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No. 57738-7-I

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION ONE

King County No. 05-1-03922-8 SEA

STATE OF WASHINGTON,

Respondent,

v.

BAYANI JOHN MANDANAS,

Appellant.

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STATE OF WASHINGTON
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APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court violated Appellant's right to a unanimous verdict by failing to utilize a unanimity instruction, even though the State presented evidence of multiple acts that could support a conviction on each of the counts charged in the Information.

2. The trial court violated Appellant's right to a unanimous verdict by failing to utilize a unanimity instruction, even though the State relied upon two separate means to support conviction on the charge of assault in the second degree.

3. The trial court committed plain error, as in *State v. Bland*, and thereby prejudiced Appellant's right to a fair trial, by utilizing a generalized instruction that did not adequately, or accurately, describe the law of self-defense.

4. The trial court committed plain error, and thereby prejudiced Appellant's right to a fair trial, by utilizing an instruction defining the term "necessary" that is inconsistent with the law of self-defense.

5. The trial court committed plain error, and thereby prejudiced Appellant's right to a fair trial, by failing to instruct the jury that a person may defend himself against an apparent injury or danger even if mistaken.

6. The trial court committed plain error, and thereby prejudiced Appellant's right to a fair trial, by failing to instruct the jury that a person has no duty to retreat before using force in self-defense.

7. The trial court erred in concluding that Appellant's convictions for assault and harassment were not "same criminal conduct" for purposes of sentencing.

8. The trial court erred in concluding that the two gun enhancements - one based on the assault charge and one based on the harassment charge - must run consecutively in this case.

9. Double jeopardy was violated where Appellant was sentenced for two separate gun enhancements, even though the jury may well have concluded that these two enhancements were based upon the same offense conduct.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court violate Appellant's right to a unanimous verdict by failing to utilize a unanimity instruction, as required by *Petrich*, even though the State presented evidence of multiple acts that could support a conviction on each of the counts charged in the information? (Assignment of Error 1)

2. Did the trial court violate Appellant's right to a unanimous verdict by failing to utilize a unanimity instruction, even though the State relied upon two separate means to support conviction on the charge of Assault in the Second Degree? (Assignment of Error 2)

3. Did the trial court violate Appellant's right to a unanimous verdict by failing to utilize a unanimity instruction, even though the State failed to present substantial evidence that could support conviction under the battery means of Assault in the Second Degree? (Assignment of Error 2)

4. Did the trial court commit plain error,

as in *State v. Bland*, by utilizing a generalized instruction that did not adequately, or accurately, describe the law of self-defense? (Assignment of Error 3)

5. Did the trial court commit plain error by utilizing an instruction that defined the term "necessary" in a manner that is inconsistent with the law of self-defense? (Assignment of Error 4)

6. Did the trial court commit plain error by failing to instruct the jury that a person, such as the Appellant, may defend himself against an apparent injury or danger even if mistaken? (Assignment of Error 5)

7. Did the trial court commit plain error by failing to instruct the jury that a person, such as the Appellant, has no duty to retreat before using force in self-defense? (Assignment of Error 6)

8. Did Appellant suffer prejudice on account of the trial court's failure to properly instruct the jury on the law of self-defense? (Assignments of Error 3, 4, 5, and 6)

9. Did the trial court err in concluding that the convictions for Assault in the Second Degree and Felony Harassment were not "same criminal conduct" for purposes of sentencing? (Assignment of Error 7)

10. Did the trial court err in concluding that the two gun enhancements that were returned by the jury - one based on the assault charge and one based on the harassment charge - must run consecutively in this case? (Assignment of Error 8)

11. Was double jeopardy violated where Appellant was convicted of two separate gun

enhancements, and then sentenced to consecutive time on these two enhancements, even though the jury may well have concluded that each of these enhancements were based upon the same conduct? (Assignment of Error 9)

III. STATEMENT OF THE CASE

A. Procedural Background

Defendant Bayani John Mandanas was charged by information, filed February 7, 2005, with one count of Assault in the Second Degree, with a deadly weapon enhancement, and one count of Felony Harassment. See CP 1. The Information was amended before trial to add a deadly weapon enhancement to the Felony Harassment count. See CP 69.

On November 17, 2005, a jury trial commenced before the Honorable Gregory Canova. See CP 70A. The jury returned a verdict of guilty to both counts on November 22, 2005. See CP 80, 81. The jury also returned a special verdict on each count, finding that the defendant was armed with a firearm during the commission of the crimes. See CP 78, 79.

On February 10, 2006, Judge Canova sentenced

Mr. Mandanas to three months on each count, to run concurrently, and an enhancement of 36 months on Count I and 18 months on Count II, to run consecutively to each other and to the standard range sentence of three months, for a total sentence of 57 months in custody. See CP 96.

Mr. Mandanas timely filed a notice of appeal on February 10, 2006. See CP 90. That same date, the trial court ordered that Mr. Mandanas would be released on bond during the pendency of this appeal. See CP 93.

B. Facts of Case

Defendant John Mandanas has been a resident of Seattle for more than 12 years. See 11/21/05 RP 178.¹ Mr. Mandanas is active in the Filipino community and has a business interest in a dental clinic in a shopping center off of Martin Luther King Way in Seattle. See 11/21/05 RP 178; 97.

¹ The court reporter produced transcripts for the November 16, 2005 and November 17, 2005 pretrial/trial proceedings, as well as the November 21, 2005 and November 22, 2005 trial proceedings. Each transcript

Mr. Mandanas married Eleanor Mandanas in 1995, and they have an eight year old daughter. See 11/21/05 RP 178. Eleanor and John began divorce proceedings in August 2004, but the couple continued living together while those proceedings were pending. See 11/21/05 RP 180-81.

During that same time, Mrs. Mandanas began a romantic relationship with Carlos Padilla. See 11/21/05 RP 181. Mr. Mandanas learned of this relationship from friends. See 11/21/05 RP 183. In the summer of 2004, a meeting was arranged between Carlos Padilla, Eleanor Mandanas and John Mandanas. See *id.* At this meeting, Mr. Mandanas asked his wife and Mr. Padilla to wait until the Mandanas divorce was finalized before publicizing their relationship. See 11/21/05 RP 184.

Mrs. Mandanas and Mr. Padilla ended their relationship sometime around December 8, 2004. See 11/21/05 RP 94. Ultimately, John and Eleanor decided to stay together and try to repair their

begins at page 1. Accordingly, transcripts for the

marriage. See 11/21/05 RP 181.

The incidents leading to criminal charges in this case occurred during the afternoon of December 20, 2004 near the Mandanas Clinic. See 11/21/05 RP 97. The parties presented sharply conflicting descriptions of these incidents.

According to Mr. Padilla, on December 20, 2004, he visited the Southgate Medical Clinic to pick up a test result. That clinic is located nearby the Mandanas Clinic. See 11/21/05 RP 97-98. Mr. Padilla claims that, almost immediately after he exited the medical clinic, Mr. Mandanas threw a punch at him. See 11/21/05 RP 99. Mr. Padilla also claimed that Mr. Mandanas said "I'm going to kill you" as he threw the first punch. See 11/21/05 RP 100. The two then fought, and Mr. Padilla acknowledges that he struck Mr. Mandanas in the face. See 11/21/05 RP 100-01. Mr. Padilla testified that he felt something metal strike him in the back of his head. And, almost immediately

proceedings will be referenced by date.

thereafter, Mr. Padilla saw Mr. Mandanas pointing a gun towards him. See 11/21/05 100, 115. According to Mr. Padilla, Mr. Mandanas again stated that he was going to kill him. See *id.*

Mr. Padilla claims that, after seeing the gun, he backed away and went back inside the medical clinic, with Mr. Mandanas following him. See 11/21/05 RP 101, 104-05, 113-15. According to Mr. Padilla, Mr. Mandanas then hit him with the gun on the side of the face. See 11/21/05 RP 116. And, at about this same time, Mr. Mandanas stated that he was going to kill him. See 11/21/05 RP 117. Eventually, Mr. Padilla made his way to the back of the clinic, where somebody locked the door and called 911 for assistance. See 11/21/05 RP 119.

In an effort to bolster Mr. Padilla's claims, the State presented the testimony of three eyewitnesses, Osman Suleiman, Mary Lou Bondoc and Estrellita Bondoc.

Mr. Suleiman testified that he was present

at the Southgate Medical Clinic on December 20, 2004. See 11/17/05 RP 39. While he was waiting, he saw a young man come inside, talk to the receptionist, and then walk outside. See 11/17/05 RP 42-43. He then saw another man and thought they might be fighting, but to him it looked like play fighting because they were not punching, just moving their hands. See *id.* Mr. Suleiman went outside and saw the "older guy" pull out a gun from his pants and point it at the "younger guy." He then watched as the older guy struck the younger guy with the gun. See 11/17/05 RP 47. The younger guy then ran inside the clinic and sat down, and the older guy kicked the seat, and pointed the gun towards the younger guy. See 11/17/05 RP 47-48. Eventually, Mr. Suleiman went to another part of the clinic, behind a door, and the younger guy entered soon thereafter. See 11/17/05 RP 50-51.

Mary Lou Bondoc testified that she was present at the Southgate Medical Clinic on

December 20, 2004, with her mother-in-law, Estrellita. See 11/21/05 RP 5. While inside the clinic, she noticed two people "punching each other" outside. See *id.* She did not see how this fight started. See *id.* She did not see a gun while the two people were fighting outside of the clinic. See 11/21/05 RP 12. She then saw one of the participants of this fight, who was later identified as Mr. Padilla, move inside the clinic, followed by Mr. Mandanas. See 11/21/05 RP 7. According to this witness, Mr. Mandanas was holding a gun with his hand down when he came in. See 11/21/05 RP 12-13. She testified that Mr. Mandanas pointed the gun at Mr. Padilla, who was sitting down, and said "what you going to do now." See 11/21/05 RP 8, 10. Mary Lou believes that she heard Mr. Mandanas say, "I will kill you," or words to that effect, in Tagalog. 11/21/05 RP 9. She saw Mr. Mandanas strike Mr. Padilla with the gun and his fist while inside the clinic. See 11/21/05 RP 11. She then heard

somebody calling the police. See 11/21/05 RP 12.

Estrellita Bondoc testified that she was present at the Southgate Medical Clinic for a medical appointment on December 20, 2004. See 11/21/05 RP 21. While waiting, she went to the gift shop next door and heard yelling outside. See 11/21/05 RP 23-24. Estrellita claimed that she heard someone say, in Tagalog, "What did I do to you?" 11/21/05 RP 25. She then saw Mr. Mandanas hitting another person, whom she did not know. According to Estrellita, Mr. Mandanas punched the other person three or four times, kicked him, and that person then fell to the ground. See 11/21/05 RP 25-26, 28. She also stated that she saw Mr. Mandanas holding a gun, which he had retrieved from his waistband. See 11/21/05 RP 29. Mr. Mandanas then hit the other guy with the gun and said "you want to fight with me." 11/21/05 RP 30. She saw that other guy run inside the clinic. See 11/21/05 RP 27. Mr. Mandanas then followed this other guy inside the

clinic. See 11/21/05 RP 28. Estrellita then went inside also because her daughter-in-law was in there. See *id.* She claims that she saw the other guy sitting down and asking Mr. Mandanas to stop. See 11/21/05 RP 29. Mr. Mandanas then hit him by the ears. 11/21/05 RP 32. Estrellita did not see Mr. Mandanas point the gun when he was inside the clinic. 11/21/05 RP 33. Then, she heard somebody said they had called the police and the fight ended. See *id.*

Mr. Mandanas presented a very different version of these events. According to Mr. Mandanas, he went to his Clinic on the morning of December 20, 2004, to tally up receipts and make a cash deposit at the bank. See 11/21/05 RP 187. As was his habit when going to the bank, Mr. Mandanas was carrying a gun (for which he had a permit). See 11/22/11/21/05 RP 187-188. The gun was tucked under his belt, on the backside. See 11/21/05 RP 191. When Mr. Mandanas returned to the shopping center, he walked along the sidewalk smoking a

cigarette and telephoned a friend. See 11/21/05 RP 190. According to Mr. Mandanas, Mr. Padilla appeared from one of the buildings, said something, and then punched Mr. Mandanas very hard. See 11/21/05 RP 193-194. As a result of this punch, Mr. Mandanas' pistol was knocked from his waist and he became concerned that Mr. Padilla might try to grab it. See 11/21/05 RP 194-95. A struggle ensued and Mr. Mandanas acknowledges that he hit Mr. Padilla with the gun after he picked it up. See 11/21/05 RP 194-195.

Mr. Padilla then backed up and moved towards the medical clinic. See 11/21/05 RP 196. As Mr. Padilla ran towards the clinic, he told Mr. Mandanas that he was going to get him. See 11/22/05 RP 7. Fearing that Mr. Padilla might be going for a weapon, Mr. Mandanas followed him. See 11/21/05 RP 197; 11/22/05 RP 7. After they both entered the clinic, another struggle occurred. See 11/21/05 RP 197; 11/22/05 RP 9. Mr. Mandanas then asked Mr. Padilla "what are you going to do?" See

11/22/05 RP 9. He did not recall if he hit Mr. Padilla with the gun again, or even if he was still holding the gun in his hand, at that time. See 11/22/05 RP 9. Mr. Mandanas thinks that the gun was in his pocket when he exited the clinic. See 11/22/05 RP 10.

IV. ARGUMENT

A. The State Violated Appellant's Constitutional Right to a Unanimous Verdict By Presenting Evidence of Multiple Acts as to Each Offense, but Failing to Use any Unanimity Instruction.

In Washington, an accused has the constitutional right to a unanimous jury verdict. See U.S. Const. amend. VI, art. I, sec. 22; *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). A defendant may be convicted only when a jury unanimously concludes that the criminal act charged has been committed. See *State v. Crane*, 116 Wn.2d 315, 324-25, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991).

When a defendant commits multiple acts that may serve as the basis for the charged offense,

the trial court must provide the jury with an instruction consistent with *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). A *Petrich* instruction must advise jurors that they must unanimously agree on a specific act to support conviction for the charged offense. See, e.g., *State v. Marko*, 107 Wn.App. 215, 220, 27 P.3d 228 (2001). The failure to give such an instruction is an error of constitutional magnitude and may be raised for the first time on appeal. See, e.g., *State v. Kiser*, 87 Wn.App. 126, 129, 940 P.2d 308 (1997); *State v. Hanson*, 59 Wn.App. 651, 659, 800 P.2d 1124 (1990).

In *Hanson*, the defendant was charged with three counts of violating certain statutes that regulated contracts for cemetery goods and services. The state presented evidence on a multitude of events sufficient to support conviction. Even so, the trial court failed to provide any unanimity instruction. *Id.* at 655-59.

On appeal, Hanson claimed that the trial

court erred in failing to give a unanimity instruction as required by *Petrich*. When analyzing this claim, the Court explained:

In determining if the evidence even establishes multiple acts, the court examines three factors: (1) what must be proven under the applicable statute; (2) what does the evidence disclose; and (3) does the evidence disclose more than one violation of the statute.

Id. at 655. In discussing the first factor, the court acknowledged that most criminal statutes - such as the assault statutes - require proof of a single event (rather than a course of conduct). See *id.* at 656. As to the second factor, the Court noted that the reviewing court must "look at the evidence in the light most favorable to the proponent of the instruction." *Id.* Finally, in discussing the third factor, the court explained:

If the evidence proves only one violation, then no *Petrich* instruction will be required, for a general verdict will necessarily reflect unanimous agreement that the one violation occurred. If the evidence discloses two or more violations, then a *Petrich* instruction will be required, for without it some jurors might convict on the

basis of one violation while others convict on the basis of a different violation. In the latter situation, the result is a lack of jury unanimity with respect to the facts necessary to support conviction, and a consequent abridgment of the right to jury trial.

Id. at 657.

Here, the State charged Mr. Mandanas with two separate offenses in regards to the incidents that occurred on December 20, 2004: assault in the second degree and felony harassment. Consistent with the relevant statutes (and instructions to the jury), each of these offenses required proof of a single event or incident. As to both of these offenses, the State presented evidence regarding multiple acts - each of which could have supported conviction on the charged offenses. Even so, the trial court failed to give any *Petrich* instruction.

In support of the assault charge, the State presented evidence that Mr. Mandanas used the gun in several different ways and at two distinct periods of time. First, Mr. Padilla described

the confrontation that occurred outside of the medical clinic. According to Mr. Padilla, while outside of the clinic, Mr. Mandanas punched him, struck him with a handgun, and then pointed that gun at him. Second, Mr. Padilla described events that occurred after he retreated to the inside of the clinic. Mr. Padilla claimed that, once inside, Mandanas pointed the gun at him and then struck him in the face with that gun. As the prosecutor told the jury during her rebuttal argument: "[T]he major points being Carlos Padilla was assaulted, hit with the gun twice, once inside, once outside, once inside, had the gun pointed in his face." 11/22/05 RP 150.

Mr. Mandanas testified as to two distinct incidents - the confrontation outside of the clinic and the confrontation inside of the clinic. Mr. Mandanas claimed that he was defending himself during the incidents and he confirmed that he did strike Mr. Padilla with the handgun while outside of the clinic. But, Mr.

Mandanas claimed that he could not recall if he struck Mr. Padilla - or if he pointed the gun - after he entered the clinic.

The eyewitnesses supported some of Mr. Padilla's claims; however, none of these persons witnessed the start of the confrontation. Moreover, these witnesses did not corroborate Mr. Padilla as to certain key details. For example, although Mary Lou Bondoc saw Mr. Padilla and Mr. Mandanas fighting outside of the clinic, she did not see Mr. Mandanas wield a gun at that time. Osman Suleiman and Estrellita Bondoc testified that they did see Mr. Mandanas use a gun during the confrontation outside of the clinic. But, both of these witnesses did not see Mr. Mandanas strike Mr. Padilla with the gun after the participants entered the clinic. In fact, Estrellita Bondoc did not see Mr. Mandanas point the gun while he was inside the clinic.

The defense raised a claim of self-defense as to the assault charge, and the prosecutor

acknowledged that this claim might need to be evaluated differently as to the distinct phases of the incident - the outside phase and the inside phase. In fact, the prosecutor conceded, there might not have been sufficient evidence to determine "who started what outside on the sidewalk." 11/22/05 RP 96.

Similarly, as to the harassment charge, the State presented evidence that Mr. Mandanas threatened Mr. Padilla in several different ways and at two distinct times. First, Mr. Padilla claims that, while outside of the clinic, Mr. Mandanas struck him and then threatened to kill him at two separate and distinct occasions. Moreover, he also claimed that Mr. Mandanas pointed the gun at him while outside of the clinic. Second, Mr. Padilla claimed that Mr. Mandanas threatened to kill him and pointed the gun at him after they entered the clinic.

Much like *Hanson*, the evidence on both counts involved multiple events, any one of which

would have been sufficient to convict, and in order to assure jury unanimity, a *Petrich* instruction was required. Viewing the evidence in the light most favorable to Mr. Mandanas, this Court must find that the jury heard evidence as to a multitude of events and it is unclear, as to each count, whether some of the jurors decided to convict based on one alleged violation while other jurors decided to convict based on another.

When the State fails to elect which incident it relies upon for the conviction or the trial court fails to instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, the error will be deemed harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt. See *Kitchen*, 110 Wn.2d at 405-06. Here, in light of the sharply conflicting testimony, this Court must find that the State cannot satisfy this exceedingly high

standard.

B. The State Violated Appellant's Constitutional Right to a Unanimous Verdict By Presenting Evidence of Two Separate Means to Support the Assault Charge, but Failing to Use any Unanimity Instruction.

As noted above, Mr. Mandanas is constitutionally entitled to a unanimous jury verdict. When the court instructs the jury on alternative ways of committing an offense, and the jury returns only a general verdict, the right to unanimity is violated unless each alternative is proved beyond a reasonable doubt. See *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); *State v. Bland*, 71 Wn.App. 345, 354, 860 P.2d 1046 (1993).

In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged. Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternative means. See *Kitchen*,

110 Wn.2d at 410. If one of the alternative means upon which a charge is based fails and there is only a general verdict, the verdict cannot stand unless the reviewing court can determine that the verdict was founded upon one of the methods for which substantial evidence exists. See *State v. Thorpe*, 51 Wn.App. 582, 586, 754 P.2d 1050, review denied, 111 Wn.2d 1012 (1988).

Here, the Court instructed the jury on two different prongs of the assault statute: actual battery and common law assault. In *State v. Nicholson*, 119 Wn.App. 855, 860, 84 P.3d 877 (2003), this Court held that the three assault definitions create alternative means of committing the crime of assault.

In *Nicholson*, the defendant placed a knife blade close to the stomach of a 20-month-old child and taunted the child's mother. At trial on a charge of second degree assault of a child, the trial court instructed the jury on all three

alternative means of assault and the State argued that the elements of common law assault were met if the jury found that the child's mother was placed in fear and apprehension of injury to the child. See *id.* at 861-63. Because the trial court erred in permitting the State to argue that fear and apprehension occurring in a third party supported a finding of the fear and apprehension element of common law assault, and the general verdict did not allow a determination of whether the jury relied on that evidence, the Court reversed the conviction and remanded the case for a new trial. See *id.* at 863-64.

The same is true in this case. In closing, the prosecutor argued to the jury that Mr. Mandanas could be convicted under both prongs of Assault in the Second Degree:

In this case, Carlos Padilla was assaulted both under that first prong and under that second prong. And let me explain that to you. Based on the testimony that you heard from the eye witnesses and even from the defendant himself, Carlos Padilla was struck with a gun in the head. He required numerous stitches and staples to close up

the wounds in his head. He was also on the other of this gun, being threatened with this gun pointed in his face. And if you read that second part of [the assault] definition and think about that moment when that gun is pointed at Carlos Padilla's face and the fear that he felt at that time. That is also an assault.

11/22/05 RP 91-92.

The defense does not deny that there was evidence to support the claim that Mr. Mandanas committed a common law assault. According to Mr. Padilla, he was placed in fear and apprehension when Mr. Mandanas pointed the gun at him.

However, Appellant maintains that there was insufficient evidence for a conviction under the battery prong of the statute. Of course, there is no evidence that Mr. Mandanas fired a shot from the gun. Moreover, although it is clear that Mr. Mandanas did strike Mr. Padilla in the head with a gun, it is the defense position that this type of battery does not support a conviction for Assault in the Second Degree with a deadly weapon. In enacting RCW 9A.36.021(1)(c), the legislature did not intend to make each and

every physical striking with a firearm - what the prosecutor euphemistically referred to as a "nontraditional" use of a gun² - a Class B felony.

Appellant is asking this Court to rely upon well-accepted principles of statutory construction. "A statute should not be given an interpretation which would make it an absurdity when it is susceptible of a reasonable interpretation which would carry out the manifest intent of the [L]egislature." *Martin v. Dep't of Soc. Sec.*, 12 Wn.2d 329, 331, 121 P.2d 394 (1942). Also, under the rule of lenity, this Court must interpret ambiguous criminal statutes in favor of the accused. See *In Re Stenson*, 153 Wn.2d 137, 149 n. 7, 102 P.3d 151 (2004).

Although substantial evidence supported one alternative means of the assault charge (fear and

² Turning to the definition of "deadly weapon," the prosecutor addressed the non-traditional use of the gun in this case: "[T]hat gun was used to inflict harm in a less traditional sense than say a shooting, we normally think a gun is used to shoot someone, but in this case it was used to hit someone. And the way it was used, it was a deadly weapon." 11/22/05 RP 92.

apprehension), this court cannot determine whether the jury relied on the failed means (battery) to convict Mr. Mandanas. As such, the assault conviction must be reversed.

C. The Trial Court Clearly Erred When Instructing the Jury on the Law of Self-Defense

At trial, Appellant attempted to raise the claim that Mr. Mandanas' actions were in lawful self-defense. The law is clear that the trial court was obliged to instruct on the law of self-defense if there is any evidence at all to support such a claim, regardless of whether the defense is strong or weak:

In order to properly raise the issue of self-defense, the defendant need only produce "any evidence" tending to prove that the homicide was done in self-defense Although defendant needs to produce some evidence so as to raise the self-defense issue, he need not produce the amount necessary to create a reasonable doubt in the jurors' minds as to the existence of self-defense (citations omitted).

State v. Adams, 31 Wn.App. 393, 395, 641 P.2d 1207 (1982).

For some unknown reason, Appellant's counsel

failed to prepare any jury instructions in this case. Without counsel's assistance³, the Court ultimately gave two generalized self-defense instructions. See Appendix A; CP 73-74.

As discussed below, the trial court erred in so instructing the jury. First, these three instructions are deficient - and misleading - in numerous respects. Second, the Court failed to instruct the jury as to several important legal matters.

1. Instruction No. 11, the General Self-Defense Instruction, Was Erroneous and Failed to Adequately Instruct the Jury as to the Elements of Self-Defense.

WPIC 17.02 is the prototypical self-defense instruction used "for any charge other than homicide, or attempted homicide." WPIC 17.02, Note on Use (2005 Supp.). This instruction, as written, has been recently criticized and held by this Court to be reversible error, even where there was no objection. See *State v. Bland*, 128

³ The State failed to propose any self-defense

Wn.App. 511, 116 P.3d 428 (2005).

In *Bland*, this Court held that the lack of punctuation in WPIC 17.02 created "a manifest error affecting a constitutional right" which required reversal, even though the issue was not raised below. See *id.* at 514. This court explained that the lack of punctuation between the alternative means whereby self-defense could be employed created confusion for the jury and could be construed to require the defendant to believe that he was about to be injured before using reasonable force to expel a malicious trespasser, which is an incorrect application of the law.⁴

Therefore, in order to comply with *Bland*, the trial court had the obligation to modify WPIC 17.02 as follows:⁵

It is a defense to the charge of assault in the second degree that the force used was

instruction, as well. See CP 77.

⁴ The WPIC Committee is in the process of modifying WPIC 17.02 in order to address the concerns raise in *Bland*.

⁵ See portion in bold font.

lawful as defined in this instruction.

The use of force upon or towards another is lawful when used by a person who reasonably believes that:

1. **He is about to be injured; or,**
2. **In preventing or attempting to prevent an offense against the person; or,**
3. **In preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession and when the force is not more than necessary.**

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

Instruction No. 11 incorrectly told the jury (in its relevant portion) that:

It is a defense to a charge of Assault in the Second Degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used **by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than is necessary.**

CP 73 (emphasis added).

As is readily apparent, the instruction not only failed to use the punctuation required by *Bland*, it also left out the conjunction "or" between the two separate means of utilizing self-defense.

2. Instruction No. 12, Defining the term "Necessary," Should Not Have Been Given to the Jury Because it Conflicted with Appellant's Rights to Self-Defense

The comment to WPIC 17.02 indicates that WPIC 16.05, "Necessary - Definition," should be used with WPIC 17.02. Of course, this instruction was drafted prior to *Bland*. Here, Court's Instruction No. 12 stated:

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP 73.⁶

The note on use in the bound WPIC volume states that this instruction should be used "when the word 'necessary' is used in the instructions relating to defenses in WPIC Chapter 16.00 and WPIC Chapter 17.00." Importantly, Chapter 16 of the WPICs defines self-defense in homicide situations and does not require that the force used is "necessary." For example, WPIC 16.02 provides in its relevant portions that it is a defense to homicide if the slayer reasonably believed that the person slain intended to commit a felony or inflict death or great personal injury. As far as the force the slayer is allowed to employ, the instruction does not include the term "necessary" but instead correctly defines the force as follows:

The slayer employed such force and means as a reasonably prudent person would under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and

⁶ Instruction 12 is taken verbatim from WPIC 16.05 (2005 Ed.).

prior to the incident.

Id. This is virtually the same language and standard utilized in the body of WPIC 17.02.

With that in mind, why would there be an additional requirement of "necessary" included in the self-defense definition for non-deadly force, than would be included in the definition of deadly force? The explanation is found in RCW 9A.16.020, the basis for WPIC 17.02, which provides in its relevant portion that the use of force towards another is not unlawful when:

(3) when used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, **or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case [sic] the force is not more than is necessary**
.

Id. (emphasis added).

As seen by the highlighted portion of this statute, and as noted by the court in *Bland*, the punctuation in this statute means that each part is a separate provision which must stand on its own.

When read in this manner, there is only one possible rational explanation with regard to the inclusion of the term "necessary." That is, the term "necessary" modifies only that section of the statute relating to malicious trespasses or malicious interference with real or personal property. This makes sense in that the legislature intended to have additional requirements and limitations on a citizen protecting his property, as opposed to defending his person from an offense or injury. Otherwise, the statutory scheme makes absolutely no sense.

WPIC 16.05 has other constitutional infirmities in that it requires that "no reasonably effective alternative to the use of force appeared to exist" before the utilization of self-defense. This contradicts the longstanding rule in Washington that one has no duty to retreat, which would certainly be an alternative to the use of force in most cases. See WPIC 17.05.

WPIC 16.05 also does not define what a

reasonably effective alternative to the use of force might be. However, in the context of WPIC 17.02, which applies only to the use of non-deadly force, with the inclusion of WPIC 16.05 "Necessary," it could be argued by the State, or interpreted by the jury, that a reasonably effective alternative would be to "turn the other cheek" and take the beating. Or, instead of using reasonable force to defend oneself when attacked, one must first attempt to try to talk to the assailant and ask him to cease and desist with the assault or to attempt some other alternative before employing force, such as calling 911.⁷

Another serious problem with WPIC 16.05 is that it instructs the jury that under the circumstances as they appear to the actor at the time "the amount of force was reasonable to effect the lawful purpose intended." This is not only

⁷ During closing argument, the prosecutor relied heavily upon this provision - arguing throughout her closing that the defendant used more force than was necessary. See 11/22/05 RP 96, 99.

redundant, it is in conflict with the third paragraph in WPIC 17.02, which defines the amount of force that a person attacked may employ. WPIC 16.05 is also erroneous because it defines the use of force in terms of "the lawful purpose intended" by the defendant which adds an additional requirement to the defendant in order to establish self-defense. Finally, nowhere does it say that the State has the burden to prove the force was not necessary.

3. The Court Clearly Erred in Failing to Instruct the Jury that a Person May Defend Himself Against an Apparent Injury or Danger Even if Mistaken

It was plain error for the court to fail to instruct the jury pursuant to WPIC 16.07, which states:

If a person acting as a reasonably prudent person mistakenly believes himself to be in danger of an offense being committed against him, he has the right to defend himself by the use of lawful force against that apparent injury or offense even if he is not actually in such danger.

Id.

This instruction is required by *State v. Penn*, 89 Wn.2d 63, 568 P.2d 797 (1977), which involved a situation where a person erroneously believed another to be in danger and went to their defense. The court held that one can still avail themselves of self-defense if he reasonably believed himself or another to be in danger, even though that view was erroneous. It is not necessary that a defendant be in "actual" imminent danger before defending himself. See *State v. LeFaber*, 128 Wn.2d 896, 913 P.2d 369 (1996).

4. The Court's Failure to Instruct the Jury that there is No Duty to Retreat Before Using Force in Self-Defense Was Plain Error

Washington law is also clear that a person has absolutely no duty to retreat before using force in self-defense. See *State v. Williams*, 81 Wn.App. 738, 916 P.2d 445 (1996). The jury therefore should have been instructed that Mandanas did not have to retreat before he defended himself. See, e.g., *State v. Redmond*, 150 Wn.2d 489, 494, 78 P.3d 1001 (2003) (even though defendant testified

that his use of force was "reactionary," no duty to retreat instruction required in second degree assault case arising out of school fist fight). This principle has been embodied in WPIC 17.05. The failure to so instruct was plain error.

D. The Two Substantive Offenses - Assault and Harassment - Constitute the Same Criminal Conduct

Where a defendant is convicted of two or more current offenses, the trial court must calculate the offender score, and resulting sentence ranges, by counting all other current and prior convictions as prior convictions. See generally *State v. Dolen*, 83 Wn.App. 361, 364, 921 P.2d 590 (1996), review denied, 131 Wn.2d 1006, 952 P.2d 144 (1997) (discussing RCW 9.94A.589(1)(a)).⁸ If, however, any of the

⁸ The statute provides in relevant part:

Whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current

current offenses encompass "the same criminal conduct," the court counts these offenses as one crime. See, e.g., *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999), *aff'd*, 148 Wn.2d 350, 60 P.3d 1192 (2003).

When a defendant is convicted of two or more crimes, current offenses are treated as prior offenses for determining the offender score unless the current offenses encompass the same criminal conduct, in which case the current offenses count as one crime. See RCW 9.94A.589(1)(a). "Same criminal conduct" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW

offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

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

9.94A.589(1)(a). The test is established where all three elements are present. See, e.g., *Tili*, 139 Wn.2d at 123; *State v. Israel*, 113 Wn.App. 243, 295, 54 P.3d 1218 (2002). In determining whether the crimes are the same criminal conduct for purposes of sentencing the trial court makes factual determinations and utilizes its discretion. See *State v. Nitsch*, 100 Wn.App. 512, 523, 997 P.2d 1000 (2000).

In *Tili*, the court addressed two questions - the first being whether three counts of rape, each act of penetration occurring within moments of another, constituted the same criminal conduct; and second, whether the counts of assault and burglary would also fall under the rule of the same criminal conduct. See 139 Wn.2d at 128. The *Tili* court concluded that the three rape counts were the same criminal conduct and that the assault was part of the rape; but it found that the assault did not merge with the burglary. See *id.* at 123. The court pointed to

the rule that the relevant inquiry for the intent prong is to what extent the criminal intent, when viewed objectively, changed from one crime to the next. See *id.* at 123.

At the time of Mr. Mandanas' sentencing hearing, the trial court concluded that the two crimes did not constitute the same criminal conduct under RCW 9.94A.589(i)(a). See 2/10/06 RP 5. In the court's view, the crimes involved "different levels of intent." *Id.*

At trial, the jury concluded that Mr. Mandanas committed the charged offenses, but the verdict did not indicate which particularly incident(s) the jury was relying upon. Where the jury verdict is ambiguous, "principles of lenity require this court to interpret the ambiguity in favor of the defendant." *State v. Taylor*, 90 Wn.App. 312, 950 P.2d 526 (1998) (citations omitted).⁹

⁹ In *Taylor*, the defendant assaulted the victim, ordered the victim to drive him and an accomplice while the accomplice pointed a gun at the victim, and

Accordingly, the trial court should have concluded that the two substantive offenses constituted the "same criminal conduct" for purposes of sentencing. There is no question that the assault and harassment offenses were committed against the same victim. In light of the State's presentation at trial (and the ambiguous nature of the verdict), this Court must assume that the offenses were committed at the same time and with the same criminal intent.

An essential element of second degree assault is specific intent either to cause bodily

shot at the car after it dropped the kidnapers at their destination. Taylor was convicted of kidnapping and assault, but it was not clear whether the jury found an assault based on his accomplice's pointing a gun at the victim, or Taylor's action in shooting at the car. See *Taylor*, 90 Wn.App. at 317. The court interpreted the ambiguous jury verdict in favor of the defendant and began the "same criminal conduct" analysis with the defendant's assumption that the jury had based its conviction on his accomplice liability for assaults inside the car. See *Taylor*, 90 Wn.App. at 317 (citing *City of Bellevue v. Hard*, 84 Wn.App. 453, 458, 928 P.2d 452 (1996)). Based on this assumption, the court held that the assault ended when Taylor and his accomplice exited the vehicle. The court also held that Taylor's objective intent in committing the assault inside the car was to persuade the victim not to resist the abduction; thus his

harm or to create apprehension of bodily harm. See, e.g., *State v. Eakins*, 127 Wn.2d 490, 496, 902 P.2d 1236 (1995). Felony harassment requires proof that a defendant knows he is communicating a threat of intent to cause bodily injury. See, e.g., *State v. J.M.*, 144 Wn.2d 472, 481, 28 P.3d 720 (2001). Because these mental elements intersect, the Court must look to whether Mr. Mandanas' intent, viewed objectively, changed between the harassment and the assault. See, e.g., *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). If the facts support a finding that Mr. Mandanas had the same criminal intent on each count, then the counts constitute the same criminal conduct. See *State v. Rodriguez*, 61 Wn.App. 812, 816, 812 P.2d 868, review denied, 118 Wn.2d 1006, 822 P.2d 288 (1991).

When viewed objectively, it is clear that the facts do establish that Mr. Mandanas had the same criminal intent - he intended to frighten

actions constituted the same criminal conduct. See

Mr. Padilla - at that time that he committed the two charged offenses.¹⁰ By the State's theory, Mr. Mandanas was intending to frighten Mr. Padilla when he committed the alleged assault by pointing a gun towards him. Likewise, the State claimed that Mr. Mandanas was intending to frighten Mr. Padilla when he threatened him (while at the same time pointing the gun towards him). As such, these offenses constitute "same criminal conduct" and the Court should count these offenses as one crime.

E. The Two Weapons Enhancements Should Not Run Consecutively

RCW 9.94A.533(3)(e) provides in pertinent part:

Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However,

Taylor, 90 Wn.App. at 321-22.

¹⁰ In presenting this argument, Appellant maintains that the battery alternative does not properly apply in this case.

whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(4).

Id.

In *State v. DeSantiago*, 149 Wn.2d 402, 68 P.3d 1065 (2003), the Washington Supreme Court concluded that the previously codified version of this statute allows the same offense to be enhanced more than once for each weapon used. This case, however, presents a different question: whether the trial court can impose two weapon enhancements, and run those enhancements consecutively, even though the defendant's underlying offenses (assault and felony harassment) must be considered "same criminal conduct" under RCW 9.94A.589(1)(a).

The enhancement statute provides that all firearm enhancements are mandatory and consecutive "for all offenses sentenced under this chapter." However, in light of RCW 9.94A.589(1)(a), this Court should consider these

crimes as one offense. Thus the Court should note that the firearm enhancement for the lesser offense - harassment - is not covered by RCW 9.94A.533(3)(e). At the very least, the statute is ambiguous in this regard.

Before sentencing, the parties identified one reported case where Division III seemed to conclude that convictions for two assaults may be subject to consecutive weapon enhancements even if the assaults could be considered "same criminal conduct." See *State v. Callihan*, 120 Wn.App. 620, 623, 85 P.3d 979 (2004). The *Callihan* Court offered little analysis to support its conclusion. Instead, it simply stated that RCW 9.94A.310 (a previous version of this same statute) unambiguously requires consecutive sentences for each enhancement. The *Callihan* court did not seem to face the same issues as presented in this case. Moreover, in *Callihan*, the two assaults were clearly distinct acts and it is hard to understand how the trial court

could have found that they constituted same criminal conduct under RCW 9.94A.589(1)(a). Nevertheless, relying upon this precedent, the trial court concluded that the two firearm enhancements must run consecutively to the substantive offenses and to each other. See 2/10/06 RP 5-6.

Appellant maintains that the suggested interpretation would potentially lead to absurd results. Generally speaking, the State is permitted to charge a defendant with multiple offenses - and multiple alternative offenses - based upon the same transaction and occurrence. See CrR 4.3. See generally *State v. Korum*, 2006 WL 2382278, --- P.3d --- (August 17, 2006). For example, when faced with a situation where the defendant fires a single gunshot and seriously injures another person during the course of an argument, the State would be free to charge that defendant with numerous offenses: assault in the first degree (assault with intent

to kill), assault in the second degree (assault with a firearm), assault in the third degree (reckless assault), assault in the fourth degree, felony harassment, harassment, reckless endangerment and perhaps numerous other offenses. In addition, the State would be free to allege that the defendant was armed with a firearm during the course of each of these offenses. If we assume that neither the State nor the defense requested a lesser offense instruction (as in WPIC 4.10), the jury would be free to return verdicts on each of these alternative charges. Clearly, the legislature could not have intended for the Court to impose consecutive terms for each firearm enhancement that could conceivably be charged on account of a single incident.

Minimally, this Court should conclude that the firearm enhancement provisions are ambiguous in these circumstances. The rule of lenity applies to resolve statutory ambiguities in criminal cases in favor of the defendant, absent

legislative intent to the contrary. See *State v. Lewis (In re Charles)*, 135 Wn.2d 239, 249-50, 955 P.2d 798 (1998). The rule applies in the event of ambiguous Sentencing Reform Act of 1981 (RCW 9.94A) provisions. See *id.*

F. Imposing Consecutive Enhancements Would Violate The Constitutional Prohibition Against Double Jeopardy

The United States and Washington Constitutions' double jeopardy clauses are "identical in thought, substance, and purpose." *State v. Schoel*, 54 Wn.2d 388, 391, 341 P.2d 481 (1959). They both "protect against multiple punishments for the same offense, as well as against a subsequent prosecution for the same offense after acquittal or conviction." *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005) (citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). See also *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

Here, Mr. Mandanas is being punished twice

for pointing a gun at Mr. Padilla - once because Mr. Mandanas intended to create apprehension of bodily harm (assault) and once because Mr. Mandanas communicated a threat of intent to cause bodily injury (harassment). The Court should not permit multiple punishments for this conduct.

V. CONCLUSION

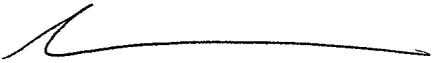
For all the reasons, and in the interests of justice, this Court should reverse these convictions and remand the case for a new trial. In the alternative, and at a bare minimum, this Court should reverse Mr. Mandanas' sentence and remand for resentencing.

DATED this 24th day of August, 2006.

Respectfully submitted,

Allen, Hansen & Maybrown, P.S
Attorneys for Appellant

By:



Todd Maybrown, WSBA #18557

PROOF OF SERVICE

Todd Maybrown swears the following is true under penalty of perjury under the laws of the State of Washington:

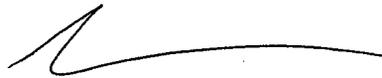
On the 24th day of August, 2006, I deposited for mailing, postage prepaid, first class, one true copy of Appellant's Opening Brief directed to attorney for Respondent:

King County Prosecutor's Office
Appellate Division
516 Third Ave., W554
Seattle, WA 98104

And to Appellant:

Bayani John Mandanas
15866 36th Ave. NE
Lake Forest Park, WA 98155

DATED at Seattle, Washington this 24th day of August, 2006.



TODD MAYBROWN, WSBA #18557
Attorney for Appellant

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APPENDIX A

It is a defense to a charge of Assault in the Second Degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

No. 12

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

No. 13

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.