

**FILED**

DEC 03 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 30198-2-III

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

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STATE OF WASHINGTON

RESPONDENT

V.

URIEL ORTIZ

APPELLANT,

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BRIEF OF RESPONDENT

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KARL F. SLOAN  
Prosecuting Attorney  
237 4th Avenue N.  
P.O. Box 1130  
Okanogan County, Washington

509-422-7280 Phone  
509-422-7290 Fax

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## **A. ASSIGNMENTS OF ERROR**

1. Whether the trial court erred in admitting the defendant's prior assaultive acts against the victim.
2. Whether the State committed misconduct when arguing based on the facts admitted at trial.
3. Whether there was sufficient evidence that the gun used was a deadly weapon.
4. Whether there was sufficient evidence that the victim was placed in reasonable fear that the threat to kill would be carried out.
5. Whether a unanimity instruction is applicable to alternate means or continuing course of conduct crimes.
6. Whether there was any error that resulted in cumulative error.

## **B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. The trial court properly admitted the defendant's prior assaultive acts against the victim when they were offered to prove elements of the crimes charged and to assess the victim's credibility.
2. The State did not commit misconduct when it referenced in closing the facts admitted in trial.
3. There was sufficient evidence to prove the gun used by the defendant was a deadly weapon.
4. There was sufficient evidence that the Ms. Humphries was placed in reasonable fear that the threat to kill would be carried out based on testimony from other eyewitnesses.

5. A unanimity instruction is not applicable when the charged crime can be committed by alternate means or is continuing course of conduct.

6. There was no cumulative error.

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

In the late evening of May 21, 2011, Abraham Ortiz went with his father, defendant Uriel Ortiz, to the store to buy a phone card. RP 116-118, 212. While at the store a friend of the defendant's told him "Flocka" (Sarah Humphries) was dropped off at the residence where his wife, Patricia Rivera, and her children lived. RP 118, 141. The defendant had been having an extra marital affair with Ms. Humphries. RP 102, 199-200. The defendant became upset when he was told about Ms. Humphries, and declared he was going over there to find her (Ms. Humphries) and kill her. RP 119.

During this time, Ms. Humphries contacted Patricia Rivera at her residence. RP 213-215. Ms. Humphries expressed concern to Patricia that the defendant would show up, so Patricia and Ms. Humphries walked down the street to talk. RP 215.

The defendant, Abraham, and a friend of the defendant returned to the residence and the defendant went into the

residence to look for Patricia. RP 120, 196-197. The defendant "freaked out" when he could not find Patricia; the defendant was angry and yelling. RP 122, 156. While the defendant and Abraham were in the house looking for Patricia, Abraham saw the defendant had a gun in a holster that he was wearing. RP 124-125. The family had not kept a gun in the house, except for a BB rifle. RP 151, 198, 227. However, Patricia had seen bullets for a gun in the kitchen drawer. RP 199. The gun Abraham saw in the defendant's holster was different in appearance than the BB gun that the defendant later claimed was the gun that he had used. RP 124-126.

While looking for Patricia, the defendant saw Ms. Humphries and Patricia down the street from the residence. RP 123, 142. The defendant contacted the women and threatened Ms. Humphries with a gun. When the defendant pulled out and pointed the gun at Ms. Humphries, she stepped back. Both Patricia and Ms. Humphries appeared scared. RP 152. Patricia tried to push the gun away and stepped in front of Ms. Humphries. RP 124, 145, 152-154, 218-219. The defendant told Ms. Humphries that she had better not come around and threatened to kill her. RP 128, 241. The gun that Patricia saw the defendant

use was not the same gun as the BB gun the defendant later claimed to have used. RP 219-221, 236

While the defendant was confronting the women, Abraham was ushered back into the residence by the defendant's friend. RP 128, 155. The defendant came into the residence later and told Abraham to go and get his mother (Patricia). RP 129, 155. Patricia came back inside, but when she tried to leave, the defendant pushed her down, pulled her into a bedroom, and proceeded to hit and kicked her. RP 222, 223, 237. During the assault on Patricia, the defendant pulled out the gun again and told Patricia he would shoot her and was not afraid to do it. RP 222, 223.

During the assault, Abraham told the defendant repeatedly "Dad, leave her alone." In response, the defendant said repeatedly "She deserves it". RP 223. The defendant told Abraham to make sure Patricia didn't leave the residence. RP 130, 148, 157-158. The defendant said he was going to find "Flocka" and kill her. RP 131, 237. The defendant told Patricia that it was her fault that "Flocka" was going to die. RP 132. The defendant told Patricia he would kill her if she didn't stay at the

residence. RP 157. The defendant then left the residence. RP 131.

Abraham asked his mother, Patricia, to call the police. Patricia did not want to call because she was afraid the defendant would kill her. Abraham told her if she didn't call, then he would. RP 133, 223-224.

Omak Police officer Joshua Petker responded to the 911 call from 416 Maple Street. RP 89-91. He made contact with Patricia, Abraham, and Patricia's youngest son. RP 92, 95-96, 100. When police arrived, the defendant was not at the residence and had not been located. Patricia was fearful that the defendant would return to the residence. RP 225-226. Officer Petker took Ms. Rivera and the children to the police station. RP 97-98, 134, 146. Officers made attempts to locate the defendant. RP 244-245, 247.

While Patricia and her children were at the police department, the defendant called Abraham on his cell phone. RP 100, 135-136, 146. Officer Petker spoke with the defendant, who would not tell the officer where he was, but agreed to meet the police at the residence at 416 Maple Street. RP 101, 102.

Officers arrived and were finally able to make contact with the defendant approximately 45 minutes after the initial 911 call. RP 101-102, 248. The defendant immediately told officers he knew why the officers were there and told the officers that the gun was a toy gun. The defendant then directed the officers to a BB gun lying on the ground , by a bush near the front porch. RP 249-251, 264-266. The defendant was not wearing the holster, and a holster was not recovered. RP 266.

The defendant told police that he was involved with another woman named "Flocka" (Sarah Humphries). RP 102. The defendant told officers that he had gone to the store with his son and when he returned he saw Ms. Humphries outside with his wife. RP 102-103. The defendant claimed he confronted them with a BB gun and acted as though he was going to slap Ms. Humphries with the gun. RP 103, 108-109. The defendant said Ms. Humphries left and they would not be able to find her because she was a drug user. RP 104. The defendant told officers he went into the residence with his wife, that nothing else happened, and that he left the residence shortly thereafter. RP 104.

In March 2011, the defendant had come to the Maple Street residence, became upset with Patricia, and destroyed photos, knocked items to the floor, and threw a computer at Patricia. RP 138, 202-204. On that occasion, Patricia called police and the defendant left the residence. RP 204.

On May 20, 2011, the defendant beat Patricia because he was angry that she had stayed at a friend's home overnight. RP 205-206, 209, 211. When Patricia did not show up for work the next day (May 21<sup>st</sup>) a co-worker contacted police to check on Patricia. RP 137, 204, 210-211. When police arrived, the officer asked Patricia if everything was okay while the defendant was standing next to the officer. Patricia responded "yes", but she testified things were not okay. RP 211. The assault and threats that lead to the current charges occurred later that evening of May 21 and/or the early morning hours of May 22<sup>nd</sup>.

The trial court judge ruled that the defendant's prior assaultive conduct was admissible in two ways. First, it was admissible to prove the element of the victim's reasonable fear to prove harassment, and to determine the existence of reasonable apprehension of bodily injury to prove assault. Second, it was admissible under ER 404(b) to permit the jury to assess the

dynamics of the domestic violence in the relationship in order to assess the victim's credibility. RP-Pretrial Motions, 24-26. The trial court cited to State v. Cook 131 Wn.App.845, 129 P.3d 834 (2006) and State v Magers, 164 Wash.2d 174, 189 P.3d 126 (2008). RP-Pretrial Motions, 24-26.

The defendant was charged with Assault in the Second Degree in count 1, and Assault in the Second Degree in count 2, based on assault with a deadly weapon. The defendant was charged with Felony Harassment in count 3 and Felony Harassment in count 4. CP 152-154.

The defendant was convicted of all counts after a jury trial on July 27, 2011.

#### **D. ARGUMENT**

1. Admission of prior incidents of domestic violence was proper and the reasoning was set out in the record of proceedings.

A trial court's admission of evidence is reviewed for abuse of discretion. State v. Pirtle, 127 Wash.2d 628, 648, 904 P.2d 245 (1995). A trial court's rulings on the admissibility of evidence will not be disturbed absent an abuse of the court's discretion. State v. Powell, 126 Wash.2d 244, 258, 893 P.2d 615 (1995). Abuse of

discretion exists when a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. Id.

In the present case, the defendant was charged with Assault 2 and Felony Harassment. The victim's "reasonable fear" was an element of the crime of harassment, and the creation of reasonable apprehension and imminent fear of bodily injury was necessary under the definition of assault. The defendant pointed a gun at Patricia Rivera and Ms. Humphries, and later claimed to have only *acted* like he was going to hit Ms. Humphries with the BB gun. Evidence of prior misconduct is admissible if it is necessary to prove a material issue. Powell, 126 Wash.2d at 262, 893 P.2d 615.

Additionally, the victim's and witness's credibility was critical to proving that the charged harassment and assault actually occurred. The evidence that the defendant had previously assaulted the victim was relevant and necessary evidence for the jury to consider.

The prior acts were admissible under ER 404(b) and the case law of the State of Washington.

Evidence Rule 404(b) states:

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It

may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The rule, although it sets out particular bases for admission, is not exclusive. See State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). If evidence of prior bad acts is admitted for purposes other than those set forth in 404(b), then the trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged. Powell, 126 Wash.2d at 259, 893 P.2d 615.

Courts have deviated from the non-exclusive list, allowing 404(b) evidence to be admitted for diverse purposes. See Powell, 126 Wn. 2d 244 (1995) (allowing evidence of defendant's prior assaults and threats against murder victim to complete the context of the murder – as “res gestae”); State v. Wilson, 60 Wn. App. 887, 808 P.2d 754 (1991) (evidence of prior assaults admissible to show victim's fear of the defendant, thus explaining her delay in reporting the incident).

In State v. Ragin, 94 Wash.App. 407, 972 P.2d 519 (1999), and State v. Barragan, 102 Wash.App. 754, 9 P.3d 942 (2000), for example, the defendants were charged with the felony harassment. In Ragin, the charge was based on the defendant's

action in calling the victim on the telephone from jail and threatening him. The Court of Appeals held there that it was not error to admit evidence of certain of the defendant's prior violent acts in order to demonstrate to the jury that it was reasonable for the victim to be fearful of the defendant's threats. In Barragan, a case where a defendant was charged with first degree assault as well as harassment, the trial court admitted evidence of prior assaults by the defendant. The Court of Appeals, Division Three, affirmed the trial court's admission of evidence of the defendant's past violent acts reasoning that the victim's knowledge of the defendant's acts was relevant to the harassment charge in order to show that the victim reasonably feared that the defendant's threats to him would be carried out. See State v. Magers, 164 Wash.2d 174, 182, 189 P.3d 126 (2008) (Approving the reasoning of the Court of Appeals in both of Ragin and Barragan).

As in Barragan, and Magers, evidence of prior violent misconduct was also relevant on the issue of assault and whether the victim's apprehension and fear of bodily injury was objectively reasonable, those elements being at issue since the charged act does not itself conclusively establish reasonable fear of bodily injury. Id. See also Powell, 126 Wash.2d at 262, 893 P.2d 615. The State bears the burden of proving every element of second

degree assault, including the definition of assault which is defined as the “reasonable fear of bodily injury.” Evidence of the defendant’s prior bad acts is properly admitted to demonstrate a victim’s “reasonable fear of bodily injury.” See Magers at 183.

The procedure for admitting 404(b) evidence that could amount to a crime, if charged, is set out with particularity in State v. Binkin: Before admitting ER 404(b) evidence under one of the exceptions, the trial court must first determine that the evidence is logically relevant and necessary to prove an essential element of the crime charged. Next, it must decide whether, under ER 403, the probative value of the evidence outweighs its prejudicial effect. When the prior act could be an offense if charged, the court must be satisfied by a preponderance of the evidence that the act actually occurred. Binkin, 79 Wn.App. 284, 289, 902 P.2d 673, (1995) (internal citations omitted).

Additionally, in State v. Grant, evidence of the defendant’s prior assaults was admissible under ER 404(b) because it was relevant and necessary to assess a domestic violence victim’s credibility as a witness and accordingly to prove the crime of assault actually occurred. State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996). Evidence of prior assaults against a domestic violence victim showed why she minimized the degree of violence

subsequent to the charged assault. For a history of domestic violence could be properly admitted under 404(b), at least for the purpose of showing a domestic violence victim's inconsistent statements and conduct. Id. at 109. See also Magers at 184-186 (adopting the rationale in Grant).

In the present case, Patricia Rivera told law enforcement who arrived at her door on May 21<sup>st</sup> that she "yes" things were okay, despite the fact that the defendant had beaten her earlier in the day. She also did not want to call 911 later after being threatened and assaulted again. As in Grant the jury must "consider the defendant's conduct in context" in order to determine the victim's credibility. The context was that the defendant had assaulted Patricia Rivera in the very recent past.

The trial court properly admitted the prior incidents of domestic violence. There was no abuse of discretion in admitting the evidence. The Appellant's arguments in his brief were made without review of the record containing the court's pre-trial rulings. These rulings clearly set out the court's reasons and legal authority for admitting the evidence. See e.g. State v. Jackson, 102 Wash.2d 689, 694, 989 P.2d 76 (1984) (absence of probative versus prejudicial balancing test is not fatal if the trial court has established a careful record of the reasons for admission).

2. There was no misconduct where closing arguments properly referenced the admitted evidence.

Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. E.g., State v. Hoffman, 116 Wash.2d 51, 93, 804 P.2d 577 (1991).

A prosecuting attorney's allegedly improper remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. E.g. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). In order to establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. State v. Hughes, 118 Wash.App. 713, 727, 77 P.3d 681 (2003) (citing State v. Stenson, 132 Wash.2d 668, 727, 940 P.2d 1239 (1997)). To establish prejudice, the defense must demonstrate there is a substantial likelihood the misconduct affected the jury's verdict. E.g., State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

In closing argument a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence. E.g., State v. Brown 132 Wash.2d 529, 565, 940 P.2d 546, 566 (1997). Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. Hoffman, 116 Wash.2d at 93; State v. York, 50 Wash.App. 446, 458, 749 P.2d 683 (1987), review denied, 110 Wash.2d 1009 (1988).

In the present case, no objection was made and no curative instruction was requested. The failure to object to a claimed improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Russell, 125 Wash.2d 24, 86, 882 P.2d 747 (1994).

The arguments complained of by the Appellant directly referred to evidence and testimony admitted at trial. The Appellant's erroneous claim of misconduct is premised upon his argument that the prior acts of domestic violence were not properly admitted into evidence. Because the evidence was

properly admitted, both the State and Defense were entitled to refer to the evidence, and reasonable inferences from it, when making closing arguments.

The State's arguments were supported by the evidence admitted at trial and clearly supported by the jury instructions given. The Appellant cannot show impropriety of the State's comments, nor any prejudicial effect, because there was no error.

3. Notwithstanding the evidence that the Defendant threatened the victims' with a firearm; even if the defendant had threatened the victims with a BB gun there was sufficient evidence that it was a deadly weapon based on the manner in which it was used or threatened to be used.

In the present case there was substantial evidence that the gun used was a firearm and that firearm was a per se deadly weapon. Yet the Appellant argues, despite that evidence, "...*there was no evidence, only speculation, that Ortiz used another weapon*". The Appellant appears to argue that the failure to recover the firearm that was seen by the victims and witness makes their direct observations and their testimony "speculation". The State presented both direct and circumstantial evidence that the gun used was a firearm and not a BB gun. The elements of a crime may be established by either direct or

circumstantial evidence, and one type of evidence is no less valuable than the other. State v. Thompson, 88 Wash.2d 13, 16, 558 P.2d 202; State v. Brooks, 45 Wash.App. 824, 826, 727 P.2d 988 (1986). See also Instruction #5, CP 50-80.

Only the defendant claimed he used the BB gun that he later directed police to. Even if one were to accept the Defendant's claim to law enforcement that he used the BB gun, it still can be a deadly weapon in fact. The trial court ruled that although the BB gun claimed by defendant was not a deadly weapon per se, the jury instruction properly permitted argument that it was a deadly weapon based on its use and/or threatened use. RP 297, 303-304.<sup>1</sup> Accordingly, Instruction 12 stated in part:

Deadly weapon also means any weapon, device, instrument, substance, or article which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

CP 50-80. RCW 9A.04.110(6) creates two categories of deadly weapons. The first includes explosives or firearms, which are deemed deadly per se regardless of whether they are loaded. See State v. Carlson, 65 Wash.App. 153, 158, 828 P.2d 30,

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<sup>1</sup> The court did conclude: "... there's no evidence that this BB pistol in this case is not operational. It appears to be operational. The officers even put that safety clasp through it. There's no reason not

review denied, 119 Wash.2d 1022, 838 P.2d 690 (1992); State v. Taylor, 97 Wash.App. 123, 126, 982 P.2d 687 (1999). The second category includes any other weapon or instrument that may be deadly in fact if it is readily capable of causing death or substantial bodily harm, depending on the circumstances in which it is used, attempted to be used, or threatened to be used. RCW 9A.04.110(6); see Carlson, 65 Wash.App. at 158–59, 828 P.2d 30.

Some courts have found that a BB gun is not a firearm and thus is not a deadly weapon per se. Carlson, 65 Wash.App. at 161 n. 10, 828 P.2d 30; see State v. Majors, 82 Wash.App. 843, 847, 919 P.2d 1258 (1996) (in most situations, a BB gun is not capable of causing death or serious injury) review denied, 130 Wash.2d 1024, 930 P.2d 1230 (1997). But, whether a BB gun is a deadly weapon in fact is a question for the trier of fact. Carlson, 65 Wash.App. at 160, 828 P.2d 30.

In Taylor, as in this case, the defendant argued there was insufficient evidence that the BB pistol was a deadly weapon in fact. When a defendant challenges the sufficiency of the evidence, the Court must view the evidence in a light most

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to believe that this BB gun is operational.” RP 297.

favorable to the prosecution and must determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Taylor at 126 (citing State v. Green, 94 Wash.2d 216, 220–22, 616 P.2d 628 (1980)). The Court must draw all reasonable inferences in favor of the State and interpret them most strongly against the defendant. Taylor at 126 (citing State v. Partin, 88 Wash.2d 899, 906–07, 567 P.2d 1136 (1977)).

The clear language of the statute requires the fact finder to consider the circumstances in which the defendant threatened to use the weapon. Here, there was ample evidence that the defendant threatened to use the gun to strike and shoot his victims. As in Taylor, the defendant's threats to shoot the victims, even with a BB gun, created an inference that it was loaded. See Taylor at 128 (distinguishing the limited dictum in State v. Carlson, 65 Wn.App. 153, 828 P.2d 30 (1992)).

Taking the evidence in a light most favorable to the State, and interpreted most strongly against the defendant, the trial court properly found a rational trier of fact could find the elements of the crime beyond a reasonable doubt. The trial court properly refused to grant the defendant's motion to dismiss the assault counts.

4. There was sufficient evidence to find Ms. Humphries was placed in reasonable fear the threat would be carried out.

As stated above, in reviewing sufficiency challenges to the evidence, the Court views the evidence in a light most favorable to the State, asking whether any rational trier of fact could find guilt beyond a reasonable doubt. A claim of evidence insufficiency admits the truth of the State's evidence. E.g., State v. Sanchez, 60 Wash.App. 687, 693, 806 P.2d 782 (1991).

The Appellant cites State v. Kiehl, 128 Wash.App. 88, 113 P.3d 528 (2005) to claim that the evidence was insufficient to find Ms. Humphries was placed in reasonable fear that the threat by the defendant would be carried out. However, Kiehl, unlike this case, involved a threat to a judge who was never aware of the threat and where there was no evidence that the judge was ever placed in reasonable fear that the threat would be carried out. In the present case, the defendant pointed the gun at Ms. Humphries, and threatened to shoot her. The defendant also told police that he "acted" like he was going to strike Ms. Humphries with the gun. Patricia Rivera and Abraham Ortiz testified that Ms.

Humphries backed away and was scared. Even before the assault, Ms. Humphries had expressed fear that the defendant would show up while she was meeting with Patricia.

In the present case there was ample evidence the victim was placed in reasonable fear that the threat would be carried out. See also Instruction #21, CP 50-80.

5. There was no basis to require a unanimity instruction when the conduct was a continuing course of conduct and where the crimes could be committed by alternate means.

Since many crimes are committable in more than one way, the information may properly charge several acts which constitute a single crime. That is, if the statute sets forth several ways of committing a single crime, the information may specify several ways in which the crime is charged to have been committed. State v. Parmenter 74 Wash.2d 343, 352, 444 P.2d 680, 685 - 686 (1968). The State need not elect between alternative means of committing a crime. Jury unanimity is not required on the particular basis upon which the defendant was convicted. State v. Grant, 104 Wn.App. 715, 720, 17 P.3d 674 (2001).

When a crime is "continual," no unanimity instruction is required. State v. Beasley 126 Wash.App. 670, 681, 109 P.3d 849, 856 (2005). Additionally, unanimity is not required, as to the means by which the crime was committed so long as substantial evidence supports each alternative means. State v. Crane 116 Wash.2d 315, 326, 804 P.2d 10, 16 (1991).

A continuing course of conduct may form the basis of one charge in an information. However, one continuing offense must be distinguished from several distinct acts, each of which could be the basis for a criminal charge. Id. To determine whether one continuing offense may be charged, the facts must be evaluated in a common sense manner. See Beasley at 681 (no unanimity instruction necessary in assault, harassment and unlawful imprisonment case where defendant pointed a gun at each victim; he knocked down one victim with the gun; he threatened each victim during the incident; he jabbed the rifle into one victim's stomach and slammed the rifle down on her shoulder, knocking her to the ground; and he threatened both women he could kill them both with one shot.). See also State v. Barrington, 52 Wash.App. 478, 761 P.2d 632 (1988) (evidence of promotion of prostitution enterprise conducted over three months in which

defendant received profits from female's prostitution, was not separate distinct acts occurring in separate time frames and identifying places; therefore, defendant was not entitled to unanimity instruction); State v. Gooden, 51 Wash.App. 615, 754 P.2d 1000, review denied, 111 Wash.2d 1012 (1988) (no need for jury unanimity as to each specific act of prostitution when there was unanimity as to a continuing course of conduct).

In the present case the crimes of harassment and assault can be committed by alternative means. No unanimity instruction was required. Additionally the conduct resulting in the defendant's convictions was a continuing course of conduct. The crimes occurred after the defendant returned to the residence for the purpose of confronting Ms. Rivera and Ms. Humphries. There was no break or change in time, place, or victims involved.

Contrary to Appellant's claim, the assault against Patricia Rivera the day prior was not alleged in the information or at trial as a basis for the jury to convict the defendant. Additionally the prior assault did not involve a deadly weapon or threats to kill. There is no basis to support a unanimity instruction under the facts of this case.

6. There was no cumulative error.

There was no showing of error in the present case. The Appellant has failed to substantiate any of his claimed errors. Any claim of cumulative error therefore cannot be found.

#### **E. CONCLUSION**

The Court of Appeals should uphold the defendant's convictions. The defendant's prior assaultive conduct was properly admitted as proof of the elements of the crimes charged. The State did not commit misconduct when it argued based on the facts admitted at trial. There was sufficient evidence for a trier of fact to find the BB gun was a deadly weapon in fact, and to find Ms. Humphries was placed in reasonable fear that the defendant would carry out his threat to kill her. The defendant was not entitled to a unanimity instruction for either the crimes of assault or harassment where they could be committed by alternate means and were part of a continuing course of conduct.

Dated this 27 day of June 2017

Respectfully Submitted by:



KARL F. SLOAN, WSBA #27217  
Prosecuting Attorney  
Okanogan County, Washington