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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RANCE POINTEC, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Karina Kirkendoll

No. 15-1-03895-0

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**Brief of Respondent**

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

1. Where defendant was engaged in a continuing course of conduct when he had actual and constructive possession of a 9 millimeter handgun, was the State required to elect a single incident upon which it relied to convict him?
2. If defendant was not engaged in a continuing course of conduct, did the State prove beyond a reasonable doubt that defendant had unlawful possession of a 9 millimeter firearm defendant helped his co-defendant purchase and was found in the home which they shared and to which he had keys?
3. Did the State properly elect which possessory act it was relying on for conviction when in closing argument the State argued how video of defendant shooting an AR-15 was enough to convict him for unlawful possession of that firearm?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Rance Pointec, hereinafter “defendant,” was charged by Third Amended Information with two counts of unlawful human trafficking in the second degree (counts I and V), one count of promoting prostitution in the second degree (count II), and two counts of unlawful possession of a firearm in the first degree (counts III and IV). CP 35-37. Count III was for unlawful possession of a 9 millimeter (mm) handgun and count IV was for unlawful possession of an AR-15 rifle. CP 46-80 (Inst. No. 28-29). Defendant was originally charged with co-defendant Nakita Allen. *See* CP 122-130. Defendant’s and Allen’s trials were severed prior to the commencement of defendant’s trial. 1RP 6-7, 10.<sup>1</sup>

Throughout the course of the trial extensive video and photographic evidence was brought forth connecting defendant to both the 9 mm and the AR-15. Exhibit 5 was screenshots from multiple different videos. Among the screenshots were two different pages of defendant being with Allen when she purchased the 9 mm. Exh. 5. On page 1 of the exhibit were two different photos of defendant handling the gun at Surplus Ammo and Arms, the gun store where defendant and Allen purchased the

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<sup>1</sup> The verbatim reports of proceedings relevant to the issues on appeal are contained in twelve volumes with consecutive pagination.

firearm. *Id.* Page 2 has a photo of defendant selecting 9 mm ammunition and giving it to Allen. *Id.* Exhibit 9 was video evidence of this purchase. In one of the videos, defendant can be seen handing Allen money which she immediately gives to the cashier to purchase the 9 mm. Exh. 9. Also in the video and photographs was Detective Ken Lewis of the Puyallup Police Department. 6RP 767. Detective Lewis happened to be at the store for personal purchases when defendant and Allen purchased the 9 mm and discussed with defendant how they would like the gun. 6RP 768. The 9 mm was later found on the bed in the apartment where defendant and Allen lived. 6RP 762-763. The AR-15 was found in a rifle case wedged between the wood of the footboard and the mattress. 6RP 756-757.

Additional video evidence and instant messages were admitted concerning defendant possessing the AR-15. Exhibit 8 was played to the jury, showing defendant firing the AR-15. Exh. 8 The video was taken on August 26, 2015. 6RP 853. Exhibit 6, Facebook Messenger conversations between defendant and Andrew Mitchell was admitted to the jury. Exh. 6; 6RP 804. The conversation included discussions of the purchase price for the AR-15 and complaints defendant had on its functionality. *Id.*

During closing argument, the State discussed defendant having possession of both the 9 mm handgun and AR-15 rifle in detail. 7RP 961-963. The State argued that defendant was in possession of the 9 mm both

when he and Allen purchased the gun, and because it was found in the apartment where they both reside. 7RP 961-962. For the AR-15, the State made a clear election as to which act it wanted the jury to convict defendant of being in unlawful possession of the rifle. 7RP 962. The State argued how defendant was in unlawful possession of the gun based upon a video showing defendant firing the gun. *Id.*<sup>2</sup>

The State also argued how defendant lived at the residence where the guns were found. 7RP 962. Exhibit 68 is a series of text messages between defendant and Allen. Exh. 68. The prosecutor read aloud multiple conversations between defendant and Allen where defendant explicitly and implicitly referenced the apartment where the guns were found as his residence. 7RP 961-962.

... [Allen] says, "Because we can't get along and I can't seem to get through to you. So you can stay here. I'm already here getting the things I need. Keep it. Just don't be late on rent. This is in my name, you know."

[Defendant] says. "You're not getting through. You're coming off as nagging. But okay. Leave. I'm still leaving. Don't need that place by myself."

Throughout [the exhibit] it's "I'll be home soon" or "Come home now," that kind of thing, on and on and on.

7RP 968-969.

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<sup>2</sup> The State erroneously stated it was a Facebook video. 7RP 962. This was an unintentional error as the video showing him shooting the AR-15 was a Snapchat video. Ex. 5, 8; 6RP 853. No evidence was presented of defendant shooting the AR-15 in a Facebook video.

Following trial, defendant was convicted of promoting prostitution and both unlawful possession of firearm counts. CP 82-84; 11RP 1135. He was acquitted on both human trafficking counts. CP 81, 85; 11RP 1135. Defendant was subsequently sentenced to a period of confinement of 43 months on the promoting prostitution conviction and 78 months on each of the unlawful possession of a firearm convictions with all convictions to run concurrent. CP 95-108.

## 2. FACTS

On August 14, 2015, Raymond Eaton was working as a maintenance man at the Cambridge Apartments located at the corner of 7<sup>th</sup> and 7<sup>th</sup> in Puyallup. 4RP 324-325. Upon arriving at his shop, he saw a silver Volkswagen Jetta parked next to his workshop at the apartments. 4RP 328. When he looked in he saw a woman with short blond hair, later identified as Ashley Wadsten, slumped over the steering wheel with no shirt on and her top pulled down to around her waist completely exposing her breasts. 4RP 328-329. After not getting a response from the woman, Eaton called 911 and stayed with the car until police arrived. 4RP 330.

Officer Lloyd Leppell was one of the first officers to arrive at the scene. 4RP 338. Officer Leppell and another officer attempted to get Wadsten out of the car by knocking on the window and shaking the car, but to no avail. 4RP 339-340. He noticed she had swelling and blood

around her face and appeared to have been beaten up. 4RP 340; Exh. 4. The officers eventually were able to unlock the car and remove her. 4RP 340. Officers determined she was unconscious, but alive. 4RP 341. She was subsequently transported to the hospital, where she was diagnosed with fractures of her jaw and nose. 4RP 341-342, 428.

Later the same day Detective Shelby Wilcox, the lead detective on the case, received a call from Good Samaritan Hospital that Wadsten was awake and trying to communicate. 4RP 390. Wilcox proceeded to the hospital where she saw Wadsten was in a neck collar, on a backboard, and was in and out of consciousness. 4RP 391-392. She attempted to communicate with Wadsten, but was unable to do so. *Id.* However, two days later Wadsten came into the Puyallup Police Department unexpectedly. 4RP 396. Wilcox interviewed her and learned that the individuals who assaulted her were defendant and Allen. 4RP 396-397. Wadsten identified both of them through a photo montage. 4RP 401-403.

Based upon the identification Wadsten made, Wilcox and another detective conducted surveillance at the Cambridge Apartments. 4RP 410-411. They saw defendant drive up and park in the same place Wadsten's car had been parked when she was found. 4RP 411. Defendant got out of his car, went into the garage, and then moved shooting targets into the garage. Exh. 32; 4RP 412.

Wilcox subsequently obtained search warrants and subpoenas. 4RP 379, 441. One search was for the website Backpage where Allen, with defendant's guidance, solicited her services as a prostitute. 4RP 438, 5RP 590. A second search was for defendant's and Allen's residence. 4RP 444. Prior to serving the warrant, police set up surveillance in the apartment complex's parking lot for safety purposes. 4RP 445. When police saw defendant leave the complex, they pulled him over for a traffic stop and to detain him. *Id.* They took the keys to the apartment off defendant and then prepared entry into the apartment. 4RP 446. After a knock-and-announce failed to result in Allen opening the door, police used defendant's key to enter the apartment. *Id.* Among the items found in the apartment were a 9 mm handgun with a loaded magazine and a homemade AR-15 rifle in the apartment's only bedroom. 4RP 451-452; Exh. 28. A receipt for the 9 mm from Surplus Ammo and Arms was found in the apartment. Exh. 20; 4RP 453-454. The serial number for the 9mm purchased from Surplus Ammo matched the serial number on the 9mm found in the apartment. 6RP 763. Various other items were found, including documentation of an upcoming dental appointment and a casino card in defendant's name. Exh. 2, 28.

Based upon the items found, Detective Lewis conducted further investigation into the firearms found. 6RP 763. Based upon the discovery of the receipt, he contacted Surplus Ammo and asked them to look up the

transaction and acquire any video footage from the transaction. 6RP 763. Detective Lewis viewed the video and saw defendant, Allen, and himself on the video. Exh. 9; 6RP 767. He interacted with defendant and discussed how good of a firearm the 9 mm is and how much they would enjoy it. 6RP 768. Defendant subsequently gave Allen money to purchase the gun and selected ammo for her to purchase. Exh. 9.

Detective Lewis conducted an investigation into the AR-15 rifle. He found Facebook communications from August 5, 2015, between defendant and Mitchell where they discuss defendant purchasing the AR-15 and how he thought it was malfunctioning. Exh. 6; 6RP 805. He also found video evidence recorded on August 26, 2015, of defendant shooting the rifle. Exh. 8; 6RP 853.

C. ARGUMENT.

1. DEFENDANT ENGAGED IN A CONTINUING COURSE OF CONDUCT DURING THE ENTIRE PERIOD WHEN HE OWNED THE 9 MM HANDGUN.

Generally, when a defendant has been charged with separate distinct criminal acts, but is charged with only one count of criminal conduct, the State must elect which act it relies on for conviction or the trial court must instruct the jury that all jurors must unanimously agree which single criminal act has been proved beyond a reasonable doubt.

*State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984) (overruled in part on other grounds by *State v. Kitchen*, 110 Wn.2d 403, 406, 756 P.2d 105 (1988)).

- a. No unanimity instruction was required as defendant engaged in a continuing course of conduct for his possession of the 9 mm handgun.

Even when separate acts are able to support separate units of prosecution, the evidence may show that the acts were part of a “continuing course of conduct.” *Petrich*, 101 Wn.2d at 571. Where the evidence shows that defendant only committed a single continuing offense, the State need not make an election and no unanimity instruction is required. *State v. Simpson*, 91 Wn. App. 874, 883-884, 960 P.2d 955 (1998) (footnote omitted); *State v. Fiallo-Lopez*, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). “[E]vidence that a defendant engaged 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.” *Fiallo-Lopez*, 78 Wn. App. at 724. “A continuing course of conduct requires an ongoing enterprise with a single objective.” *State v. Garman*, 100 Wn. App. 307, 313, 984 P.2d 453 (1999). An appellate court reviews the facts in a “commonsense manner” to evaluate whether there was in fact a continuing course of conduct. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

In evaluating whether an act constitutes an ongoing enterprise with a single objective, courts have looked to what was the intention of the defendant. For instance, in *State v. Gooden*, 51 Wn. App. 615, 754 P.2d 1000 (1988), defendant was charged with promoting prostitution. *Gooden*, 51 Wn. App. at 616. The State elicited multiple acts that demonstrated how defendant did indeed promote prostitution. *Gooden*, 51 Wn. App. at 620. However, defendant had the same objective for all three acts: to make money. *Id.* Similarly in *State v. Campbell*, 69 Wn. App. 302, 848 P.2d 1292 (1993), there were 21 distinct instances of conduct presented that could have formed the basis for separate counts on welfare fraud. *Campbell*, 69 Wn. App. at 311 (*reversed on other ground, State v. Campbell*, 125 Wn.2d 797, 888 P.2d 1185 (1995)). The court found that while there were distinct acts, they all were conducted in furtherance of the single goal of receiving public assistance to which one is not entitled. *Campbell*, 69 Wn. App. at 312.

Here, the actions undertaken by defendant were done in a continuing course of conduct with a single objective, to possess a firearm. Owning a firearm, similarly to promoting prostitution or fraud, is a continuing act, regardless of how long it lasts. Defendant handling the firearm in the gun store, giving Allen money to purchase the gun, and then storing it at their apartment is a continuing course of conduct designed to

facilitate him owning the 9 mm. As such, this Court should affirm defendant's conviction.

Defendant essentially argues that the State should have prosecuted him for each separate instance in which he owned the 9 mm. *See* Brf. of App. at 12-13. Under such a theory, the State could have made each instance of possession of the 9 mm a separate unit of prosecution. This would result in one unit of prosecution for when defendant was in possession of the gun at the gun store and one unit of prosecution for each day defendant owned the gun. Under defendant's theory, the State could even charge and obtain a conviction for every single day defendant possessed the same gun. The claim fails because the underlying unit of prosecution for unlawful possession of a firearm is each gun. RCW 9.41.040(1)(a); *see also State v. Westling*, 145 Wn.2d 607, 611, 40 P.3d 669 (2002) ("Any' means "every" and "all."). It is illogical to assume that the legislature or courts intend for such a result to occur. Defendant's argument should be rejected and his conviction affirmed.

- b. In the alternative, any error in not electing a single act to rely on as each incident was proven beyond a reasonable doubt.

When the State does not elect which act it relies on and the court does not instruct the jury it must be unanimous as to a specific act, the error will be deemed harmless if no rational trier of fact could have

entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 405-406.

Possession may be actual or constructive. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012). Actual possession occurs when something is in one's physical custody, while constructive possession occurs when something is not in one's physical custody, but is within their dominion and control. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). The ability to reduce an object to actual possession is an aspect of dominion and control. *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 214 (1997). Constructive possession is established when the person charged has dominion and control over an item or the premises where the item is found. *State v. Wood*, 45 Wn. App. 299, 312, 725 P.2d 435 (1986). Possession and control need not be exclusive, but may be inferred from such circumstances as *having possession of the keys to the residence*. *Id* (emphasis added). Brief actual possession of a firearm is illegal. *State v. Summers*, 107 Wn. App. 373, 387, 28 P.3d 780 (2001). *See also State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969).

Here, the jury was properly instructed on the elements for both actual and constructive possession. CP 46-80 (Inst. No. 26). During closing argument the State mentioned two different ways defendant was in possession of the 9 mm: (1) when defendant had the firearm in the store;

and (2) the 9 mm being found in defendant's apartment. 7RP 961-962, 968-970. In both instances, no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt.

First, there was extensive evidence defendant was directly involved in purchasing the 9 mm. Defendant was seen on video actually handling the 9 mm in the gun store and selecting ammunition to use with the gun. Exh. 9. Detective Lewis testified how he interacted with defendant when the gun was being purchased. 6RP 768. They discussed how good of a firearm the 9 mm is and how much defendant and Allen would enjoy it. *Id.* Defendant subsequently gave Allen money to purchase the gun and selected ammo for her to purchase. Exh. 9.

All of this evidence makes it so no rational jury could have entertained a reasonable doubt as to defendant's possession of the gun at the store. Defendant handled the gun prior to its purchase. Exh. 9 He chose what ammunition to purchase for the gun. He gave Allen the money used to pay for the gun. *Id.* He never denied he was buying the gun when Detective Lewis told him how great of a gun it is. 6RP 768. The totality of this evidence indicates defendant had possession of the gun at the gun store.

Allen being the actual buyer of the gun can be seen as a calculated move by defendant to ensure he could purchase the gun. Defendant would have known he was ineligible to purchase firearms. By having Allen buy the gun in her name, defendant avoided going through a background check that would have shown his ineligibility to possess a firearm. He also may have calculated that if the gun was found at their apartment, he could raise a defense that the gun was not his, but solely Allen's as it was bought in her name. These are all things the jury could have considered. As such, no rational jury could have found reasonable doubt as to defendant possessing the gun at the gun store.

Second, no reasonable jury could have found defendant did not possess the 9 mm when it was located at the residence he lived in with Allen. An inference can be made that a defendant has dominion and control over an item when he has keys to the premises where the item is found. *Wood*, 45 Wn. App. at 312. Here, defendant had the keys to the apartment where the gun was found. When he was detained, police took the key to the apartment off of his person. 4RP 446. They then used defendant's key to enter the apartment. *Id.* This creates a strong inference that defendant had dominion and control over items in the premises. Since the gun was found on the only bed in the sole bedroom of the house, there

is a clear inference that defendant would have dominion and control over items located on his bed. 4RP 451-452.

Further evidence also demonstrated how the apartment is where defendant lived. During closing argument, the State read aloud conversation from three different dates between defendant and Allen where he referred to the apartment as his home. 7RP 961-962; Exh. 68. Additional evidence was placed before the jury of conversations between defendant and Wadsten where he referred to that address as his apartment. He told her in a Facebook message to go to his address. Exh. 41. He then provides his address in a text message as the apartment complex where the guns were found. Exh. 42. Directions on Wadsten's phone were from her location to defendant's apartment. Exh. 35.

Police conducted surveillance on defendant at the apartment. 4RP 410-411. They saw him drive up and park in the same place Wadsten's car had been parked when she was found. 4RP 411. Defendant got out of his car, went into the garage, and then moved shooting targets into the garage. Exh. 32; 4RP 412. Defendant using the garage as his own can be seen as him exercising dominion and control over the property.

Inside the apartment was further evidence that he was one of its residents. There was a piece of mail in defendant's name in the form of a dental appointment slip found at the apartment. Exh. 2 (Photograph No.

50). Finally, at least one photograph was placed before the jury showing male clothing in a drawer at defendant's apartment. Exh. 2 (Photograph No. 23) 5RP 547-548.

The combination of defendant having keys to the apartment, text messages where he refers to the apartment as his residence, instructions to Wadsten to come to his residence and giving her the address of the apartment as such, using the apartment's garage as his own, a dental appointment slip in defendant's name, and articles of his clothing at the apartment make it so that no rational trier of fact could have a reasonable doubt as to defendant having possession of the 9 mm handgun and hence his guilt. As such, this Court should affirm defendant's conviction on Count III.

2. THE STATE PROPERLY ELECTED A SPECIFIC POSSESSORY ACT FOR DEFENDANT'S POSSESSION OF AN AR-15 CONVICTION WHEN IT ARGUED IN CLOSING ARGUMENT THAT A VIDEO OF DEFENDANT SHOOTING THE AR-15 WAS UNLAWFUL POSSESSION.

As previously mentioned, when multiple separate criminal acts are charged as one count, the State can elect a single act on which it is relying for conviction. *Petrich*, 101 Wn.2d at 572. The State made a clear election of a single act which it was relying on for conviction. During closing, the prosecutor stated, "Then you have the AR-15. You have the [Snapchat] video showing the defendant firing the AR-15 that was then found during

the service of the search warrant.” 7RP 962. This was a clear election by the State on which specific act it was asking the jury to rely on to convict. The jury subsequently convicted defendant as charged for the AR-15. CP 84; 11RP 1135. As the State made a clear election, and the jury subsequently convicted, this Court should affirm defendant’s conviction on Count IV.

- a. In the alternative, if the State did not make a proper election, no reasonable doubt could have existed that defendant had possession of the AR-15 in both the Snapchat video and at the residence.

Even if the State did not make a clear election, no rational jury could have entertained a reasonable doubt as to defendant’s possession of the AR-15 in both the Snapchat video and at the residence.

The jury was tasked with determining whether defendant was in unlawful possession of the rifle from May 14, 2015, to September 28, 2015. CP 46-80 (Inst. No. 29). There was testimony and evidence presented to the jury that defendant was the owner of AR-15 and had possession of it during the charging period. Detective Lewis found Facebook conversations between defendant and Mitchell from August 5, 2015, detailing the price of the gun and complaints defendant had after he purchased the rifle about it malfunctioning. Exh. 6; 6RP 804-805. There

was also video evidence of defendant firing the AR-15 during the charging period. A video recovered from defendant's phone shows him shooting the AR-15. Exh. 8. Detective Lewis was asked when this video was uploaded and he responded it was uploaded on August 26, 2015. 6RP 853. No rational jury could entertain a reasonable doubt that defendant buying a gun and firing said gun during the charging period results in defendant not being in actual possession of the gun.

The same logic applies to both the AR-15 as applies to the 9 mm regarding defendant having constructive possession of the AR-15 when it was seized during the search of his apartment. Just like the 9 mm, the AR-15 was found in his bedroom at the apartment. 6RP 756-757. As previously mentioned, defendant had keys to the apartment, he referred to the apartment as his home in numerous text messages with Allen and Wadsten, he gave Wadsten directions to the apartment, he used the apartment's garage as his own, a dental appointment slip in defendant's name, and articles of his clothing were at the apartment. No rational trier of fact could have a reasonable doubt as to defendant being in constructive possession of the items seized from the residence, including having possession of the AR-15 rifle. As no rational trier of fact could have a

reasonable doubt as to defendant possessing the AR-15 when he bought it from Mitchell, fired the gun on the Snapchat video taken during the charging period, and lived in the home where the gun was recovered, this Court should affirm defendant's conviction on Count IV.

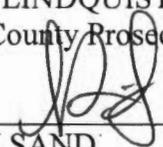
D. CONCLUSION.

Defendant's right to a unanimous verdict was not hindered. No rational trier of fact could have found a reasonable doubt if defendant had possession of the 9 mm handgun in either a gun store when he had Allen purchase the gun or in the apartment where it was seized which he had keys to and personal items located inside, including clothing and mail. The State made a clear election for which act it was relying on for defendant's conviction related to the AR-15 rifle. Even if the State did not, no rational trier of fact could have found a reasonable doubt if defendant had possession of it as he texted questions regarding buying the gun and its functionality with its previous owner, video was seen of him shooting the gun, and it was found at the same apartment and in the same approximate

location as the 9 mm gun was found. For the aforementioned reasons, the States asks this Court to affirm defendant's convictions.

DATED: February 1, 2018.

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2-1-18 Theresa K  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**February 01, 2018 - 3:30 PM**

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