND TO THE TRIAL COURT TO ALLOW ENTRY OF FINDING DEFENDANT HAS A CHEMICAL DEPENDENCY THAT CONTRIBUTED TO THE COMMISSION OF THE CRIMES WHEN THE RECORD INDICATES THE DEFENDANT COMMITTED THE OFFENSES TO FUND HIS DRUG HABIT. 24

D. CONCLUSION. 27

Table of Authorities

State Cases

State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) 14

State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) 14

State v. Fiallo–Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995) 23

State v. Freeman 153 Wn.2d 765, 771, 108 P.3d 753 (2005)), aff'd,
171 Wn.2d 244, 250 P.3d 107 (2011) 23

State v. Furseth, 156 Wn. App. 516, 521, 233 P.3d 902 (2010) 23

State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*,
479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d 301 (1986) 15, 16

State v. Kelley, 168 Wn.2d 72, 77, 226 P.3d 773 (2010) 23

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) 16

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) 14

State v. Simms, 151 Wn. App. 677, 690, 214 P.3d 919 (2009) 23

State v. Villanueva-Gonzalez, ---P.3d---, July 17, 2014,
WL 3537961 (WA) 21

Federal and Other Jurisdictions

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052,
80 L. Ed. 2d 674 (1984) 15, 16

Rules and Regulations

CrR 3.2.1 2

CrR 3.5 .... 3, 24

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. When viewed in the light most favorable to the State, was there sufficient evidence to support the crime of intimidation of a witness when the verdict is supported by the reasonable inferences from the evidence?

2. Has defendant demonstrated that trial counsel's performance was both objectively unreasonable and that he was prejudiced by counsel's failure to argue intimidation of a witness and second degree assault were the same criminal conduct?

3. When the acts relied upon are one unit of prosecution, did the trial court err in failing to give a unanimity instruction when none was requested?

4. Should this court remand to allow the trial court to enter a Finding that the defendant has a chemical dependency that contributed to the commission of the crimes when the record indicates defendant committed the offenses to fund his drug habit?

B. STATEMENT OF THE CASE.

1. Procedure

The defendant was first seen in court on February 6, 2013 pursuant to CrR 3.2.1, *Procedure Following Warrantless Arrest--Preliminary Appearance.* The court found probable cause and set bail. CP 1-2 (*Dec. of Probable Cause for preliminary hearing).* The defendant was arraigned on February 8, 2013 for a number of crimes as a result of his actions of February 5, 2013.

The defendant was charged with the following:

Count I:	Assault in the Second Degree
Count II:	Drive-By Shooting
Count III:	Unlawful Possession of a Stolen Vehicle
Count IV:	Unlawful Possession of a Firearm in the Second Degree
Count V:	Reckless Driving
Count VI:	Hit and Run (non felony)
Count VII:	Driving While License Suspended in the Third Degree

Counts I and III were firearm enhanced. CP 3-6. (*Information* at arraignment). Several months later the State filed an amended information adding three charges:

Count VIII: Felony Violation of a Protection Order (Assault)

Count IX: Taking Motor Vehicle Without Owner's Permission

Count X: Intimidation of a Witness

All three counts were firearm enhanced. CP 7-12. (*Amended Information*).

The case was called for trial on October 28, 2013 by the Honorable Katherine Stoltz. The court held a CrR 3.5 hearing prior to commencing trial. 2 RP 70. At trial, 24 witnesses testified and 23 exhibits were admitted. CP 383, 384 (*Witness Record, Exhibit Record*). Dr. Geoffrey Loftus testified on behalf of the defendant. 5 RP 451-476. The defendant did not testify.

On November 19, 2013 the jury returned verdicts, guilty as charged on all counts, with enhancements.

The defendant was sentenced on January 10, 2014. CP 343-357 (*Felony Judgment & Sentence*). The State moved to dismiss Count III, unlawful possession of a stolen vehicle, because double jeopardy would be violated given the same vehicle was the basis for that count and Count IX, taking motor vehicle without owner's permission. 9 RP 854-55. The court sentenced the defendant for his felony convictions: drive-by shooting, unlawful possession of a firearm, taking motor vehicle, felony violation of a protection order, and intimidation of a witness. CP 343-57. The court

also sentenced him for his non-felonies: counts V, reckless driving, VI: hit and run, and VII: driving with suspended license. CP 385-86 (*Suspended Judgment & Sentence).*

The defendant was sentenced to the high end of the standard sentencing range on each of his felony convictions, to be served concurrently. The drive-by carried the greatest amount of time and the court imposed 102 months. CP 343-57. There were four firearm enhancements ranging from 18 to 36 months each. The court ordered the enhancements be served consecutively. CP 385-86.

The defendant filed a *Notice of Appeal* on January 17, 2014. This appeal is timely.

2. Facts

On February 5, 2013 the defendant engaged in behavior that lead to the charges enumerated above.

The crime spree started in the afternoon of February 5th with the defendant stealing a 2000 Honda Civic EX registered to the father of victim Matthew Rapozo. 3 RP 167. Mr. Rapozo last saw his Honda Civic around 12:30 in the afternoon, parked in front of his apartment complex in Puyallup, Washington. 3 RP 168. He realized around 4:00-4:30 p.m. that his car was missing. 3 RP 169. He called police. *Id.* The car was

ultimately recovered, among other damage, the car's driver's window was broken, and it was missing several wheels. 6 RP 171. Mr. Rapozo also testified the rear bumper was missing. *Id.* Only his father had a spare key and neither he nor his father had given anyone permission to take or drive the car. 6 RP 174.

Testimony at trial revealed the defendant met up with his friend and co-defendant, Sothea Chum, Chum's girlfriend, Nichole Shoemaker, and his own girlfriend, Tiffany LaPlante. 5 RP 489-91, 552. They eventually ended up at an apartment complex where the defendant wanted to remove the wheels from the Honda. 5 RP 491-501. The defendant and his friends loaded the wheels into the defendant's car. When it appeared things were not going to work out as planned, the defendant's friends began getting rid of the wheels by shoving them out as they were driving. 5 RP 498. Several of the wheels were later recovered. 5 RP 526-28.

Later in the day the defendant was driving his car while armed with a firearm. The defendant is not legally entitled to posses a firearm, which lead to his charge of unlawful possession of a firearm in the second degree. CP 387-88. (*Stipulation*).

His friends testified that the defendant had possession of the stolen Honda and took it to a location where they assisted the defendant in removing the wheels to sell later. 5 RP 489. Based upon the evidence

adduced at trial, it became apparent the defendant had stolen the car. These facts formed the basis for both the charge of taking a motor vehicle without permission and possession of a stolen vehicle. (The later charged was dismissed at sentencing for double jeopardy reasons.)

As mentioned above, the defendant's girlfriend, Ms. LaPlante was with the defendant in the car for a period of time. There was an existing protection order precluding them from having contact. 3 RP 239, Ex. 12 *(DV No Contact Order).* At one point while in the car, they had a disagreement and the defendant responded by head-butting Ms. LaPlante. 4 RP 439-40. This was the basis for the felony charge of violation of a protection order.

The defendant's license was suspended, so he was also charged with driving while license suspended in the third degree. 3 RP 181, Ex. 4. (*DOL certified driving record*).

The remaining charges arise from the defendant firing multiple rounds from the car and his attempt to avoid identification or arrest.

Victim Gabriel Colbern was coming home from work when he found himself driving behind the defendant. He watched as the defendant fire two shots from inside the car, shattering the driver's window. 4 RP 286. He continued behind the vehicle until it stopped in a center turn lane; Mr. Colbern was stopped behind defendant in the same lane. The

defendant gestured to Colbern to go around, Mr. Colbern decided not to and remained stopped behind the defendant. The defendant responded by extending his right arm out the driver's window, turning and facing toward Mr. Colbern. 4 RP 289. The defendant fired two shots at or near Mr. Colbern in an attempt to scare Mr. Colbern. 4 RP 331. The victim was not struck by either round, and was not sure if the defendant fired two or three shots at him. 4 RP 346-49. This forms the basis for second degree assault. The State argued that the defendant's acts of firing at Colbern also constituted an attempt to dissuade Colbern from either reporting or cooperating with law enforcement in any investigation into the defendant's criminal behavior. As a result, the State also charged defendant with one count of intimidation of a witness.[1] Colbern noted there was a junior high school behind him and in the vicinity of where the shots were fired.

After firing at Colbern, the defendant drove off erratically and fishtailed as he rounded a corner, going into on-coming traffic nearly striking on-coming cars. 4 RP 287. This, and other bad driving, supported the charge of reckless driving.

After the defendant turned the corner, he came to a red stop light. He elected to proceed through. As a result of running the red light, he was

[1] The State acknowledges the same actions were the basis for the assault, and concur the intimidation count should be removed from the convictions.

struck by a school bus coming through the intersection. The school bus, which was carrying children at the time, hit the defendant's car in a manner that caused it to spin and the rear bumper to fall off. The defendant continued driving and did not stop and provide the necessary information to the bus driver. 4 RP 294-95. This resulted in the charge of both the reckless driving and hit and run of an attended vehicle.

Mr. Colbern attempted to continue to follow the defendant, but lost him a short distance later. 4 RP 296. He testified he observed the defendant fire either six or seven shots in his presence. 4 RP 347. He testified that several shots were in the direction of the junior high school (when he was firing at Colbern), two in the direction of the neighborhood they were driving through, and the initial two that went out the driver's window, also in the neighborhood. 4 RP 286, 287, 293.

Anna Monroe next saw the defendant as she was coming home from work about 3:00 p.m. in the Puyallup area. 3 RP 204. At one point she was driving behind the defendant. She watched as he extended his arm out the driver's window and fired shots, she said up in the air. 3 RP 215. This is believed to have occurred a short time and distance from those acts observed by Mr. Colbern. Based upon the number of shots, (estimated to be either eight or nine in total) the time of day, the populated area and traffic, the presence of a nearby junior high school,

and a neighborhood, the defendant's firing in such circumstances lead to his charge of drive-by shooting.

The defendant was ultimately apprehended by law enforcement, much in thanks to the information Mr. Colbern provided as he remained on the phone with the 911 operator throughout his observation of the defendant. 4 RP 283, 289, 296-97.

The defendant was interviewed by Detective Canion of the Pierce County Sheriff's Department shortly after his arrest. 6 RP 623-35.

Detective Canion testified at trial to many of the defendant's statements. The defendant candidly explained his significant drug history, including the wide variety of drugs he had taken over the course of his life. 6 RP 630, 634. He also explained that he estimated he had stolen over a 1,000 cars to support his drug habit. 6 RP 630. He claimed to be high every day. 6 RP 634.

As a result of the testimony to the facts outlined above, on November 19, 2013 the defendant was convicted by jury of all charges, including five that carried firearm sentencing enhancements.[2]

[2] One enhancement was eliminated when the charge of possession of a stolen vehicle was dismissed at sentencing on the State's motion based upon double jeopardy.

C. ARGUMENT.

1. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CRIME OF INTIMIDATION OF A WITNESS BASED UPON THE REASONABLE INFERENCES FROM THE EVIDENCE.

a. Relevant Facts

Two witnesses testified seeing the defendant fire a handgun out his driver's window. Mr. Colbern pulled behind defendant while at a stoplight in Puyallup. Just after the light turned green, he saw what he described as two "poof[s] out the side window." 4 RP 286. Mr. Colbern watched as the driver's side window flew out of the car and land in the middle of the road. *Id.* Mr. Colbern called 911. *Id.* Colbern continued behind the defendant's car. When they approached the next traffic light, at 136th and Meridian, the defendant forced his way to the right lane, turned right at a high rate of speed such that he fishtailed into the on-coming lane, almost hitting other vehicles. 4 RP 287. The defendant regained control of the car and continued until he came to a stop "just past Balieu Junior High School." *Id.* Colbern was still behind him. Both cars were stopped in the middle turn lane. The defendant wanted Mr. Colbern to drive around him which he demonstrated by stepping out of the car, turning and "wav[ing] him by." 4 RP 288, 327. The defendant got back inside the car. Mr.

Colbern "didn't go anywhere...and [] was still on the phone." *Id.* Mr. Colbern estimated he was about 25 yards behind the defendant. When Colbern didn't go around, the defendant responded by placing his right arm out the driver's window again and Colbern heard, "pop, pop--back in [his] direction." He testified both bullets went towards Balieu Junior High School." 4 RP 289. Mr. Colbern realized the defendant was shooting at him. Colbern testified the gun was pointed back, towards him. 4 RP 290. Colbern also testified the defendant was looking back at him at this point. 4 RP 292. When the defendant fired at Mr. Colbern he reached out the window with his right hand and turned around and fired. *Id.* Colbern said "[defendant] was shooting in my direction, trying to scare me off." 4 RP 331. Mr. Colbern was able to see the shooter's face. 4 RP 293. He positively identified the defendant in court as the person who shot at him while he was on the phone with 911. 4 RP 310.

The defendant drove off after firing at Mr. Colbern. 4 RP 293. The defendant "fired two more shots out the window randomly just towards the neighborhood that was there." 4 RP 293. Colbern said they were still "on the same stretch of road," i.e. near the junior high school. *Id.* At this point, the defendant had fired a total of six rounds from the car he was driving.

After these two shots, the defendant continued to the next intersection, 94th and 136th. 4 RP 294. The light was red, but the defendant drove through the intersection anyway. As the defendant "blew through" the intersection, he was "T-boned by a school bus with kids on it." 4 RP 294. Mr. Colbern was still behind him. The defendant continued and did not stop. 4 RP 295. Mr. Colbern attempted to follow the defendant after he turned onto 144th Street, but was unsuccessful. 4 RP 296.

Anna Monroe next encountered the defendant on her way home from work about 3:00 p.m. 3 RP 203-04. They were both traveling the same direction on a two lane street, one lane each direction. The defendant passed her at a fast speed, narrowly missing the front bumper of her car. 3 RP 204. She continued behind him and saw a "completely outstretched [arm] on the driver's side." The man fired a gun twice. 3 RP 205. This brought the total number of shots fired by the defendant to either eight or nine. Though she could not identify the driver, she was sure the shot came from the driver's side of the vehicle. 3 RP 213. She described the shots as "directed up to the sky." 3 RP 215. Shortly thereafter she turned onto another street and did not see the defendant again.

The State argued in closing the reasonable inferences from the admitted evidence. The State's theory was that the defendant knew that Mr. Colbern had witnessed him commit a crime, i.e., shooting a gun from his car. Mr. Colbern testified that he was on the phone with 911 and remained on the line with them until he lost sight of the defendant. 4 RP 296. Given the length of time and proximity between the cars, it is reasonable to conclude the defendant was aware Colbern was on the phone, and given his actions, likely with police. The defendant fired with the idea of scaring or threatening the witness with the hope the witness would not report the crime. 7 RP 801. Furthermore, it is a reasonable inference that the defendant hoped to cause sufficient fear that Colbern would either not report the crime, or be deterred from cooperating with law enforcement. The defendant hoped that firing at or in the vicinity of Colbern, and the subsequent shots into the neighborhood, would sufficiently intimidate Colbern so the defendant could go unpunished for his offenses.

b. Applicable law

A defendant's claim of insufficient evidence is reviewed by examining the evidence in the light most favorable to the State. If such review permits that any rational trier of fact could find the essential

elements of the crime beyond a reasonable doubt, the claim fails. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Furthermore, with a claim of insufficient evidence, the defendant admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. ***Salinas*** 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable and shall be given equal weight. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

As to the assessment of the credibility of the witnesses, that job is left to the jury and the reviewing court should defer to the jury on issues of conflicting testimony or determination of the weight to give evidence. ***State v. Camarillo,*** 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

c. Conclusion

Based upon the evidence admitted in this matter, and the applicable law, the State argued reasonable inferences in support of conviction for the crime of intimidation of a witness. The State requests this court affirm this conviction.

2. DEFENDANT HAS NOT DEMONSTRATED THAT TRIAL COUNSEL'S PERFORMANCE WAS BOTH OBJECTIVELY UNREASONABLE AND THAT HE WAS PREJUDICED BY COUNSEL'S FAILURE TO ARGUE INTIMIDATION OF A WITNESS AND SECOND DEGREE ASSAULT WERE THE SAME CRIMINAL CONDUCT.

a. Applicable facts

The State does not dispute that trial counsel did not propose or argue to the court that Count X, intimidation of a witness, amounted to the same criminal conduct as Count I, assault in the second degree.

b. Applicable law

A defendant demonstrates ineffective representation by satisfying the two-part standard initially announced in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), *and subsequently adopted in* ***Washington. State v. Jeffries***, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d 301 (1986). To demonstrate ineffective assistance of counsel, the defendant must show (1) counsel's performance was objectively unreasonable; and (2) the deficient performance prejudiced the defense. ***Jeffries***, 105 Wn.2d at 418, 717 P.2d 722 (*citing* ***Strickland***, 466 U.S. at 687, 104 S. Ct. 2052). The defendant bears the burden of proving both

parts, and failure to establish either part defeats the ineffective assistance of counsel claim. ***Jeffries***, 105 Wn.2d at 418, 717 P.2d 722 (*citing* ***Strickland***, 466 U.S. at 687, 104 S. Ct. 2052). "Competency of counsel is determined based upon the entire record below." ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Courts engage in a strong presumption that counsel's representation was effective. ***McFarland***, 127 Wn.2d at 335.

c. Conclusion

The circumstances of this particular trial place the State in an unusual position. First, based on the totality of the entire record, the defendant has not established that the defendant failed to receive effective assistance of counsel.

Counsel asked pointed and relevant questions of each witness, indicating he was both prepared and had identified the issues of the case. He made timely objections throughout the trial. Based on the entire record, the State submits defendant has not met the first prong of ***Strickland***, i.e., that counsel was objectively unreasonable in his performance as counsel for the defendant.

However, the State must concur that, in this case, based on the particular facts of this case, the crimes of intimidation of a witness and

assault in the second degree amount to continuous conduct. Both charges are based upon the same conduct, the same victim, and involve the same intent, i.e. to cause apprehension in Mr. Colbern by firing a gun at or in the direction of the victim. Therefore, the two charges equate to the same course of criminal conduct and should be treated as one offense for the purposes of sentencing. The defendant should only be sentenced on the assault in the second degree.

Clearly, reducing defendant's offender score by one less felony, is advantageous to the defendant. Trial counsel's failure to argue the same criminal conduct resulted in the defendant's standard sentencing range on each of his felony convictions being higher than without including the intimidation conviction. The State would concur this resulted in prejudice to the defendant, despite the fact that counsel's representation, when looking at the entire record, does not support the first prong of the analysis.

The State proposes this court remand to the sentencing court for a correction of the judgment and sentence reflecting an amended offender score, eliminating the intimidation charge.

3. WHEN THE ACTS RELIED UPON ARE ONE UNIT OF PROSECUTION, DID THE TRIAL COURT ERR IN FAILING TO GIVE AN UNREQUESTED UNANIMITY INSTRUCTION?

a. Applicable Facts

The State relied upon the entirety of defendant's actions in the series of shootings to support the crime of drive-by shooting. The acts support both that charge and that of second degree assault. In the case of drive-by shooting, as compared to the assault of Mr. Colbern, the victim or victims in the drive-by do not have be a particular person. Rather, the defendant's conduct must be such that it creates the risk to "another person."

Jury Instruction no. 18 defined the crime of drive-by shooting. It stated:

> A person commits the crime of drive-by shooting when he recklessly discharges a firearm in a manner that creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge.

CP 268-321.

Mr. Colbern said that the defendant fired twice out of his window, apparently while the window was rolled up. This is based on the fact that these two shots shattered the driver's window of the car. 4 RP 286.

Given the shots go through the window, the reasonable inference is that the defendant fired in a primarily horizontal manner. The defendant continued driving, at this point Mr. Colbern said the defendant "*chang[ed] lanes erratically.*" 4 RP 287. He turned at the next light, and fishtailed as he did so. *Id.* The defendant drove a short distance, "*Just past Balieu Junior High School*" where the defendant took "two shots at [Colbern]." 4 RP 289. This action was clearly directed at Mr. Colbern and intended to cause him apprehension.

Mr. Colbern also said that while these shots were in his direction, the bullets also went towards the Junior High School. 4 RP 289. At one point, Mr. Colbern was not certain if the defendant fired two or three time in his direction. 4 RP 346, 348-49. Colbern also testified that after these shots, the defendant took off and "fired two more shots out the window randomly just towards the neighborhood that was there." 4 RP 293. In response to a subsequent question, he confirmed the shots were in the direction of "a neighborhood right there." 4 RP 293-94. The defendant clearly was firing in a residential neighborhood, near a school, in the middle of the afternoon.

Mr. Colbern said the defendant drove through a red light where defendant was "T-boned by a school bus *with kids on it.*" The collision

with the school bus was near where the defendant recently fired a number of shots.

Anna Monroe testified that she was coming home from work, between 3:00 and 3:15 p.m. that day when she witnessed a person, later identified as the defendant, fire two shots out his driver's window. She was on a public road, close to the notoriously busy Meridian Avenue in Puyallup. 3 RP 204. She testified the street she traveled on "*becomes 98th Avenue East.*" *Id.* She watched as the defendant outstretched his arm and shot twice. 3 RP 205. She indicated the two shots appeared to be "*up to the sky.*" 3 RP 215. This appears to be the last two shots of what was ultimately a total of eight or nine.

Being in an area described as being a neighborhood, near a junior high school, and where school buses come and go, so close in time to the defendant recklessly firing his gun, constitutes drive-by shooting. The State did not rely on one act, or one occasion the defendant fired the weapon, but rather on the entirety of his actions and the conditions and surroundings at the time he fired the gun.

b. Applicable Law

The most recent case to address the "unit of prosecution" subject is that of ***State v. Villanueva-Gonzalez***, ---P.3d---, July 17, 2014, WL 3537961 (WA).[3]

In that case the defendant was convicted of two separate assaults, second degree and fourth degree assault arising from the defendant's attack on his girlfriend. In short, the conduct relied upon in that case included the defendant "head-butting" the victim, breaking her nose in two places. The second act occurred when he grabbed the victim by her neck, and held her against furniture. The defendant was convicted of second degree assault for the head-butting, and fourth degree assault for grabbing her around the neck. The Supreme Court was asked to decide the issue whether the defendant's convictions for the two assaults violated double jeopardy. The Court did extensive research, which included looking to other jurisdictions for guidance to ascertain if the defendant had been convicted twice for the same offense. The Court concluded that the proper analysis was to determine if the two convictions were the "*same in fact.*" The Court stated, *"This is the exact question that the unit of prosecution test is designed to answer."* Slip Op. 6-7. [Emphasis added]. The Court continued,

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[3] The State recognizes this opinion was filed after defendant filed his opening brief.

> There is no bright-line rule for when multiple assaultive acts constitute one course of conduct. While any analysis of this issue is highly dependent on the facts, courts in other jurisdictions generally take the following factors into account:
> - The **length of time** over which the assaultive acts took place,
> - Whether the assaultive acts took place in the **same location**,
> - The **defendant's intent or motivation** for the different assaultive acts,
> - Whether the **acts were uninterrupted** or whether there were any intervening acts or events, and
> - Whether there was an opportunity for the **defendant to reconsider his or her actions.**

Slip Op. 10. [Emphasis added.] The Court stated that no factor is dispositive and the ultimate determination should depend on the totality of the circumstances, not a mechanical balancing of the various factors. Slip Op. 11.

In the present case, the State did not rely on a particular act, or in this case, a particular shooting, upon which to base its charge of drive-by shooting. The State asserts that all of the defendant's acts of shooting from his car in the area(s) where there clearly was people sufficiently close by that they were in substantial risk of death or serious physical injury equate to drive-by shooting. The fact that a portion of those acts also support another charge is not improper, much the way defendant was convicted of crimes where defendant used the firearm and was convicted of unlawful possession of a firearm too.

A legislature can enact statutes imposing cumulative punishments for the same conduct in a single proceeding. ***State v. Kelley***, 168 Wn.2d 72, 77, 226 P.3d 773 (2010). The imposition of multiple punishments, if clearly intended by the legislature, does not violate double jeopardy. *Id.* If the legislature clearly intended to authorize cumulative punishments under two different statutes, the court's double jeopardy analysis is at an end. ***State v. Simms***, 151 Wn. App. 677, 690, 214 P.3d 919 (2009) (*quoting* ***State v. Freeman*** 153 Wn.2d 765, 771, 108 P.3d 753 (2005)), aff'd, 171 Wn.2d 244, 250 P.3d 107 (2011).

Where the State relies on "one unit of prosecution" as basis for a charge, as it did here, a unanimity instruction is not required. ***State v. Furseth,*** 156 Wn. App. 516, 521, 233 P.3d 902 (2010). If the evidence shows the defendant was engaged in a continuing course of conduct, the State need not make an election and the trial court need not give a unanimity instruction. ***State v. Fiallo–Lopez,*** 78 Wn. App. 717, 724, 899 P.2d 1294 (1995).

c. Conclusion

The defendant's actions that day amounted to one continuous course of conduct. All of defendant's irresponsible and dangerous acts of firing the handgun at a particular person, with a junior high school in the

background, in traffic, or at a neighborhood, amounted to creating a substantial risk of death or serious injury to another person. A unanimity instruction was not required nor requested, and therefore the court did not err in not giving the instruction.

4. THE COURT SHOULD REMAND TO THE TRIAL COURT TO ALLOW ENTRY OF FINDING DEFENDANT HAS A CHEMICAL DEPENDENCY THAT CONTRIBUTED TO THE COMMISSION OF THE CRIMES WHEN THE RECORD INDICATES THE DEFENDANT COMMITTED THE OFFENSES TO FUND HIS DRUG HABIT.

At trial, the defendant provided ample evidence that his drug habit fueled his criminal activity. The defendant made numerous statements regarding his drug history when interviewed by Detective Canion. The defendant's statements were admitted at trial through the detective following a CrR 3.5 hearing. Here are some of the defendant's statements from the trial that support the conclusion the defendant has a chemical dependency that contributed to the commission of the crimes:

•[The defendant] told [the detective] he had done every street drug, except for heroin, to include meth, sherm[4], weed; and I believe, acid, as well. 6 RP 630.

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[4] Sherm was described as marijuana dipped in acid or some kind of PSP-based liquid. 6 RP 630.

●[The defendant] told [the detective he] stole cars to sell parts to support his drug habit. 6 RP 631.

●[The defendant said he did every type of drug] except "fucking heroin." 6 RP 633.

●[The defendant said he] started smoking weed when ...young. Started doing coke...in high school. Started doing meth and stopped doing everything, pretty much, just did meth and found a new drug, started swallowing pills. Never did no oxy 80 but started swallowing perc 30s[5], smoked a little bit of wet.[6] 6 RP 633-34.

●D[id] some acid. 6 RP 634.

●Q: ....This [drug use] caused you to get into the car theft business. Is that correct?

A: Yeah. 6 RP 634.

●The defendant estimated he had stolen over thousand cars. 6 RP 630.

●I'm high every day, man. 6 RP 635.

●When asked, the defendant said the purpose he steals cars is for the drugs. 6 RP 635.

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[5] Percocet painkiller.
[6] "Sherm"

No guessing is required, the defendant was candid and rather detailed in his drug use, his frequency, and what he did to fund his habit. A finding the defendant is chemically dependent and that the dependency contributed to the commission of these crimes is well-based and warranted.

The State does not dispute the sentencing court did not make a formal finding. However, at sentencing the State reminded the court there was evidence of a drug problem and followed with a request for drug treatment and conditions. The court mistakenly thought that was sufficient. Given the substantial drug history this defendant clearly has, the State would request this court remand for resentencing to allow the trial court to formally make the proper finding and allow the imposed conditions to remain.

D. CONCLUSION.

The State respectfully requests this court find the following:

1. There was sufficient evidence to support the charge of intimidation of a witness.

2. The convictions for second degree assault and intimidation of a witness amount to the same course of conduct and remand for resentencing for removal of the intimidation conviction, and to adjust the

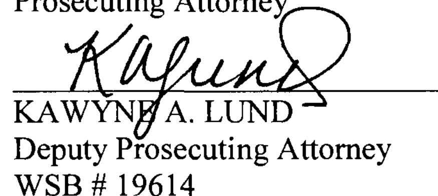
offender score as to the remaining felony convictions.

3. No unanimity jury instruction was required for the drive-by shooting conviction because it was one unit of prosecution. This is based upon the defendant's repeated firing of the gun in an area and at a time that created a substantial risk of death or serious physical injury to a person or persons that were present in the area in which defendant was firing.

4. There is ample evidence in the record to support the finding the defendant suffers from a substantial chemical dependency which was directly related to the commission of the crimes in this case. Further, to remand the matter for resentencing to allow the trial court to make a formal finding and maintain the necessary related conditions of community custody.

DATED: August 6, 2014

MARK LINDQUIST
Pierce County
Prosecuting Attorney



KAWYNE A. LUND
Deputy Prosecuting Attorney
WSB # 19614

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or
ABC-LMI delivery to the attorney of record for the appellant and appellant
c/o his attorney true and correct copies of the document to which this certificate
is attached. This statement is certified to be true and correct under penalty of
perjury of the laws of the State of Washington. Signed at Tacoma, Washington,
on the date below.

9/11/14 ______________________
Date Signature

PIERCE COUNTY PROSECUTOR

August 11, 2014 - 7:37 AM

Transmittal Letter

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Court of Appeals Case Number: 45651-6

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