SUPREME COURT NO. _____

NO. 33002-8-III 92240-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SOPHEAP CHITH,

Petitioner.

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

The Honorable Katherine M. Stolz, Judge

PETITION FOR REVIEW

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WASHINGTON CASES

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A. IDENTITY OF PETITIONER

Petitioner Sopheap Chith asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' unpublished decision in State v. Chith, filed July 9, 2015, attached to this petition as Appendix A. Chith filed a timely motion for reconsideration, App. B, which was denied on August 6, 2015. App. C.

C. ISSUE PRESENTED FOR REVIEW

The petitioner, charged with as single count of drive-by shooting, engaged in separate acts of shooting at different times and different places with different motivations. Where the trial court failed to instruct the jury on the unanimity requirement as to that count, where the State did not make an election in closing argument, and where a rational trier of fact could have had a reasonable doubt as to whether each of the acts met the necessary "substantial risk . . . to another person"[1] threshold under the statute, was the petitioner's right to a unanimous jury violated?

D. STATEMENT OF THE CASE

The State charged Chith with (1) second degree assault (assault with a deadly weapon), (2) drive-by shooting, (3) unlawful possession of

[1] See State v. Rich, 186 Wn. App. 632, 642, 347 P.3d 72 (2015).

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 (involving Chith's then-girlfriend), (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.[2] 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.

Chith appealed,[3] primarily arguing that there was insufficient evidence to convict him of witness intimidation and that the lack of unanimity instruction as to the drive-by shooting violated his right to a unanimous verdict on that count.

The Court of Appeals agreed that insufficient evidence supported the witness intimidation verdict, Opinion (App. A) at 4-5, but rejected Chith's unanimity argument on the grounds that the various shootings represented a continuing course of conduct and that, in any event, any error was harmless. App. A at 5-9.

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[2] By statute, firearm enhancements do not apply to charges of drive-by shooting. RCW 9.94A.533(3)(f).

[3] The appeal was filed in Division Two of the Court of Appeals, but that Court transferred the case to Division Three.

Chith asked the Court of Appeals to reconsider its decision as to the unanimity argument only, arguing the evidence demonstrated Chith engaged in separate acts of shooting at different times and different places with different motivations, the court did not instruct the jury that it was required to agree on the act of shooting and the prosecutor did not elect the act to be relied on, and the error was not harmless in light of Division One's decision in Rich, 186 Wn. App. 632. App. B. The Court of Appeals summarily denied the motion for reconsideration. App. C. Chith now asks this Court to accept review of his case.

E. REASONS REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1), (2), AND (3) AND TO PROVIDE NEEDED GUIDANCE TO THE LOWER COURTS BECAUSE THERE IS NO PUBLISHED CASE DEALING WITH JURY UNANIMITY IN THE CONTEXT OF DRIVE-BY SHOOTING.

This Court should grant review because the Court of Appeals' opinion conflicts with the constitutional requirement of jury unanimity and ignores the recent opinion of Division One as to the risk of harm required to prove drive-by shooting. RAP 13.4(b)(1), (2), and (3). This Court should also accept review to provide guidance as to jury unanimity requirements where drive-by shooting is concerned, as there is a dearth of authority as to this subject. RAP 13.4(b)(4).

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) (emphasis added); CP 292 (Instruction 22, to-convict instruction). A person who unlawfully discharges a firearm from a moving 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 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. 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 an accused engages in a series of acts toward the same objective, supports the characterization of those acts as a continuing course of conduct. Id.[4]

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. Id. In State v. Fiallo-Lopez, Fiallo argued the trial court 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 the evidence showed two discrete acts of delivering cocaine, delivery of a "sample" to a restaurant and a later delivery of baggies of cocaine at a second

[4] Cf. State v. Villanueva-Gonzalez, 180 Wn.2d 975, 329 P.3d 78 (2014) (in context of double jeopardy challenge, devising test for whether multiple assault acts constitute one, or more than one, violation of the assault statute).

location. Id. at 725. The Court disagreed, holding the two deliveries of cocaine were a continuing course of conduct, i.e., one continuous delivery of drugs by Fiallo to the same recipient. Id. at 725-26.

In State v. King, however, the Court held that failure to give unanimity instruction was reversible error where State's evidence tended to show two distinct episodes of cocaine possession occurring at different times, in different places, and involving two different containers. 75 Wn. App. 899, 903-04, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1995). In Petrich, this Court similarly rejected the State's continuing course of conduct argument. Petrich was charged with one count of indecent liberties and one count of second degree statutory rape. 101 Wn.2d 566. Each incident occurred at a separate time and place. The only connection between the incidents was the victim. Id. at 571. This Court could not find the error harmless, so it reversed. Id. at 573.

As Chith argued below, this case is more like Petrich and King than Handran or Fiallo-Lopez. Although close in time, the shootings were separable by geographical location and underlying motivation. While, as the Court of Appeals points out, *Chith* did not present evidence as to his possible motivation for each shooting incident,[5] the *State* did. The Court of Appeals' reasoning is defective in this respect. See Carle v. McChord Credit Union,

[5] App. A at 8.

65 Wn. App. 93, 100, n. 9, 827 P.2d 1070 (1992) ("Each party is entitled to the benefit of evidence produced by the other."); WPIC 1.02 ("Every party is entitled to the benefit of the evidence whether produced by that party or by another party.").

Here, as the State argued in closing, at some point Chith fired shots into the air, arguably motivated by his anger at his then-girlfriend, who was, under the State's theory, the passenger in the stolen car. RP 215 (testimony of Monroe, driver following while shots fired into the air); RP 285-86 (testimony of Colbern, driver of another vehicle who saw the man he identified as Chith shaking fist at and appearing to scream at his passenger, followed by shooting out window); see also 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 (State's closing argument espousing theory, as to charge of felony violation of no-contact order based on assault, that Chith assaulted then-girlfriend by not only head-butting her, but also *by firing gun out the window* and driving recklessly).

During another episode, Chith shot toward Colbern. According to the State's theory, this was motivated by his desire that Colbern stop following him. RP 801.

Then, after shooting *at* Colbern, Chith simply fired into a neighborhood. RP 293-94. One could infer this was generalized anger

related to the girlfriend, 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.

The Court of Appeals' opinion asserts each incident of shooting was motivated by Chith's desire to get away with car theft. App. A at 8. Although this reasoning might be logical as to the Colbern-related shooting, the logic breaks down as to at least one of the other episodes. An individual who wants to get away with car theft would not seek to draw additional attention by shooting into the air. There was, for example, no evidence that the driver perceived Monroe was following when she saw the shots fired into the air. RP 203-15. There was no evidence Chith perceived Colbern was following him when Colbern saw the driver shooting after appearing to become enraged at the passenger. RP 285-86.

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).

Contrary to the Court of Appeals' opinion, App. A at 8-9, the error 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 *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 case of State v. Rich, decided by Division One while Chith's appeal was pending, is instructive. 186 Wn. App. 632, 642, 347 P.3d 72 (2015).[6] That case involved the related reckless endangerment statute. RCW 9A.36.050(1) provides as follows:

> A person is guilty of reckless endangerment when he or she recklessly engages in conduct not amounting to drive-by shooting but that *creates a substantial risk of death or serious physical injury to another person.*

(Emphasis added.) The reckless endangerment statute thus proscribes only endangering conduct that places another person at *substantial* risk. Rich, 186 Wn. App. at 642 (citing State v. Graham, 153 Wn.2d 400, 406, 103 P.3d 1238

[6] Chith brought the Rich case to the Court of Appeals' attention through a Statement of Additional Authorities in April of 2015 two weeks after its publication.

(2005)). Significantly, the reckless endangerment statute, located in the Revised Code of Washington side-by-side with drive-by shooting, utilizes the same italicized language as drive-by shooting.

On appeal, Rich argued that the State failed to prove beyond a reasonable doubt that merely driving while intoxicated with a passenger created a substantial risk of death or serious physical injury to another. Rich, 186 Wn. App. at 640.

The State argued the fact that Rich operated a vehicle while legally intoxicated in violation of the DUI statute—Rich had blood alcohol levels exceeding .18—also automatically satisfied the elements of reckless endangerment. The State also argued the following additional "evidence" supported a finding that Rich's conduct created a substantial risk of death or serious physical injury: "(1) Rich endangered a passenger and motorists on a 'major public roadway,' (2) she was heavily intoxicated, and (3) she exceeded the speed limit." Id. at 641-42.

Division One rejected each of the State's arguments.

> The State's suggestion that the trier of fact could have relied on the presence of others—motorists or pedestrians—to satisfy the victim element is wholly unsupported. . . . *[T]he State offered no evidence whatsoever about the presence of other vehicles, motorists, or pedestrians, nor any evidence about the type of road or traffic conditions.*

Id. at 642 (emphasis added).

Reversing the conviction, Division One concluded the State presented insufficient evidence from which the trier of fact could conclude Rich's driving created a "risk of death or serious physical injury that was considerable or substantial."[7] Id. at 647.

Here, the State told the jury it could convict Chith based on the shots fired into the air. But, as Rich makes apparent, a rational trier of fact could have had a reasonable doubt as to whether that act met the necessary "substantial risk to another person" threshold. Comparable to the Rich case, there was simply no testimony regarding the character the area where Chith fired his shots into the air or the specific danger posed by firing into the air. Id. at 642. The Court of Appeals' opinion recognizes that the shooting occurred in the afternoon when other drivers were on the road. But as in Rich, where the clearly intoxicated Rich was seen driving with traffic at around 8 p.m., this does not necessarily establish "substantial" danger to any individual or individuals. In any event, the test is not (as in Rich) whether *any* rational trier of fact could have found substantial danger.[8] The test is,

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[7] In rejecting the State's arguments, Division One observed that this Court has approved of the definition of "substantial" as "'considerable in amount, value, or worth.'" Rich, 186 Wn. App. at 647 (quoting State v. McKague, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011) (quoting Webster's Third New International Dictionary 2280 (2002))).

[8] Rich, 186 Wn. App. at 640 (quoting State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979))).

rather, whether the State can demonstrate *no* rational trier of fact could have a reasonable doubt as to whether others were substantially endangered by that particular shooting incident. Hanson, 59 Wn. App. at 659. It goes without saying that it is easier for an appellant to satisfy the latter standard than the former.

There was evidence supporting differing motivations for each of the shootings, which occurred at distinct times and places. Moreover, the State cannot meet the test for harmless error. This Court should accept review and reverse Chith's drive-by shooting conviction because it was not supported by a unanimous jury verdict. Id. at 660.

In summary, this Court should accept review because the Court of Appeals' opinion conflicts with the law of jury unanimity and with Division One's opinion as to the risk of harm required to prove drive-by shooting. RAP 13.4(b)(1), (2), and (3). This Court should also accept review to provide guidance as to whether shootings occurring at different times and in different places and for different reasons must constitute a continuing course of conduct, or rather may represent separate acts. RAP 13.4(b)(4).

F. CONCLUSION

For the foregoing reasons, this Court should accept review of Mr. Chith's case.

DATED this 4TH day of September, 2015

Respectfully submitted,

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APPENDIX A

FILED
JULY 9, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. SOPHEAP CHITH, Appellant.	)	No. 33002-8-III UNPUBLISHED OPINION

BROWN, A.C.J. – Sopheap Chith appeals his witness intimidation and drive-by shooting convictions. He contends (1) insufficient evidence supports his conviction for witness intimidation and alternatively that he received ineffective assistance of counsel because his counsel failed to argue same criminal conduct for his witness intimidation and second degree assault convictions, (2) a unanimity instruction was required on the drive-by shooting charge, and (3) the trial court erred in imposing substance abuse treatment as a community custody condition. Because insufficient evidence supports the witness intimidation conviction and no findings support the imposition of the community custody condition, we agree with Mr. Chith's first and third contentions, but we hold under these facts that no unanimity instruction was required because of a continuing course of conduct. Accordingly, we reverse the witness intimidation

conviction, remand for the trial court to resentence on the community custody condition, and affirm Mr. Chith's drive-by shooting conviction.

FACTS

On February 5, 2013, Mr. Chith stole a silver Honda Civic from the parking lot of a Puyallup apartment complex. Mr. Chith and his girlfriend, Tiffany LaPlante, drove the car to an apartment complex in Spanaway, where the pair joined Sothea Chum and Nicole Shoemaker; they began removing the Civic's tires before Mr. Chith left, fearing capture. People noticed Mr. Chith on the way to Spanaway. Gabriel Colbern sat at a red light at a busy intersection, waiting to turn left, when he saw Mr. Chith across the intersection. Mr. Chith stood outside the Civic, which was stopped at a red light. He appeared to be yelling at the person inside the car. When the light changed, Mr. Chith got back in his car and turned right, directly in front of Mr. Colbern's car. Mr. Colbern noted Mr. Chith was gesturing angrily at his passenger. Ms. LaPlante later told officers Mr. Chith was upset with her, got out of the car, returned, and head-butted her.

Mr. Colbern followed Mr. Chith, noting he drove erratically, weaving and fishtailing in and out of lanes. Mr. Colbern saw Mr. Chith fire two shots from the car, shattering the driver's side window, prompting Mr. Colbern to call the police. Mr. Colbern continued to follow Mr. Chith until he stopped in a center turn lane near a junior high school. Mr. Chith tried to wave Mr. Colbern past him, but Mr. Colbern stayed where he was. Mr. Chith then fired two or three shots at or near Mr. Colbern in an attempt to scare Mr. Colbern. Mr. Chith resumed driving, firing two more shots "just

toward the neighborhood that was there." Report of Proceedings at 293-94. Mr. Chith drove on, running a red light. A school bus full of children hit Mr. Chith's car, loosening the rear bumper. Mr. Chith still continued to drive, however Mr. Colbern lost sight of the car. Mr Colbern remained on the phone with the police during this time.

Anna Monroe saw Mr. Chith near a busy intersection as she drove home from work. She drove behind Mr. Chith, who was driving aggressively. She saw Mr. Chith extend his arm out the driver's window and fire two shots into the air. Ms. Monroe lost sight of Mr. Chith when his car turned left.

The State charged multiple crimes. A jury found Mr. Chith guilty of the following counts: (I) second degree assault with a firearm enhancement; (II) drive-by shooting; (III) unlawful possession of a stolen vehicle with a firearm enhancement; (IV) second degree unlawful possession of a firearm; (V) reckless driving; (VI) hit and run; (VII) third degree driving with a suspended license; (VIII) violation of a court order with a firearm enhancement; (IX) first degree taking of a motor vehicle without permission with a firearm enhancement; and (X) witness intimidation with a firearm enhancement. The trial court dismissed count III, ruling it merged with count IX. The court sentenced Mr. Chith to concurrent standard range sentences on the felonies plus four firearm enhancements for a total sentence of 228 months. Without findings, the court ordered a substance abuse evaluation and treatment as a community custody condition. Mr. Chith appealed.

ANALYSIS

A. Witness-Intimidation Evidence

The issue is whether Mr. Chith's witness intimidation conviction is supported by sufficient evidence under RCW 9A.72.110(1)(a). "A defendant's challenge to the sufficiency of the evidence requires the reviewing court to view the evidence in the light most favorable to the State and to determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt." *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007).

RCW 9A.72.110, in relevant part, provides:

> (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.

"Subsections (a) through (d) describe alternative means of committing the crime of intimidating a witness." *Brown*, 162 Wn.2d at 428.

Brown is dispositive. In *Brown*, the defendant committed a burglary. *Id.* at 426. He told a woman who overheard him discussing the burglary that she would "'pay'" if she spoke to police. *Id.* The defendant was subsequently 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. The Supreme Court concluded insufficient evidence supported his conviction because the evidence only proved the defendant

intended to prevent the witness from providing information to the police; the evidence did not show the defendant intended to influence the witness' testimony. *Id.* at 430.

Mr. Chith's case is similar to *Brown*. Evidence shows Mr. Chith did not want Mr. Colbern reporting his activities to the police. But no evidence shows Mr. Chith wanted Mr. Colbern to change his testimony. The evidence, viewed most favorably to the State, shows Mr. Chith threatened Mr. Colbern in an attempt to prevent him from providing any information to the police. This is insufficient to meet the influencing testimony prong of RCW 9A.72.110. Because insufficient evidence supports his witness intimidation conviction, we do not address Mr. Chith's alternative ineffective assistance arguments.

B. Unanimity Instruction.

The issue is whether, considering the evidence describing several shootings, the trial court erred by not giving a unanimity instruction for the drive-by shooting charge. Mr. Chith argues that, if so, the omission was not harmless error.

"A person is guilty of drive-by shooting when 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). While "[a] person who unlawfully discharges a firearm from a moving motor vehicle may be inferred to have engaged in reckless conduct," this inference may be overcome. RCW 9A.36.045(2).

Because of its constitutional implications, we must consider a unanimity instruction argument regardless of whether such an instruction was proposed or argued.

State v. Fiallo-Lopez, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995). "When the facts show two or more criminal acts which could constitute the crime charged, the jury must unanimously agree on the same act to convict the defendant." *Id.* at 723-24. As such, the State must specify "the specific criminal act on which it is relying for conviction." *Id.* at 724. If the State does not do so, "the trial court must instruct the jury that all the jurors must agree that the same underlying criminal act was proven beyond a reasonable doubt." *Id.* The failure of the State or the trial court to act accordingly is constitutional error. *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009). The error results from the possibility some jurors may have relied on one act or incident and some jurors a different act, resulting in a lack of unanimity on all elements necessary for a valid conviction. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

However, no unanimity instruction is needed if the evidence shows the defendant was engaged in a "continuing course of conduct." *Fiallo-Lopez*, 78 Wn. App. at 724. "We review the facts in a commonsense manner to decide whether criminal conduct constitutes one continuing act." *Id.* In analyzing whether a continuing course of conduct exists, courts consider various factors. *Id.* "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.* Additionally, evidence of a single victim is not by itself enough to show one continuing offense. *Id.* But "evidence 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 rather than several distinct acts." *Id.*

In *State v. Handran*, 113 Wn.2d 11, 775 P.2d 453 (1989), the defendant entered his ex-wife's apartment at night via the window. *Id.* at 12. He kissed her then hit her in the face. *Id.* A unanimity instruction was not needed for the two alleged assaults because the defendant's actions showed a continuing course of conduct intended to secure sexual relations with the victim rather than several distinct acts. *Id.* at 17. Similarly, in *Fiallo-Lopez*, a unanimity instruction was not needed on the charge of delivery of cocaine. *Fiallo-Lopez*, 78 Wn. App. 717. The evidence showed two discrete acts of delivering cocaine, a sample at a restaurant and bags of cocaine at a grocery store. *Id.* at 725. The court found the two deliveries of cocaine were a continuing course of conduct: the purchaser of each sale was the same and the purchases were near in time. *Id.* at 725-26.

But a unanimity instruction was required in *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), *overruled in part on other grounds by Kitchen*, 110 Wn.2d 403. The State charged the defendant with one count of indecent liberties and one count of second degree statutory rape. *Id.* at 568. The victim testified to at least four episodes of sexual contact during a 22-month period. *Id.* Because each incident occurred in a separate time frame and identifying place and the sole connection between the incidents was the victim, a unanimity instruction was necessary. *Id.* at 571-73.

Contrary to Mr. Chith's assertions, his case is more similar to *Handran* and *Fiallo-Lopez* than *Petrich*. Mr. Chith agrees the shootings were relatively close in time but argues they were separable by geographic location and motivation. But Mr. Chith did not present any motivation evidence at trial. Looking at the shooting conduct in a commonsense manner, the evidence shows Mr. Chith's actions were intended to secure the same objective: stealing and stripping a car. The first shooting occurred sometime after Mr. Chith and Ms. LaPlante got into an argument about stealing the car. While he may have been upset with Ms. LaPlante, he wanted to get away with stealing the car. The second shooting occurred when Mr. Chith shot at Mr. Colbern. Mr. Chith saw Mr. Colbern following him and using the phone. He wanted Mr. Colbern to leave him alone so he would not be caught with a stolen car and consequently fired at Mr. Colbern. The shooting was motivated by a desire to get away with stealing a car. The third shooting occurred a little after Mr. Colbern refused to go ahead of Mr. Chith. Once again, Mr. Chith was upset because he could not get rid of the witness to his crime. The fourth shooting occurred sometime after the bus accident, inferably because Mr. Chith was frustrated with the situation regarding the stolen car and not getting caught. While generally distinct acts, Mr. Chith's crimes occurred close in time in the same moving vehicle and were motivated by the same objective of getting away with his crime.

However, even had we found it was error to not give a unanimity instruction, it was harmless. *See Petrich*, 101 Wn.2d at 573 ("The error is harmless only if a rational trier of fact could have found each incident proved beyond a reasonable doubt."). All

four shootings carried with them a substantial risk of physical injury. The first shooting was in the middle of the afternoon, when people were getting off work, with traffic on the road. The second and third shootings were in Mr. Colbern's direction, at a nearby school, and into a neighborhood. The fourth shooting was also in an area where people were traveling.

C. Community Custody Condition

The issue is whether, under RCW 9.94A.607(1), the trial court erred when ordering a substance abuse evaluation and treatment as a condition of community custody without making required findings. The State concedes remand is required.

RCW 9.94A.607(1) allows a court to order rehabilitative chemical dependency treatment provided the court "finds that the offender has a chemical dependency that contributed to his . . . offense." Both the State and Mr. Chith agree the trial court did not make the appropriate findings. However, while the State requests we remand for the trial court to make the appropriate findings and keep the condition, Mr. Chith argues *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003), and *State v. Lopez*, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007), require dismissal. In *Lopez*, the court struck the mental health treatment condition of community custody because the trial court did not make the statutorily required finding that mental illness contributed to the crime. 142 Wn. App. at 353-54. The court found no basis in the record for the imposition of such a condition. *Id.* at 345; *see also Jones*, 118 Wn. App. at 207, 211 (striking the alcohol counseling condition because nothing in the record showed alcohol contributed

to the offense and striking the mental health treatment condition unless the trial court determined it could lawfully and presently comply with statutory requirements).

Here, testimony showed Mr. Chith's drug addiction contributed to the crime. RCW 9.94A.607(1) mandates certain findings must be made before substance abuse treatment can be ordered; remanding to make those findings does not render the statutory language superfluous. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Provided the trial court on remand can make the requisite findings, the condition should be kept. And if the trial court cannot make those findings, it should strike the condition.

Witness intimidation conviction reversed, drive-by shooting conviction affirmed, and remanded for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, A.C.J.

WE CONCUR:

Korsmo, J.

Lawrence-Berrey, J.

APPENDIX B

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

STATE OF WASHINGTON, Respondent, vs. SOPHEAP CHITH, Appellant.	)	No. 33002-8-III MOTION FOR RECONSIDERATION

I. IDENTITY OF MOVING PARTY AND RELIEF SOUGHT

Appellant Sopheap Chith, through his attorneys, Nielsen, Broman & Koch, asks that under RAPs 12.3 and 12.4 this Court reconsider its unpublished opinion, filed on June 8, 2015. The opinion is attached as an Appendix.

II. FACTS RELEVANT TO MOTION

The State charged 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 (involving Chith's then-girlfriend), (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.[1] 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.

Chith appealed, primarily arguing that there was insufficient evidence to convict him of witness intimidation and that the lack of unanimity instruction as to the drive-by shooting violated his right to a unanimous verdict on that count.

This Court agreed that insufficient evidence supported the witness intimidation conviction, Opinion (App.) at 4-5, but rejected Chith's unanimity argument on the grounds that the various shootings represented a continuing course of conduct and that, in any event, any error was harmless because each shooting endangered others. App. at 5-9.

Chith now asks this Court to reconsider its decision as to the unanimity argument only. This Court's opinion misapprehends the evidence at trial as well as relevant law as to that argument.

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[1] By statute, firearm enhancements do not apply to charges of drive-by shooting. RCW 9.94A.533(3)(f).

III. GROUNDS FOR RELIEF AND ARGUMNT

THIS COURT SHOULD RECONSIDER ITS DECISION AND HOLD THE LACK OF UNANIMITY INSTRUCTION AS TO DRIVE-BY SHOOTING VIOLATED CHITH'S RIGHT TO A UNANIMOUS JVERDICT ON THAT COUNT.

Under RAP 12.4(c), a motion for reconsideration should

> state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised.

Here, this Court misapprehended the facts and misapplied the law.

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) (emphasis added); CP 292 (Instruction 22, to-convict instruction). A person who unlawfully discharges a firearm from a moving 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 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. 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 an accused engages in a series of acts toward the same objective, supports the characterization of those acts 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. Id. In State v. Fiallo-Lopez, Fiallo argued the trial court

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 the evidence showed two discrete acts of delivering cocaine, delivery of a "sample" to a restaurant and a later delivery of baggies of cocaine at a second location. Id. at 725. The Court disagreed, holding the two deliveries of cocaine were a continuing course of conduct, i.e., one continuous delivery of drugs by Fiallo to the same recipient. Id. at 725-26.

In State v. King, 75 Wn. App. 899, 903-04, 878 P.2d 466 (1994), however, the Court held that failure to give unanimity instruction was reversible error where State's evidence tended to show two distinct episodes of cocaine possession occurring at different times, in different places, and involving two different containers), review denied, 125 Wn.2d 1021 (1995). In Petrich, the Court similarly rejected the State's continuing course of conduct argument. Petrich was charged with one count of indecent liberties and one count of second degree statutory rape. 101 Wn.2d 566. Each incident occurred at a separate time and place. The only connection between the incidents was the victim. Id. at 571. And the Court could not find the error harmless, it reversed. Id. at 573.

As Chith argued in his Brief of Appellant, this case is more like Petrich and King than Handran or Fiallo-Lopez. Although close in time, the shootings were separable by geographical location and underlying motivation. While, as this Court points out, *Chith* did not present evidence as to his possible

motivation for each shooting incident,[2] the *State* did. Chith respectfully asserts that, as a result, this Court's reasoning is flawed in this respect. See Carle v. McChord Credit Union, 65 Wn. App. 93, 100, n. 9, 827 P.2d 1070 (1992) ("Each party is entitled to the benefit of evidence produced by the other."); WPIC 1.02 ("Every party is entitled to the benefit of the evidence whether produced by that party or by another party.").

Here, as the State argued in closing, at some point Chith fired shots into the air, arguably motivated by his anger at his then-girlfriend, who was, under the State's theory, the passenger in the stolen car. RP 215 (testimony of Monroe, driver following while shots fired into the air); RP 285-86 (testimony of Colbern, driver of another vehicle who saw the man he identified as Chith shaking fist at and appearing to scream at his passenger, followed by shooting out window); see also 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 (State's closing argument espousing theory, as to charge of felony violation of no-contact order based on assault, that Chith assaulted then-girlfriend by not only head-butting her, but also *by firing gun out the window* and driving recklessly).

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[2] App. at 8.

During another episode, Chith shot toward Colbern. According to the State's theory, this was motivated by his desire that Colbern stop following him. RP 801.

Then, after shooting *at* Colbern, Chith simply fired into a neighborhood. RP 293-94. One could infer this was generalized anger related to the girlfriend, 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.

This Court's opinion asserts each incident of shooting was motivated by Chith's desire to get away with car theft. App. at 8. Although this reasoning might be logical as to the Colbern-related shooting, the logic breaks down as to at least one of the other episodes. An individual who wants to get away with car theft would not seek to draw additional attention by shooting into the air. There was, for example, no evidence that the driver perceived Monroe was following when she saw the shots fired into the air. RP 203-15. There was no evidence Chith perceived Colbern was following him when Colbern saw the driver shooting after appearing to become enraged at the passenger. RP 285-86.

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).

Contrary to this Court's opinion, App. at 8-9, 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 *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 case of State v. Rich, decided while Chith's appeal was pending, is instructive. 186 Wn. App. 632, 642, 347 P.3d 72 (2015).[3] That case involved the reckless endangerment statute. RCW 9A.36.050(1) provides as follows:

> A person is guilty of reckless endangerment when he or she recklessly engages in conduct not amounting to drive-by shooting but that *creates a substantial risk of death or serious physical injury to another person.*

[3] Chith brought the Rich case to this Court's attention through a Statement of Additional Authorities in April of 2015, two weeks after its publication.

(Emphasis added.) The reckless endangerment statute thus proscribes only endangering conduct that places another person at *substantial* risk. Rich, 186 Wn. App. at 642 (citing State v. Graham, 153 Wn.2d 400, 406, 103 P.3d 1238 (2005)). Significantly, the reckless endangerment statute, located in the Revised Code of Washington side-by-side with drive-by shooting, utilizes the same italicized language as drive-by shooting.

On appeal, Rich argued that the State failed to prove beyond a reasonable doubt that merely driving while intoxicated with a passenger created a substantial risk of death or serious physical injury to another. Rich, 186 Wn. App. at 640.

The State argued the fact that Rich operated a vehicle while legally intoxicated in violation of the DUI statute—Rich had blood alcohol levels exceeding .18—also automatically satisfied the elements of reckless endangerment. The State also argued the following additional "evidence" supported a finding that Rich's conduct created a substantial risk of death or serious physical injury: "(1) Rich endangered a passenger and motorists on a 'major public roadway,' (2) she was heavily intoxicated, and (3) she exceeded the speed limit." Id. at 641-42.

The Court rejected each of the State's arguments.

> The State's suggestion that the trier of fact could have relied on the presence of others—motorists or pedestrians—to satisfy the victim element is wholly unsupported. . . . *[T]he*

> *State offered no evidence whatsoever about the presence of other vehicles, motorists, or pedestrians, nor any evidence about the type of road or traffic conditions.*

Id. at 642 (emphasis added).

Reversing the conviction, the Court concluded the State presented insufficient evidence from which the trier of fact could conclude Rich's driving created a "risk of death or serious physical injury that was considerable or substantial."[4] Id. at 647.

Here, the State told the jury it could convict Chith based on the shots fired into the air. But, as argued in Chith's opening brief, and as Rich makes even more apparent, a rational trier of fact could have had a reasonable doubt as to whether that act met the necessary "substantial risk to another person" threshold. Comparable to the Rich case, there was simply no testimony regarding the character the area where Chith fired his shots into the air or the specific danger posed by firing into the air. Id. at 642. This Court's opinion recognizes that the shooting occurred in the afternoon when other drivers were on the road. But as in Rich, where the clearly intoxicated Rich was seen driving with traffic at around 8 p.m., this does not necessarily establish "substantial"

[4] In rejecting the State's arguments, the Court observed that the Supreme Court has approved of the definition of "substantial" as "'considerable in amount, value, or worth.'" Rich, 186 Wn. App. at 647 (quoting State v. McKague, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011) (quoting Webster's Third New International Dictionary 2280 (2002))).

danger to any individual or individuals. In any event, the test is not (as in Rich) whether *any* rational trier of fact could have found substantial danger.[5] The test is, rather, whether the State can demonstrate *no* rational trier of fact could have a reasonable doubt as to whether others were substantially endangered by that particular shooting incident. Hanson, 59 Wn. App. at 659. It goes without saying that it is easier for an appellant to satisfy the latter standard than the former.

In summary, there was evidence supporting differing motivations for each of the shootings, which occurred at distinct times and places. Moreover, the State cannot meet the test for harmless error. This Court should, therefore, reconsider its opinion holding to the contrary and reverse Chith's drive-by shooting conviction. Id. at 660.

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[5] Rich, 186 Wn. App. at 640 (quoting State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

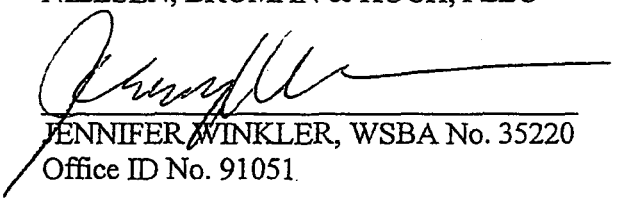
IV. CONCLUSION

For the foregoing reasons, Chith respectfully requests that this Court reconsider its decision as required by RAP 12.4(c).

DATED this 28TH day of July, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX C

FILED
August 6, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON, Respondent, v. SOPHEAP CHITH, Appellant.	No. 33002-8-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration of this court's decision of July 9, 2015, and having reviewed the records and files herein, is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration is hereby denied.

DATED: August 6, 2015

PANEL: Jj. Brown, Korsmo, Lawrence-Berrey

FOR THE COURT:

Laurel H. Siddoway, CJ

LAUREL H. SIDDOWAY
CHIEF JUDGE

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. SOPHEAP CHITH, Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 33002-8-III

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 4TH DAY OF SEPTEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL PER AGREEMENT OF THE PARTIES PURSUANT TO GR30(b)(4) AND/OR BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] PIERCE COUNTY PROSECUOR'S OFFICE
PCpatcecf@co.pierce.wa.us

[X] SOPHEAP CHITH
DOC NO. 374950
STAFORD CREEK CORRECTIONS CENTER
191 CONSTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF SEPTEMBER 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

September 04, 2015 - 3:10 PM

Transmittal Letter

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